IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Company Petition No.61 of 2006 (O&M)
Date of decision: December 24, 2015

Vinod Krishan Khanna and others

……Petitioners

Vs.

M/s Amritsar Swadeshi Textile Corporation (P) Limited and others

…..Respondents

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Argued by:
Present: Mr. Sanjiv Bansal and Mr. R.Kartikeya, Advocates for the petitioners.

Argued by:
Mr.Arun Kathpalia, Sr. Advocate with
Mr. Prateek Gupta, Advocate for the respondents.

Ajay Kumar Mittal,J.

1. The present petition has been filed by the petitioners under Section 433 (f) read with Section 439 of the Companies Act, 1956 (in short, "the Act") for the winding up of the respondent-company as the same has been incorporated against the provisions of the Act.

2. Respondent - M/s Amritsar Swadeshi Textile Corporation (P) Limited having its registered office at Ramtirath Road, Putlighar, Amritsar is a company incorporated as Company Limited by shares and is registered with the Registrar of Companies, Punjab, HP and Chandigarh at Jalandhar vide certificate of incorporation dated 24.1.2005, Annexure P.1. The partnership firm was formed by Hansraj Khanna alongwith his three sons

namely Hari Krishan Khanna, Siri Krishan Khanna and Raj Krishan Khanna in the year 1957 at Amritsar. It owned a textile manufacturing unit and its main business was of manufacturing woollen blankets and woollen fabric. Since it was a family business, other male members of the family on attaining majority were inducted as partners in the firm. On each inclusion, fresh partnership deeds were executed. Over the period of time, the firm expanded its business and set up wholly owned manufacturing units styled as M/s ASWM Spinning Mills, M/s Sommettex Fabrics, M/s Swadeshi Udyog, M/s Hansa Fabrics, M/s Amritsar Swadeshi Woollen Mills (Garments Division) and M/s Swadeshi Koreatex. In 1959, Shri Hari Krishan Khanna died and petitioner No.1 being his eldest son who was then a student was included as a partner in the firm. Petitioner No.1 joined the Indian Administrative Service in 1963 and during this service was the Chief Secretary, Government of Punjab. He retired as Chairman, Inland Waterways Authority of India in the year 2001 and then was working as Chairman, National Shipping Board, Government of India. Hansraj Khanna died in 1989 and a fresh partnership deed was signed between the parties on 28.9.1992, Annexure P.2 in continuation of the earlier partnership. Sachin Khanna, on attaining majority was admitted to the benefit of the partnership. Petitioner No.2 was a working partner of the said firm for the last 40 years and was looking after the three units ASWM Spinning Mills, M/s Sommerttex Fabrics and M/s Hansa Fabrics, all situated at Amritsar. He was also signing cheques regarding the bank accounts of these firms. In addition, he was also operating the accounts of other units of the firm. Due to differences amongst the partners of the firm, it was decided to dissolve the firm and divide the assets between the parties/partners. On 2.2.2004, it was suggested by some of the partners Siri Krishan Khanna and Raj Krishan Khanna to convert the partnership firm into a private limited company under the name and style of M/s Amritsar Swadeshi Corporation. A resolution was thus prepared and petitioner Nos. 1 and 2 also signed the same. However, the original resolution was kept by Siri Krishan Khanna. A number of changes/interpolations were made in the resolution signed by petitioner Nos. 1 and 2 subsequently. Some of the interpolations were (i) the word 'Textile' was inserted after the word Swadeshi in the name of the proposed company; (ii) the names of R.L.Mehra, Raghav Mehra and Rajat Mehra, Chartered Accountants were inserted. These changes were made without the consent of the petitioners. On 2.4.2004, the partners of the firm again met where one of the partners Siri Krishan Khanna got a fresh partnership deed, Annexure P.4 prepared which was signed by the petitioners and it was decided to make partnership firm a joint stock company within the meaning of Section 565 of the Act, which was a pre-requisite for getting the company registered under Chapter IX of the Act. However, actual conversion of the partnership firm into a company could not be proceeded with due to differences on various issues like composition of the Board of Directors; whether the directors would be permanent or removable by an ordinary resolution of 51%; the managerial responsibilities of each member of the family/director and emoluments and perquisites of the directors. In view of the differences,one of the partners L.K.Khanna wrote a letter in August 2004 to the petitioners, Annexure P.5 stating that there was lack of confidence amongst the partners and therefore, in order to sort out the problem, there was no need to form a company. They could sign a Memorandum of Understanding (MOU) to divide the assets in partnership concern itself. Thereafter, the idea of formation of a company was given up and steps were initiated to divide the assets within the partnership itself. Accordingly, a draft MOU/Family settlement was signed by heads of all the four branches of the family on 5.8.2004. Several rounds of discussions were held among the partners for implementation of the draft memorandum/family agreement for division of assets by draw of lots. However, some of the partners conspired to disregard the decision not to form a company and to divide the assets within the partnership itself by draw of lots. The petitioners had executed a general power of attorneys in favour of Siri Krishan Khanna for the running of the business of the firm M/s Amritsar Swadeshi Woollen Mills in the years 1969, 1978 and 1981. The said general power of attorney was only for exclusive running of the business and for no other purpose. Thereafter, petitioner No.3 had specifically revoked his power of attorney in the year 1989 which had been given in favour of Siri Krishan Khanna. Further, petitioner No.3 then executed a power of attorney on 22.2.1989 in favour of his elder brother petitioner No.1 and an affidavit to this effect was given to the various authorities in this regard. In pursuance of this decision, without the knowledge and consent of the petitioners and in conspiracy with Chartered Accountant R.L.Mehra, the respondents applied for registration of the company on 21.1.2005 and got it registered on 24th January 2005. This was done in an entirely fraudulent and clandestine manner. The new company which was got incorporated under Chapter IX of the Act was named as M/s Amritsar Swadeshi Textile Corporation (P) Limited having its registered office at Ramtirath Road, Putlighar, Amritsar. The petitioners immediately on coming to know of the formation of the company from the firm filed a complaint with the Registrar of Companies on 8.3.2005, Annexure P.11 praying that the company should not be allowed to carry out any activity of any nature as the formation of the company was fraudulent and illegal and that any activity carried out by the company would be detrimental to the interest of the petitioners. The complaint was forwarded to the Union of India through the Regional Director, Department of Company Affairs, Kanpur. According to the petitioners, in order to get the company registered, several misleading and false representations were made and false documents were used. The application for allotment of name was made on 21.1.2005. 22nd and 23rd being holidays, the entire processing of the case was done in one day i.e. 24.1.2005. Several illegalities and procedural lapses were committed while incorporating the company. Further, prescribed procedure for approval of name had not been followed. In any case, the company could not have been formed without the express authorization of the petitioners. The General Power of Attorneys (GPAs) used for registration did not authorize any person to subscribe to Memorandum of Association (MOA) or Articles of Association (AOA). The petitioners had never given any GPA to anyone for this purpose. Some GPAs were given to Siri Krishan Khanna decades back but these were limited to matters pertaining to routine business of the firm. None of them contained even a single word authorizing anyone to sign the MOA or AOA for formation of a company. After 1989, Vinod Krishan Khanna was acting as Vijay Krishan Khanna's GPA as the GPA of 1969 had been revoked in 1989 and was repeatedly recognized as such by all partners particularly Siri Krishan Khanna. Hence after 1989, Siri Krishan Khanna had no authority to act on behalf of Vijay Krishan Khanna at the time of signing MOA/AOA on 21.1.2005. When on

24.2.2005, Siri Krishan Khanna first informed the petitioners that the partnership had been converted into a company and that GPAs of the petitioners had been used to sign on their behalf, petitioner Nos. 1 and 2 Vinod Krishan Khanna and Vimal Krishan Khanna asked Siri Krishan Khanna to return their GPAs immediately because they did not want them to be again misutilised for any other purpose. Hence again fraud was played on the petitioners. Instead of returning the GPAs used for registration, Siri Krishan Khanna returned to petitioner Nos. 1 and 2 the GPAs dated 27.12.1997 which had nothing to do with registration of the company. In nut shell, the company was incorporated in complete disregard of the mandatory provisions of sections 13, 15, 26 and 30 of the Act. The petitioners who were the original partners of the firm were left out and had been debarred entry into the premises of the company by way of secrecy clause in the AOA whereby they could only enter the company with the permission of the directors. On complaint being filed by the petitioners, the Registrar of Companies issued a notice under Section 234(7) of the Act calling upon the respondent company for furnishing of information and documents with regard to the formation of the company. The said notice was sent on 16.3.2005, Annexure P.12. Another notice was sent on 26.5.2005, Annexure P.13 for launch of prosecution under section 234(4) of the Act. The Registrar of Companies after enquiry had written a detailed note to the Union of India through the Regional Director regarding the illegal formation of the company. It was stated therein that there was clear violation of the provisions of the Act and necessary directions were sought. Thereafter, the Registrar of Companies on 12.7.2005 issued a show cause notice to the company under section 433(f) of the Act read with Section 439 of the Act for winding up of the said company as it was wrongly and illegally registered and incorporated. The Union of India, Ministry of Company Affairs through the Regional Director, NR directed the Registrar of Companies vide communication dated 10.8.2005 to issue notices for action under sections 628, 629 and 433(f) of the Act after obtaining necessary approval from Regional Director, Noida and report the matter to the Ministry. Inspite of that, no action has been taken by the authorities. Hence the instant petition by the petitioners for winding up the respondent company.

