**(1958) 05 AHC CK 0010**

**Allahabad High Court**

**Case No:** Special Appeal No''s. 46 and 48 of 1952

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| Mohan Lal and Another | | APPELLANT |
| | Vs | |
| Grain Chamber Ltd., Muzaffarnagar and Others | | RESPONDENT |

**Date of Decision:** May 7, 1958

**Acts Referred:**

- Companies Act, 1913 - Section 162, 170(1), 202, 227(2), 86F
- Companies Act, 1956 - Section 297, 300, 433, 443

**Citation:** AIR 1959 All 276

**Hon'ble Judges:** V. Bhargava, J; B. Dayal, J

**Bench:** Division Bench

**Advocate:** R.S. Pathak, for the Appellant; Shanti Bhushan, J. Swarup and Jagnandan Lal, for the Respondent

**Final Decision:** Dismissed

**Judgement**

V. Bhargava, J.

These two connected Special Appeals are directed against one common judgment of the learned Company Judge by which he dismissed two petitions for winding up of the same company presented by the same petitioners. The first petition was presented on the 22nd of February, 1950 on behalf of two persons appearing as petitioners. The first petitioner was Mohan Lal in his personal capacity.

The second petitioner was Seth Mohan Lal and Co., which was a trade name under which Mohan Lal was himself carrying on the business, he being the sole proprietor of this firm. The first petition, which was registered as case No. 12 of 1950, was based on certain grounds, which according to the petitioners had come into existence by the 22nd of February, 1950. Subsequently, the petitioners made an application for amendment of this petition.

The amendments sought not only included facts relating to incidents before the 22nd of February, 1930 but also certain facts which came into existence after that date, on the basis of which the petitioners wanted to add new grounds for seeking the winding up order. The amendment application was allowed only to the extent that it related to incidents before the 22nd of February, 1950; the rest of the amendment application for adding grounds which had come into existence after that date was rejected.

In pursuance of this rejection, the petitioners moved the second petition on the 23rd of February, 1951 and based their request for winding up order on the ground which had come into existence subsequent to the 22nd of February, 1950. Since the two petitions were filed by the same petitioners and were directed against the same company, the learned Company Judge recorded evidence in only one proceeding and decided both the petitions on the basis of that evidence by one single judgment. In the circumstances it is convenient for us also to deal both the appeals in this one single judgment.

2. The company, which the petitioners desired should be wound up, is known as the Grain Chamber Limited Muzaifarnagar. The company was formed in the year 1931 with its share capital of Rs. l,00,000/- divided into one thousand snares of Rs. 100/- each. The actual paid up capital of the company is Rs. 97,845 / - representing the call money on 985 shares which were subscribed. The objects of the company, as set forth in the Memorandum of Association, are twenty in number which need not all be reproduced. The relevant objects to which reference would be necessary in the course of the Judgment, are as follows:--

(a) To promote and protect the Trade, Commerce and Manufactures of India, and in particular the trade, Commerce and Manufactures of Grain, Cotton, Sugar, Jagree and Pulses;

(b) To establish just and equitable principles in trade and to form a Code or Codes of practice, to simplify and facilitate transaction of business and keep the accounts between merchants dealing in grain, cotton seed etc., and of persons entering into those transactions with them;

(c) To do Banking and money lending business;

(d) To do all such other things as may be conducive to the extension of trade, commerce, or manufactures, or incidental to the attainment of the above objects or any of them; and

(e) To deal in ready stock of grain and in khattis or other quantities and to carry on the business of forward sale or purchase of grain or other yege-tyblo products.

About the years 1949 and 1950, when the events .giving rise to the dispute which led to these winding up petitions took place, the company was carrying on the business solely in future transactions relating to Gur and silver. The rules, under

which these future transactions were going on, were not filed before the learned single Judge, though it appears from some documents on record that there was a set of general rules which governed all such transactions. In the circumstances, the learned single Judge obtained an agreed statement from the parties giving the modus operandi of this company relating to the future transactions entered into by the company. The learned single Judge has, in his judgment, reproduced the statement, which is as follows:--

"If A wishes to enter into a future contract for the sale of one Bijak of gur, he has to meet a broker and to request him to find a purchaser. The broker finds a purchases in B. A and B who are thus brought together through the broker approach the company and get their contract registered. This contract is split up into two independent contracts, viz., a contract of sale by A to the company and another contract of sale by the company to B. There remains no longer a privity of contract between A and B. On the other hand, the company deals with A as principal to principal and similarly with B .as principal to principal. The Company buys from A and sells to B. From both of them the company receives a deposit of rupee one per maund as Sai and further deposit of annas eight per maund as chook. The price at which delivery shall be received and given is fixed. If there is a rise in the price, the company will call upon A to deposit further Chook so as to cover the difference in price. If A makes the deposit, the contrnct continues to stand. B will be entitled to withdraw from the company the profits which he is thus managing consequent on the rise in price. If A fails to make the deposit, the company has a right to enter into a reverse transaction by finding a purchaser according to the current rate of the day and thus to square up A''s transaction of sale. But the company''s liability to B to pay the profits consequent on the rise in price still remains. If A becomes insolvent or, for any other reason, becomes incapable of performing his obligations, B remains unaflected. The company may or may not be able to recover anything from A but it has to pay to B all the same. The company is therefore always on the alert to realise the Chook from the seller or from the buyer according to the rise or fall in price. If the person called upon to pay the Chook makes default, it is in the company''s interest at once to square up his transaction. If on the date of delivery the parties-wish to settle their transactions by paying diiferences the company shall fix the rate at which transactions are to be settled. The necessity to fix the rate arises because sometimes rates fluctuate even during the course of the day. At the rate fixed by the company the accounts are settled, the parties send what is known as their "Dailies," bills are prepared and amounts are paid and received according to such rate."

During the hearing of the appeals before us, we considered it advisable to try and discover whether there were any general rules, particularly because a reference was made to the general rules in a resolution of the company dated the 14th of March, 1949, under which resolution transactions took place which ultimately led the petitioners to move these petitions for the winding up order.

Two printed hand books were produced before us but the parties were unable to agree that they were the general rules referred to in the resolution. In any case, on a perusal of these general rules, we discovered that they did not render any assistance at all to us in deciding these appeals and consequently we have decided not to refer to these hand books at all in the course of our judgment.

