M/S. KILPEST PVT. LTD.

v.

SHEKHAR MEHRA

OCTOBER 8, 1996

[S.P. BHARUCHA AND S.B. MAJMUDAR, JJ.]

Companies Act 1956, Ss.397 398, 402 and 433(f)—Minority share holder M's petition for oppression and mismanagement tried as a petition for winding up under just and equitable clause—High Court finding no ground for winding up but directing reinstatement of M as director; requiring inspection of company's records by the Registrar and directing other director D to return moneys wrongly appropriated—Held: there was no ground for winding up the company; having regard to the wide powers under s.402 very rarely would it be necessary to wind up any company in a petition filed under Ss.397 and 398.

M and D promoted K, a private limited company and were its first directors. The two fell out and M did not attend the Board or other meetings of the company after September 1, 1981. In December, 1981 the M group held 1500 shares and the D group held 1625 shares. Thereafter the D group increased its shareholding to 4500 shares. At a Board meeting held on April 9, 1983 it was resolved that M ceased to be a director. M then filed a petition for oppression and mismanagement under ss.397 and 398 of the Companies Act, 1956 ('Act') in the Bombay High Court. A Single Judge thought it fit to try the petition as one for winding up, which was concurred with by this Court.

The Single Judge dismissed the petition. M appealed to the Division Bench which held that the company could not be treated as a partnership concern and there was no ground for winding it up under the just and equitable clause. In exercise of its powers under S. 402 of the Act it directed that M be appointed a director; that D should pay back to the company the sum of Rs. 52, 875 wrongly appropriated by him; that the Registrar of Companies should inspect the records of the company and if the purchases of raw materials and payments made are found to be to fictitious persons, D should pay back the amount thereof.

M and D appealed to this Court. During the pendency of the appeals,

A **the operation of the High Court's order was stayed but the inspection was allowed to be carried on; the company prospered during the pendency of the appeals.**

Dismissing the appeals, this Court

B **HELD : 1.1. The appeal by M would have to be rejected as there was no case for winding up the company. There was no substance in D's appeal either. The High Court found D had appropriated to himself moneys belonging to the company. M's presence on the Board would prevent a recurrence, thus protecting M's interest and that of the company.**

C **[246-G; 247-A]**

1.2. The general interest of the shareholders should not be readily sacrificed at the alter of squabbles of directors for power to manage the company. The promoters of a company, whether or not they were thitherto partners, elect to avail of the advantages of forming a limited company.
D **They voluntarily and knowingly bind themselves by the provisions of the Companies Act. The submission that a limited company should be treated as a quasi-partnership should therefore, not be easily accepted. Having regard to the wide powers under Section 402, very rarely would it be necessary to wind up any company in a petition filed under Section 397 and 398. [244-E; 246-D-E]**

E

Ebrahimi **v.** *Westbourne Galleries Ltd. and Ors.*, **(1972) 2 All ER 492, referred to.**

Hind Overseas Private Limited **v.** *Raghunath Prasad Jhunjhunwalla*
F *and Anr.*, **[1976] 3 SCC 259, affirmed.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1974 of 1986.

From the Judgment and Order dated 16.4.86 of the Madhya Pradesh
G High Court in Company Appeal No. 4 of 1985.

H.K. Puri for the Appellants in C.A. No. 1974/86 and C.P. No. 352/96.

A.N. Pareekh, Sushil Kr. Jain, Pradeev Agarwal and A.P. Dhamija
H for the Respondent in C.A. No. 1974/86 and 1975/86.

The Judgment of the Court was delivered by A

BHARUCHA, J. These are cross appeals against the judgment and order of a Division Bench of the High Court of Madhya Pradesh.

The appellant in Civil Appeal No. 1975/86, Shekhar Mehra (Mehra), B and the second appellant in Civil Appeal No. 1974/86, R.K. Dubey (Dubey) promoted Kilpest Pvt. Ltd. (the company) and were its first Directors. Dubey was the Managing Director and Mehra was the Joint Managing Director. The two fell out and Mehra did not attend Board or other meetings of the company after 1st September, 1981. In December 1981 Mehra, his relations and friends (the Mehra group) held 1500 shares of the C company of Rs.100 each and Dubey, his relations and friends (the Dubey group) held 1625 shares. Thereafter the Dubey group increased its shareholding so that when the present petition was filed they held 4500 shares. At a Board meeting of the company held on 2nd January, 1982, K.P. Mishra, the third appellant in Civil Appeal No. 1974/86, was appointed D to the Board as an Additional Director. In the Extraordinary General Meeting held on 15th January, 1983, Articles 84 to 86, 91 and 93 of the Articles of Association of the company, which provided for the management of its business by Dubey and Mehra for life with equal remuneration, were altered and the post of Joint Managing Director was abolished. At a Board meeting held on 9th April, 1983, it was resolved that Mehra had E ceased to be a Director. He then filed a civil suit, with which we are not directly concerned, and then the present petition for oppression and mis-management under Sections 397 and 398 of the Companies Act, 1956.