3. Reply on behalf of the respondent company has been filed wherein it has been inter alia stated in the preliminary objections that the petitioners have not made any allegation against the respondent company. The allegations relate to the period prior to the incorporation of the company and that too against the persons other than the respondent company. The petitioners have no locus standi to file the winding up petition under section 433(f) of the Act because they have filed the petition as partners of the erstwhile firm Amritsar Swadeshi Woollen Mills. The provisions of the Act do not entitle an individual partner to file a winding up petition. Only those persons who are specifically named in Section 439 of the Act are entitled to file a winding up petition. The petitioners have also challenged the change made by the land revenue department in the revenue records in favour of the company by representing themselves as partners of the firm. They have also filed their claims for compensation as partners of the firm before the Sub Divisional Magistrate-1, competent authority, National Highways Act, 1956. The incorporation of the company cannot be challenged on any ground in view of Section 35 of the Act. The

petitioners had already agreed that the partnership firm was a joint stock company within the meaning of section 566 of Part IX of the Act and that the said joint stock company be got registered under Part IX of the Act. The partnership firm was converted into joint stock company by adopting the procedure laid down in Part IX of the Act. The certificate of incorporation dated 24.1.2005 issued by Registrar of Companies clearly states that the company is registered under Part IX of the Act. The company stands properly incorporated even in view of the provisions contained in Section 565 of the Act because the holding of the petitioners is only 21% as compared to 79% holding of the other members. Section 565 of the Act clearly provides that the assent of the majority of the members is required to get joint stock company registered under Part IX of the Act. The respondent company is a premier organization in the woollen industry. Its paid up capital is twenty crores. It has 1000 employees and also provides indirect employment/work to about 5000 persons through auxiliary industries and its business activities. It is not just and equitable to wind up a going concern because that would result not only in huge loss of public money and government revenue but also will lead to huge unemployment. When the Registrar of Companies (ROC) had perused the original GPAs and was satisfied that Siri Krishan Khanna was authorised to sign on behalf of Mr. V.K.Khanna and his brothers that he registered the company and issued the certificate of incorporation on 24.1.2005. Petitioner No.1 had no interest in the concern and even after retirement from service he never participated in the management of the business. Petitioner No.3, a doctor by profession residing permanently in USA and carrying on his profession in a big way had neither contributed in the management of the concern nor did he ever had any interest in the running of the organization. He alongwith petitioner No.1 had always been sleeping partner or in other words only investor. Petitioner No.2 -Vimal Krishan Khanna was made a partner on the demise of his father. The ancestral investment in the concern was to the tune of ₹ 15,000/- only. Petitioner No.2 never made any fresh investment in the concern as a partner out of his personal income. It has been further submitted that Section 433(f) of the Act cannot be used as an instrument to wind up a company on mere allegations. Winding up cannot be taken up on disputed facts since the company court has summary jurisdiction. Further, the petition does not fulfil the criterion necessary for proceeding under section 433(f) of the Act. The petitioners never objected to the conversion of the firm into company at any time after signing the unanimous resolution dated 2.2.2004 and partnership deed dated 2.4.2004 nor did they revoke the partnership deed dated 2.4.2004. Even earlier, the petitioners had filed civil suit on 9.4.2005 maintaining their status as partner of the erstwhile firm which was withdrawn on 5.5.2006. On merits, the allegations made in the petition have been controverted by giving parawise reply. The petitioners had not made any allegation against the respondent company or against the working of the company or there was any averment in respect of the period after the respondent company was incorporated. On these premises, prayer for dismissal of the petition has been made.

4. I have heard learned counsel for the parties and perused the record.

5. The petitioners have preferred the company petition seeking winding up of the respondent-company-M/s Amritsar Swadeshi Textile Corporation (P) Limited under Section 433(f) of the Act on the ground of

"Just and equitable". The core issue arising in this Company Petition is whether it would be appropriate to wind up the respondent-company M/s Amritsar Swadeshi Textile Corporation (P) Limited under Section 433(f) of the Act on the ground of "just and equitable".

6. It would be expedient to refer to Section 433(f) of the Act which reads thus:-

> "**433. Circumstances in which company may be wound up by Court -** A company may be wound up by the Court-
>
> xx xx xx xx xx
>
> (a) to (e) xx xx xx xx xx
>
> (f) if the Court is of the opinion that it is just and equitable that the company should be wound up."

Section 443 of the Act provides for powers of the company court on hearing of a winding up petition. Sub section (2) thereof which is relevant for the present purposes is in the following terms:-

> "**Section 443 – Power of Court on hearing petition**
>
> (1)xxxxxx
>
> (2) 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.
>
> (3)xxxxxxxxx"

A plain reading of the above provision shows that Section 433 of the Act prescribes the circumstances in which a company may be wound up. As per clause (f) of Section 433 of the Act, if in the opinion of the court, it is just and equitable that the company should be wound up, it can make an order in this behalf. In other words, under Section 433(f) of the Act, it has been provided that if the court is of the opinion that it is just and equitable that the company should be wound up, it has the jurisdiction to do so. Under Section 443 of the Act, powers of the Court have been prescribed on hearing petition for winding up. The court may dismiss it or make an order for winding up if in its opinion, it is just and equitable to do so. In other words, Section 443(2) of the Act empowers the company court to refuse to make an order of winding up if it is of the opinion that some other remedy was available to the petitioners and that they were acting unreasonably in seeking winding up instead of pursuing that other remedy.

7. Firstly, the amplitude of the expression "Just and equitable" needs to be scanned. The phrase "just and equitable" has wide scope. It is for the court to consider keeping in view the overall facts and circumstances of the case that it is just and equitable to make out an order for winding up of a company. The court may refuse to make an order of winding up if it is of the opinion that some other remedy is available to the petitioner. When a winding up petition is made under section 433(f) of the Act on the cause of just and equitable ground, it is the duty of the petitioner to disclose the material facts in clear and fair manner. While dealing with the issue of winding up of a company on just and equitable ground, the Gujarat High Court in ***Re: Atul Drug House Limited,*** (1971) 41 Company Cases 352 (Guj.) elaborately discussing the issue had observed as under:-

> "As regards the last ground, it should be kept in mind that when a winding-up petition is made under section 433(f) on the cause

of just and equitable ground, the petition to exercise such jurisdiction must be filed with absolute candour. Section 443(2) in terms enacts 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. In the context of section 443(2) which is applicable when the ground for winding-up is under section 433(f) that it is just and equitable to do so, it would be the bounden duty of the petitioners to disclose the material facts as to the alternative remedies which they have availed of or which are available to them. It is only this disclosure which would enable the court to exercise its discretion under section 443(2) and when such a petition is presented on this ground under section 433(f), to make up its mind as to whether the other remedy is available to the petitioners and they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy. The material distinction between the bankruptcy proceedings and winding-up proceedings should always be kept in mind, for the winding-up proceedings cannot be heard and decided without issuing a public advertisement under the rules. Such a public advertisement would have very serious repercussions especially when the concern is a solvent, flourishing, running concern and the harm which would be done to such a concern by issuing the public advertisement would be almost irreparable and irreversible. That is why the petitioners, who seek to get the winding-up petition admitted full well knowing that in such solvent concern the advertisement would have such effect or irreparable damage, must exercise scrupulous care and caution to come with absolute altogether candour by disclosing to the court why they are pursuing the alternative remedies they have or which they may have availed of before filling such a petition. In **Jaggannath Gupta & Co. v. Mulchand Gupta,** (1969) Company Cases 262, **Ray J.** (as he then was) in terms held that suppression by the petitioners in such a winding-up petition under section 433(f) on just and equitable grounds that the petitioners had asked any investigation of the affairs of the company by the Company Law Board would be one of the reasons not to permit this alternative remedy. The importance of such an allegation is that if investigation of the affairs of the company was pending it might be that the court would not admit the petition for winding-up. In such an investigation before the company Law Board rival contentions would be gone into and, therefore, if that remedy had been chosen, it would not be just and proper to allow the winding-up petition to be pursued by the same litigant. It should be kept in mind that section 408 empowers the Central Government to appoint not more than two directors notwithstanding anything contained in the Act it if it is satisfied after such inquiry as it deems fit to make that it is necessary to make the appointment in order to prevent the affairs of the company being conducted either in a manner which is oppressive to any members of the company or in a manner which is prejudicial to the interests of the company or to public interest. When the state of affairs of the company were required to be investigated by the minority group by applying under section 408, this material fact ought to have been disclosed in the petition. The petitioners have never cared to disclose this fact in the petition. Mr. Divan vehemently argued that there was no deliberate suppression and this might have been overlooked and, for such an inadvertent omission, the extreme penalty of rejecting the petition should not be imposed on the petitioners. Mr. Divan in this connection pointed out that some reference to this application under section 408 is made by the petitioners by relying upon the admissions which have been made by the majority group in that application. Such a causal reference would hardly meet with the relevant requirement that there should be the averment that the petitioners had preferred a complaint before the Company Law Board and had availed of the alternative remedy in that connection for remedying the state of affairs by appointment of two additional Government directors. To what extent this averment would have weighed with the court at the time of admission is wholly immaterial. In fact, the interim orders were sought at the stage of presentation of this petition when the notice was issued to the company. The petitioners were, therefore, under a duty to disclose these material facts. When the petitioners sought interim orders without disclosing these material facts and got a stay from this court on material suppression of such facts, the general rule that those who get a stay in this manner should not be heard, should have been followed, especially in a matter of this type where the consequences of a petition being inadvertently admitted, and the advertisement being issued would be so ruinous on a solvent company. Therefore, this last ground would have itself disentitled the petitioners from claiming any relief on just and equitable grounds......"