3. In the year 1949, the company had 11 directors. Two of these directors Lala Deep Chand and Lala Qabul Chand were not carrying on any business in forward or future transaction with the company whereas admittedly the remaining nine directors were carrying on such transactions. Since the question of the fact of directors carrying on business with the company has assumed considerable importance for the purpose of deciding these Special Appeals, we consider it useful to quote at this stage some of the Articles of Association of the company which have a bearing on this aspect. The most important rule is Rule 5 of the Articles of Association, which reads as follows:--

"No person or firm will be entitled to remain as the member of the company who is found not to be doing any transaction or business through the company at Muzaffarnagar for continually six months. In such circumstances the company will give him a week''s registered notice in writing asking thereby, why his name should not be struck off from the membership of the company and his share be put to sale."

Rule 46(a) provides:--

"Every member of the company who is owner of at least ten shares of the company in his own name or in the name of the firm of whom he is a proprietor or partner can be elected as a director of the company."

Rule 47 Clause (b) runs as follows:--

"Subject to as herein otherwise provided or to the terms of any subsisting agreement, the office of the Directors shall be vacated

(a) .....

(b) if he is adjudged an insolvent or makes any agreement or composition with his creditors. If the cover money for transactions due from him is not paid in the office of the Company within the fixed time."

It was under these conditions laid down in the Articles of Association that the company continued to function from 1931 onwards and even after the Companies Act had been amended in the year 1936.

4. Another relevant fact relating to the carrying'' on the business by the company, which does not specifically find place either in the Memorandum of Association or Articles of Association, is that one of the principles of carrying on the business by the company was that only members of the company could enter into contracts with

the company and no stranger was allowed to do so. This principle does not appear to have been specifically brought out in the petitions or in the various affidavits filed by the parties.

But it appears that the petitions have been proceeded with by both the parties on the basis that only members were entitled to transact with the company. During the course of arguments in these appeals before us also, learned counsel agreed that this principle has not only been acted upon but must be accepted as being one of the conditions under which the company was carrying on the business.

5. We now come to the specific facts and circumstances which ultimately led up to these two petitions for winding up orders. In accordance with its practice of passing a general resolution fixing terms for entry into transactions in future, a meeting of the Directors of the company was held on the 14th of March, 1949 when a resolution was passed sanctioning entry of transactions in futures in Gur for Phagun Sudi 15 Sambat 2006 (which is equivalent to 4th March, 1950).

The special rules applicable to these transactions in futures were also laid down by the same resolution. The rules provided that each transaction was to be on the basis of a unit of one hundred maunds of Gur described as one "bijak" so that a single bijak was a unit for which a transaction could be accepted. The maximum limit of bijaks, in respect of which a single member could enter into transactions with the company was one thousand.

Even though the transactions were for Phagun Sudi 15 Sambat 2006, it was laid down that the seller could give delivery from the 1st to 5th Sudi and the buyer could demand delivery from the 6th to 10th Sudi. The time and method of delivery were subject to the rules of delivery laid down on 25th March, 1948. In case there was no delivery, the rates of the due date settlement and of demand were to be determined by the company according to Dara rate of ready Gur Pansera Muzaffarnagar.

The rate of Dara was laid down to be that for which the largest quantity of Gur was sold. In default of delivery, the buyer was also entitled to a penalty of four annas per maund. When fixing the rate for settlement, the committee had to keep in mind the act of any party responsible for illegal meddling in the rates. The rules also laid down that the Chamber was entitled to six annas per bijak which consisted of four annas for brokerage, one anna commission, one pice for Gaoshala, one pice for Vedic Purti Pathshala and two pice for Grain Chamber School,

In addition an amount of annas four per bijak was to be charged as sales tax. Then there were detailed rules prescribing the manner in which weighment was to be carried out in case of delivery. In these petitions, it has been the admitted case of both the parties that the scheme laid down by this resolution or other schemes similar to this scheme, which had been worked under other resolutions, all contemplated actual delivery and that the transactions in future, which were to be entered into with the company, were not of wagering nature. After this resolution

had been passed, members of the company started entering into transactions in future under it.

6. Seth Mohan Lal was not a member of the company at the time when this resolution was passed. He became a member of the company on 9th August, 1949 under his firm name Seth Mohan Lal and Co. and started dealings with the company thereafter. He acquired membership by purchasing one share of the company. By December, 1949, the applicant Mohan Lal and Co. had entered into numerous transactions out of which 1,136 bijaks for sale of Gur were outstanding in the name of Mohan Lal and Co.

The average rate of sale under these bijaks worked out at about Rs. 12/13. The petitioners'' case is that in addition to these transactions of sale of 1,136 bijaks, the petitioners had also entered into a number of other transactions in the names of five other persons, viz., Ram Swamp Sahdi Ram, Sadhu Ram Sant Ram, Dashondhi Ram Banarsi Dass, Niadar Mal Kirpa Ram and Hardwari Lal Amba Prasad.

According to the petitioners the transactions entered into with the company in the names of these five firms by or on behalf of the petitioners were also all transactions of sale of bijaks and not of purchase of bijaks. It was claimed that in addition to the outstanding 1,136 bijaks, which were in the name of Mohan Lal and Co., the other bijaks belonging to the petitioners which stood in the name of the above five firms, were 2,137 in number, making up a total of 3,273 bijaks which thus, in fact, belonged to Mohan Lal and Co.,

The learned Company Judge accepted the case of the petitioners only with regard to the l,041i bijaks standing in the name of Ram Swarup Shads Ram and held that, in fact, the transactions of sale of these bijaks were on behalf of Mohan Lal and Co., who were the principals in those transactions, whereas Ram Swarup Snadi Ram had merely lent their name to the transactions.

With regard to the remaining four firms, the finding recorded is that the petitioners had failed to prove that they were interested in or were owners of the bijaks which were outstanding in their names and in the case of some of the firms it was alleged that, in fact, there were no outstanding bijaks of sale in their favour at all.

In these appeals, learned counsel appearing for the appellants made no efforts at all to challenge the findings given by the learned Company Judge against the petitioners in respect of the bijaks which stood in the names of the four firms, viz., Sadhu Ram Sant Ram, Dashondhi Ram Banarsi Dass, Niadar Mal Kirpa Ram and Hardwari Lal Amba Prasad.

He based his case in the appeals solely on the bijaks which were in the name of Mohan Lal and Co. and those which had been held by the learned Company Judge to belong to Mohan Lal and Co. while they stood in the books in the name of Ram Swarup Shadi Ram. On behalf of the respondents, the finding of the learned

Company Judge that the transactions in respect of 1,041 bijaks standing in the name of Ram Swarup Shadi Ram actually belonged to the petitioners was challenged during the course of hearing of the appeals.

