

(1983) 02 AHC CK 0013

Allahabad High Court

Case No: Company Petition No. 5 of 1981

Paramjit Lal Badhwar

APPELLANT

Vs

Prem Spinning and Weaving
Mills Co. Ltd.RESPONDENT

Date of Decision: Feb. 14, 1983**Acts Referred:**

- Companies Act, 1956 - Section 433, 434(1)

Citation: (1986) 60 CompCas 420**Hon'ble Judges:** S.D. Agarwala, J**Bench:** Single Bench

Advocate: B.C. Dey, Ashok Khare, Prabha Shankar, Vijendra Singh, Shirish Chandra, K.C. Sinha, B.N. Asthana and Lal Vijay Singh, for the Appellant; Ravi Kiran Jain, R.S. Agarwal and Ashok Kumar Gupta, for the Respondent

Final Decision: Dismissed

Judgement

S.D. Agarwala, J.

This is a petition for winding up Pream Spinning and Weaving Mills Co. Ltd., hereinafter referred to as "the company", u/s 439 of the Companies Act, 1956. The Companies Act, 1956, shall hereinafter be referred to as "the Act". The petitioner, Paramjit Lal Badhwar, was secretary-cum-manager of the company since 1969 up to January 16, 1981. The petitioner was in-charge of the day-to-day working of the company. After he ceased to be the secretary of the company, the present petition was filed on February 25, 1981.

2. Originally, the registered office of the company was situated at Ujhani, District Budaun, but now the office has shifted to Ambala Road, Saharanpur. The total number of issued and subscribed shares of the company are 26,215 of Rs. 60 each. The company was incorporated in the year 1921 and started manufacturing cotton yarn from 1923 and continued to manufacture cotton yarn till December, 1973. In

1973, the spinning section of the company was burnt out, resulting in heavy loss and, ultimately, the mill was closed in May, 1976. The damage caused by the fire was so great that, ultimately, it had to be closed down as stated above.

3. The company also installed a straw board unit in 1965 but the factory could not be started till 1971. This factory is also alleged to have been closed in 1977. The allegation consequently is that both the spinning mill as well as the straw board factory of the company have closed down. Thereafter, steps were taken to sell the straw board unit and on December 6, 1978, a resolution was passed in the extraordinary general meeting of the shareholders authorising Lala Janak Raj, who is one of the directors of the company, to take necessary steps for effecting closure and negotiating with the prospective buyers in respect of both the units and the proposal to be put up before the board for its consideration and approval. Proceedings were thereafter taken for sale of the straw board unit. On December 9, 1980, in the meeting of the board of directors of the company, it was resolved that an offer of 24 lakh rupees from G. T. Oil Mills. Ujhani, be accepted. It was further resolved that Lala Janak Raj, director, be authorised to issue letters of acceptance to receive payment and execute registration of the sale deed. After this resolution was passed on December 9, 1980, accepting the offer of G.T. Oil Mills, Ujhani, in regard to the sale of straw board unit of the company, the real dispute between the parties arose and, as such, the present petition has been filed in this court on February 25, 1981, and an ad interim order was issued restraining the directors from selling the property of the company till further orders. The petition has been based, inter alia, on the ground that the working in the spinning mill and the straw board factory was stopped since 1976 and 1977, respectively. The company has also declared permanent closure of the spinning mill with effect from July 15, 1979, and, as such, the company was liable to be wound up u/s 433(e) of the Act.

4. It has further been alleged that the company is unable to pay the salary and other dues amounting to Rs. 29,786 to the petitioner within three weeks of the notice of demand issued to the company on January 6, 1981, and, as such, the company was liable to be wound up u/s 433(e) of the Act. It has further been alleged that the company has become commercially insolvent and that the substratum of the company has gone and, as such, it is just and equitable that the company should be wound up.

5. After filing the present petition in this court, M/s G.T. Oil Mills, Ujhani, has filed an application in this court on August 31, 1981, u/s 536(2) of the Act with a prayer that the agreement for sale of the straw board mill to the applicant be certified as valid and permission be granted to the company to execute the sale deed of the straw board mills in favour of the applicant. This application has been opposed by the petitioner.

6. Lala Janak Raj, director of the company, has filed a counter-affidavit contesting the petition. His case is that the petitioner was the secretary-cum-manager of the

company till January 16, 1981. The company had executed a general power of attorney in favour of the petitioner according to which the petitioner was in charge of the day-to-day working of the company and was custodian-in-charge of all the properties and assets of the company. The further allegation is that the petitioner has not yet handed over the charge. He is guilty of misappropriation and embezzlement of the company's funds and he has not yet rendered the accounts of the company.

7. It has further been stated in reply that the present petition has been filed mala fide with the motive of harassing Lala Janak Raj and other directors of the company and the purchaser, M/s G.T. Oil Mills. It has been stated that one of the partners of the G.T. Oil Mills, Shri Kishan Goyal, is a Cabinet Minister in the U.P. and the petitioner has contested the election of MLA against him in the general election held in June, 1980, and that the family of the petitioner and the family of the partners of G.T. Oil Mills are not only political rivals, but also business rivals. The reason given for filing the present petition, according to the respondent, is that the petitioner could not bear this fact that Goyal's family will become owner of the straw board mill and thereby expand their business and influence.

8. In the counter-affidavit, it has been denied that the company is liable to be wound up u/s 433(e) of the Act. The case of the company is that after the sale of the straw board unit, they intended to pay off their dues and start a new venture from the balance amount and the petition has been filed before the company could achieve this object and, as such, the petition is premature. It has further been denied that the company is commercially insolvent or that it has lost its substratum.

9. Considering the pleadings of the parties, the following issues have been framed.

1. Whether the petition is maintainable in law or not ?
2. Whether the notice given by the petitioner is valid u/s 434 of the Companies Act ?
If the notice is not valid, whether the petition is maintainable or not ?
3. Whether the company has suspended its business for more than one year ? If so, whether the company is liable to be wound up u/s 433(c) of the Companies Act ?
4. Whether the company is unable to pay its debts u/s 433(e) of the Companies Act?
5. Whether the company has lost its substratum ?
6. Whether the company is commercially insolvent ?
7. Whether it is just and equitable that the company should be wound up ?
8. Whether the alleged agreement of sale, dated January 20, 1981, executed in favour of G.T. Oil Mills is valid in law or not under the Companies Act ?
9. Whether the petition is bad on account of mala fides ?

