Supreme Court of India
Hind Overseas Private Limited vs Raghunath Prasad Jhunjhunwalla ... on 10 October, 1975
Equivalent citations: 1976 AIR 565, 1976 SCR (2) 226
Author: P Goswami
Bench: Goswami, P.K.

PETITIONER:
HIND OVERSEAS PRIVATE LIMITED

Vs.

RESPONDENT:
RAGHUNATH PRASAD JHUNJHUNWALLA AND ANR.

DATE OF JUDGMENT10/10/1975

BENCH:
GOSWAMI, P.K.
BENCH:
GOSWAMI, P.K.
ALAGIRISWAMI, A.
UNTWALIA, N.L.

CITATION:
1976 AIR 565 1976 SCR (2) 226
1976 SCC (3) 259
CITATOR INFO :
MV 1983 SC 75 (82)

ACT:
Practice-Company cases-Winding up petitions-Duty of the company Court.
English decisions-Usefulness of-Applicability to cases under the Companies Act.
Winding up of companies-The Companies Act (Act I), 1956-Sec.433(f)-Scope of vis-a-vis s. 44(g) of the partnership Act.
"Just and equitable clause"- Applicability in case of partnership firms in the guise of a private company.

HEADNOTE:
Under s. 433(f) of the Companies Act, 1956, a company may be wound up by the Court, if the Court is of opinion that it is just and equitable that the company should be wound up. Section 44(g) of the Partnership Act also speaks of the "just and equitable clause".
One RPJ agreed with VDJ and MPJ who are carrying on the business under the name and style of "Chimanram Motilal" to start a new business of iron and steel in co-partnership and for that purpose, an account was opened in the name of

"Raghunath Prasad Jhunjhunwalla Ka Sir Khata" in the books of "Chimanram Motilal". It was agreed that RPJ should have 3/8th share and VDJ with MPJ should have 5/8th share of the proposed business. Before the said proposed business could be started, at the suggestion of VDJ, actually a limited company was formed in August,. 1956 under the Companies Act with the understanding that (i) VDJ with MPJ should finance the entire business. (ii) the share in the company should be held by RPJ, VDJ and MPJ and the members of their respective families in the proportion of 3/8th and 5/8th as agreed to before and (iii) that RPJ and his group would generally look after the day-to-day business of the company under the general control and supervision of VDJ. The nominal capital of the company was Rs. 5 lacs divided into 2500 equity shares of Rs. 100/- each. RPJ and another ACD, an employee and nominee of VDJ, became the subscribers to the Memorandum of Association of the company and also became its first directors. On 23-8-1956, VDJ and MPJ were appointed as directors of the company. On 23-11-1957, ACD resigned and PCJ (son of RPJ) was opted in his place. RPJ was appointed a director-in-charge of the company and both RPJ and PCJ were paid monthly remunerations. Following a family partition between VDJ and MPJ in the year 1958, the shares of MPJ were transferred in the name of the wife of VDJ and MPJ resigned from the Board of Directors on 21-1-1959. Since that date till October, 1965 the Board of Directors were RPJ. PCJ and VDJ, when VDJ got his son VKJ appointed as Technical Director of the company. Though the business of the company was managed by RPJ and PCJ, the business policy, the appointment of staff, general supervision of the work of the business etc., were in the hands of VDJ. From 1959 onwards the factory commenced its regular production and substantial profits were made between 1960 and 1965 except in the year 1961 when there was some loss. Finding that there has been a mismanagement of affairs of RPJ and PCJ to the tune of Rs. 8 lacs the VDJ group who were holding the major shares numbering, 3125, in order to safeguard their interest and the business, called the Board's meeting on 27-5-1966 and the Board countermanded all the previous resolutions and thus took away all the powers of RPJ. The extraordinary general meeting called on 28-5-1966 resolved to remove RPJ and PCJ as directors of the company and to appoint persons belonging to VDJ's group as directors. This led to the filing of an application for winding up under s. 433(f) of the Companies Act by RPJ before the company Judge of the Calcutta High Court contending that the company was in the nature of a

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partnership and is liable to be wound up in view of the loss of confidence between the two groups/members and on the alleged ouster of RPJ group. The Petition for winding up was dismissed by the company Judge inasmuch as (i) the substratum of the company was not gone; (ii) the deadlock

could be resolved by the articles; (iii) there were alternative remedies open: and (iv) lack of probity did not result in prejudice to the company's business affecting petitioner's rights as share-holder, but only affected his right as director. The appellate Bench, however, allowed the appeal of the respondent RPJ and ordered the winding up of the company in the facts and circumstances of the case, viz., impossibility of carrying on business by RPJ as a partner, the exclusion of RPJ from the partnership concern and loss of mutual confidence between RPJ and VDJ group.

Dismissing the appeal by certificate, the Court,

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HELD: (1) In an application under s. 433, the company Court will have to keep in mind the position of the company as a whole and the interests of the shareholders and see that they do not suffer in a fight for power that ensues between the two groups. The court should see that a prima facie case has been made out before it is admitted on the allegations in the petition. Even admission of a petition which will lead to advertisement of the winding up proceedings us likely to cause immense injury to the company if ultimately the application has to be dismissed. The interest of the applicant alone is not of predominant consideration. It is not proper principle to encourage hasty petitions under s. 433 without first attempting to sort out the dispute and controversy between the members in the domestic forum in conformity with the articles of association. There must be materials to show when "just and equitable clause" is involved, that it is just and equitable not only to the persons applying for winding up but also to the company and to all its shareholders.