7. In January, 1950, it appears that there were very marked fluctuations in the price of Gur and the price continued to rise very high. There arose a feeling in the market that it was necessary to take some steps to stabilize the price which could only be done by fixing highest limit of loss which the seller would suffer, in case the price kept on rising. With this end in view, the Directors in a meeting held on the 7th of January, 1950, passed a resolution fixing Rs. 17/8/ as the ceiling price beyond which the company would not accept settlements of any of the transactions in futures. The resolution runs as follows:--

"Resolved unanimously that the price of the forward transaction in Gur for Phagun Sudi 15, Sambat 2006 in this Chamber shall not be allowed to rise above Rs. 17/8/- and the rate of Miti due date and demand shall not be settled above Rs. 17/8. Until Phagun due date, Chamber shall not accept bijaks above Rs. 17/8/- and no minimum rate shall be fixed."

On that very date, after the resolution had been passed, all the sellers including the petitioners were required to deposit Chook which would be due at the maximum rate of Rs. 17/8/- per bijak. It is the common case of both the parties that partly by making deposits on the same day and partly by making deposits on the days following, the petitioners did deposit with the company the entire amount of Chook falling due on calculation at the maximum rate of Rs. 17/8/- per bijak.

The case of the petitioners was that in depositing the Chook in pursuance of this resolution of 7th January, 1950, the petitioners not only deposited the amount due in respect of 1,136 bijaks standing in the names of the petitioners but also the Chook due on the transactions standing in the names of the other five firms mentioned above. It has been accepted by the company that in the case of the Chook due on the transactions standing in the name of Ram Swarup Shadi Ram, the petitioners issued cheques in the name of that firm, which were endorsed in favour of the company and cashed by the company.

In the case of the remaining four firms, the evidence only disclosed that the petitioners had issued cheques in favour of those firms but there is nothing to show either that the petitioners made the deposits with the company or even that the cheques issued by the petitioners in favour of those firms were actually endorsed in favour of the company and cashed by the company.

After these deposits had been made, the transactions in futures continued to remain outstanding. As a result of the resolution passed by the company fixing the ceiling price of 7th January, 1950, the quotations for the rate of bijaks in futures for Phagun Sudi 15 Sambat 2006 could not thereafter rise above Rs. 17/8/-. But it appears that the quotations for the rate of ready Gur continued to rise.

The result was that the Government of India decided to intervene and on the 15th of February, 1950, the Govt. of India issued a Notification No. SV-101 (II)/49 amending the Sugar (Futures and Options) Prohibition Order, 1949 by adding Gur to that order and making certain other amendments. It is the common case of the parties that the result of the amendment of the Sugar (Futures and Options) Prohibition Order, 1949 by adding Gur in that order was that all future transactions in futures or options in Gur were prohibited so that after that date no transactions either in futures or in options in Gur could be entered into by anyone.

There is, however, a dispute as to whether this Notification also rendered void all outstanding transactions in futures in Gur which had not yet matured and which were yet to be settled after that date. The contention on behalf of the petitioners is that the result of the amendment of the Sugar (Futures and Options) Prohibition Order 1940 by the Notification of 15th February, 1950 mentioned above introducing Gur in that order, was that even the outstanding transactions in futures in Gur all-became void; whereas the case taken up on behalf of the company is that this Notification did not, in any way, affect the outstanding transactions which had been entered into earlier and which could, therefore, still be settled subsequent to that date.

In this connection, very considerable reliance was placed by the petitioners on what, according to the petitioners, was a press note issued by the Govt. of India before the Notification could actually be Gazetted, indicating the contents of the Notification. It may be mentioned that at the time when this Notification was issued there was also simultaneously another Notification banning movement of Gur, Gur Sakkar or Khandsari Sakkar by rail within or outside U.P.

The purpose of this second Notification also was to check the abnormal rise in the price of Gur. According to the petitioners, the press note relating to both the Notifications was issued by the Government of India sometime on the 14th of February, 1950, and it was broadcast throughout India through the press trust of India and All India Radio and was extensively published throughout the country in the morning papers of 15th February, 1950.

It is the further case of the petitioners that in this press note it was clearly mentioned by the Government that the Notification which prohibited futures and options in Gur, Gur Sakkar and Rab in addition to sugar, also provided that all such transactions entered into before the commencement of that order or remaining to be fulfilled, were to be void and not enforceable by law.

When the first petition on 22nd February, 1950 for the winding up was filed by the petitioners, reliance was placed in the petition principally on the press note which had been issued by the Government of India without giving in detail the contents of the Notification by which the Sugar (Futures and Options) Prohibition Order, 1949 had been amended or indicating what were the provisions of the amended Sugar

(Futures and Options) Prohibition Order, 1949, which resulted in rendering all transactions entered into before the commencement of the order or remaining to be fulfilled, void and not enforceable by law.

According to the version given in the petition of the 22nd February, 1950, Mohan petitioner came to know of the aforesaid Notification on the morning of 15th of February, 1950 and he thereupon proceeded at once to Muzaffarnagar where he was informed that, in contravention of the provisions of this Notification, the management was intending to make payments to themselves and others on the pretext of settling all pending contracts at the rate prevailing on 14-2-1950.

It was also alleged that, immediately after the decision of the Central Government came to the knowledge of the management of the company, the company suspended all business and the Chamber remained closed for three days. Some of the Directors of the company hurriedly assembled on 15-2-1950, and with a view to defraud the company and its members of large amounts lying in trust with them and with the fraudulent object of misappropriating such amounts for their own benefit or for the benefit of their firms, relatives, friends and associates, issued a large number of cheques.

It was ''also pleaded that when Mohan Lal proceeded to Muzaffarnagar on the morning of 15th February, 1950, he immediately rushed to the office of the company and found the manager and a number of Directors assembled there. He warned them that the Notification which was already known to them made ail future contracts in Gur void and that his firm was entitled to the refund of all amounts deposited as Sai and Chook.

The precise time or occasion Mohan Lal went and had this talk was not indicated in the petition, but in the course of his evidence Mohan Lal petitioner stated that he had reached the office of the comoany at 9-30 a.m. and it was at that time that he had this talk with the manager and some of the Directors. According to the petitioners, he was given no definite reply either by the manager or the Directors.

Thereupon he returned to his office after giving a warning that any action in settling the transactions on their part would be absolutely illegal and would make them personally, liable for any loss caused to the petitioner''s firm. On return to his office, he addressed a letter to the company and sent it through his employee Raja Ram, who presented it to Trilok Chand manager of the company.