10. To what relief is the petitioner entitled ?

Before I consider each of the issues separately, in my opinion, it will be appropriate to consider the application of G.T. Oil Mills (annexure A-21) because much of the case of the respondent would depend upon the determination of the validity of the sale held in favour of G.T. Oil Mills.

10. In order to determine the application (A-21) moved by M/s G.T. Oil Mills for certifying that the sale by the straw board mills to G.T. Oil Mills is valid or not, it is necessary to examine a few facts. An extraordinary general meeting of the shareholders of the company was held on December 6, 1978. At that meeting, a resolution was passed authorising the board of directors of the company to declare closure of both the units, namely, the spinning unit and the straw board unit, and sell the undertakings of the company in full or in part and in such manner and terms and conditions, as the board may think fit and expedient. Lala Janak Raj, director of the company, was authorised to take all necessary steps for effecting closure and negotiate with the prospective buyers and put up proposals before the board for its consideration and approval. A copy of the minutes of the meeting dated December 6, 1978, has been filed as annexure "2" to the main petition.

11. In paragraph 4 of the affidavit of K. K. Goyal filed in support of the application, A-21, it has been stated that the applicant, M/s. G. T. Oil Mills, made an offer to the company for the purchase of the straw board unit for a sum of Rs. 16,00,000. This offer was not accepted. M/s. G. T. Oil Mills then again raised the offer to Rs. 18,00,000 and, thereafter, to Rs. 20,00,000 and then to Rs. 23,25,000 between the years 1978 and 1980 and the last offer made by M/s. G. T. Oil Mills was Rs. 24,00,000. In para 5 of the said affidavit, it has been further stated that the company advertised twice in English newspapers having large circulation in regard to the sale of the straw board unit, namely, in the newspapers, Times of India and Hindustan Times, Thereafter, on December 9, 1980, a meeting of the board of directors took place and in the said meeting, it was resolved as under :

"Resolved that offer of Rs. 24,00,000 received from M/s. G. T. Oil Mills, Ujhani, as per their letter dated December 9, 1980, be accepted. Lala Janak Raj, director, be and is hereby authorised to issue the letter of acceptance and to receive payment and execute registration of the sale deed."

This resolution has been filed by the petitioner himself as a part of annexure " 3 " to the petition.

12. After the offer of M/s. G. T. Oil Mills was accepted by the resolution of the board of directors dated December 9, 1980, M/s. G. T. Oil Mills paid a sum of Rs. 2,00,000 as advance on December 13, 1980. A further advance of Rs. 2,00,000 was also made on January 13, 1981. This fact has not been denied by the petitioner.

13. In para 12 of the affidavit of K. K. Goyal, it has been stated that after an advance of Rs. 4,00,000 was given to the company, an agreement for the sale of the straw board unit was executed between M/s. G. T. Oil Mills and the company on January 20, 1981. A copy of this agreement has been filed as annexure "I" to the affidavit of K. K. Goyal. It is admitted that this agreement of sale was registered on March 2, 1981, after the filing of the present petition on February 25, 1981.

14. From the facts enumerated above, it would be apparent that by a resolution of the shareholders of the company as far back as on December 6, 1978, it was decided to sell both the spinning unit as well as the straw board unit of the company. Advertisement was made in the newspapers. Thereafter, the applicant, M/s. G. T. Oil Mills, made offers from time to time and, ultimately, its offer was accepted on December 9, 1980, in the meeting of the board of directors. In pursuance of the acceptance of the offer, M/s. G. T. Oil Mills also made advance of Rs. 2,00,000 on December 13, 1980, and Rs. 2,00,000 on January 13, 1981. After the payment of Rs. 4,00,000 has been made, then only an agreement of sale was executed between M/s. G. T. Oil Mills and the company on January 20, 1981.

15. From the facts stated above, it is clear that the transaction which was for the sale of straw board unit of the company in favour of M/s. G.T. Oil Mills was a transaction in good faith and for valuable consideration.

16. Learned counsel for the petitioner, however, has vehemently urged that this agreement of sale has been entered into after the petitioner filed the petition for winding-up of the company in this court on February 25, 1981, He has accordingly relied upon certain interim orders passed by this court. On February 25, 1981, this court passed an ad interim order after admitting the petition to the effect that the directors are restrained from selling the properties of the company till further orders. Thereafter, on August 12, 1981, an advocate commissioner was appointed by this court to make an inventory of the plants, machinery, stores and other goods of the straw board unit. Since there was difficulty faced by the commissioner in complying with the orders passed by this court on August 12, 1981, certain further directions were issued by this court on August 28, 1981. The said order is quoted below ;

" From the commissioner's report, it appears that the inventory could not be prepared on account of the fact that Sri Keshav Krishna Goel, a partner of the firm, which is the prospective purchaser, wanted an endorsement from the commissioner that the order passed on August 12, 1981, operates against the firm of which he is a partner. The straw board unit has not yet been sold to M/s. G. T. Oil Mills and, as such, M/s. G. T. Oil Mills have not acquired any authority or title to the unit.

As the order was passed against the company, it was binding on the firm and on its partners, who were the prospective purchasers.

The order dated August 12, 1981, is accordingly clarified to the extent that the order will operate not only against the company but also against the firm, which is the prospective purchaser, and all other persons who may resist the execution of commission. The Superintendent of Police, Budaun, is directed to assist the execution of the commission, by providing a police force and, if necessary, by breaking open the locks of the unit. The commission may be executed within a period of one month. From the report of the commissioner, it appears that an amount of Rs. 486 is yet to be paid to him in respect of expenses of earlier commission. The petitioner should pay this amount as well as an additional amount of Rs. 2,000 in order to enable the commissioner to prepare an inventory, as directed by me earlier. The amount should be paid to the commissioner within a week.

The earlier order directing the petitioners to find out purchasers for the unit within a period of six weeks is modified to the extent that the period of six weeks will now run after the commissioner had submitted the inventory of the straw board unit. The commission will be executed by Sri Urna Shanker who has been appointed commissioner earlier.