[243 C-D, 240 H, 241 A]

(2) Section 433 of the Companies Act is modelled on the English Companies Act. The Indian law is developing on its own lines and making progress of its own circle. The courts will have to adjust and adapt limit or extend the principles derived from English decisions entitled as they are to great respect, suiting the conditions of our society and the country in general, always, however, with one primary consideration in view that the general interests of the shareholders may not be readily sacrificed at the altar of squabbles of directors of powerful groups for powerful to manage the company. [240A, C-D]

Ramanandi Kuer v. Kalawati Kuer, (1928) PC 2, applied.

(3) Section 433 of the Companies Act, 1956, provides six recipes so that the company may be wound up by the court. Under s. 433(f) which is identical in terms withs. 222(f) of the English Act of 1948, a company may be wound up by the court if the court is of opinion that it is just and equitable that the company should be wound up. It is now well established that the sixth clause, viz., "just and equitable" is not to be read as being "ejusdem generis" with the preceding five clauses. The just and equitable clause

leaves the entire matter to the wide and wise judicial discretion of the court. The only limitations are force and the content of the words themselves "just and equitable". Section 44(g) of the Indian Partnership Act also contains the words "just and equitable". [241-B-E]

Section 433(f) is to be read with s. 443(2) of the Act, which provides that 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. Again under s. 307 and 398 of the Act there are preventive provisions in the Act as a safeguard against oppression in management. These provisions also indicate that relief under s. 433(f) based on the "just and equitable" clause is in the nature of a last resort when other remedies are not efficacious enough to protect the general interests of the company. [241 E-G]

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Madan Lal and another v. Groin Chambers Ltd., Muzaffar Nagar and others, [1968] 2 S.C.R. 252 and S. P. Jain v. Kalinga Tubes Ltd. [1965] 2 S.C.R. 720, followed.

(4) In applying the principles of dissolution of partnership to companies, the following factors must be present:

Equal shareholding; complete deadlock in the administration of the company; lack of probity and mismanagement in the conduct of affairs of the company [In re Yenidje Tobacco Co. Ltd. 1961 2 Ch. 426]. The just and equitable clause cannot be invoked if a deadlock can be resolved by the articles and if there are alternate remedies. (In re Cuthbert Cooper and Sons Ltd., 1937 Ch. 392). If there is no justifiable lack of confidence grounded on the conduct of the directors in the conduct of management of the companies affairs (Rajahmundry Electric Supply Corporation (1955) 2 S.C.R. 1068). These are sound principles depending upon the nature, composition and character of the company. The principles are good as they are their application in a given case or in all cases, generally creates problems and difficulties.

[233D-E; 236-D]

(5) The principle of "just and equitable" clause baffles a precise definition. It must rest with the judicial discretion of the court depending upon the facts and circumstances of each case. When more than one family or several friends and relations together form a company and there is no right as such agreed upon for active participation of members who are sought to be excluded from management the principles of dissolution of partnership cannot be liberally invoked. Besides, it is only when shareholding is more or less equal and there is a case of complete 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, there may arise a case for winding up on the "just and equitable" ground. In a given case the principles of dissolution of partnership may apply squarely if the apparent structure of the company is not the real structure and on piercing the veil it is found that in reality it is a partnership. These are necessarily equitable considerations and may in a given case be superimposed on law. Whether it would be so done in a particular case cannot be put in the strict jacket of an inflexible formula. [247G, D-F]

In re Cathbert Cooper & Sons Limited, [1937] Ch. 392; and In re Yenidje Tobacco Company Limited, [1916] 2 Ch. 426, discussed.

In re Ebrahimi and Westbourane Galleries Ltd. [1973] AC 360, discussed and considered.

Lackh and another v. John Blackwood Limited [1924] AC 783, quoted with approval.

Baird v. Lees. [1924] AC 83 and D. Davis & Co. Ltd. v. Brunswick (Australia) Ltd. and others A.I.R. 1938 PC 114, referred to.

Rajahmundry Electric Supply Corporation Ltd. v. A. Nageswara Rao and others[1955] 2 SCR [1066], Mohan Lal & Anr. v. Grain Chamber Ltd., Muzaffarnagar and others. [1968] 2 S.C.R. 252 and S.P. Jain v. Kalinga Tubes Ltd., [1965] 2 S.C.R. 820, followed.

(6) In the present case, assuming partnership had been contemplated the idea was deliberately abandoned; the company was started with one ACD who had no relation with MCJ group or the VDJ group but an employee of VDJ, which would negative the idea of partnership which connotes equal status among the partners; While it is true that a director may work in the company on remuneration. RPJ however served like an employee on monthly salary not on his own initiative enjoying an equal partner's freedom and prestige but directly under the supervision and control of VDJ acknowledging a status definitely of a subordinate character; The voluntary financial involvement of a large stake by VDJ carefully thought to be protected against erosion of his interests by constant vigil on the day-to-day working does not fit in with the
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concept of a partnership; Even the account was being opened for the purpose of the formation of the company and the account was closed on such formation. The shareholding is between the two family groups, it cannot be said that the company thereby takes the image of partnership. On the other hand, the fact that after discussion, the parties deliberately abandoned the idea of farming a partnership would go to show that there was no intention to carry on business as partners. [242E-H]

There are no special features which would

unquestionably lead to the conclusion that the company is in substance a partnership and the principle of "just and equitable clause" cannot be therefore, extended. [242-H, 245A]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1785 of 1970.