The manager refused to accept delivery of the letter when Raja Ram returned and informed Mohan Lal that there was a strong rumour in the office of the company to the effect. that the Directors had decided to settle all pending contracts at some arbitrary rate. Thereupon, the petitioner sent a telegram to the company alleging that the company had refused to accept the letter of his firm and that he had heard that the company had settled Phagun Mitti Sambat 2006.

He enquired what were the grounds on which the company had settled. According to the petitioners, a reply was received by them the following day, i.e., 16-2-1950 in which it was said that no letter bad been refused and that Phagun Miti had been settled by the Board of Directors basis being the closing rates of last day of business on the 14th. With regard to the action which was taken by the company on the 15th February, 1950, the case put forward on behalf of the petitioners had already been mentioned as showing that the management of the company had hurriedly called a meeting on that date and had settled all outstanding transactions.

On further information, the case accepted by the petitioners is that this meeting of the Directors was held on the 15th of February, 1950, on the basis of a requisition which was received by the company from a number of members of the company who had entered into transactions in futures for Phagun Sudi Sambat 2006. The further case is that on 16th of February, 1950, Banarsi Das, the father of Mohan Lal petitioner came to Muzaffarnagar on getting information of the Government Notification from the newspapers at Lucknow where he happened to be on that date and met Mohan Lal.

Banarsi Das had with him Hargovind Lal. When they met Mohan Lal petitioner, Mohan Lal informed them of all the events which had occurred on the 15th of Feb., 1950, whereupon Banarsi Das and Har Govind Lal went to the office of the Chamber. There they found Trilok Chand in the office. Banarsi Das enquired from Trilok Chand why he was distributing the money when he was informed that the Directors had passed a resolution and he was distributing the money in pursuance of it.

According to Banarsi Das and Har Govind Lal, the register containing the resolution was shown to them by the manager Trilok Chand. The contents of the resolution which were recorded in the minute book, have been the subject of great controversy between the parties. On behalf of the petitioners a case has been set up that the resolution, as it found place in the minute book when it was subsequently seized by the provisional liquidator appointed by this Court in connection with the petition dated 22nd of February, 1950, was different in three respect from the resolution as it was found recorded when Banarsi Das and Har Govind Lal saw it on the 16th of February, 1950.

The controversy has arisen principally because the case taken up on behalf of the petitioners is that the resolution was to the effect that the company was actually settling all outstanding transactions in futures relating to Phagun Sudi 15, Sambat 2,006, whereas the case set up on behalf of the company is that the resolution did not go further than merely laying down the rate at which parties could settle those future transactions which means that an option was left to the parties, either to settle the transactions at those rates or allow the transactions to continue and settle them later in accordance with the original terms and conditions of the contracts in respect of those transactions.

The case set up on behalf of the petitioners is that the actual language used in the resolutions which was seen by Banarsi Das and Har Govind Lal, was that "the transactions are being settled" (settle kar diye jate hain) whereas subsequently the record of the resolution was changed by saying that rates for the transactions are fixed (Bhao qaim kar diye jawen). Two further changes in the record of the resolution were also alleged by the petitioners.

One change was that the original record of the resolution showed that eleven directors were present whereas the subsequent record contained names of only ten directors. The other alteration was that the original record did not make any mention of the presence of Mohan Lal at the meeting in which the resolution was passed whereas the subsequent record showed that Mohan Lal was also present in the meeting.

All these allegations about the talk which took place between Banarsi Das and Trilok Chand on 16th February, 1950, about the scrutiny of the record of the resolution by Banarsi Das on that date and about the alterations in the record of the resolution, were put forward in the court in proceedings subsequently to the filing of the petition, partly in the course of affidavits filed, and fully in the course of evidence tendered on behalf of the petitioners.

In the first petition filed on the 22nd of February, 1950 and in the subsequent petition filed on the 23rd of February, 1950, there was no mention of these allegations. The further case of the petitioners put forward in their petition is that in pursuance of the resolution of the 15th February, 1950, the company paid out a sum of about Rs. 30,00,000 to the various Directors and members of the company and by refunding the securities of the brokers to them.

Further, in their books of account the company showed settlement of transactions relating to Phagun Sudi 15 Sambat 2,006 including the transactions entered into by the petitioners and the transactions outstanding in the name of the firm Ram Swarup Shadi Rao as well as the other four firms, whose names have been mentioned above. These entries were made sometime between 15th and 18th February, 1950, Thereafter, the petitioners came to this Court and presented their first petition for winding up of the company on 22nd of February, 1950.

In the second petition filed on 23rd of February 1951, the allegation is that by sending the tele gram dated the 16th of February, 1950 and by making entries of settlement of transactions in their books of account, the company had indicated its refusal to perform the contracts which had been entered into between the company and the petitioners and further by paying out large sums of money amounting to Rs. 30,00,000/-, the company had disabled itself from performing those contracts.

Consequently, after filing the first petition on the 22nd of February, 1950, a letter was sent on, behalf of Mohan Lal and Co. on 23rd of February, 1950 rescinding all these contracts and subsequently another letter rescinding the contracts was sent

on 1st of March, 1950, which was received by the company on the 2nd of March, 1950. It was also alleged in the second petition that, on the 1st March, 1950, the Government of India issued one other Notification imposing further restrictions on the transport of Gur.

As a result of the Notification of the 15th February, 1950 which had already imposed certain restrictions on the transport of Gur by rail, contracts which had been entered into by Mohan Lal and Co. with the company, had become impossible of performance so that there was frustration of those contracts and the contracts became void, entitling the petitioners to the refund of the amounts deposited by them.

The whole amount of refund claimed was to the extent of Rs. 12,00,000/- and odd. which was said to be the amount deposited in respect of the bijaks which stood in the names of Mohan Lal and Co., Ram Swarup Shadi Ram and the other four firms mentioned above. On those facts, these two petitions were moved for winding up the company and the grounds urged on their basis for seeking the winding up orders are indicated by the issues which were framed by the learned Company Judge and are reproduced below:--

1. Whether the petitioners, or any one of them were or was creditors or creditor of the company on 22-2-1950 or 23-2-1951?

2. Whether the petitioners'' debt is disputed in good faith by the company? If so, what is its effect on the maintainability of this petition?