The commissioner should approach the Superintendent of Police, Budaun, first, who is directed to give the commissioner a police force, in order that there is no impediment to the execution of the commission. Counsel for the petitioners stated that it is possible that the Supurdar appointed by the District Judge may not be in a position to preserve the property, after inventory has been prepared. The Superintendent of Police is directed to instruct the Supurdar as and when necessary in the preservation of the property.

A copy of this order shall be given to the commissioner. The parties may obtain copies on payment of usual charges ".

From a reading of the above order, it is clear that this court only clarified the fact that the order would be operative also against M/s. G.T. Oil Mills, who were alleged to have purchased the straw board unit. Thereafter, on September 1, 1981, and September 10, 1981, further orders were passed by this court clarifying the earlier orders in regard to the making of the inventory of the straw board unit. From the mere fact that certain interim orders were passed, it cannot be said that the agreement of sale executed by the company in favour of M/s G. T. Oil Mills on January 20, 1981, was not executed. No evidence has been placed before this court to show as to why the agreement could not have been executed on January 20, 1981. There is only an averment in paragraph 11 of the affidavit of Ram Autar to the effect that it is incorrect to say that the same was executed on January 20, 1981. If it is so, why the registration was delayed till March 2, 1981 ? This by itself does not substantiate the fact that the agreement was not executed at all on January 20, 1981. I am of the opinion that in the normal course, after a purchaser pays a heavy amount, namely, Rs. 4,00,000, the agreement must have been executed by the

company in favour of M/s G.T. Oil Mills. In the circumstances, I do not find any illegality in the agreement, which was executed on January 20, 1981, in the normal course of business, particularly when the petition for winding up of the company was filed in this court on February 25, 1981, The transaction is a bona fide transaction and for valuable consideration. This finding further disposes of Issue No. 8 in the case and I hold that the agreement of sale dated January 20, 1981, is valid in law. No provision of the Companies Act has been pointed out to me as to why the said agreement is not valid under the Companies Act. The issue is answered accordingly.

17. The result of the above finding is that in case the actual sale had taken place, as per the resolution of the company dated December 9, 1980, the company would have received a sum of Rs. 20,00,000 more from M/s. G. T. Oil Mills besides Rs. 4,00,000 which was received by the company in advance on December 13, 1980, and January 13, 1981. This fact is relevant for determination of the other issues involved in the present petition. Since, ultimately, I am of the view that the petitioner has failed to make out a case for winding up of the company, it is not necessary for me to consider in detail the arguments raised by the learned counsel for the petitioner challenging the sale held in favour of M/s. G.T. Oil Mills on the basis of Sections 531, 532A and 536 of the Companies Act, as once the company is not sought to be wound up under the supervision of the court, it is always open to a company to sell away its properties in the normal course of its business.

18. Issue No. 1: In para 6 of the petition, it has been stated that the petitioner is a contributory and is a holder of 76 fully paid-up shares. Section 439(1)(c) of the Companies Act provides that an application to the court for winding-up of the company shall be by petition presented by any " contributory ". The term " contributory " has been defined in Section 428. Section 428 of the Companies Act is quoted below :

" 428. The term " contributory " means every person liable to contribute to the assets of a company in the event of its being wound up, and includes the holder of any shares which are fully paid up ; and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory. "

From the above, it is clear that the term " contributory " includes the holder of any shares which are fully paid up. Admittedly, the petitioner is a holder of 76 fully paid-up shares. In the circumstances, the petition is clearly maintainable. I, accordingly, hold that the petition is maintainable.

19. Issues Nos: 2, 4 and 6: In order to record a finding on these issues, it is necessary first to examine the scope and effect of Section 433(e) of the Companies Act. Section 433 enumerates the circumstances in. which the company may be wound up. It

provides as under:

" A company may be wound up by the court,--.....

(e) if the company is unable to pay its debts. "

The word " may " used in the opening part of the section clearly indicates that even if the company is unable to pay its debts, it is a matter of discretion of the court whether, in the circumstances of the case, it would be in the interest of justice to wind up the company.

20. In Aluminium Corporation of India Ltd. v. Lakshmi Ratan Cotton Mills Co. Ltd. [1970] 40 Comp Cas 259, Hon M. H. Beg J. (as he then was), after analysing Section 433 of the Companies Act, laid down the following principle of law (at page 267) :

"Although the power to wind up is discretionary, it has to be exercised judicially. This means that it is only where the balance of equities is shown by a petitioner to tilt appreciably in favour of a winding-up order that it will be made *ex debito justitiae*. It is in this special sense that a petitioner relying on grounds contained in Section 433 can get a winding up order as a matter of right. It is issued as a matter of right when the proved contents of the petition produce a compelling effect. It is not granted mechanically as a matter of course on proof of certain facts. In other words, equitable considerations have a decisive effect even when the power to wind up a company is invoked under a clause of Section 433 other than the general just and equitable Clause (f). The provisions of Section 434(1) determine when the requirements of Section 433(e) will be deemed to be fulfilled, but they do not lay down when a winding-up order must necessarily be passed. It is true that a creditor is not bound to wait and give time to the company beyond the time prescribed after the statutory notice, before filing his petition. But the court may, if there are sufficient counterbalancing equitable grounds, deny an immediate winding-up order, or, in appropriate cases, even refuse it altogether in spite of the proved inability of a company to pay its debts. Exercise of such discretionary power must necessarily be governed by justice and equity. "

I fully agree with the enunciation of law made by Hon M.H. Beg J. (as he then was). The matter consequently has to be examined in "the light of the above principles.

21. Section 434 of the Companies Act enumerates the circumstances when it would be deemed that the company is unable to pay its debts. Sub- Clause (1) of Section 434 provides as under :

"434. Company when deemed unable to pay its debts.--(1) A company shall be unable to pay its debts◆

(a) if a creditor, by assignment or other wise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a

demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor ;

(b) if execution or other process issued on a decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part ; or

(c) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company."