From the Judgment and Order dated 25-9-69 of the Calcutta High Court in Appeal No.146 of 1967.

S. V. Gupte, S. B. Mukherjee, P. C. Bhartari, J. B. Dadachanji and Dilip Sinha for the Appellant.

A. K. Sen, R. C. Nag, O. P. Khaitan, B. P. Maheshwari, Suresh Sethi and R. S. Agarwal for Respondents.

The Judgment of the Court was delivered by GOSWAMI, J. This appeal by certificate is against the common judgment of the Calcutta High Court in respect of respondents' application for winding up and appellant's stay application relating to the Hind Overseas Private Limited, a private limited company (briefly the company).

The question that is raised in this appeal relates to the scope of section 433(f) of the Companies Act, 1956 (briefly the Act) and in particular whether the principles applicable in the case of dissolution of partnership could be involved in the case of the company.

The allegations in the winding up petition before the High Court are as follows:

The company was incorporated under the Act in August 1956. The nominal capital of the company is Rs. 5,00,000/- divided into 2,500 Equity shares of Rs. 100/- each and 2,500 unclassified shares of Rs. 100/- each, the entire nominal capital has been issued and fully paid up.

The petitioners (respondents herein), Raghunath Prasad Jhunjhunwalla and his son, Phoolchand Jhunjhunwalla (hereinafter to be described as R.P.J. and P.C.J. respectively), and the members of their family hold 1875 shares in the company and the remaining 3125 shares are held by one V. D. Jhunjhunwalla and the members of his family.

In or about the month May, 1956, R.P.J. and V. D. Jhunjhunwalla (briefly V.D.J.) who was then carrying on business under the name and style of 'Chimanram Motilal' with his cousin, one Mahabir Prasad Jhunjhunwalla (for brevity M.P.J.) agreed to start a new business of iron and steel in co-partnership and for that purpose an account was opened in the name of 'Raghunath Prasad Jhunjhunwalla Ke Sir Khata' in the books of 'Chimanram Motilal'. It was further agreed between the parties that R.P.J. would have six annas share and V.D.J. along with M.P.J. ten annas share in the said proposed partnership business.

Before the said proposed business could be started, V.D.J., however, changed his mind and some time in the month of June 1956, he suggested to R.P.J. that a limited company be formed, inter alia, to carry on the business in iron and steel and the shares in the company would be held by R.P.J., V.D.J. and M.P.J. and the members of their respective families in the same proportion as mentioned above. V.D.J. further agreed to provide for and arrange along with M.P.J. the entire finance that may be necessary for the purpose of the business of the company and R.P.J. and his group would generally look after the day-to-day business of the company under the general control and supervision of V.D.J. It is stated in the petition that R.P.J. in view of the relationship between the parties and having trust and confidence in V.D.J. agreed to the said suggestions and accordingly the company was formed on or about August 9, 1956, under the provisions of the Act. One Anil Chandra Dutta, an employee and nominee of V.D.J. along with R.P.J. became the subscribers to the Memorandum of Association of the company and also became its first directors. After its incorporation, the company carried on for some time the business of controlled stockists of iron and steel and since the end o the year 1958 the company carried on the business of the manufacture and supply of railway sleepers in execution of Government contracts.

On or about August 23, 1956, V.D.J. and M.P.J. were co- opted as directors of the company. On or about November 23, 1957, Anil Chandra Dutta resigned from the Board of Directors and P.C.J. was co-opted as a Director in this place. R.P.J. was appointed as Director in-charge of the company on November 23, 1957 at a monthly remuneration of Rs. 1000/-. This remuneration was subsequently increased to Rs. 1250/- per month with effect from October 1, 1961 and he was also granted further allowance of Rs. 250.00 per month on account of maintenance of guest house. His monthly remuneration was again increased to Rs. 2000.00 with effect from September, 1964. The monthly remuneration of P.C.J. was initially fixed at Rs. 750.00 per month with effect from October 1, 1961 and was subsequently increased to Rs. 1500.00 from September 1, 1964.

Following a family partition between V.D.J. and M.P.J. about the year 1958, the shares of the latter were transferred in the name of the wife of V.D.J. M.P.J. also resigned from the Board of Directors on or about January 31, 1959. Since that date and until October 1965, the Board of Directors of the company consisted of R.P.J., P.C.J. and V.D.J. In or about the month of October, 1965, V.D.J. got his son, Vinode Kumar Jhunjhunwalla, appointed as the Technical Director of the company.

Since the year 1958 and until February 26, 1965, the entire business of the company has been the manufacture and supply of railway sleepers in execution of Government contracts. The business of the company during this period had been always managed by R.P.J., P.C.J. under the general supervision and guidance of V.D.J. and the business policy was always dictated by V.D.J. The Cashier, Manager-cum-Engineer, Munim, and Cash Peon and other important Officers and employees were always appointed by V.D.J. of his own choice and on his terms. R.P.J. has been acting as the Director-in charge throughout since his appointment at a Board meeting held on November 23, 1957. V.D.J. asked for and received daily reports of the working of the factory and of the business of the company from R.P.J. and gave detailed instructions even relating to the daily administration. From 1959 onwards the factory commenced its regular production of railway sleepers and made substantial profits between 1960 and 1965 except in the year 1961 when there was some loss.