3. Whether the company is unable to pay its debts?

4. Wheher it is just and equitable to wind up the company because

(i) there have been fraud and misappropriation by the directors;

(ii) the substratum of the company is gone;

(iii) there is no bona fide intention to carry on business:

(iv) there is no prospect of the company trading at profit;

(v) the main object of the company has substantially failed and has become impracticable;

(vi) there is no properly constituted Board of Directors;

(vii) a large majority of shares is held by the directors and their associates and persons to whom illegal payments have been made, and are recoverable from directors members and their associates;

(viii) large amounts have been misapplied by the directors;

(ix) there is justifiable lack of confidence in the directors and the management;

(x) the directors have materially altered the resolution which was passed on 15-2-1950 and have substituted a new resolution (which was never passed) in place of the one actually passed.

5. Whether the business of forward contracts in silver was ultra vires the company? If so, does that furnish a just and equitable ground to wind up the company?

6. Whether the directors settled contracts of Phagun 2006 on 15-2-1950 otherwise than at the request of the parties concerned? If so, did their act furnish a just and equitable ground for winding up the company?

7. Was there a valid transfer of the rights of Messrs. Rain Swarup Shadi Ram in favour of the petitioners? If so, did the company act fraudulently in settling the claim with Messrs. Ram Swarup Shadi Ram instead of with the petitioner. Does that amount to a just and equitable ground for winding up the company?

8. Whether some or all of the directors had, in the eye of law, vacated office before 15-2-1950? ,If so, what was its effect?

9. Whether the petitioners arc, in their capacity as contributories, estopped from raising the preceding issue?

8. Besides the points of controversy covered by the issues mentioned above, there arose, during the course of hearing of the winding up petition, another very important question which, as contended on behalf of the appellants and as admitted by the respondents, went to the root of the case and which was whether the result of the Notification of 15th February, 1950 was that all outstanding transactions in futures in gur remaining to be fulfilled, became void or they continued to be valid and capable of being settled subsequently.

No specific issue was framed on this question by the learned Company Judge, as the procedure, which was adopted for dealing with the winding up petition, made it necessary that this question should be decided as a preliminary issue at an early stage of the hearing. The point having been decided before the issues were framed by the learned company Judge there arose no occasion for framing an issue on this point.

What happened was that, in connection with the appointment of a provisional liquidator, which was sought in pursuance of the winding up petition presented on 22-2-1950, the learned single Judge dealing with company cases, considered it advisable to refer the case to a Division Bench.

While the matter was before the Division Bench and the question of appointment of the provisional liquidator was being considered, a suggestion was made by Mr. Pearey Lal Banerji, learned Counsel for the respondents that this queslion about the invalidation of all outstanding transactions in futures in gur as a result of the Notification of 15-2-1950, may be decided by an early date as thereafter

consideration of other questions, which had to be decided by the Bench, might not be necessary.

This request was made on 12-5-1950, and on this request, the case was fixed for 22-5-1950 for the decision of this point as a preliminary issue. The order passed on the 22nd of May, 1950, shows that, on behalf of the respondents company, it was conceded that, if the interpretation placed on the amended Sugar Control Order on behalf of the present appellants was correct, a winding up order would have to be made.

The reason for this concession on behalf of the respondents company was not clearly brought Out in the order of the Division Bench, but it appears to be obvious. The admitted facts of the case were that, after the amendment of Sugar Control Order by the Notification dated 15-2-1950, the company had passed a resolution for settlement of all outstanding transaction in futures and, in pursuance of that resolution, had actually settled transactions with almost all the buyers in Sugar, who had entered into transactions in futures for Phagun Sudi 15 Sambat 2006.

As a result of this settlement, very large sums of money were paid out by the company to those buyers. As has been mentioned earlier, the case of the petitioners was that the amount paid was somewhere in the region of rupees thirty lacs. On behalf of the petitioners it was admitted that the payments, which were made, were, in the region of rupees thirteen lacs. The company had a paid up capital of below rupees one lac.

Near about the date 15-2-1950, the assets in the hands of the company consisted of some immovable property, deposits in banks and cash, and these included very large sums which had been received as Sai and Chook from the various members of the company, who had entered into contracts with the company. The sum received as Sai and Chook deposits with the company, amounted to at least more than rupees twelve lacs.

If the result of the Notification of 15-2-1950, was to render all transactions in futures outstanding on that date, void, the company would clearly have been liable to refund the Sai and Chook deposits which had been received by the company from the various members in respect of those transactions, so that the company was liable to refund a sum of more than rupees twelve lacs to the holders of the bijaks for sale of gur.

On the other hand, the holders of bijaks for buying gur would not have been entitled to any profits and the amount of rupees thirteen lacs or thereabout, which was disbursed to them as profits earned by them on those transactions in futures, could not have been validly paid to them. The company, on the other hand, actually proceeded to pay off the profits, which were due on the basis of the settlement of outstanding transactions in pursuance of the resolution of 15-2-1950.

The action taken by the management of the company in these circumstances led to the position that, if those outstanding transactions were void, the company had unjustifiably paid out a sum of money in the neighbourhood of rupees thirteen lacs to persons not entitled to it, whereas the company had become liable to refund the Sai and Chook deposits to the holders of the bijaks for sale a sum of about or over rupees twelve lacs. This would mean that the action, which was taken by the company was most imprudent and placed the company in a very precarious financial condition.

The company would have become liable to refund the huge sum of rupees twelve lacs when its paid up capital was less than rupees one lac, and this liability could only be met it the company could successfully realise back the sum of rupees thirteen lacs or so which the company paid out to the buyers as their profits in respect of those void transactions.

Consequently if it be held that the Notification of 15-2-1950 had rendered all outstanding transactions in futures in gur void, the subsequent action taken by the management of the company was such that the company was facecl with an immediate failure and, in those circumstances, a winding up order would necessarily be just and equitable.

This point was, therefore, of prime importance in the decision of the petition for a winding up order. The Bench, by its order dated 22-5-1950, held that the Notification dated 15-2-1950, did not render the outstanding transactions in futures in gur void.

Thereafter the case went back to the learned single Judge, who was dealing with company cases, and then further proceedings were taken on the petition for winding up order. Naturally, when the petition came up for hearing before the learned single Judge subsequently the learned single Judge did not enter into this question again and accepted the findings given by the Division Bench.

9. In these appeals it has been contended on behalf of the appellants that the decision of that Division Bench was incorrect and should be set aside by us. On behalf of the respondents a preliminary objection was taken that, the decision on the point being by a Division Bench, it has to be treated as a decision of two learned Judges of this Court from which an appeal cannot be entertained by any other Bench of this Court so that we are not competent to go into this question in these appeals.