In Clause (a) above, if a creditor has served on a company, a demand requiring the company to pay a sum so due and the company has neglected to pay the sum, then it would be deemed that the company is unable to pay its debts. Clause (b) provides that if execution or other process issued on a decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part, it shall be deemed that the company is unable to pay its debts. Clause (c) further provides that if a court is satisfied that the company is unable to pay its debts, then also the company will be deemed to be unable to pay its debts. All the three clauses, mentioned above, are disjunctive, and if the petitioner is able to establish the circumstances mentioned in either Clause (a) or (b) or (c), it would be deemed that the company is unable to pay its debts. If a notice given under Clause (a) is held to be invalid, then too it would be open to the petitioner to satisfy the court that the company is unable to pay its debts. In this connection, the petitioner has placed reliance on the decision in *Tripura Administration v. Tripura State Bank Ltd.* 1960 30 Comp Cas 324. In that case, it has been laid down that the proper demand made in accordance with the provisions of Section 434(1)(a) of the Companies Act only gives the benefit of the presumption that arises under it ; but if the demand is found to be invalid for any reason, then it is still open to the creditor to fall back upon Section 431(1)(c) and prove that the company cannot pay its debts. I agree with the view given in the case of *Tripura Administration v. Tripura State Bank Ltd.* 1960 30 Comp Cas 324.

22. In general terms, if it is established that the company is unable to pay its debts as deemed u/s 434(1)(c) of the Companies Act, it is called a commercial insolvency. It has, therefore, to be examined on the circumstances of each case as to whether a company is commercially insolvent, and, as such, liable to be wound up after the court takes into account the contingent and the prospective liabilities of the company.

23. Section 434(1)(a) of the Companies Act came up for interpretation before the hon"ble Supreme Court in *Amalgamated Commercial Traders (P.) Ltd. v. A.C.K. Krishnaswami* [1965] 35 Comp Cas 456. In that case, the hon"ble Supreme Court laid down that a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented

ostensibly for a winding-up order but really to exercise pressure will be dismissed, and under such circumstances may be stigmatised as a scandalous abuse of the process of the court. It further laid down that if the debt was bona fide disputed, there cannot be " neglect to pay" within the meaning of Section 434(1)(a) of the Companies Act. The facts in the instant case have now to be examined in the light of the principles laid down above.

24. The notice, which is alleged to have been given by the petitioner u/s 434(1)(a) of the Companies Act was given on January 28, 1981. This is annexure " RA 3 " to the rejoinder affidavit. It is quoted in full.

"Dear Lala Janak Raj,

Kindly refer to you letter No. 105/U dated January 22, 1981. The facts stated in my letter dated January 15, 1981, in reply to your letter No. 26-U were correct and are reiterated.

It is correct that I was the custodian of all the records till I was the secretary and will continue to be so till the charge is not taken over from me and, as such, files and records should not be removed without my knowledge or permission or by an unauthorised person. Kindly depute somebody to take over the charge of all the files, records, etc., against valid receipt.

It is false and baseless that Ram Prasad refused to show the files and other documents to your representative.

It is false, baseless and malicious propaganda that I have sold any shosham trees or got the Rakhi removed. The number from 200 has come down to 50 now of Rakhi Trucks. Kindly stop from making such baseless insinuations.

So far as a piece of Plot No. 795 measuring 10 biswas 3 biswansipukta is concerned, it does not belong to the Prem Spg & Wvg Mills Co. Ltd. which can be verified from your records. The sale deed in the name of my father was executed and registered on February 3, 1951, and a copy can be had from the office of the Sub-Registrar, Budaun.

I am enclosing my statement of accounts prepared by B. Ram Prasad. Kindly remit the amount early.

With kind regards.

Shri Janak Raj, Yours sincerely,

The Straw Board Wvg. Co. Ltd.,

Ambala Road,

Saharanpur (U.P.).

(Sd.) Paramjit Lal Ba

From a perusal of the above alleged notice, it is clear that it is actually a letter in reply to the letter dated January 22, 1981. Thereafter, in the five paragraphs, he has

stated facts challenging the allegations made against him by the company, as, admittedly, the petitioner was the secretary of the company earlier. In the last paragraph, he only states that he is enclosing the statement of accounts prepared by Babu Ram Prasad. Kindly remit the amount early. In the notice, there is no indication at all that this is a notice sought to be given u/s 434(1)(a) of the Companies Act. It is not necessary, in law, that the notice should specifically mention Section 434(1)(a) of the Companies Act, but there should be some indication given to the company that in case of non-compliance with the terms of a notice, the petitioner will take steps for the winding up of the company under the provisions of the Companies Act. The petitioner did not even mention the period within which his demand was to be fulfilled. He has only conveniently asked the company to remit the amount at an early date. In my opinion, this cannot constitute as a valid notice u/s 434 of the Companies Act. Under issue No. 2, therefore, I hold that the notice given by the petitioner is not valid in law, but as I have already stated above, even if the notice is invalid, the petition is still maintainable in law and it is open to the petitioner to challenge the inability of the company to pay its debts.

25. Even if it is held that the notice of the petitioner is valid in law, then too, in my opinion, the claim made in the notice cannot be a foundation for winding up the company u/s 433(c) of the Companies Act. In para 11 of the petition, it has been stated that the company is liable to pay to the petitioner his salary and other dues amounting to Rs. 29,786. Lala Janak Raj, a director of the company, had filed a counter-affidavit. In para 16 of the counter-affidavit, it has been stated that the petitioner did not make any demand as alleged in the paragraph under reply. The statement of dues dated January 30, 1981, was received, but that contained very highly exaggerated figure and the alleged claim of dues was based on vague demands and the same was disputed by the company. The petitioner made a false claim without rendering any account. He did not even render any account after resignation from the post of secretary/manager. The accounts could not be ascertained, as the petitioner has not yet cared to give charge of the account books, other records and files of the company. The claim of the petitioner has not been adjudicated upon. It is also not disputed that the petitioner was secretary/manager of the company since 1969 up to January 16, 1981, for almost 12 years and the allegations have been made by the company against the petitioner in regard to the fact that he has not given charge and other account books, etc. In the circumstances, in my opinion, the amount claimed by the petitioner was bona fide disputed by the company and, as such, it cannot be held on the basis of the demand made by the petitioner that the company has neglected to pay the amount claimed by the petitioner and that the company should be deemed to be unable to pay its debts u/s 433(c) of the Companies Act in respect of the claim made by the petitioner. The other liabilities of the company have been enumerated in para 12 of the petition. In respect of these liabilities, it has not been alleged that any notice had been given to the company. In reply to paragraph 12 of the petition, Lala Janak Raj,