It was the case of Mehra in the petition that the meetings subsequent F to December, 1981, had been called without notice to him so as surreptitiously to allot additional shares to the Dubey group and remove Mehra from the post of Joint Managing Director. The allotment of additional shares and the alteration of the aforesaid Articles had altered the basic structure of the company. While this might be a ground for winding it up, G Mehra sought relief under Sections 397 and 398 of the Act. The petition also set out various alleged acts of mis-management by Dubey. The petition was contested. The learned single Judge found it appropriate to try the petition as a winding-up petition. The company appealed. The Division Bench allowed the appeal, set aside the order of the single Judge and dismissed the petition. Mehra then filed an appeal to this Court, which was H

A allowed and the matter was remanded.

Upon remand the parties went to trial on the basis of affidavits. The single Judge dismissed the petition, whereupon Mehra filed the appeal upon which the order under challenge was passed. The Division Bench came to the conclusion that there was no merit in *Mehra's* case that he had
B not been given notice of the meetings. It found that the company could not be treated as a partnership concern and there was no ground for winding it up under the just and equitable clause. Dubey was found to have committed an act of breach of faith by appropriating to himself the sum of Rs. 52,875 belonging to the company. Having regard to its powers under
C Section 402 of the Companies Act, the Division Bench directed that Mehra be appointed a Director of the company enjoying all the powers and privileges enjoyed by the other Director, K.P. Mishra; that Dubey should pay back to the company the sum of Rs. 52,875; and that the registrar of Companies should inspect the records of the company for the period 1981 till date of the judgment regarding purchases of raw materials from the
D parties mentioned therein and if it was found that no such purchases had been made and payments were to fictitious parties, Dubey should pay back the amount thereof.

At the stage when leave to appeal was given by this Court, the
E operation of the order under challenge was stayed. It was directed that the company would function in the manner it was functioning during the pendency of the appeal before the High Court and that the stay would not prevent the Registrar of Companies carrying out the inspection required by the order under appeal.

F While these appeals have been awaiting final disposal the company has prospered.

Learned counsel for Mehra Sought to challenge the findings of fact reached by the Division Bench in the judgment under appeal. We find that
G the Division Bench assessed the evidence before it and came to a conclusion thereon. The conclusion has not been challenged as being perverse or such as could not reasonably have been reached upon the record, as, indeed, it could not have been. We, therefore, proceed upon the basis of the findings of fact recorded by the Division Bench.

H The principal argument on behalf of Mehra was based upon the judgment of the House of Lords in *Ebrahimi* v. *Westbourne Galleries Ltd. and Ors.*, (1972) 2 All ER 492. It was submitted that inasmuch as there were only two promotor Directors, who held, along with their friends and relations, 1500 and 1650 shares respectively, and since they were to remain Joint Managing Director for life, the principles applicable to a partnership were relevant. There having been an exclusion of Mehra from the business of the company, Mehra was entitled to an order winding up the company.

Ebrahimi's case was considered by this Court in *Hind Overseas Private Limited* v. *Raghunath Prasad Jhunjhunwalla and Anr.*, [1976] 3 S.C.C. 259. The facts of *Ibrahimi* case were set out therein thus :

> "In *Ebrahimi's* case (supra) the Company which was first formed by the two erstwhile partners, Ibrahimi and Nazar, was joined by Nazar's son, George Nazar, as the third director and each of the two original shareholders transferred to him 100 shares so that at all material times Ebrahimi held 400 shares, Nazar 400 shares and George Nazar 200 shares. The Nazars, father and son, thus had a majority of the votes in general meeting. Until the dispute all the three remained directors. Later on as ordinary resolution was passed by the company in general meeting by the votes of Nazar and George Nazar removing Ebrahimi from the office of director. That led to the petition for winding-up before the court."