8. In ***Suresh Kumar Bansal vs. U.P.Mineral Products Limited,*** (1996) 87 Company Cases 223 (Delhi), it was observed by the Delhi High Court:-

"2. I have heard learned counsel for the petitioner and perused the record. Admittedly, the grounds taken by the petitioners are not covered under section 433(f) of the Act. The only ground on which winding up has been sought are that the company has reduced the share capital without approval of the shareholders and sanction of the court, and that of the removal of petitioners Nos. 1 and 2 from the management of the company and from the board of directors. For these grounds of oppression and mismanagement, alternative remedy is available. Resorting to this extreme remedy of winding up, to my mind, is not necessary. It is only when there is no practical possibility of remedying the mismanagement that it becomes a proper case for winding up on the just and equitable ground. Doing of an unauthorised business and entering into ultra vires transactions will not furnish a just and equitable ground for an order of winding up. Reference can be had to the decision of the Supreme Court in the case of **Seth Mohan Lal v. Grain Chambers Ltd. [1968] 38 Comp Case 543** as well as to the judgment of the Division Bench of this court in **Bhaskar Stoneware Pipes Pvt. Ltd. v. Rajinder Nath Bhaskar [1988] 63 Comp Case 184**. On the ground of reduction of the share capital, mismanagement and oppression, the petitioners can invoke the jurisdiction of the Company Law Board under section 397 and can file civil suit for seeking relief. To my mind, the remedy of winding up is not the answer, and, therefore, the petition as such is not maintainable under section 433(f) of the Act."

9. "Just and equitable" principle cannot be used as an instrument to wind up a company on mere allegations. Various judicial pronouncements have held that unless the court is compelled by circumstances, an order for winding up a company on just and equitable ground should not be made. No body can seek winding up as a matter of right. It is a discretion vested with the company court to be exercised with due diligence because the court has summary jurisdiction and it cannot go into complicated questions of fact which are disputed by the respondents. Under just and equitable clause, the interest of the applicant is not of predominant consideration. The interest of the shareholders of the company as a whole, interest of the creditors, lenders, workers and the public at large has to be kept in mind. The relief under Section 433(f) of the Act based on just and equitable clause is in the

nature of last resort when other remedies are not efficacious enough to protect the general interest of the company. For winding up under section 433(f) of the Act, it has to be established by the petitioner that the circumstances in the functioning of the company are such that winding up of the company is the only alternative and no other remedy was available.

10. Learned counsel for the parties drew my attention to certain other statutory provisions for adjudication of the controversy involved. It would be advantageous to refer to the relevant provisions which read thus:-

> "**35. Conclusiveness of certificate of incorporation.** A certificate of incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of this Act have been complied with in respect of registration and matters precedent and incidental thereto, and that the association is a company authorized to be registered and duly registered under this Act.
>
> **397. Application to Company Law Board for relief in cases of oppression.**
>
> (1) Any members of a company who complain 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 Company Law Board for an order under this section, provided such members have a right so to apply in virtue of section 399.
>
> (2) If, on any application under sub- section (1), the Company Law Board is of 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
>
> (b) that to wind up the company would unfairly prejudice such member or members, but that 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 Company Law Board] may with a view to bringing to an end the matters complained of, make such order as it thinks fit

439. Provisions as to applications for winding up.

(1) An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section,-

(a) by the company; or

(b) by any creditor or creditors, including any contingent or prospective creditor or creditors; or

(c) by any contributory or contributories; or

(d) by all or any of the parties specified in clauses (a), (b) and (c), whether together or separately; or

(e) by the Registrar; or

(f) in a case falling under section 243, by any person authoised by the Central Government in that behalf.

(2) A secured creditor, the holder of any debentures (including debenture stock), whether or not any trustee or trustees have been appointed in respect of such and other like debentures, and the trustee for the holders of debentures, shall be deemed to be creditors within the meaning of clause (b) of sub- section (1).

(3) A contributory shall be entitled to present a petition for winding up a company, notwithstanding that he may be the holder of fully paid-up shares, or that the company may have no assets at all, or may have, no surplus assets left for distribution among the shareholders after the satisfaction of its liabilities.

(4) A contributory shall not be entitled to present a petition for winding up a company unless-

(a) either the number of members is reduced, in the case of a public company, below seven, and, in the case of a private company, below two; or

(b) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months immediately before the commencement of the winding up, or have devolved on him through the death of a former holder.

(5) Except in the case where he is authorised in pursuance of clause (f) of sub-section (1), the Registrar shall be entitled to present a petition for winding up a company only on the grounds specified in clauses (b), (c), (d), (e) and (f)] of section 433:

Provided that the Registrar shall not present a petition on the ground specified in clause (e) aforesaid, unless it appears to him either from the financial condition of the company as disclosed in its balance-sheet or from the report of a special auditor appointed under section 233A or an inspector appointed under section 235 or 237, that the company is unable to pay its debts:

Provided further that the Registrar shall obtain the previous sanction of the Central Government to the presentation of the petition on any of the grounds aforesaid.

(6) The Central Government shall not accord its sanction in pursuance of the foregoing proviso, unless the company has first been afforded an opportunity of making its representations, if any.

(7) A petition for winding up a company on the ground specified in clause (b) of section 433 shall not be presented-

(a) except by the Registrar or by a contributory; or

(b) before the expiration of fourteen days after the last day on which the statutory meeting referred to in clause (b) aforesaid ought to have been held.

(8) Before a petition for winding up a company presented by a contingent or prospective creditor is admitted, the leave of the Court shall be obtained for the admission of the petition and

such leave shall not be granted-

(a) unless, in the opinion of the Court there is a prima facie case for winding up the company; and

(b) until such security for costs has been given as the Court thinks reasonable.”

565. Companies capable of being registered.

(1) With the exceptions and subject to the provisions contained in this section-

(a) any company consisting of seven or more members, which was in existence on the first day of May, 1882 , including any company registered under Act No. 19 of 1857 and Act No. 7 of 1860 or either of them or under any laws or law in force in a Part B State, corresponding to those Acts or either of them; and

(b) any company formed after the date aforesaid, whether before or after the commencement of this Act, in pursuance of any Act of Parliament other than this Act or of any other Indian law (including a law in force in a Part B State), or of any Act of Parliament of the United Kingdom or Letters Patent in force in India, or being otherwise duly constituted according to law, and consisting of seven or more members; may at any time register under this Act as an unlimited company, or as a company limited by shares, or as a company limited by guarantee; and the registration shall not be invalid by reason only that it has taken place with a view to the company's being wound up: Provided that-

(i) a company registered under the Indian Companies Act, 1882(6 of 1882), or under the Indian Companies Act, 1913(7 of 1913), shall not register in pursuance of this section;

(ii) a company having the liability of its members limited by any Act of Parliament other than this Act or by any other Indian law (including a law in force in a Part B

State), or by any Act of Parliament of the United Kingdom or Letters Patent in force in India, and not being a joint stock company as defined in section 566, shall not register in pursuance of this section;

(iii) a company having the liability of its members limited by any Act of Parliament other than this Act or by any other Indian law (including a law in force in a Part B State), or any Act of Parliament of the United Kingdom or Letters Patent in force in India, shall not register in pursuance of this section as an unlimited company or as a company limited by guarantee;

(iv) a company that is not a joint stock company as defined in section 566 shall not register in pursuance of this section as a company limited by shares;

(v) a company shall not register in pursuance of this section without the assent of a majority of such of its members as are present in person, or where proxies are allowed, by proxy, at a general meeting summoned for the purpose;

(vi) where a company not having the liability of its members limited by any Act of Parliament or any other Indian law (including a law in force in a Part B State) or by any Act of Parliament of the United Kingdom or Letters Patent in force in India, is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three- fourths of the members present in person, or where proxies are allowed, by proxy, at the meeting;

(vii) where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member, or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

(2) In computing any majority required for the purposes of sub- section (1) when a poll is demanded, regard shall be had to the number of votes to which each member is entitled according to the regulations of the company.

(3) Nothing in this section shall be deemed to apply to any company the registered office whereof at the commencement of this Act is in Burma, Aden or Pakistan

566. Definition of "joint- stock company".

(1) For the purposes of this Part, so far as it relates to the registration of companies as companies limited by shares, a joint stock company means a company having a permanent paid up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in the one way and partly in the other, and formed on the

1. The words" or in the State of Jammu and Kashmir" omitted by Act 62 of 1956, s. 2 and Sch. (w. e. f. 1- 11- 1956).

principle of having for its members the holders of those shares or that stock, and no other persons.