It is alleged that after trying to take wrongfully and illegally full control and management of the affairs of the company in order to oust R.P.J. group, V.D.J. ultimately succeeded in getting hold of Directors' Minute Books and the Minute Books of the General Meetings of the company. V.D.J. with the help of the members of his group, wrongfully and illegally took away the keys and the other statutory books and documents of the company from the registered office and refused R.P.J. group any access to them, R.P.J. was also assaulted by an employee of the company at the instance of V.D.J. and there were some criminal proceedings against R.P.J. and P.C.J. V.D.J. as a Director called a meeting of the Board on May 27, 1966, by Notice dated May 24, 1966. R.P.J.'s solicitors on May 27, 1966, sent a notice to the company and V.D.J. calling upon them to desist from holding the meeting which was called with a view to oust the R.P.J. group completely from the control and management of the affairs of the company. V.D.J. group did not pay any heed to the Solicitors' letter and passed various resolutions in the Board's meeting held on May 27, 1966, whereby the previous resolutions of the Board were countermanded and cancelled and R.P.J. was deprived of his all lawful authority and powers as a Director including the right to operate the banking account of the company. R.P.J. was purported to be removed from the office of the Director-in-charge of the company. V.D.J. group caused an advertisement to be published in the Vishwamitra on or about May 20, 1966, intimating the cancellation of powers in favour of R.P.J. V.D.J. taking advantage of the majority holding of shares by himself and the members of group, caused to be issued through certain shareholders belonging, to his group a requisition dated May 28, 1966, for calling an Extra ordinary general meeting with a view to remove R.P.J. and P.C.J. as directors of the company and to appoint other persons belonging to their group in their places instead. The explanatory statement to that Notice alleged that there was a loss of about Rs. 8 lakhs in the year 1965.

It is further alleged that V.D.J. with the help of goondas and armed guard took possession of the company's factory and ousted R.P.J. and P.C.J. therefrom. It is also alleged that the liabilities of the company would exceed its assets and the same was not commercially solvent. That serious disputes and differences had arisen among the shareholders of the company and there was a complete deadlock in the management of its affairs. There was also complete loss of confidence of one group in the other. Lastly it is averred that the company was in substance a partnership and it could not carry on its business any more and the circumstances would justify the dissolution of the company had it been a partnership.

The above are the allegations in the winding up petition which came up for admission before the learned Company Judge. There was a counter-affidavit filed by V.D.J. in opposing the prayers. We may only note paragraph 14 of his counter-affidavit "The respondent, Raghunath Prasad Jhunjhunwalla was an employee of the firm of Messrs Kamlapati Motilal of Kanpur of which I am the Managing Partner. Having gained confidence as such employee the said Raghunath Prasad Jhunjhunwalla was taken in as a Director of the Company and entrusted with the powers of management of the Company. The respondents had no money to subscribe for the shares of the Company and moneys were procured by me to enable them to subscribe for the share of the Company. The applicants on their own admission were in charge of the management of the affairs of the Company. While in such management they have mismanaged the affairs of the Company and misappropriated the funds and assets of the company as would appear from the statements made in my affidavit affirmed on June 16, 1966.. "

The only point which appears to have been canvassed before the learned Company Judge and later before the appellate court was that the company was formed as a result of mutual trust and confidence and the company was in substance a partnership and, therefore, the principles of partnership would be attracted. The same arguments are pressed into service by the respondents before us. If it were a partnership, says Mr. Sen on behalf of the respondents, on the facts and circumstances disclosed in the petition dissolution would have been ordered by the court under section 44(g) of the Partnership Act. A case for winding up has been, therefore, prima facie, made out by the respondents on these allegations. It is submitted that the learned Company Judge committed an error of law in dismissing the winding up petition without admitting it and in allowing the stay petition of the company (appellant herein) and that the Division Bench in the Letters Patent Appeal was right in setting aside the order of the Company Judge.

According to the learned Company Judge the principle of dissolution of partnership applies to companies either on the ground of complete deadlock or on the ground of domestic or family companies. A complete deadlock, according to the learned Judge, is where the Board has two real members or the ratio of shareholding is equal. In the domestic or family companies, says the learned Judge, courts have applied the dissolution of partnership principle where shareholdings are more or less equal and there is ousting not only from management but from benefits as shareholders. Lack of probity has to result in prejudice to company's business, affecting rights of complaining parties as shareholders and not as directors. The learned Judge relied on an English case [In re Cuthbert Cooper & Sons Limited(1)] which illustrates that if a deadlock can be resolved by the articles there is no deadlock to bring in winding-up and if there are alternative remedies the company should not be wound up. The learned Judge was also unable to hold that the substratum of the company was gone. The learned Judge concluded as follows:-

> "As I have indicated these charges and counter- charges raise disputed questions of fact between two contesting parties for power. The petitioners desire that they should be in power and the respondents would go on financing. This was said to be the heart of the matter by counsel for the respondents. This comment is not without foundation. I am unable to hold that there is any mismanagement or misapplication either as regards shareholders or as regards directors. Directors' disputes are not grounds for winding up on the facts and circumstances of the present case".

According to the learned Judge the case of In re Yenidje Tobacco Company Limited (2) and the cases following it have established that in applying the principles of dissolution of partnership to companies the following factors were important:

(1) Equal share-holding.

(2) Complete deadlock in the administration of the company.

(3) Lack of probity and mismanagement in the conduct of affairs of the company.

The learned Company Judge held that the principle in Yenidje's case (supra) was not attracted in this case.