It was urged that our jurisdiction in appeal was confined to consideration of only those questions which had been decided by a single Judge of this Court. On behalf of the appellants the reply was that, even though this particular point may have been decided by a Division Bench, that decision is open to challenge in the present appeals as it must be treated as a part of the final judgment passed in the winding up petition by a single Judge and the particular Court or the Bench competent to hear the appeal against the decision of the single Judge, is also competent to

re-examine this finding.

The contention of the learned Counsel for the respondents was that the decision of the preliminary point by the Division Bench cannot be treated as a part of the decision of the petition by the single Judge and cannot be reexamined in these appeals. In support of this argument learned Counsel for the respondents relied upon the principles emerging out of a decision of a Division Bench of this Court in Musammat Masihunnissa and Others Vs. Musammat Kaniz Sughra,

In that case, a Second Appeal was heard by a single Judge of the High Court and the case was remanded to the lower appellate Court under Order 41, Rule 23 of the Code of Civil Procedure. On remand, the lower appellate Court arrived at a certain finding and, in its turn, remanded the suit to the court of first instance for decision on the merits. There was again an appeal from this order of remand of the first appellate Court but the main ground taken in this appeal was one challenging the first order of remand made by the High Court.

It was held that, though in the case of a remand under Order 41, Rule 25 of the CPC by a Judge or Bench of the High Court, another Judge or another Bench before whom the appeal subsequently comes up for disposal was not bound by the remand order and could consider the question of its correctness, in the case of a remand under Order 41, Rule 23 of the CPC by a Single Judge, from which an appeal lay under the Letters Patent but no appeal was preferred against the correctness of the order of remand, could not thereafter be challenged u/s 105(2) of the Code of Civil Procedure, nor could the findings arrived at in the remand order be ignored.

Learned Counsel for the respondents, in our opinion, rightly urged that this decision indicates the principle that if the High Court had once lost complete seisin of the case by remanding the case under Order 41, Rule 23 of the Code of Civil Procedure, that order would not be re-examined by the High Court if the case came up again by another appeal from some decision of the lower Courts.

This principle is quite separate and distinct from the principle that, if the court does not lose seisin of the case and merely makes an order of remand under Order 41, Rule 25, of the Code of Civil Procedure, the Court retains competence to re-examine the points decided by it in the order by which an issue or issues may have been remitted for findings under Order 41, Rule 25 of the Code of Civil Procedure.

In the latter case, even though the case goes on remand to the lower Courts for a finding on certain issues, the High Court never loses seisin of the case and the original appeal pending before the High Court continues to remain pending. When the finding from the lower Courts is received, the jurisdiction, which the High Court exercises, is in continuation of the previous jurisdiction which became vested in the High Court, as a result of the appeal having originally been filed in the High Court.

In the case of a remand under Order 41, Rule 23, Civil Procedure Code, on the other hand, once the order of remand is made by the High Court, the appeal before the High Court is finally concluded so far as the High Court is concerned and, when the case comes up again, it comes up as a fresh proceeding which cannot be held to be in continuation of the original proceeding in which the order of remand under Order 41, Rule 23, was made.

It was urged in the present case that, when the Division Bench passed this order on the 22nd of May, 1950, it was exercising special jurisdiction because of the reference made to that Bench on a particular question of importance by the single Judge and, thereafter, when the Bench gave its decision and the case went back to the learned single Judge, the Bench last seisin of the case so that that decision must be treated as a final decision of the Bench which cannot now be re-examined in an appeal against the judgment of the single Judge,

In our opinion, the argument has a fallacy. In the case of 19 All LJ 139: (AIR 1921 All 276) relied upon by the learned Counsel, the order which was under consideration, was an order by the High Court under Order 41, Rule 23, as a result of which the High Court as such was no longer seized of the case and the matter, which had come up before the High Court, had been finally decided so far as the High Court was concerned.

In the case before us the position is different. The winding up petition was pending before the High Court and only a preliminary point arising in it came up before the Division Bench. Before the case was placed in the list of the Division Bench and even after the Division Bench had given its decision on 22nd of May, 1950 and sent back the case to the single Judge, the winding up petition continued to remain pending in the High Court.

The High Court, as such, therefore, had continuous seisin of the case throughout the period prior to the order of the Division Bench. While the Division Bench was dealing with the case as well as subsequent to the order of the Division Bench. At no stage did the High Court lose seisin of the case. The Bench may have lost seisin of the case by giving its decision and sending the case back to the single Judge; but, in giving the decision, the Bench was exercising the jurisdiction which was vested in the single Judge also and was consequently exercising concurrent jurisdiction with the single Judge.

That decision of the Bench was, therefore, in exercise of the same jurisdiction which was vested in the single Judge and hence it cannot be said that that decision cannot be treated as a part of the decision if the single Judge by which the winding up petition was finally disposed of. The preliminary objection raised by learned counsel for the respondents does not thus find support from the decision reported in the case of 19 All LJ 139: (AIR 1921 All 276) cited above.

We have, however, considered it unnecessary in this case to give a final decision on this preliminary objection raised by learned counsel because, in our view, whether we hold that we have jurisdiction to rehear this question or not to rehear it, the result is the same. If the decision of the Division Bench be held to have become final and to be a decision which we, in these appeals, are not competent to re-examine, then for purposes of these appeals that decision must be accepted and the appeals decided on the basis that that decision is correct.

On the other hand, even if we are competent to re-examine the decision given by that Bench on the basis that it is a part of the decision of the winding up petition by the single Judge, we consider that on merits there is no reason at all to differ from the view taken by the Division Bench. We may say, with respect, that we entirely agree with the view which was taken by the Division Bench on this point. Of course, if we had been inclined to disagree with that decision and to hold that we are competent to rehear that point, we would have considered it appropriate to refer this point for opinion to a larger Bench.

But, since we agree with the decision of the Division Bench, we do not think that there is any need at all to refer this question to a larger Bench. We may now indicate our reasons for agreeing with the view taken by the Division Bench on this point besides the reasons which led the Bench to give that decision and which, we need not repeat.

10. The point specifically raised would be clear from the language of the Sugar (Futures and Options Prohibition) Order, 1949, as it read after the amendment by the Notification dated the 15th of February, 1950. The relevant clauses are as follows;

"2(d) Futures in Sugar and Gur mean any agreement relating to the purchase or sale of sugar or gur made on a forward basis and providing for delivery at some future date and payment of margin on such date or dates, as may be expressly or im-pliedly agreed upon by the parties.