(2) Such a company, when registered with limited liability under this Act, shall be deemed to be a company limited by shares.

567. Requirements for registration of joint- stock companies. Before the registration in pursuance of this Part of a joint stock company, there shall be delivered to the Registrar the following documents:-

(a) a list showing the names, addresses and occupations of all persons who on a day named in the list, not being more than six clear days before the day of registration, were members of the company, with the addition of the shares or stock held by them respectively, distinguishing, in cases where the shares are numbered, each share by its number;

(b) a copy of any Act of Parliament or other Indian law, Act of Parliament of the United Kingdom, Royal Charter, Letters Patent, deed of settlement, deed of partnership or other instrument constituting or regulating the company; and

(c) if the company is intended to be registered as a limited company, a statement specifying the following particulars:-

(i) the nominal share capital of the company and the number of shares into which it is divided or the amount of stock of which it consists;

(ii) the number of shares taken and the amount paid on each share;

(iii) the name of the company, with the addition of the word" Limited" or" Private Limited" as the case may require, as the last word or words thereof; and

(iv)in the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of the guarantee.

569. Authentication of statements of existing companies. The lists of members and directors and any other particulars relating to the company required to be delivered to the Registrar shall be duly verified by the declaration of any two or more directors or other principal officers of the company.

575. Vesting of property on registration. All property, movable and immovable (including actionable claims), belonging to or vested in a company at the date of its registration in pursuance of this Part, shall, on such registration, pass to and vest in the company as incorporated under this Act, for all the estate and interest of the company therein.

579. Power to substitute memorandum and articles for deed of settlement.

(1) Subject to the provisions of this section, a company registered in pursuance of this Part may, by special resolution, alter the form of its constitution by substituting a memorandum and articles for a deed of settlement.

(2) The provisions of sections 17 and 19 with respect to an alteration of the objects of a company shall, so far as applicable, apply to any alteration under this section with the following modifications:-

(a) there shall be substituted for the printed copy of the altered memorandum required to be filed with the Registrar a printed copy of the substituted memorandum and articles; and

(b) on the registration of the alteration being certified by the Registrar, the substituted memorandum and articles shall apply to the company in the same manner as if it were a company registered under this Act with that memorandum and those articles, and the company' s deed of settlement shall cease to apply to the company.

(3) An alteration under this section may be made either with or without any alteration of the objects of the company under this Act.

(4) In this section, the expression" deed of settlement" includes any deed of partnership, Act of Parliament of the United Kingdom, Royal Charter or Letters Patent, or other instrument constituting or regulating the company, not being an Act of Parliament or other Indian law."

11. Section 35 of the Act deals with conclusiveness of certificate of incorporation. Once certificate of incorporation is given by the Registrar in

respect of any association, there is conclusive evidence that all the requirements of the Act have been complied with in respect of registration and the matters incidental thereto and the association is a company authorized to be registered and is duly registered under the Act. Under Section 397 of the Act, any members of the company who are of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest or in any manner oppressive to its members, they may file an application before the Company Law Board for an order under this section as it thinks fit. Section 439 of the Act deals with the provisions with regard to filing applications for winding up of a company by the company or any creditor or creditors, contributory, Registrar or second creditor etc. Section 565 of the Act relates to companies capable of being registered whereas Section 567 of the Act prescribes the requirements for a company to be entitled for registration. As per section 569 of the Act, the declaration to be submitted to the Registrar should be verified by two or more directors or other principal officers of the company. Under Section 575 of the Act, all properties movable and immovable belonging to or vested in a company on the date of its registration shall pass to and vest in the company as incorporated. Section 579 of the Act inter alia provides that a company registered in pursuance of this part of the Act may by special resolution alter the form of its constitution by substituting memorandum and articles for a deed of settlement. The deed of settlement includes any deed of partnership.

12. In order to establish irregularities and illegality in the formation of the respondent-company, learned counsel for the petitioners pointed out several infirmities which may be narrated thus:-

(i) A family owned partnership firm of fifty years was illegally and fraudulently converted into a company on 24.1.2005 on the basis of false and forged documents, misrepresentation of facts and false statements. The GPAs dated 21.5.1969, 4.8.1978 and 21.9.1981 which were used by Siri Krishan Khanna to sign for the petitioners for getting the company registered which did not at all authorize him to do so. There was not a single word in them about formation of a company. These GPAs stood revoked. The terms of the GPAs were required to be read and seen. These were unregistered GPAs and therefore, could not be used for transferring the right, title and interest in the assets of the partnership firm. The GPAs were executed decades earlier by the petitioners only for regulating the day to day functioning of the partnership firm in their absence.

(ii) The basis of incorporation of a company is partnership deed dated 2.4.2004 whereas the Articles and the Memorandum differ from the scheme contained in the partnership deed. The partnership deed dated 2.4.2004 is signed by all the three petitioners individually. The terms agreed upon in the partnership deed were unilaterally changed/replaced by the Memorandum and Articles by the respondents without the knowledge of the petitioners.

(iii) There was no authority to the Chartered Accountants to act on behalf of the petitioners.

(iv) Fraud vitiates every action and one should not be allowed to reap profits of his misdeeds.

(v) The documents – Forms 18, 31, 39, letter dated 24.1.2005 by Mr. Mehra, resolution dated 2.2.2004 and partnership deed dated 2.4.2004 submitted for incorporation of the company are not in terms of the provisions of the Act. Rajiv Khanna was not the authorized person who had submitted the application for incorporation.

(vi) Memorandum of association and articles of association should be only in the hand of the person concerned and not through an attorney. The power had not been given to the attorney to sign the memorandum of association and articles of association.

(vii) Sections 13, 15, 26 and 30 of the Act require each subscriber to personally sign the memorandum of association and the articles of association. There is no scope for any power of attorney holder to sign these vital documents on behalf of any subscriber/promoter even if specifically authorized to do so.

(viii) The GPAs used by Siri Krishan Khanna to sign for the petitioners for getting the company registered did not at all authorize him to do so. There was not a single word in them about formation of a company. When these GPAs were executed in the year 1969, 1978 and 1981, no one had even thought of forming a company. Moreover, these GPAs stood revoked. Although Siri Krishan Khanna had ceased to act as the GPA of Vinod Krishan Khanna and Vimal Krishan Khanna since 1989, Vijay Krishan Khanna had specifically withdrawn his GPA in 1989. The memorandum and articles of association were never shown to the petitioners. No explanation whatsoever in written or oral submissions had been given as to why Mr. S.K.Khanna signed the memorandum and articles on behalf of the petitioners.

(ix) The chartered Accountant without any authority and with dishonest intention furnished a false certificate to the ROC about the validity of the GPAs used for incorporation.

(x) Incorporation of the company is void *ab initio* as the mandatory statutory provisions had not been complied with. Section 15(c) of the Act provides that the memorandum shall be signed by each subscriber in the presence of atleast one witness who shall attest the signatures.

(xi) The company's name has been changed from Amritsar Swadeshi Corporation to Amritsar Swadeshi Textile Corporation without following the procedure laid down in Section 572 i.e. without any general meeting called for the purpose.

Besides, the learned counsel for the petitioners had drawn the attention of the court to various documents/Annexures to substantiate and corroborate the aforesaid contentions.

13. To support these contentions, learned counsel for the petitioners relied upon the following pronouncements:-

(a) ***Sri Arthamari Transport (P) Limited and others vs. K.P.Swami***, AIR 1966 Madras 231;

(b) ***Hind Overseas Pvt. Limited vs. Raghunath Prasad Jhunjhunwalla and another***, (1976) 3 SCC 259;

(c) ***Needle Industries (India) Limited and others vs. Needle Industries Newey (India) Holdings Limited and others***, AIR 1981 SC 1298;

(d) ***Syed Abdul Khader vs. Rami Reddy and others***, AIR 1979 SC 553;

(e) ***G.V.Sreerama Reddy and another vs. Returning Officer and others,*** AIR 2010 SC 1323;

(f) ***K.M.Mani vs. P.J.Antony and others,*** AIR 1979 SC 234;

(g) ***Krishan Kumar vs. Nand Lal***, 2011(1) RCR 970 (Civil) (P&H);

(h) ***Shiba Shankar Mohapatra and others vs. State of Orissa and others,*** AIR 2010 SC 706;

(i) ***Firm Mathra Das Jagan Nath vs. Firm Jiwan Mal Gian Chand,*** AIR 1928 Lahore 196;

(j) ***Timblo Irmaos Limited, Margo vs. Jorge Anibal Matos Sequeira and another***, (1977) 3 SCC 474;

(k) ***Naresh Chandra Sanyal vs. Calcutta Stock Exchange Association Limited,*** 1971(1) SCC 50

(l) ***Sangramsinh P.Gaekwad and others vs. Shantadevi P.Gaekwad (dead) through LRs and others,*** (2005) 11 SCC 314.