This Court noted that the following features had been found in *Ebrahimi's* case :

> "(1) There was a prior partnership between the only two members who later on formed the company.
>
> (2) Both the shareholders were directors sharing the profits equally as remuneration and no dividends were declared.
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> (3) One of the shareholders' son acquired shares from his father and from the second shareholder, Ebrahimi, and joined the company as the third shareholder - director with two hundred shares (one hundred from each).
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> (4) After that, there was a complete ouster of Ebrahimi from the management by the votes of the other two directors, father and son.

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

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

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

This Court observed that although the Companies Act was modelled on the English statute, the Indian law was developing on its own lines and making significant progress. Where the words used in both the Indian and English statutes were identical, English decisions might throw light and their reasons might be persuasive, but the proper course was to examine the language of the statute and ascertain its true meaning. It was apposite, having regard to the background, conditions and circumstances of present Indian society and the needs and requirements of the country that a somewhat different treatment be adopted. The courts would have to adjust and adapt, limit or extend principles derived from English decisions, entitled as they were to great respect, suiting the conditions of Indian society and the country in general, always, however, with one primary consideration in view that the general interests of the shareholders should not be readily sacrified at the alter of squabbles of directors for power to manage the company. This Court said :

"When more than one family or several friends and relations together form a company and there is no right as such agreed upon for active participation of members who are sought to be excluded from management, the principles of dissolution of partnership cannot be liberally invoked. Besides, it is only when shareholding is more or less equal and there is a case of complete deadlock in the company on account of lack of probity in the management of the company and there is no hope or possibility of smooth and efficient continuance of the company as a commercial concern, there may arise a case for winding-up on the just and equitable ground. In a given case the principles of dissolution of partnership

> may apply squarely if the apparent structure of the company is not the real structure and on piercing the veil it is found that in reality it is a partnership. On the allegations and submissions in the present case, we are not prepared to extend these principles to the present company." A

We respectfully agree with the observations in the case of *Hind Overseas Pvt. Ltd.* and would add this. Sections 397 and 398 of the Companies Act provide relief to shareholders against oppression and mismanagement. The powers exercisable in such petitions, at the relevant time by the courts and now by the Company Law Board, have been set out in Section 402. Section 402 reads thus : B C

> "*S.402. Powers of Company Law Board on application under section 397 or 398* - Without prejudice to the generality of the powers of the Company Law Board under section 397 or 398, any order under either section may provide for -
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> (a) the regulation of the conduct of the company's affairs in future; D
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> (b) the purchase of the shares or interests of any members of the company by other members thereof or by the company;
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> (c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital; E
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> (d) the termination, setting aside or modification of any agreement, howsoever arrived at, between the company on the one hand, and any of the following persons, on the other, namely :
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> (i) the managing director, F
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> (ii) any other director,
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> (iii) the managing agent,
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> (iv) the secretaries and treasures, and G
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> (v) the manager,
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> upon such terms and conditions as may, in the opinion of the Company Law Board, be just and equitable in all the circumstances of the case; H

(e) the termination, setting aside or modification of any agreement between the company and any person not referred to in clause (d), provided that no such agreement shall be terminated, set aside or modified except after due notice to the party concerned and provided further that no such agreement shall be modified except after obtaining the consent of the party concerned;

(f) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under section 397 or 398, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference :

(g) any other matter for which in the opinion of the Company Law Board it is just and equitable that provision should be made.

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

The present was a petition under Sections 397 and 398. The Division Bench exercised power under Section 402 to appoint Mehra as a Director to protect his interests and guard against mis-management. It required Dubey to return to the company the sum of Rs. 52,875 which he had wrongly appropriated to himself. It directed the Registrar of Companies to enquire into other allegations of misconduct in which it found, *prima facie*, substance; and we may say immediately that we have perused the report filed by the Registrar of Companies which shows that no substance was, ultimately, found thereon. We agree with the Division Bench that this was no case for winding up the company and must dismiss the appeal filed by Mehra.

Insofar as Dubey's appeal is concerned, it was submitted that the Division bench ought not to have ordered that Mehra be appointed a

Director of the company. The Division Bench found that Dubey had appropriated to himself moneys belonging to the company. Mehra's presence on the board would prevent recurrence, thus protecting Mehra's interest and that of the company. We, therefore, find no substance in Dubey's appeal.

Dubey has filed a contempt petition against Mehra for having made complaints to certain authorities while these appeals were pending. There is no breach of any order nor any contempt and the contempt petition must be dismissed.

The appeals are dismissed. The contempt petition is dismissed. There shall be no order as to costs.

S.M. Appeals dismissed.