the director of the company, in paragraph 17 of his counter affidavit, denied the allegations made in paragraph 12 of the petition. It has been alleged that the Income Tax liabilities of Rs. 6,00,000, shown in paragraph under reply, has not yet been quantified for the assessment year 1981-82 in respect of the account ending on March 31, 1981. It is, therefore, alleged that it is too early to say anything in regard to this liability. It has been further stated that the provident fund dues shown are incorrect. There was a recovery certificate for Rs. 4,467.90 only for which a draft had already been sent towards payment in favour of the Collector, Budaun. In regard to the claim of Prem Prakash Mani to the extent of Rs. 1,35,000, it has been stated that the demand is only for Rs. 21,992 and that too is under dispute and is the subject-matter of pending litigation. In regard to the dues of Bareilly Corporation Bank, it is stated that the said loan was taken from the bank against the mortgage of land, building, plant and machinery of the spinning unit out of which an amount of Rs. 10,25,000 was paid. It has been further stated that the expenses alleged to have been incurred by Lala Janak Raj was imaginary and false. They were not so incurred and in regard to this liability of the claims of the workmen, this has also been denied and it has been stated that it is not possible to say as to how much liability is likely to be decided in favour of the workmen.

26. A supplementary affidavit dated December 21, 1982, of J. P. Sharma has been filed. In the said supplementary affidavit, has been stated that certain arbitration cases were pending between the company and the U.P. Electricity Board at the time when the petition was filed and one of the cases has been decided by an award given by the arbitrators in which an amount of Rs. 1,50,000 has been awarded in favour of the company. It has been further stated in para 8 of the said affidavit that the company was expecting a refund of Rs. 7,00,000, in the pending arbitration cases.

27. From all the facts mentioned above in the counter-affidavit, it is clear that the liabilities enumerated in para. 12 of the petition have been disputed bona fide by the company and, therefore, the company cannot be held to be unable to pay its debts on the basis of debts which are bona fide disputed by the company. In the circumstances, in my opinion, it cannot be held that the company is unable to pay its debts u/s 433(c) of the Companies Act.

28. The question now which has to be considered is whether the company is commercially insolvent.

29. As I have already stated above, a company can be said to be commercially insolvent, if the company is not in a position to meet its current liabilities even though it may have a very valuable asset not presently realisable. A company shall be called commercially insolvent, if it is unable to pay its debts or liabilities as they arise in the ordinary course of business. If a company has a number of undertakings and if it decides to sell away one of its units as a matter of commercial exigency in order to save the company from further loss, it cannot be said that the company has

become commercially insolvent. The petitioner has relied upon the balance-sheets for the year ending March 31, 1980, March 31, 1981, and March 31, 1982, to show that the company has no sufficient liquid or readily realisable assets to meet even the current liabilities and if the contingent and the prospective liabilities are added to the aforesaid liabilities, the position of the company will be worse and, as such, it is argued that the company is commercially insolvent.

30. In *V.V. Krishna Iyer Sons v. New Era Manufacturing Co. Ltd.* [1965] 35 Comp Cas 410, it has been held as follows (at page 425) :

" It is true that ordinarily the court does not go behind the company's balance-sheet to ascertain its financial position, but this does not mean that the mere fact that a particular item appears in the balance-sheet under the head "Liabilities" conclusively establishes that that item is a liability of the company in the sense in which the word "liability" is used in Section 434(1)(a) of the Companies Act. Notwithstanding that the word "liabilities" and not the word "debt" is used in that provision when referring to the contingent and prospective liabilities of the company, it is quite apparent that the liability referred to therein must be a debt which the company has, or might or will have to pay, something which cannot be said with regard to its share capital."

I fully agree with the view expressed in *Krishna Iyer Sons*" case [1965] 35 Comp Cas 410. Fixed assets, plant and machinery are not to be ignored in assessing the solvency of the company. For deciding the question whether the company is commercially insolvent, it has to be determined whether it is unable to pay current demands. The share capital, though shown as liability of the company for the purposes of balance-sheet, cannot be considered to be a liability within the meaning of Section 434(1)(a) of the Act. In the light of these principles, the balance-sheets which have been relied upon by the petitioner have to be examined. In the balance-sheet for the year ending January 31, 1980, in annexure "F", the current assets, loan and advances have been stated. The total amount shown is Rs. 3,32,206. The current liabilities and provisions have been mentioned in Schedule "G". The total amount shown is Rs. 15,87,633. If the amount of Rs. 3,32,205 is deducted from this amount, the total liability would come to about Rs. 12,50,000. If to this amount, unsecured loan mentioned in Schedule " C " is also added which is about Rs. 5 lacs, then the total liability comes to Rs. 17,50,000. I have already held above that the sale in favour of G.T. Oil Mills is valid and four lacs of rupees have already been received from G.T. Oil Mills as advance and the balance recoverable is Rs. 20 lacs. If these Rs. 20 lacs are received from G.T. Oil Mills, then the entire current liability as well as loan can be met by the said amount. In the circumstances, it cannot be said while perusing the balance-sheet for the year ending March 31, 1980, that the company is unable to pay its debts.

31. The balance-sheet for the year ending March 31, 1981, shows the current assets to be Rs. 4,57,934. The current liability and provisions shown in schedule "G" are to the extent of Rs. 11,38,340. In the sum of Rs. 11,38,340, four lacs of rupees have

been added as a liability in respect of the sale of the straw board unit. This cannot possibly be treated to be a liability in the sense it is used in Section 434(1)(a) of the Act. In the circumstances, the total liability under schedule "G" is Rs. 7,38,340. Considering the assets and liabilities in schedules " F " and " G ", the total liability accordingly would be about Rs. 3 lacs. To this may be added the unsecured loan payable by the company to the tune of Rs. 41,307 shown in schedule " C ". Total amount would, therefore, be of about Rs. 3,50,000. These liabilities can easily be met by the sale consideration of Rs. 20 lacs to be received by the company from G.T. Oil Mills. In the circumstances, even from the balance-sheet for the year ending March 31, 1981, it cannot be said that the company is unable to pay its debts.