2(e) margin means the difference between the price specified in an agreement relating to the purchase of or sale of sugar and gur and the prevailing market price for the same quality and quantity of sugar or gur on a particular day;

2(f) Option in sugar or gur means an agreement for the purchase or sale of a right to buy or a right to self or a right to buy and sell, sugar or gur in future and includes a teji a mandi and tejimandi in any sugar.

3. On or after the appointed day no person shall

(a) save with the permission of the Central Government in this behalf or of an officer authorised by the Central Government in this behalf, enter into any futures in sugar or gur, or pay or re ceivei or agree to pay or receive any margin in connection with any such futures.

(b) enter into any option in sugar or gur,

4. Any option in sugar or gur entered into before the appointed day and remaining to be performed whether wholly or in part shall be voic within the meaning of the Indian Contract Act 1872 and shall not be enforceable by law."

It was not contended, as it could not be contended by learned counsel for the appellants in view of the language quoted above, that there was any specific and clear provision in this order making futures in gur entered into before the appointee day or remaining to be performed wholly or in part void. What was contended by learned counsel was that the effect of the language used in Sub-clause (a) of clause (3) was to make all such outstanding transactions in futures in gur void.

The direction laid down by the Sub-clause is divisible into two parts. There is first the direction which has the effect of prohibiting all persons from entering into any futures in sugar or gur after the appointed day save with the permission of the Central Government or of an officer authorised by the Central Government in this behalf.

The second part of the direction prohibits any payment or receipt of or any agreement to pay or receive any margins in connection with any "such futures". The controversy has arisen because of the use of the word ''such'' before the word ''future'' in the second part of the directive contained in the Sub-clause.

The contention of the learned counsel for the appellants was that the expression ''such futures'' means futures in gur or sugar referred to in the first part of the directive and if this contention be accepted, it was urged, that the result of the second directive was to prohibit any payment or receipt of margins in respect of transactions in futures in sugar or gur which would also include outstanding transactions which had been entered into before the appointed day.

The effect of this prohibition of payment or receipt of margins would be that those transactions would be impossible of performance, as payment or receipt of margins is one of the essential ingredients of a contract or transaction in futures. On the other side, the argument was that in interpreting the words ''such futures'' in Sub-clause (a) of Clause (3), the reference by the word ''such'' should not be so restricted as to indicate that this expression was used to cover all futures in sugar or gur but that the proper interpretation would be to hold that this expression ''such futures'' refers to futures in sugar or gur of the type mentioned in the first directive.

The first directive laid down a prohibition against entry into any futures in sugar or gur after the appointed day so that the payment or receipt of margins was also prohibited only in respect of those futures the entry into which was prohibited by the first part of the directive contained in the Sub-clause viz. futures entered into after the appointed day.

11. Learned counsel for the appellants argued before us that the interpretation nought to be placed on behalf of the respondents amounted to doing violence to the language used by the legislature in the Sub-clause and that was totally unjustified. He referred us to various decisions of various Courts in which principles for interpretation of Statute were laid down. In the case of The New Piecegoods Bazar Co. Ltd., Bombay Vs. The Commissioner of Income Tax, Bombay, their Lordships of the Supreme Court said:

"It is elementary that the primary duty of a Court is to give effect to the intention of the legislature as expressed in the words used by it and no outside consideration can be called in aid to find that intention."

In Dr. Ishwari Prasad Vs. Registrar, University of Allahabad and Others, a learned single Judge of this Court remarked:

"It is, however, a well-known rule of construction that, if there is nothing to modify or qualify the language which the Statute contains, it mint be construed in the ordinary and natural meaning of the words."

In Newman Manufacturing Co. v. Marrable 19312 KB 297 Borridge J. had to ascertain the meaning of the word unfinished used in Sub-section (3) of Section 9 of the Finance Act 1928 when defining the expression ''buttons.'' In interpreting this word the learned Judge was of the opinion that he ought to look at the object of the section which was intended to protect the Englisa button trade.

He was of the view that the statute was directed against those who imported goods which were not quite buttons, but upon which the bulk of the work had been done abroad, very little remaining to be done by the manufacturers in England. Having arrived that this interpretation of the word ''unfinished'' by a reference to the intention of the legislature, the learned Judge proceeded further to hold that the articles in question in the case before him, were unfinished buttons.

The principle thus accepted by the learned Judge was that if a word is used which has to be interpreted and cannot be said to have a very precise meaning, the proper course to discover the scope of the word is to look at the intention of the legislature as indicated by the statute in which the word has been used-

12. Another principle of interpretation of Statutes was laid down by Lord Esher in the case of the Queen v. Bishop of London (1889) 24 QBD 213 where he agreed with the law of construction laid down by Lord Selhorne in one of the cases cited before him to the effect that:

"It is useless to enter into an inquiry with regard to the history of an enactment, and any supposed defect in the former legislation on the subject, which it was intended to cure, in cases where the words of the enactment are clear. It is only material to enter into such an inquiry where the words of an enactment are ambiguous and capable of two meanings, in order to determine which of the two meanings was

intended. In the first place, therefore, wo ought to look at the words of the section i self, and to read it according to the well-known canon in order to see what the words in their ordinary grammatical sense in the English language mean as applied to such a subject-matter as that with which the section deals."

In the Bank of England v. Vagliano Brothers 1891 ACJ 107 Lord Hat shell, one of the law lords delivering the judgment on behalf of the House of Lords, held:

"I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was p robably intended to leave it unaltered to see if the words of the enactment will bcai an interpretation in conformity with this view."

In Shrimati Hira Devi and Others Vs. District Board, Shahjahanpur, their Lordships of the Supreme Court, while considering the amended Section 71 of the U. P. District Boards Act, remarked:

It was unfortunate that, when the legislature came to amend the old section 71 of the Act, it forgot to amend section 90 in conformity with the amendment of section 71. But this lacuna cannot be supplied by any such liberal construction as the High Court sought to put upon the expression ''orders of any authority whose sanction is necessary''. No doubt it is the duty of the Court to try to harmonise the various provisions of an Act passed by the Legislature. But it is certainly not the duty of the Court to stretch the words used by the Legislature to fill in gaps or omissions in the provisions of an Act."

Lastly on this point learned counsel for the appellants brought to our notice the relevant principles relating to interpretation of Statutes given by Craiew in his book of Statute Law. 5th Edition at pages 65, 67 and 68. The principles are:

"Even if a Court is satisfied that the Legislature did not contemplate the consequences of an enactment, a court is bound to give effect to its clear language.