On the other hand, according to the appellate court the principles in Yenidje's case were to the effect that-

> "if a private company could be fairly called a partnership in the guise of a private company then the things which might be a ground for dissolution of a partnership will apply also in the case of a private company" and that "in this connection deadlock is not material".

The appellate court then described the circumstances which according to Lindley justify the dissolution of the partnership:

> (1) if the partnership agreement is wilfully or persistently violated;
>
> (2) if one partner so behaves in matters relating to the partnership business that the other partners find it impossible to carry on business in partnership with him;
>
> (3) if some partners are in effect excluded from the concern;
>
> (4) if the misconduct of one or more partners is such that the mutual confidence which must subsist in a partnership is destroyed;
>
> (5) if there is a state of animosity which precludes all reasonable hope of reconciliation and friendly cooperation;

(6) if it is impossible for the partners to place that confidence in each other which each has a right to expect, provided that the impossibility has not been caused by the persons seeking to take advantage of if Having noted the above, the appellate court held that conditions (2), (3) and (4) were unquestionably fulfilled in this case and, therefore, allowed the application and rejected the stay application.

Before we proceed further we may refer to a recent decision of the House of Lords in Ebrahimi and Westbourne Galleries Ltd. and Others (1) (briefly Ebrahimi's case) wherein after reviewing all the earlier cases it was held as follows:-

> "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 obligation inter se which are not necessarily submerged in the company structure.

> That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations: considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way....
>
> "The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements:
>
> (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence-this element will often be found where a pre-existing partnership has been converted into a limited company;
>
> (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business;
>
> (iii)restriction upon the transfer of the members' interest in the company-so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere."

The respondents have laid great emphasis on the ratio of the above decision. It is true that section 222(f) of the English Companies Act, 1948 which the House of Lords was considering corresponds to section 433(f) of the Act. In the above decision the House of Lords had to deal with a private limited company consisting of three members, the petitioner therein, being one of the three. Lord Wilberforce delivering his reasoned speech has himself noted that-

> "It is a fact of cardinal importance that since about 1945 the business had been carried on by the appellant and Mr. Nazar as partners, equally sharing the management and the profits".

It was also noticed that-

> "the company made good profits, all of which were distributed as directors' remuneration. No dividends have ever been paid, before or after the petition was presented."

In Ebrahimi's case (supra) the company which was first formed by the two erstwhile partners, Ebrahimi and Nazar, was joined by Nazar's son, George Nazar, as the third director and each of the two original shareholders transferred to him 100 shares so that at all material times Ebrahimi held

400 shares, Nazar 400 shares and George Nazar 200 shares. The Nazars, father and son, thus had a majority of the votes in general meeting. Until the dispute all the three remained directors. Later on an ordinary resolution was passed by the company in general meeting by the votes of Nazar and George Nazar removing Ebrahimi from the office of director. That led to the petition for winding up before the court.

The following features are found in Ebrahimi's case:- (1) There was a prior partnership between the only two members who later on formed the company.

(2) Both the shareholders were directors sharing the profits equally as remuneration and no dividends were declared.

(3) One of the shareholders' son acquired shares from his father and from the second shareholder, Ebrahimi, and joined the company as the third shareholder-director with two hundred shares (one hundred from each).

(4) After that, there was a complete ouster of Ebrahimi from the management by the votes of the other two directors, father and son.

(5) Although Ebrahimi was a partner, Nazar had made it perfectly clear that he did not regard Ebrahimi as a partner but regarded him as an employee in repudiation of Ebrahimi's status as well as of the relationship.

(6) Ebrahimi through ceasing to be a director lost his right to share in the profits through directors' remuneration retaining only the chance of receiving dividends as a minority shareholder.

Bearing in mind the above features in the case, the House of Lords allowed the petition for winding up by reversing the judgment of the court of appeal and restoring the order of Plowman, J.

None of the parties questions the principles as such adumbrated by the House of Lords in Ebrahimi's case (supra) or even those in the earlier Yenidje's case (supra) and indeed these are sound principles depending upon the nature, composition and character of the company, The principles, good as they are, their application in a given case or in all cases, generally, creates problems and difficulties. The respondents' counsel is well cognizant of this difficult aspect and, therefore, rests his argument on the footing that the company is in substance a partnership and necessarily, therefore, according to him, the principles of partnership should be attracted.

Before we come to the facts of the present case, we have to deal with the principles of the Yenidje's case (supra) which were the cornerstone of the arguments on behalf of both the parties before the Company Judge as well as the appellate court. Ebrahimi's case (supra) was not available to the parties at that stage.

Yenidje's case (supra) has acquired celebrity and in application of the ratio of that case varying shades and colour have been sought to be given from time to time in England and appropriate to

occasions and to facts and circumstances of cases coming before the courts.

It is not necessary for us to go over the labyrinth of cases wherein the Yenidje's principle was applied and it will be sufficient to gather the ratio from the words of Lord Cozens-Hardy M.R. expressed in the decision itself. The learned Master of Rolls posed the question thus in that case:

> "I think it right to consider what is the precise position of a private company such as this and in what respects it can be fairly called a partnership in the guise of a private company."