32. The balance-sheet for the year ending March 31, 1982, has now to be considered. From this balance-sheet also, the total amount shown in schedule "F" as current assets is Rs. 4,35,129. The current liability and provisions mentioned in schedule "G" are to the extent of Rs. 11,84,399. This amount includes a sum of Rs. 4 lacs as advance against the sale of straw board unit. This cannot be treated to be a liability. If this is deducted from the amount mentioned in schedule "G", the total current liability and provisions would come to Rs. 7,84,399. The difference, therefore, between the liability and the assets would be about Rs. 3 lacs. To this amount may be added the unsecured loans mentioned in schedule " C " which are to the extent of Rs. 82,903. The total amount, therefore, payable by the company as a liability is about Rs. 4 lacs. This amount can be easily paid from out of an amount of Rs. 20 lacs, which the company has to receive from G.T. Oil Mills. In the circumstances, in respect of this year also, it cannot be said that the company is unable to pay its debts.

33. The question of inability of the company to pay its debts can be examined from another light as urged by the counsel for the company. The current balance-sheet is for the year ending March 31, 1982, Schedule " C " mentions the loan funds. The total comes to Rs. 11,69,311. Schedule "G" mentions sundry creditors for Rs. 1,45,761, Customers' credit balance Rs. 55,182, Other liabilities Rs. 2,02,216. The total of three items comes to Rs. 4,03,159. The contingent liabilities as shown in paragraph 3 of the director's report is about Rs. 2,20,000. Totalling all the three amounts mentioned above, the total amount of liabilities comes to Rs. 17,93,470 or in round 18 lacs. The liquid assets of the company comprise of:

	Rs.
(i) Sundry debtors	2,09,648
(ii) Cash and bank balance	38,969
(iii) Advances recoverable in cash	1,13,484

(iv) Security deposit	25,130
Total of this comes to	3,87,611

In paragraph 3 of the supplementary affidavit of J. P. Sharma (A-50), it has been stated that the liability of Rs. 65,000 shown in the balance-sheet in respect of the coal/sundry amount has been discharged. This amount has consequently to be deducted from the liabilities. In paragraph 6 of this supplementary affidavit, it has been further stated that a sum of Rs. 1,50,000 has to be received as refund from the electricity department. This consequently has to be added as an asset of the company. Deducting Rs. 65,000 and adding Rs. 1,50,000 mentioned above, the total liabilities of the company would come to Rs. 11,97,389. This figure has been arrived at as follows :

		Rs.
Total liabilities according	about	18,00,000
to Schedule "G "	minus	65,000
	comes	17,35,000
	to	

If from this amount, Rs. 3,87,611 being the total liquid assets of the company is deducted, it comes to Rs. 13,47,389. If from this amount, a sum of Rs. 1,50,000 is deducted which is recoverable from the electricity department, the total comes to Rs. 11,97,389. This amount can consequently be paid from the amount of consideration which has to be received from G.T. Oil Mills.

34. There is a further aspect of this. Affidavits have been filed on behalf of the creditors of the company. A-68/3 is the affidavit of Pt. Durga Das, dated December 14, 1982, who is trustee of Chunnilal Trust. It has been stated in the said affidavit that the trust is a shareholder of the company having 1,490 shares. In the balance-sheet for the year ending March 31, 1982, an amount of Rs. 6,48,136 has been shown under the heading of secured loan payable to the trust. In paragraph 5, it has been categorically stated that the trust will not make any demand of its loan to the company for another one year, in case no winding-up order is passed in the petition. Similarly, affidavit A-66/3 of Lala Janak Raj states in paragraph 3 that the Central India Electric Co. Ltd. will not claim any amount from the company to the tune of Rs. 1,15,378.15 shown as a current liability for a period of at least two years.

35. In view the the above affidavits of the creditors that they will not demand the amount due from the company for some time further strengthens the case of the company, and it cannot be said that the company is unable to pay its debts at present. As I have already stated above, if the company has to pay the debts, the

sum of Rs. 20 lacs received from G.T. Oil Mills would be sufficient to pay off the amount of the debts of the company. In view of the above, I am of the opinion, that it cannot be said that the company is commercially insolvent and that it is unable to pay its debts.

36. Learned counsel for the petitioner has relied upon a few cases mentioned below in support of his submissions that the company is commercially insolvent.

37. In the matter of Punjab Flying Club Ltd., In re [1933] 3 Comp Cas 146, the company was wound up after a finding was recorded that the company was unable to meet its current demands. This case is clearly distinguishable as I have already held above that the company in the present case is in a position to meet its current liability.

38. In Vanaspati Industries Ltd. v. Prabhu Dayal Hari Ram [1950] 20 Comp Cas 311, it was held that the expression "commercially insolvent" means that the assets of the company are such and its existing liabilities are such as to make it reasonably certain that the existing and probable assets would be insufficient to meet the existing liabilities. There is no dispute to this proposition ; but on the facts of the present case, I have already held above that the company is in a position to meet the existing liabilities ; in the circumstances, this case is also clearly distinguishable on its own facts.

39. In [Bengal Luxmi Cotton Mills Ltd. and Others Vs. Mahaluxmi Cotton Mills Ltd. and Others](#), , reliance has been placed by the learned counsel on the principle enunciated in this case to the effect that if the company has to sell its capital assets in order to pay its debts, it cannot ordinarily be said to be commercially solvent unless the assets are surplus assets. In this case, it has not been laid down that in every case where the company has to sell away its capital assets, it must be held that the company is commercially insolvent. The expression used by the court is "ordinarily". Therefore, the question whether a company when it sells its capital assets can be called commercially insolvent or not, depends upon the facts and circumstances of each case. As I have already expressed above, if there are many units of a company and in order to pay off the current liabilities, if the company has to sell one of its units, it cannot be said that the company is commercially insolvent. This decision, therefore, does not advance the petitioner's case.