(m)***Claude-Lila Parulekar (Smt.) vs. Sakal Papers (P) Limited and others,*** (2005) 11 SCC 73;

(n) ***Mohammad Laiquiddin and another vs. Kamala Devi Misra (dead) by Lrs and others***, (2010) 2 SCC 407.

14. On the other hand, the prayer of the petitioners was vehemently opposed by the respondents in the following terms:-

i) The company is registered under Part IX Section 35 of the Act. There is no fraud. There is no irregularity. There is complete compliance of Part IX of the Act. The company court in summary proceedings cannot determine the disputed questions of fact regarding power of attorney and validity of other documents. Fraud has to be specific and pleaded in eloquent manner. Resolution dated 2.2.2004 cannot be said to have been negated by partnership deed dated 2.4.2004. No document between 2.4.2004 and January 2005 for not getting the company registered was addressed by the petitioners. Only 3/4th majority was required under clause (vi) of Section 565 of the Act.

ii) The argument of fraud is vitiated. One of the petitioners was a working partner and knew about all steps being taken for registration as a joint stock company.

iii) Amended written statement is at the asking of influential person in the ministry.

iv) There is no document abandoning the partnership deed dated 2.4.2004. The decision regarding partnership to be converted into a company was taken in a period spreading over several months.

v) There is no evidence that the partnership of 2.4.2004 was not to be acted upon till 24.1.2005.

vi) The pleas taken by the petitioners are meaningless in view of Section 35 of the Act.

vii) The argument of the petitioners that Memorandum and articles of association was never shown to them is misconceived on facts and in law. The company was formed by conscious and affirmative act of the partners.

viii) Jurisdiction of this court being summary, the question of examining complicated questions of fact is beyond its scope particularly when suit for declaration on the same allegations was withdrawn unconditionally and without any liberty. Further, the allegations are against the persons who are not parties before the company court.

ix) The provisions of Sections 13, 15, 26 and 30 of the Act are not attracted in the instant case. Moreover, in view of Section 35 of the Act, no such plea is available to the petitioners more particularly as it raises questions of fact which are seriously disputed by the respondents.

Support was gathered from the following judgments:-

(a) ***Salim Akbarali Nanji and others vs. Union of India and others,*** 2003 Company Cases 141;

(b) ***Rama Sundari Ray vs. Syamendra Lal Ray,*** (1947) 2 ILR Calcutta Series 1;

(c) ***Smt. Somawanti and others vs. The State of Punjab and others,*** AIR 1963 SC 151;

(d) ***In re Barned's Banking Company (Peel's case)***, 1867 Volume II Chancery Appeals 670;

(e) ***Moosa Goolam Ariff vs. Ebrahim Goolam Ariff,*** 1912 Volume XL ILR Calcutta Series 1

(f) ***Hammond vs. Prentice Brothers Limited***, 1920 Chancery Division 201;

(g) ***Vali Pattabhirama Rao and another vs. Sri Ramanuja Ginning and Rice Factory P. Limited and others,*** (1986) 60 Company Cases 568;

(h) ***Oswal Fats and Oils Limited vs. Additional Commissioner (Administration), Bareilly Division, Bareilly***

and others, (2010) 4 SCC 728;

(i) ***In re Atul Drug House Limited***, (1971) 41 Company Cases 352 (Guj.);

(j) ***Commissioner of Income Tax vs. Greenworld Corporation,*** (2009) 314 ITR 81;

(k) ***S.B.Adityan and others vs. First Income Tax Officer, Madras,*** (1964) ITR 453;

(l) ***M/s Anand Construction (P) Limited vs. Ram Niwas,*** 1994(31) DRJ 205 (Delhi);

(m) ***National Textile Workers' Union vs. P.R.Ramakrishnan and others,*** (1983) 53 Company Cases 184 (SC);

(n) ***K.S.Mothilal and others vs. K.S.Kasimaris Ceramique (P) Limited and others,*** (2003) 113 Company Cases 562 (Madras);

(o) ***Suresh Kumar Bansal vs. U.P.Mineral Products Limited,*** (1996) 87 Company Cases 223 (Delhi);

(p) ***Punjab Distilling Industries Limited vs. Biermans Paper Coating Mills Limited and another***, (1973) 43 Company Cases 189 (Delhi);

(q) ***Marina World Shipping Corporation Limited vs. Jindal Exports P.Limited,*** (2004) 122 Company Cases 399 (Delhi);

15. The arguments raised by learned counsel for the petitioners cannot be accepted for more than one reason elaborated hereinafter.

16. Section 35 of the Act relates to the conclusiveness of the certificate of registration granted by the Registrar of Companies. In view of issuance of certificate of incorporation on 24.1.2005, it would result in conclusive evidence that all the formalities under the Act had been undertaken in respect of registration and all incidental matters have been complied with for the registration of the company. The conclusiveness of the certificate of incorporation was recognized in ***Re: Barnard's Bank***

Company's case (supra) (Peel's case), wherein it was observed:

> "Although the conduct of the Registrar in knowingly registering a document which had been thus altered, was most censurable, the company was duly constituted, the certificate of registration being under the Company Act, conclusive evidence that the requisitions of the Act had been complied with."

17. In ***Hammond's*** case (supra), it was observed:-

> "Maughan K.C.in reply. There is no substance in the point as to the certificate of incorporation not being conclusive. If correct, it would invalidate the title of many breweries in the country.
>
> xxxxxxxxxxxxxxx
>
> In my opinion the certificate of incorporation given to this company under Section 192 of the Act of 1862 is conclusive evidence that the company was authorized to be registered under Part VII, and although it may be that if prior to the substitution of section 1 of the Act of 1900 for sections 18 and 192 of the Act of 1862, now in turn replaced by section 17 of the Act of 1908, it could have been established that at the date of registration, no partnership or association capable of registration was really in existence, the conclusiveness of the certificate, by analogy to the decision in the case of In re National Debenture and Assets Corporation (1) might have been challenged – a point on which I entertain the gravest doubt, having regard to the very different wording of sections 18 and 192 of the Act of 1862 – I am satisfied that it is not now open to the plaintiff to go behind the certificate in this case and that the court of appeal never intended the observations relied upon to apply, even as the statute law then stood, to a company then already registered under Part VII and possessed of the evidence declared by statute to be conclusive of the fact that it was a company authorized so to be registered."

18. In ***Moosa Goolam Ariff's*** case, it was recorded thus:

> "8. The provisions of the Indian-Companies Act of 1882 as

regards the incorporation of Companies are the same as those contained in the Imperial Act of 1862, except that it is specially provided in Section 40 of the Indian Act that it is not the duty of the Registrar to require evidence as to whether the subscribers to the Memorandum are competent to contract. Probably this provision was introduced because, according to the Indian law, the contract of an infant is not voidable but void, and it would lead to endless confusion and expense if the Registrar were to take upon himself the duty of ascertaining whether the signatories to the Memorandum were or were not of full age."

19. In ***Somawanti's case*** (supra), it was recorded by the Apex Court thus:-

"Since evidence means and includes all statement which the court permits or requires to be made, when the law says that a particular kind of evidence would be conclusive as to the existence of a particular fact it implies that that fact can be proved either by that evidence or by some other evidence which the Court permits or requires to be advanced. Where such other evidence is adduced it would be open to the Court to consider whether, upon that evidence, the fact exist or not. Where, on the other hand, evidence which is made conclusive is adduced, the Court has no option but to hold that the fact exists. If that were not so, it would be meaningless to call a particular piece of evidence as conclusive evidence. Once the law says that certain evidence is conclusive it shuts out any other evidence which would detract from the conclusiveness of that evidence. In substance, therefore, there is no difference between conclusive evidence and conclusive proof. Statutes may use the expression 'conclusive proof' where the object is to make a fact non- justiciable. But the legislature may use some other expression such as 'conclusive evidence' for achieving the same result. There is thus no difference between the effect of the expression conclusive evidence' from that of 'conclusive proof', the aim of both being to give finality to the establishment of the existence of a fact from the proof of another."