This was a company of the two shareholders and two directors who had earlier traded separately but amalgamated their businesses and formed a private limited company. The constitution of the company was such that under its articles of association for any case of difference or dispute between the directors there was a provision for arbitration. In fact in one of such disputes a reference was made to arbitration which resulted in an award to which one of the two shareholders declined to give effect. It was proved in that case that the two directors were not on speaking terms, that the so-called meetings of the board of directors had been almost a farce or comedy, the directors would not speak to each other on the board, and some third person had to convey communications between them which ought to go directly from one to the other. Under the above situation it was observed by the learned Master of Rolls as follows:

> "Is it possible to say that it is not just and equitable that that state of things should not be allowed to continue, and that the Court should not intervene and say this is not what the parties contemplated by the arrangement into which they entered ?"
>
> * * * * * "Certainly, having regard to the fact that the only two directors will not speak to each other, and no business which deserves the name of business in the affairs of the company can be carried on, I think the company should not be allowed to continue. I have treated it as a partnership, and under the Partnership Act of course the application for a dissolution would take the form of an action; but this is not a partnership strictly, it is not a case in which it can be dissolved by action. But ought not precisely the same principles to apply to a case like this where in substance it is a partnership in the form or the guise of a private company ? It is a private company, and there is no way to put an end to the state of things which now exists except by means of a compulsory order. It has been urged upon us that the just and equitable clause has... been held.. not to apply except where the substratum of the company has gone or where there is a complete deadlock. Those are the two instances which are given, but I should be very sorry, so far as my individual opinion goes, to hold that they are strictly the limits of the 'just and equitable' clause as found in the Companies Act".
>
> * * * * * "If ever there was a case of deadlock I think it exists here; but, whether it exists or not, I think the circumstances are such that we ought to apply, if necessary, the analogy of the partnership law and to say that this company is now in a state

> which could not have been contemplated by the parties when the company formed and which ought to be terminated as soon as possible".

It is clear that although Yenidje's case (supra) was a case of a complete deadlock, that was not stated to be the sole basis for a conclusion to wind up the company. The House of Lords in Ebrahmi's case (supra) approved the decision in Yenidje's case (supra). We may also point out that the House of Lords did not approve of the undue emphasis put on the contractual rights arising from the articles over the equitable principles, derived from partnership law in re Cuthbert Cooper & Sons Limited (supra).

We may also refer to the Privy Council decision in Loch and Another and John Blackwood Limited(1), wherein section 127 of the Companies Act, 1910, of Barbados, identical with section 433(f) of the Act was considered. Lord Shaw of Dunfermline quoted in the judgment a passage from the case of Baird v. Lees(2), which is as follows :-

> "I have no intention of attempting a definition of the circumstances which amount to a `just and equitable' cause. But I think I may say this. A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second is that it shall be carried on by certain persons elected in a specified way. And the third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute, which provide some guarantee of commercial probity and efficiency. If shareholders find that these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhelming voting power, and if the result of that is that, for the extrication of their rights as shareholders they are deprived of the ordinary facilities which compliance with the Companies Acts would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the Court to wind up the company".

We may also refer to another decision of the Privy Council in D. Davis & Co. Ltd. v. Brunswick (Australia), Ltd. and others(3) which was from the decision of the Full Court of the Supreme Court of New South Wales. Section 84(e) of the New South Wales Companies Act (1899) also provides for winding up, inter alia, on just and equitable ground. In dealing with that clause, the Privy Council observed as follows :-

> "The position of the Court in determining whether it is just and equitable to wind up the company requires a fair consideration of all the circumstances connected with the formation and the carrying on of the Company during the short period which had elapsed since 12th May, 1930; and the common misfortune which had befallen the two shareholders in the Company does not, in their Lordships view, involve the consequence that the ultimate desires and hopes of the ordinary, shareholders should be disregarded merely because there is a strong interest in favour of liquidation naturally felt by the holders of the preference shares".

> * * * * * "Nor on the other hand can any general rule be laid down as to the nature of the circumstances which have to be borne in mind in considering whether the case comes within the phrase".

This Court had to deal with the `just and equitable' clause under section 162(vi) of the Indian Companies Act, 1913, in Rajahmundry Electric supply Corporation Ltd. v. A Nageswara Rao and others(1) and the Court quoted with approved the following passage in Loch's case (supra) :

> "It is undoubtedly true that at the foundation of applications for winding up, on the `just and equitable' rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company is wound up".
>
> Again in Mohan Lal & Anr. v. Grain Chamber Ltd.

Muzaffarnagar & Ors.,(2) this Court had held that-

> "Primarily the circumstances existing at the date of the petition must be taken into consideration for determining whether a case is made out for holding that it is just and equitable that the company should be wound up"

(See also Rajahmundry Electric Supply Corporation's case (supra) and S. P. Jain v. Kalinga Tubes Ltd.(3).

Keeping the ratio of Ebrahimi's case in the forefront of his argument Mr. Sen submits that in the present case also there was a definite understanding and agreement between the two family groups for equal status and equal participation in management and, therefore, exclusion of the respondents from the directorship is burial of mutual trust and denial of that relationship on which alone the company was formed and hence there is a prima facie case for admitting the petition.

Although the Indian Companies Act is modelled on the English Companies Act, the Indian law is developing on its own lines. Our law is also making significant progress of its own as and when necessary. Where the words used in both the Acts are identical, the English decisions may throw good light and reasons may be persuasive. But as the Privy Council observed long ago in Ramanandi Kuer v. Kalawati Kuer(1)-

> "It has often been pointed out by this Board that where there is a positive enactment of the Indian legislature, the proper course is to examine the language of that statute

> and to ascertain its proper meaning-uninfluenced by any considerations derived from the previous state of the law or of the English law upon which it may have been founded."