40. In Sri Shanmugar Mills Ltd. v. S. K. Dharmaraja Nadar [1969] 39 Comp Cas 297, it was held that where the debts of the company could not be paid without selling its machinery and building and if the machinery and building were to be sold, the mill could not run and the company would necessarily have to be wound up. This case is distinguishable on the facts of the present case. Here the straw board unit is only one of the units of the company. Besides running of spinning mill and the straw board unit, there are other objects of the company which can be achieved if the company had liquid funds. In the circumstances, if the company has to sell away

certain machinery and building for continuing the company for the fulfillment of its other objects, the company cannot possibly be wound up merely on the ground that it was selling its machinery and building.

41. In [Registrar of Companies Vs. M.K. Brothers \(Private\) Ltd.](#), the company was wound up by this court as it had found that the company had incurred loss to the tune of Rs. 8,95,147 and the company had virtually no fixed assets. It was further found that the loss and expenditure incurred by the company are far in excess and the share capital of the company had virtually disappeared. In the instant case, the position is to the contrary. The company is in a position to pay all the current liabilities and in spite of the said fact, valuable fixed assets still remain with the company. This case is on its own facts and, consequently, it does not support the case set up by the petitioner.

42. The other case relied upon by the learned counsel for the petitioner is [Maharashtra Small Scale Industries Development Corporation Vs. Trawlers P. Ltd.](#). In this case, the statutory notice had been given by the creditors and in spite of the statutory notice, the company had not paid the amount due against it and, as such, the court held that the company was liable to be wound up. The position in the present case is entirely different. Here, no valid notice was served on the company as required by Section 434(1)(a) of the Act and I have already found after examining the balance-sheets that the company cannot be said to be commercially insolvent. In the circumstances, this case also is of no assistance to the petitioner. In view of the above, I find that the notice given by the petitioner is invalid in law u/s 434 of the Companies Act, though the petition would be maintainable in spite of the invalidity of the notice. I further find that the company is in a position to pay its debts and that it is not commercially insolvent. Issues Nos. 2, 4 and 6 are decided accordingly.

43. Issues Nos. 3, 5 and 7 : I am considering these issues together, as they are interconnected and the question whether the company has lost its substratum is the content of the just and equitable clause mentioned in Section 433(f) of the Act. Under Clause (c) of Section 433 of the Companies Act, (if a company) does not commence its business within a year from its incorporation or suspends its business for the whole year, then a discretion has been given to the court in such a case to wind up the company. Even if the business is suspended for a whole year, this by itself does not entitle the petitioner to get the company wound up as a matter of right ; but the question whether the company should be wound up or not in such a circumstance is entirely in the discretion of the court depending upon the facts and circumstances of each case.

44. In Halsbury's Laws of England, fourth edition, volume 7, Article 998, the clause has been rightly construed as follows :--

" An order will not be made on the ground that the company has suspended its business for a year, if a petitioning shareholder is opposed by a large majority of the

shareholders and there is a genuine intention to proceed with the business. A company does not cease to carry on business, because it has given up part of its business ".

In the case of a company having a number of units of business, by the mere fact that one unit is closed, it cannot be said that the company has suspended its business. Even if work of all the units of the company has been suspended, then too it will still be open to the court to examine as to whether it will be possible for the company to continue its business.

45. u/s 433(c), the suspension of the business must be the entire business of the company and not a part of it.

46. With regard to the question as to under what circumstances the company can be said to have lost its substratum, it is not necessary for me to refer to the various decisions cited by the parties, as the question is now well settled by the decision of the Hon"ble Supreme Court in [Mohan Lal and Another Vs. Grain Chamber Ltd., Muzaffarnagar and Others](#), where it has been held that the substratum of the company is said to have disappeared, when the object for which it was incorporated has substantially failed, or when it is impossible to carry on the business of the company except at a loss, or the existing and possible assets are insufficient to meet the existing liabilities.

47. In [Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.](#), , again this question came up for consideration before the hon"ble Supreme Court. It opined as follows (at p. 134) :

" An allegation that the substratum of the company is gone is to be alleged and proved as a fact. The sale of the machinery was alleged in the petition for winding up to indicate that the substratum of the company had disappeared. It was also said that there was no possibility of the company doing business at a profit. In determining whether or not the substratum of the company has gone, the objects of the company and the case of the company on that question will have to be looked into. In the present case, the company alleged that with the proceeds of sale, the company intended to enter into some other profitable business. The mere fact that the company has suffered trading losses will not destroy its substratum unless there is no reasonable prospect of it ever making a profit in the future, and the court is reluctant to hold that it has no such prospect. "

It is in the light of the above principles as well as facts and circumstances of this case that the question arising out of these issues have to be decided.

48. It is admitted by the parties that both the spinning mills and straw board units have been closed. In fact, on the night December 23, 1973, a fire broke out in the mills resulting in a serious loss to the spinning mills. The entire machinery of the spinning mill was burnt out. From the directors" report for the year ending March

31, 1977, mentioned in the balance-sheet for the year ending March 31, 1977, it has been clearly accepted that due to financial problems, spinning mills were closed on May 11, 1976. In the balance-sheet for the year ending March 31, 1979, it has been categorically stated in the directors' report that this unit stands closed with effect from July 14, 1979. From the same report, it is also clear that the straw board unit was also not working due to financial stringency. From the directors' report mentioned in the balance-sheet for the year ending March 31, 1978, it has been stated in paragraph 5 that considering the overall position, it was proposed to declare the closure of both the units and to sell the undertakings of the company in full or part or in parts in order to avoid further liability. It may at this stage be mentioned that the petitioner was all along the secretary of the company. The mills were closed during his tenure. The decision to sell away both the units was made also during his tenure. It is further admitted by the parties that the majority of the shareholders are opposing the winding up and it has been stated on behalf of the company that there is a genuine intention to proceed with the business. The question to be considered in these circumstances is whether the entire business of the company has been closed or whether the company can still carry on the business. If the company can carry on the business, then the question of applicability of Clause (c) would not arise.

49. This question is also interlinked with the question whether the entire substratum of the company has gone. The memorandum of association of the company has been attached as annexure " 3 " to the counter-affidavit of Janak Raj. On a perusal of the objects of the company, it is evidently clear that besides establishment of spinning mill and the straw board unit, there are other objects which the company can fulfill Clause (3), Sub-clause (a), relates to the taking over of a factory and thereby starting a spinning mill. Sub-clause (a)(1) and Sub-clause (a)(2) were subsequently added. They are relevant and, hence, they are quoted below :

"(a)(1) To manufacture straw board, mill board, pulp board, coir washers and to sell the same.