20. The Courts are expected to look into the interests of the company first and it is safe to ignore the individual grievances of persons associated with the company as a legal personality so that they work out their remedies and have redressal of their grievances as provided for under different provisions of the Act, the last resort being winding-up. Normally, this remedy should not be resorted to, unless the other equally efficacious remedies provided by the Act are exhausted. Further, a company registered under the Act is a legal person separate and distinct from its individual members. An incorporated company has separate existence and law recognises it as a juristic person separate and distinct from its members. In ***K.Mohan Babu vs. Heritage Foods India Limited,*** 2001(5) ALD 800, it was observed by the Andhra Pradesh High Court as under:-

> "28. Section 433 of the Act deals with several circumstances in which company may be wound up by the Court and the opening words of the provision "A company may be wound up by the Court" clearly go to show that the provision itself is discretionary, discretionary in the sense, judicious discretion only. Section 433(f) of the Act specifies "if the Court is of the opinion that it is just and equitable that the company should be wound up". What is the meaning of the words 'just and equitable'. In **Davis Co. v. Brunswick (Australia) LD**., AIR 1936 PC 114, their Lordships of the Privy Council observed that no general rule can 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 'just and equitable' for purposes of winding-up. In **R.E.S. Co., Ltd v. Nageswara Rao, 1956 ALT 279,** their Lordships held that the words 'just

and equitable' specified in Section 433 of the Act were not to be read as ejusdem generis with the preceding words of the enactment. (J.A. Raghurama v. East Coast T & S Co., AIR 1958 AP 259. **In P.K. Shah v. Rinku Polychem Ltd.**, (2000) 100 CC 170, it was held that the company petition was filed as a pressure tactic. It is an abuse of process of the Court and widespread publication of the company petition of the acceptance or the admission would cause irreparable loss to the company. **In N.M. Shah v. Atul Drug House,** 1970 (2) Comp.LJ 274, it was observed that it would be the bounden duty of the petitioner to disclose material facts as to the alternative remedies, which they have availed of or which are available to them. **In Senthil Kumar v. Sudha Mills (India) Pvt. Ltd. (Madras),** (2001) 103 CC 1029, it was held that under Section 443(2) of the Companies Act, the Court shall decline the wind-up the company on just and equitable grounds, if the Court is of the opinion that some other remedy is available to the petitioner and they are acting unreasonably in seeking to have company wound up instead of pursuing other remedy. In this context, the decision in **Raghunath Swamp Mathur v. Har Swarup Mathur,** (1970) 40 CC 282, also laid down the same proposition. **In Daulat Makanmal Luthria v. Solitaire Hotels,** (1993) 76 CC 215, it was held that the vague allegations of mismanagement were of no consequence and the winding-up has to be resorted to only where other means had failed. **In Prem Seth v. National Industrial Corpn. Ltd. (Delhi),** (2001) 103 CC 1011, it was held that even where the averments constitute oppression and mis-management, a winding-up petition is not maintainable. **In Smt. Abnash Kaur v. Lord Krishna Sugar Mills Ltd. (Delhi),** (1974) 44 CC 390, it was observed as follows:

"The Law required the Court to form an opinion about the equitable nature of the case. Equity jurisdiction, thus, has been vested in the Court by the statute itself; and then it is not imperative on the Court to make a winding-up order even if the Court forms the opinion that it was just and equitable to do so. The use of the word "may" creates a further discretion in the Court to order or not to order a winding-up. The discretion cannot be exercised arbitrarily or according to one's own will or whim. It has to be regulated by law and the well-known rules of equity in order to assist the taw, allay its rigour, advance the remedy and to relieve against abuse".

21. Further, it has been authoritatively held that a company is a social institution having duties and responsibilities towards the community in which it functions and one of the paramount objectives is to bring about maximization of social welfare and common good. This necessarily involves reorientation of thinking with regard to the duties and obligations of the company not only vis-a-vis the shareholders but also vis-a-vis the rest of the community affected by its operations such as workers, consumers and the government representing the society. The Apex Court pointed out as far back as in 1950's in ***Chiranjit Lal Chaudhary vs. Union of India,*** AIR 1951 SC 41 as under:-

> "We should bear in mind that a corporation which is engaged in production of commodities vitally essential to the community, has a social character of its own and it must not be regarded as the concern primarily or only of those who invest their money in it."

22. In ***National Textile Workers' Union'***s case (supra), it was observed by the Apex Court as under:-

> "The concept of a company has undergone radical transformation in the last few decades. The old nineteenth century view which regarded a company merely as a legal device adopted by

shareholders for carrying on trade or business as proprietors has been discarded and a company is now looked upon as a socioeconomic institution wielding economic power and influencing the life of the people. The view that a company is the property of the shareholders can no longer be regarded as valid. Apart from capital and labour there are other factors which contribute to the production of national wealth; the financial institutions and depositors who provide the additional finance required for production and the consumers and the rest of the members of the community who are vitally interested in the product manufactured. A company, according to the new socio-economic thinking, is a social institution having duties and responsibilities towards the community in which it functions and one of its paramount objectives is to bring about maximisation of social welfare and common good. This necessarily involves reorientation of thinking in regard to the duties and obligations of the company not only vis-a-vis the shareholders but also vis-a-vis the rest of the community affected by its operations such as workers, consumers and the Government representing the society.

It is now accepted on all hands, even in predominantly capitalist countries, that a company is not property. The traditional view that the company is the property of the shareholders is now an exploded myth. There was a time when a group controlling the majority of shares in a company used to say: "This is our concern. We can do what we like with it." The ownership of the concern was identified with those who brought in capital. That was the outcome of the property-minded capitalistic society in which the concept of company originated. But this view can no longer be regarded as valid in the light of the changing socio-economic concepts and values. Today social scientists and thinkers regard a company as a living, vital and dynamic, social organism with firm and deep rooted affiliations with the rest of the community in which it functions. It would be wrong to look upon it as something belonging to the shareholders. It is true that the shareholders bring capital, but capital is not enough. It is only one of the factors which contributes to the production of national wealth. There is another equally, if not more, important factor of production and that is labour. Then there are the financial institutions and depositors, who provide the additional finance required for production and lastly, there are the consumers and the rest of the members of the community who are vitally interested in the product manufactured in the concern. Then how can it be said that capital, which is only one of the factors of production, should be regarded as owner having an exclusive dominion over the concern, as if the concern belongs to it? A company, according to the new socio-enconomic thinking, is a social institution having duties and responsibilities towards the community in which it functions...."

23. It is settled principle of law that winding up is a remedy of last resort and is not available to wind up and kill a healthy and economic entity. The company is a separate legal entity and juristic person. It cannot be held responsible or liable for acts antecedent to its formation.

24. The petitioners have sought winding up of the respondent-company enumerating various circumstances which according to them would declare the registration as illegal and unwarranted by law. On the other hand, the irregularities pointed out by the petitioners have been vehemently controverted by the respondent-company by referring to the validity of various documents executed and submitted to the Registrar of Companies for incorporation of the company. It is well recognised that the jurisdiction conferred on the Company Court under Section 433 of the Act is not to enter into the domain of making enquiries about the genuineness of these documents, more particularly once certificate of incorporation had been issued by the Registrar of Companies. The disputed questions of fact

fall outside the domain of the Company Court under the Act.

25. With regard to the issue of disputed questions of fact, Company Court is of summary jurisdiction. In exercise of its jurisdiction under Section 433 of the Act, it does not embark upon an enquiry into highly disputed or complicated questions of fact which may be the subject matter of adjudication by a civil court and not by Company court. The law on the point has been succinctly enunciated in various pronouncements. Reference may be made to the judgment of Delhi High Court in ***Punjab Distilling Industries Limited's*** case (supra) wherein it was held:-

> "In all cases where justice requires, the order to rectify will be nunc pro tune (see in **re. Sussex Brick Company,** (1904) I Chancery Division 598 and Re Imperial Chemical Industries Limited, (1936)-2 All E.R. 463). **In Smt. Soma Vati Devi Chand v. Krishna Sugar Mills Ltd. , H. R. Khanna J.** (as his Lordship then was) observed that "Although the power conferred by the section on courts is very wide, the law seems to be well settled that the remedy provided by the section is summary. It can be invoked in non-controversial matters requiring quick decision. Section 155 is not meant to be used for deciding disputes requiring investigation. In the case of a dispute of complicated nature involving controversy under several heads, the section ought not to be allowed to be used and the party concerned should be directed to proceed by way of a regular suit." Reference was made by the learned Judge to the following decisions In re**: Greater Britain Products Development Corporation Ltd**. (1924) 40 ITR 488. **Jagan Nath v. Gopi Chand** AIR 1915 Lahore l00, ***Bhagut Singh v. Piur Bus Service Lid. Amritsar,*** In the matter of **Delakht Tea Co. Ltd. , PEOPLE'S Insurance Co. Ltd v. C.R.E. Wood & Co. Ltd. and Public Passenger Service Ltd. v. M. A. Khader** and to a passage in Volume 6 of Halsbury's Laws of England Third

Edition at page 218 which reads :- "If the Court thinks that the case, by reason of its complexity or on the ground that there are matters requiring investigation or otherwise, could more satisfactorily be dealt with by an action, the court will decline to make an order on a motion, without prejudice to the right of the applicant to institute an action for rectification."

26. In ***Marina World Shipping Corpn Limited's case*** (supra), it was again noticed by the Delhi High Court :-

"17. A Company Court under Section 10 of the Companies Act, is a Court of limited jurisdiction and adjudicates and decides only those matters in respect of which the Companies Act has specifically conferred jurisdiction upon it. The procedure for winding up a company is also provided in the Companies Act. Such a process is in the nature of a summary proceeding. In a number of decisions it is held that the Company Court would decline adjudication in a winding up proceeding when the matter agitated involves complicated and disputed questions of fact requiring investigation on facts and evidence in depth. The Company Court in such a proceeding has only a restricted jurisdiction which is limited by the provisions of the Act. It cannot act like a civil Court for adjudicating and fixing the liability by scrutinizing and examining in depth the entire evidence placed on record. In this connection reference may be made to a decision of this Court in **Maharaja Exports and another vs. Apparels Export Promotion Council** reported in 1986 (60) Company Cases 353. In the said judgment this Court reiterated the principle that except in cases where the Companies Act, 1956 confers jurisdiction on the Company Court or on some other authority like the Central Government or on the Company Law Board, all other disputes pertaining to a company are to be resolved through the forum of Civil Court. The aforesaid principle was also laid down by the Kerala High Court in the case of **R.Prakasham vs. Sree Narayan Dharma**

> **Paripalana Yogam** in (1980) Vol.50 Company Cases 611 (Kerala). Similar view has also been taken by the Punjab and Haryana High Court in the case of **Panipat Woolen and General Mills Company Limited vs. P.L.Kaushik** reported in (1969) 39 company Cases 249."