If it was true in the twenties it is more apposite now that the background, conditions and circumstances of the Indian society, the needs and requirements of our country call for a somewhat different treatment. We will have to adjust and adapt, limit or extend, the principles derived from English decisions, entitled as they are to great respect, suiting the conditions of our society and the country in general always, however, with one primary consideration in view that the general interests of the shareholders may not be readily sacrificed at the altar of squabbles of directors of powerful groups for power to manage the company.

When more than one family or several friends and relations together form a company and there is no right as such agreed upon for active participation of members who are sought to be excluded from management, the principles of dissolution of partnership cannot be liberally invoked. Besides, it is only when share-holding is more or less equal and there is a case of complete 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, there may arise a case for winding up on the just and equitable ground. In a given case the principles of dissolution of partnership may apply squarely if the apparent structure of the company is not the real structure and on piercing the veil it is found that in reality it is a partnership. On the allegations and submissions in the present case, we are not prepared to extend these principles to the present company.

The principle of `just and equitable' clause baffles a precise definition. It must rest with the judicial discretion of the court depending upon the facts and circumstances of each case. These are necessarily equitable considerations and may, in a given case be superimposed on law. Whether it would be so done in a particular case cannot be put in the strait-jacket of an inflexible formula.

In an application of this type allegations in the petition are of primary importance. A prima facie case has to be made out before the court can take any action in the matter. Even admission of a petition which will lead to advertisement of the winding up proceedings is likely to cause immense injury to the company if ultimately the application has to be dismissed. The interest of the applicant alone is not of predominant consideration. The interests of the shareholders of the company as a whole apart from those of other interests have to be kept in mind at the time of consideration as to whether the application should be admitted on the allegations mentioned in the petition.

The question that is raised in this appeal is as to what is the scope of section 433(f) of the Act. Section 483 provides for the circumstances in which a company may be wound up by the court. There are six recipes in this section and we are concerned with the sixth, namely, that a company may be wound up by the court if the court is of the opinion that it is just and equitable that the company should be wound up. Section 222(f) of the English Companies Act, 1948 is in terms identical with the Indian counter-part, section 433 (f). It is now well established that the sixth clause namely, 'just and equitable' is not to be read as being ejusdem generis with the preceding five

clauses. While the five earlier clauses prescribe definite conditions to be fulfilled for the one or the other to be attracted in a given case, the just and equitable clause leaves the entire matter to the wide and wise judicial discretion of the court. The only limitations are the force and content of the words themselves, 'just and equitable'. Since, however, the matter cannot be left so uncertain and indefinite, the courts in England for long have developed a rule derived from the history and extent of the equity jurisdiction itself and also born out of recognition of equitable considerations generally. This is particularly so as section 35(6) of the English Partnership Act, 1890 also contains, inter alia, an analogous provision for the dissolution of partnership by the court. Section 44(g) of the Indian Partnership Act also contains the words 'just and equitable'.

Section 433(f) under which this application has been made has to be read with section 443(2) of the Act. Under the latter provision 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 would up instead of pursuing that other remedy.

Again under sections 397 and 398 of the Act there are preventive provisions in the Act as a safeguard against oppression in management. These provisions also indicate that relief under section 433(f) based on the just and equitable clause is in the nature of a last resort when other remedies are not efficacious enough to protect the general interests of the company.

Coming to the present case we find that the company was formed first with R.P.J. and Anil Chandra Dutta. Anil Chandra Dutta was admittedly an employee of V.D.J. and it is also claimed that even R.P.J. was an employee of a company in which V.D.J. was a managing partner. Although the entire finance was to be arranged by V.D.J., it appears the company was started by the above two persons with V.D.J. remaining in the background. Anil Chandra Dutta soon resigned and other people came in and in 1965-66 there were 19 shareholders, nine headed by R.P.J. and ten headed by V.D.J., clearly showing two family groups-R.P.J. group had 1875 shares and V.D.J. group had 3125 shares. V.D.J. stood guarantee for bank overdraft to the tune of Rs. 47 lakhs and as the learned Company Judge has noted the stake of the appellant in the company was about Rs. 63 lakhs as opposed to the stake of the respondents amounting to Rs. 1.87 lakhs. It is, therefore, clear that R.P.J. group's interest in the company was not of the same magnitude as that of the appellants. The learned Company Judge put the picture as follows:-

> "The entire affidavit evidence brings in the forefront two broad features. First, that there are disputes between the petitioners and the respondents regarding appointment of Vinode Kumar Jhunjhunwalla and Hariram Modi. It is said on behalf of the petitioners that these appointments in breach of articles and in breach of the provisions of the Companies Act are adequate grounds for winding up. It is, on the other hand said by the respondents that the allegations of breach of articles and provisions of the Act are denied and these are the subject-matter of remedy by suit and are not the subject-matter of winding up. The other feature is that the respondents charge the petitioners with misappropriation. The petitioners also charge the respondents with having utilised the funds of the company."

Is this company, in substance a partnership or in the image of a partnership as claimed ? We may now address to this aspect strenuously emphasised by Mr. Sen. It as in Ebrahimi's case (supra) there had been an earlier partnership and the partners later on formed into a company, the matter would have stood on a different footing. In the present case, however, we do not find any special features which would unquestionably lead to the conclusion that the company is in substance a partnership. On the other hand the following aspects are noteworthy:

Assuming partnership had been contemplated, the idea was deliberately abandoned. The company was started with one Anil Chandra Dutta who was no relation of the two families but was an employee of V.D.J. This would negative the idea of partnership which connotes equal status amongst the partners. While it is true that a director may work in the company on remuneration, R.P.J., however, served like an employee on monthly salary not on his own initiative enjoying an equal partner's freedom and prestige but directly under the supervision and control of V.D.J. acknowledging a status definitely of a subordinate character. The voluntary financial involvement of a large stake by V.D.J. carefully sought to be protected against erosion of his interests by constant vigil on the day-to-day working does not fit in with the concept of a partnership.