(a)(2) To manufacture agricultural implements and other metallic parts of cast iron, cast steel, mild steel, and steel alloys as also of non-ferrous metals for agricultural, mechanical or domestic uses."

There is one other clause which is relevant, that is, Clause (e), which is also quoted below:

"(e) To carry on all or any of the following businesses, namely, cotton spinners and doublers, flax, hemp and jute spinners, linen manufacturers, flax, hemp, jute and wool merchants, wool combers, worsted spinners, woollen spinners, yarn merchants, assorted stuff manufacturers, bleachers and dyers, and makers of vitriol bleaching and dyeing materials and to purchase, comb, prepare, spin, dye and deal in flax, hemp, jute, wool, cotton, silk and other fibrous substances and to weave or

otherwise manufacture, buy and sell and deal in yarn, linen, cloth and other goods and fabrics, whether textiles felted, netted or looped and to supply power."

I am leaving aside the other clauses which the counsel for the parties interpreted differently. From the light of the above clauses, it is clear that Sub-clause (a)(1) contemplated the starting of a straw board unit, but clearly the objects mentioned in Sub-clause (a)(2) and (e) quoted above have yet not been explored by the company. In the circumstances, it cannot be said that after the closure of the spinning mill and the straw board unit, the entire substratum of the company had gone. It cannot be said that the object for which the company was incorporated has disappeared and has substantially failed. The straw board unit has already been sold. Rupees four lacs was received as advance and rupees 20 lacs are yet to be received. I am of the opinion that existing and possible assets are not insufficient to meet the existing liabilities. This question, I have already discussed in detail while considering the question as to whether the company has become commercially insolvent.

50. It is further significant to note that in paragraph 39 of the counter-affidavit of Janak Raj, it has been stated that after the sale of the straw board unit, there remains about one lakh square metres of land and building thereon which according to the petitioner himself is a valuable property and the company could take up any of its objects with the help of this property. Building could be rented out as previously it was done and sufficient rent could be learned therefrom. This allegation has been made on the basis of the letter issued by the petitioner himself as the secretary of the company. This letter has been attached as annexure " 7 " to the counter-affidavit.

51. An affidavit of J.P. Sharma, A-33, dated October 27, 1981, has also been filed on behalf of the company. In paragraph 4(B) of the said affidavit it has been reiterated by him that after disposing of the straw board unit, about one lakh square metres of land would remain along with a number of godowns and constructed area which is more than worth rupees fifty lacs (land only). It has also been stated in this paragraph that the company is maintaining its registered office, holding meetings and permanent staff has also been employed by the company and, as such, it cannot be said that it is not a going concern.

52. In view of the fact that after the sale of straw board unit, the company would have liquid assets to start another business for fulfilling other objects for which the company had been incorporated and further since the company has huge land and building still left with it, it cannot be said that the company has lost its substratum or that merely because a part of the business of the company has been closed, it cannot revive its business to achieve the other objects for which it had been incorporated. In view of the above circumstances, I am of the opinion that it is not just and equitable that the company should be wound up and an opportunity should be given to the company to commence its business, particularly when efforts are

being made for revitalising the company in the interest of shareholders, and when admittedly, the majority shareholders are against the winding-up of the company. I accordingly hold that the company is not liable to be wound up u/s 433(c) of the Companies Act. The company has not lost its substratum and that it is not just and equitable that the company be wound up. All the three issues are decided accordingly.

53. Issue No. 9 : I have already stated in the earlier part of the judgment that the petitioner, Paramjit Lal Badhwar, was the secretary-cum-manager of the company since 1969 up to January 16, 1981. The petitioner was the secretary when the spinning mills were destroyed by fire in December, 1973. The petitioner was also the secretary when on December 6, 1978, a decision was taken to sell both the units. Throughout the period when the company was suffering loss, efforts are being made to solve the company's financial crises as is clear from the directors' report mentioned in various balance-sheets. The petitioner was also the secretary on December 9, 1980, when the offer given by G.T. Oil Mills was accepted. It appears from a perusal of the petition that the dispute between the petitioner and the company really arose after December 9, 1980, when the bid of G.T. Oil Mills was accepted, and it was not to the liking of the petitioner who was also then the secretary of the company. The basis of the petition when originally filed was that the company owed to the petitioner a sum of Rs. 29,786 towards his salary and other dues. This I have already held was bona fide disputed by the company. It appears to me that till January 16, 1981, the petitioner was the secretary of the company and that the petitioner being the secretary-cum-manager of the company being not happy with the resolution of the company selling the straw board unit to G.T. Oil Mills, wanted to coerce the company to proceed according to his own suggestion and to accept the proposal of sale which he desired. An amount of advance had already been made by G.T. Oil Mills and, thereafter, the present petition was filed. If the case of the petitioner was genuine, there was no reason why in spite of the fact that after 1973, the company had come in a crisis, the petitioner did not take any step for winding up but was a party to all the decisions taken by the company and abided by the said decisions. The petitioner is a very small shareholder of the company having only 76 fully paid up shares and the majority shareholders who are opposing the petitioner have 13,870 shares. In the circumstances, I am of the opinion that, in fact, filing of the petition is a result of the mala fides on the part of the petitioner.

54. Issue No. 10: Though the decision on Issue No. 9 would have been sufficient to dismiss the petition, but since there were other persons who came to support the petitioner, I thought it fit to examine the entire petition on its merits and have come to the conclusion that the company is not commercially insolvent. It is not required to be wound up because of suspension of its part business and also that the company has not lost its substratum. In the circumstances, I am of the view that even on merits, the petitioner is not entitled to any relief.

55. Since I have already held on merits that it is not just and equitable that the company be wound up, it is not necessary to pass any order on the application A/65 u/s 557 of the Companies Act seeking a direction for holding the meeting of the contributories for ascertaining their wishes. The application is, accordingly, filed.

56. In the result, the petition is dismissed. In the circumstances of the case, I direct that the parties shall bear their own costs of this petition.