27. To gather support to the contentions raised by him, learned counsel for the petitioners drew support from the contents of the replication filed by them. Learned counsel for the respondents vehemently submitted that the petitioners had without the permission of the Court tried to place reliance on the averments made in the replication which is legally not permissible. On the strength of order dated 17.8.2006 relating to rejection of certain documents from consideration in the petition and also order dated 27.1.2010 vide which amendment of the original petition was declined had been relied upon by learned counsel for the respondents.

28. With regard to the filing of replication by the petitioners, it may be noticed that the petitioners without the permission of the court filed replication in which the documents which were already rejected by this court vide order dated 17.8.2006 were relied upon. They incorporated all the pleadings which were not allowed to be added by way of amendment to the original petition vide order dated 27.1.2010 by this Court. The position of law in this behalf is well settled. In ***M/s Anant Construction's*** case (supra), it was held by the Delhi High Court :-

> "23. The law of pleadings does not require a plaintiff to file a replication merely denying the allegations made in the written statement. Failure to file a replication cannot be treated as an admission of the plea in the written statement. **Veemsekhara v. Amirthavalliammal, Laxmansing. v. Laxminarayan Deosthan.** AIR 1948 Nagpur 127, **Bank of Behar Ltd v.**

Madhusudan Lal, AIR 1937 Patna 4281

(26) To sum up:

(1)'replication' and 'rejoinder' have well defined meanings. Replication is a pleading by plaintiff in answer to defendant's plea. 'Rejoinder' is a second pleading by defendant in answer to plaintiff's reply i.e. replication. (2) To reach the avowed goal of expeditious disposal, all interlocutory applications are supposed to be disposed of soon on their filing. A delivery of copy or the I.A. to the counsel for opposite party is a notice of application. Reply, if any, may be filed in between, if the time gap was reasonable enough enabling reply being filed. (3) I.As. which do not involve adjudication of substantive rights of parties and/or which do not require investigation or inquiry into facts are not supposed to be contested by filing written reply and certainly not by filing replication. (4) A replication to written statement is not to be filed nor permitted to be filed ordinarily, much less in routine. A replication is permissible in three situations. (i) when required by law; (ii) when a counter claim is raised or set off is pleaded by defendant (iii) when the court directs or permits a replication being filed. (5) Court would direct or permit replication being filed when having scrutinised plaint and written statement the need of plaintiff joining specific pleading to a case specifically and newly raised in written statement is felt. Such a need arises for the plaintiff introducing a plea by way of 'confession and avoidance.' (6) A plaintiff seeking leave of the court has to present before it the proposed replication. On applying its mind the court may grant or refuse the leave. (7) A mere denial of defendant's case by plaintiff needs no replication. The plaintiff can rely on rule of implied or assumed traverse and joinder of issue. (8) Subsequent pleadings are not substitute for amendment in original pleadings. (9) A plea inconsistent with the pleas taken in original pleadings cannot be permitted to be taken in subsequent pleadings. (10) A plea which is foundation of plaintiff's case or essentially a part of causes of action of plaintiff, in absence whereof the suit will be liable to be dismissed or the plaint liable to be rejected cannot be introduced for the first time by way of replication."

Thus, a replication to the written statement is not to be filed or permitted to be filed ordinarily much less in routine. The petitioner has to seek leave of the court before presenting its replication. The court may grant or refuse the leave. In view of the discussion herein before, no reliance could be placed on the contents of the replication in the present case.

29. The court has to take a decision regarding winding up of the company keeping in view the overall facts and circumstances of the case. The respondent company in the written statement has claimed itself to be a premier organization in the woollen industry. As per further averments therein, its paid up capital is rupees twenty crores. It has 1000 employees and also provides indirect employment/work to about 5000 persons through auxiliary industries and its business activities. Its total turnover for the year ending 31.3.2006 was ₹ 56.53 crores. The exports during the year were ₹ 33.23 crores. It had in hand export orders to the tune of ₹ 10 crores to be executed upto 30.9.2010. Public money to the tune of ₹ 25 crores by way of Bank loans etc. stands invested in the company. The company generates revenue of crores of rupees to the Government by way of foreign exchange, income tax, sales tax, customs duty, service tax, excise etc. It is a government recognized export house and enjoys worldwide reputation. It is recognized as an approved manufacturer for the supply of woollen textiles to the Defence and other Government agencies with its highest manufacturing capacity. Thus, it is a running and flourishing company. Petitioner No.1 Vinod Krishan Khanna is a retired IAS officer. He had

always been employed in government service right from the beginning till his retirement in 2001. After his retirement, he was gainfully employed as Chairman of the National Shipping Board, Government of India. He had absolutely no interest in the concern and even after retirement he never participated in the management of the business. Petitioner No.2 Vimal Krishan Khanna is holding 7% equity share capital in the company. It has also been alleged that even prior to incorporation of the company, petitioner No.2 was holding the same amount in the company capital as is clear from the deed of partnership dated 2.4.2004. Still further, petitioner No.3 Vijay Krishan Khanna is a doctor by profession and is permanently residing in USA since 1968. He neither contributed in the management of the concern nor did he ever had any interest in the running of the organization.

30. The petitioners have not made any allegation against the respondent company and all the allegations relate to the period prior to the incorporation of the company and that too against the persons other than the respondent company. With regard to the allegation that the company has not been formed as per the provisions of the Act, Section 35 of the Act debars raising of any such objection relating to the incorporation of the company after the issuance of certificate of incorporation dated 24.1.2005 by the ROC. The certificate of incorporation is conclusive evidence that all the requirements of the Act qua registration and formation of the company have been complied with. Herein the certificate of registration was duly issued by the Registrar. Thus, there was no question of any illegality or irregularity. The petitioners had already agreed as per partnership deed dated 2.4.2004 which clearly stipulated that the partnership firm was a joint

stock company within the meaning of section 566 of Part IX of the Act. Section 565 of the Act provides for the companies capable of being registered under Part IX of the Act for which the formalities prescribed thereunder alone were required to be fulfilled and which were duly complied with in the present case. For substituting the deed of partnership with the memorandum/Articles, only $3/4^{th}$ majority is required. The petitioners hold only 21% shares in the respondent company and the balance 79% are held by the persons who have no grievance against the company. From the perusal of the record of the case, it is discernible that the respondent company had already made an offer to buy back the equity shares of the petitioners but they had not agreed to the said proposal.

31. As already noticed above, the company was registered under Part IX of the Act after complying with the requirements enumerated thereunder. The company court in a summary proceedings cannot determine the disputed questions of fact regarding power of attorney and validity of other documents. Fraud has to be specific and pleaded in an eloquent manner. Further, vide order dated 17.8.2006 passed by this Court in CA No.440 of 2006, authenticity of the documents i.e. memorandum of understanding entered between the parties in the month of August 2004 and the power of attorney dated 22.2.1989 being in dispute had been ordered not to be taken into consideration. It would be apposite to notice the order dated 17.8.2006 passed by this Court which reads thus:-

> "Respondent No.5 has filed the present application for directing the production of original of Annexures P.5, P.6, P.8, P.9, P.10 and P.18.
>
> The petitioner was directed by this court on 3.8.2006 to

produce originals of the said documents within two weeks. Today, an affidavit has been filed by one of the petitioners producing original of Annexure P.5 and certified copy of Annexure P.18 original being an affidavit submitted by Registrar of Companies before the Civil court at Amritsar.

Substantially the dispute between the parties resolves around production of original of Annexure P.6 alleged Memorandum of Understanding between the parties and a power of attorney Annexure P.9 dated 22.2.1989 executed by petitioner No.3 in favour of petitioner No.1.

I have heard learned counsel for the parties at some length. Annexure P.6 is a memorandum of understanding which was alleged to have been entered upon by the parties in the month of August 2004. Reference may be made to para (x) and (xi) of para No.3 of the petition. The said document is titled as Draft Memorandum of Understanding/Family Settlement and does not bear any date and month but years 2004 as the year. Still further Clause (d) of para No.3 relates to the value of assets and liabilities on the strength of business as on 31.3.2004. Petitioner No.1 while accepting the said Memorandum of Understanding has put date as 5.8.2004. In the affidavit filed today in court, it is pointed out that this memorandum of understanding was authored by one Lalit Krishan Khanna who after signing it and after obtaining the signatures of Shri S.K.Khanna and V.K.Khanna, petitioner No.1 in Amritsar, took the document to Bangalore to get the signatures of Shri RK Khanna. It is pointed out that after obtaining the signatures of Shri R.K.Khanna, the document was faxed to the petitioner. The date of fax mentioned as 8.8.2003 is stated to be incorrect.