All the above features do not enable us to accept the submission of the respondents that the company in this case is in substance a partnership.

In the present case there is yet another important feature against the respondents. Serious trouble apparently arose on or about May 23, 1966, when a Board meeting was notified. Prior to that even though something might, perhaps, be brewing inside, but nothing came to the surface although the respondents alleged that V.D.J's son, Vinode Kumar Jhunjhunwalla, had been sent to the States at company's expense and was later on, after completion of education, appointed as Technical Director and that all these were illegal actions. It is significant that R.P.J. group was present in the meeting when these resolutions were passed and they made no grievance at the time about the same. The petition for winding up was filled on June 7, 1966 and the foundation for it was laid in the solicitors' letter to the appellants on May 27, 1966. That may be said to be nucleus of the dispute so far as the records show.

It is not a proper principle to encourage hasty petitions of this nature without first attempting to sort out the dispute and controversy between the members in the domestic forum in conformity with the articles of association. There must be materials to show when 'just and equitable' clause is invoked, that it is just and equitable not only to the persons applying for winding up but also to the company and to all its shareholders. The company court will have to keep in mind the position of the company as a whole and the interests of the shareholders and see that they do not suffer in a fight for power that ensues between two groups.

The cases of small companies stand on a different footing from a company like the present with nineteen shareholders, although apparently arrayed in two groups. It is not, prima facie, established on the allegations that the company cannot run smoothly in the best interest of the general shareholders, including the R.P.J. group, after exit of the quondam directors.

The conclusion of the Division Bench that the company is in substance a partnership venture was based on the following principal reasons:-

> (1) The original idea was to start a partnership venture and that idea was given ultimately the shape of a private company (2) The Sir Khata account shows that the starting on a partnership venture the parties set up a private company.
>
> (3) The shareholding shows division amongst two family groups.
>
> (4) There was no denial by the appellants of a specific averment of the respondents that the company was in substance a partnership. (5) The respondents were all along functioning as working partners and the respondent, V.D.J. was the financial partner.
>
> We will examine each of these reasons.

With regard to the first reason, the solicitors' letter of May 27, 1966, which is the nucleus of the subsequent winding up petition filed in court is of great significance and the improvement in the version later in the petition will lose its importance. It was stated in the solicitors' letter that "some time in May 1956 it was agreed between our client Shri R. P. Jhunjhunwalla and Shri V. D. Jhunjhunwalla and Shri Mahabir Prasad Jhunjhunwalla to do some type of business in partnership, Shri V. D. Jhunjhunwalla suggested that a limited company should be formed in which our client could hold shares to the extent of -/6/- annas and Shri V. D. Jhunjhunwalla and Shri Mahabir Prasad Jhunjhunwalla to the extent of annas -/10/- and that our client would manage the business of such company as and when it was formed and that the requisite finance for the working of the company would be made by Shri V. D. Jhunjhunwalla and Shri Mahabir Prasad Jhunjhunwalla."

There is nothing in the above paragraph which is the corner-stone of the plea of partnership in substance that there was any active contemplation about forming of a partnership. Reference to 'some type of business of partnership' is very casual in the above extract. On the other hand, it is more reasonable to conclude that although there might have been discussion about the advantages and disadvantages of partnership vis-a-vis a private limited company, no time was lost in deciding to form a company. If this is the only basis of agreement between the parties to sustain the claim, we are unable to accept the same.

Regarding the second reason, the Sir Khata account which has been heavily relied upon to found an agreement or understanding is wholly misconceived. It merely shows that a joint account was, for the time being opened for the purpose of the formation of the company and the account was closed on such formation. It does not indicate any understanding as to the right of management of the company by any group of shareholders. Thirdly, because the shareholding is between two family groups, it cannot be said that the company thereby takes the image of partnership. On the other hand, the fact that after discussion, the parties deliberately abandoned the idea of forming a partnership would go to show that there was no intention to carry on business as partners. Fourthly, after going through the correspondence it is not possible to say that there was no denial of the averment by the respondents that the company was in substance a partnership. Apart from anything

else it is enough to point out that in the letter of V.D.J. dated June 3, 1963, the allegations have been clearly denied. It is, therefore, a very weak reason to reckon. With regard to the last reason, it appears that the respondents themselves took the position in their petition that R.P.J. was managing the affairs of the company under daily supervision and control of V.D.J. Whether this position is accepted by the appellants or not, their statement in that respect gives no indication of their right to manage the business as a working partner as claimed. Besides, working on remuneration by a director is not an unknown feature even in company business and we have already adverted to the status in which he worked. Nothing, therefore, turns on this feature. All the above reasons, therefore, fail to convince us that the conclusion of the Division Bench that the company is in substance a partnership, is correct.

We should observe, that nothing observed by us in this appeal may be taken as expression of any opinion on the merits of the allegations and counter-allegations of the parties.

In the result the appeal is allowed with costs. The judgment of the Division Bench is set aside. The winding up petition stands dismissed and the stay petition of the appellant is allowed.

S.R. Appeal allowed.