With respect to Annexure P.9, a General Power of Attorney dated 22.2.1989, it is pointed out by the learned counsel for the respondents that the same is attested at Delhi, although on the same date, a letter is purportedly written by

> Shri V.K.Khanna, from Michigan (USA) (copy Annexure P.8). Thus,it is contended that the author of Annexure P.8 and P.9 could not be in USA and Delhi on the same date and therefore, the original of such document is required to be produced.
>
> Shri Chhibbar, learned counsel for the petitioners states that the documents Annexures P.6 and P.9 are part of the narration of facts. The case of the petitioners is primarily based upon the investigations conducted by the Registrar of companies and the Government of India in respect of incorporation of the respondent Company and not on these documents. Since the authenticity of Annexures P.6 and P.9 is in dispute and the originals have not been produced, I order that the said documents shall not be taken into consideration for the purpose of the present petition.
>
> The present application stands disposed of accordingly."

The serious disputed questions of facts are required to be adjudicated by way of this petition which is not permissible.

32. There is no allegation against the company for which Section 433 of the Act can be invoked. The allegations are against private people who are not parties to this lis and had been deleted from the array of respondents vide order dated 2.11.2006, the relevant part of which reads thus:-

> "It could not be pointed out by the learned counsel for the petitioners as to how and why respondent No. 2 to 8 are necessary or proper parties in the petition for winding up- of a company. In a petition for winding up, the company alone is required to be impleaded. The Directors, other persons or authorities have no role in such petition. Infact, the petitioners have impleaded respondent Nos. 2 to 4 to furnish evidence to the petitioners in support of their averments. Such procedure is not known to law.

Consequently, I deem it appropriate to struck off the names of respondent Nos. 2 to 8 from the memo of parties. Ordered accordingly."

33. Additionally, the winding up of the respondent company inter alia has also been sought on the ground that the Registrar of Companies in its written statement before the civil court admitted that the incorporation of the company was illegal. Further, the respondent through RTI process came to know that the amendments in the written statement were as per and in terms of the dictates of petitioner No.1. Petitioners have failed to disclose all the essential facts necessary for just and proper adjudication of the lis between the parties. Where the conduct of the party approaching the court is not upright, the courts have been circumspect in granting the desired relief to them. In ***Oswal Fats and Oils Limited's*** case (supra), it was observed by the Apex Court thus:-

> "20. It is settled law that a person who approaches the Court for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts which have bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court to bring out all the facts and refrain from concealing/suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person.
>
> 21. In one of the earliest decisions on the subject i.e., - **R. v. Kensington Income Tax Commissioner** (1917) 1 KB 486, Viscount Reading, Chief Justice of the Divisional Court observed:
>
> "Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion

that the affidavit in support of the applicant was not candid and did not fairly state the facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that this Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit."

22. The above extracted observations were approved by the Court of Appeal in the following words:

"It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction: and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward. If an applicant does not act with uberrima fides and put every material fact before the Court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted." His Lordship rightly pronounced: "The Court, for its own protection, is entitled to say: We refuse this writ... without going into the merits of the case on the ground of the conduct of the applicant in bringing the case before us." Warrington, L.J. was also of the same opinion. In a concurring judgment His Lordship observed:

"It is perfectly well settled that a person who makes an ex parte application to the Court - that is to say, in absence of the person who will be affected by that which the Court is asked to do - is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him."

23. This Court and different High Courts have repeatedly invoked and applied the rule that a person who does not disclose all material facts has no right to be heard on the merits of his grievance - **State of Haryana v. Karnal Distillery Co. Ltd. (1977) 2 SCC 431, Vijay Kumar Kathuria v. State of Haryana (1983) 3 SCC 333, Welcome Hotel and others v. State of Andhra Pradesh and others etc. (1983) 4 SCC 575, G. Narayanaswamy Reddy (dead) by LRs. and another v. Government of Karnataka and another (1991) 3 SCC 261, S.P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by LRs. and others (1994) 1 SCC 1,Agricultural and Processed Food Products v. Oswal Agro Furane and others (1996) 4 SCC 297, Union of India and others v. Muneesh Suneja(2001) 3 SCC 92, Prestige Lights Ltd. v. State Bank of India (2007) 8 SCC 449, Sunil Poddar and others v. Union Bank of India (2008) 2 SCC 326, K.D. Sharma v. Steel Authority of India Ltd. and others (2008) 12 SCC 481, G. Jayshree and others v. Bhagwandas S. Patel and others(2009) 3 SCC 141 and C.A. No. 5239/2002 - Dalip Singh v. State of U.P. and others,** decided on 3.12.2009."

34. Keeping the facts and circumstances enumerated hereinbefore in focus, it cannot be held that the petitioners have disclosed all the material and relevant facts to the court and their conduct in approaching the court is above board. The person seeking equity must approach the court without hiding anything from it. The petitioners have not disclosed all the relevant

material facts. The entire case of the petitioners is based on the alleged Draft MOU/Family settlement and on the allegation that the memorandum and articles of association were signed by Siri Krishan Khanna on behalf of Vijay Krishan Khanna without having a valid power of attorney because Vijay Krishan Khanna had issued a new power of attorney in favour of his brother petitioner No.1. Although in the affidavit dated 5.4.2006, the petitioners stated that the documents to the petition were true and correct, they did not produce the originals before the court. With regard to alleged draft MOU/Family settlement, it may be noticed that in view of the respondent challenging the very existence of the said documents on various grounds, this court had passed an order dated 17.8.2006 in CA No.440 of 2006 to the effect that the said documents shall not be taken into consideration for the purposes of this petition. Similarly, the GPA executed by Vijay Krishan Khanna in favour of Vinod Krishan Khanna was also not to be taken into consideration being disputed and the originals having not been produced. It was for the first time on 24.2.2005 that Vinod Krishan Khanna and his brothers expressed their desire to revoke the general power of attorneys executed by them and all the original GPAs were returned to them on that day. It is only after Vinod Krishan Khanna had got in his hands the original GPAs from Siri Krishan Khanna on 24.2.2005 that he came up with a fresh allegation that the GPA of Vijay Krishan Khanna was revoked in 1989. There appears to be no doubt that after perusal of the original GPAs, the ROC was satisfied that S.K.Khanna was authorized to sign on behalf of V.K. Khanna and his brothers that he registered the company and issued the certificate of incorporation on 24.1.2005.

35. Now, adverting to the judgments relied upon by learned counsel for the petitioners, in ***Sri Arthamari Transport (P) Limited's*** case (supra), the issue was of a new company formed on the basis of subscription to MOA and AOA. In that case, someone was mentioned as Director in the MOA/AOA but he was not holding the qualification shares. So it was held that he was not director of the company. In the present case, the petitioners were already the shareholders/members of the Joint Stock Company.

36. In ***Hind Overseas Private Limited's*** case (supra), it was held that just and equitable clause could be invoked only when it was manifestly brought out that winding up will be just and equitable for the company, its members, workers and public at large. The relevant observations which are rather in favour of the respondent are as under:-

> 24. 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.
>
> 35. 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.

36. The question that is raised in this appeal is as to what is the scope of section 433(f) of the Act. Section 433 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'.

37. 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."

37. In ***Needle Industries (India) Limited's*** case (supra), the issue was with regard to oppression under Section 397 of the Act. The acts of oppression and mismanagement under Sections 397 and 398 fell under the jurisdiction of the Company Law Board. Such is not the position in the present case.

38. ***Syed Abdul Khader's*** case (supra) was dealing with the principles of agency which is not the case here. ***Bhaskar Stoneware Pipes Pvt. Limited's*** case deals with the petition under section 397 of the Act i.e. oppression and mismanagement. ***G.V.Sreerama Reddy*** and ***K.M.Mani's*** cases (supra) deal with the provisions of Representation of Peoples Act, 1950. In ***Krishan Kumar's*** case (supra), it was held that where there was power to compromise and sell, it shall not include power to transfer the property by consent decree. ***Shiba Shankar Mohapatra's*** case relates to Article 16 of the Constitution of India. In ***Firm Mathra Das Jagan Nath's*** case, the issue was with regard to Sections 211 and 215 of the Contract Act, 1872. ***Timblo Irmaos Limited's*** case was dealing with the interpretation of General Power of Attorney. In ***Naresh Chandra Sanyal'scase*** (supra), the issue was with regard to determining whether articles of association of stock exchange were ultra vires regarding forfeiture of shares. In ***Sangramsinh P.Gaekwad's*** case (supra), the matter was with regard to relationship between directors and the shareholders. In case of conflict between the interests of the company and the shareholders, interest of the company was of paramount importance.

39. In ***Clude-Lila Parulekar (Smt)'s case*** (supra), issue was with regard to registration of transfer under Section 108 of the Act. The

instrument of transfer must be executed by the transferor or it must be executed on behalf of the transferor.

40. On the basis of factual and legal position noticed hereinabove, the irresistible conclusion is that no case is made out for winding up the respondent-company. Learned counsel for the petitioners has not been able to prove on the basis of the material and the evidence on record that it is just and equitable to make out an order for winding up the respondent-company. Consequently, finding no merit in the petition, the same is hereby dismissed.

December 24, 2015 **(Ajay Kumar Mittal)**
'gs' **Judge**