A statute, even more than a contract, must be construed, at res magis yaleat quam pereat so that the intentions of the Legislature may not be treated as vain or left to operate in the air. The intention of the Legislature, however obvious it may be, mast no doubt in the construction of statutes be defeated where the language it has chosen compels to that result, but only where it compels it.

We cannot aid the Legislature''s defective phrasing of an Act, we cannot add and mend and, by construction, make up deficiencies which are left mere. In other words, the language of Acts of Parliament, and more especially of modern Acts, must neither be extended beyond its natural and proper limits in order to supply omissions or defects, nor strained to meet the justice of an individual case.''''

These quotations from various cases and from Craies book on Statute Law indicate that the well recognised principles for interpretation of Statutes are that the Courts must give first precedunce to the plain meaning of the language used in the Statute and, if the meaning is clear and quite unambiguous, that meaning must be accepted by the Courts irrespective of other considerations, even though the purpose of the Legislature might be defeated by that interpretation.

On the other hand, if the language is such that it is either ambiguous or capable of more than one meaning, the Courts must seek aid from the other provisions of the Statute itself, in order to arrive at the proper meaning of the word used in that Statute; and that interpretation should be accepted which would result in properly carrying out the intention of the Legislature in enacting that Statute. In no case are Courts justified in stretching the language for filling up gaps or omissions or for the purpose of doing justice in individual cases. The principles brought to our notice by learned counsel for the appellants are well accepted and there can be no doubt that, in interpreting the Sugar and Gur Futures, and Options Prohibition Order, 1949, after the amendment by the Notification of 15th February, 1950, we must apply these principles.

But we are unable to agree with the learned counsel that the interpretation sought to be put on behalf of the appellants, is the correct interpretation of the provisions of that order in accordance with these principles.

13. As has been indicated above, the expression that has to be interpreted in this Notification is "such futures". It is not possible to hold that the word "such" used before the word "futures" in its plain meaning, necessarily means only futures in sugar or gur and not those f tures in sugar or gur which possess the further characteristic mentioned in the earlier part, viz., futures the entry into which is prohibited.

In fact, it appears to us that, when the word "such" is used before a noun in a later part of a sentence, the proper con truction in the English language is to hold that the same noun is being used after the word "such" with all its characteristics which might have been indicated earlier in the same sentence. The language used in the Notification thus favours the interpretation sought to be put on behalf of the respondents.

14. The second principle that, if the language is either ambiguous or capable of more than one meaning the Courts must seek aid from the other provisions of the Statute itself in order to arrive at the proper meaning of the word used in that Statute and that that interpretation should be accepted which would result in the properly carrying out the intention of the legislature in enacting that Statute, also in the present ca e supports the contention or the respondents rather than the interpretations-sought to be put on behalf of the appellants.

The Sugar and Gur Futures and Options Prohibition Order 1949 as amended by the Notification of the 15th February, 1950, was intended to check the abnormal rise in the price of Sugar and Gur and it appears that for that purpose, the Government considered it necessary to prohibit or regulate futures in sugar or gur as well as options in sugar or gur.

Sub-clause (a) of Clause 3. which we have so far considered, deals with futures in sugar or gur and Sub-clause (b) of Clause (3) deals with options in sugar or gar. Sub-clause (b) of Clause (3) lays down an absolute prohibition against entry into any options in sugar or gur after the appointed day. Then comes Clause (4) which deals with options in sugar or gur entered into before the appointed day and remaining to be performed whether wholly or in part.

In this clause it is laid down in plain language that all options in sugar or gur entered into before the appointed day and remaining to be performed wholly or in part, were to be void within the meaning of the Indian Contract Act and were not to be enforceable by law. The introduction of this clause, specifically dealing with options in sugar or gur entered into before the appointed day and remaining to be performed without a similar clause relating to futures in sugar or gur, itself gives an indication.'' that the Government intended to make different types of provision for ''options in sugar or gur, and futures in sugar or gur''.

In the case of options in sugar or gur, all outstanding contracts of options were declared void and unenforceable by law. Had it been intended that futures in sugar or gur, which were outstanding, were also to become void, there is no reason at alt" why a similar provision in similar language could not have been put in respect of all outstanding futures also.

In fact, there would have been no difficulty at all in slightly changing the language of Clause (4) and mentioning therein, not only options in sugar or gur but also futures in sugar or gur. The fact that futures in sugar or gur were not mentioned in Clause (4) leads to the interpretation that outstanding futures in sugar or gur were never intended to be declared void or unenforceable by law. Clause (3), as we have indicated earlier, dealt with both, futures in sugar or gur as well as options in ugar or gur and that clause, it is clear, was incorporated with the specific purpose of prohibiting futures in : ugar or gur as well as options in sugar or gur, which were to be entered into after the appointed day.

In the case of options in sugar or gur, there was a total prohibition into entry of any such options after the appointed day; whereas in the case of futures in sugar or gur, there was a prohibition with a saving clause permitting entry into such futures in sugar or gur even after the appointed day with the permission of the Central Go ''eminent, or an officer authorised by the Central Government.

It is thus clear that futures were treated in a way different from options in that behalf. Having thus dealt with all futures in sugar or gur, as well as, options in sugar

or gur which could be entered into after the appointed day, this order proceeds in Clause (4) to deal with the outstanding ''options in sugar or gur'' which were declared under that clause to be void and unenforceable by law.

Since it was not intended that outstanding ''futures in sugar or gur'' should also become void and unenforceable by law, no mention of the outstanding futures in sugar or gur was made in Clause (4) nor was any other separate clause included in the order for that purpose.

The omission of a specific clause in respect of outstanding futures in sugar or gur similar to Clause (4) dealing with outstanding options in sugar or gur, in our opinion, must lead to the conclusion that the Government could not have intended to render outstanding futures in sugar or gur void by implication on the interpretation of Sub-clause (a) of Clause (3) which is sought to be put on it on behalf of the appellants. The specific mention of outstanding options in sugar or gur in Clause (4) points to the fact that the Government, when passing the order, was aware of the fact that it was necessary to deal with these outstanding transactions also.

Being aware of it, the Government specifically declared outstanding options in sugar or gur void and unenforceable by law. Had it been at all intended to declare outstanding futures in sugar or fur also void and unenforceable by law. it would e expected that, in these circumstances, the Government would certainly have made similar provi-sions in plain language and, consequently, other clauses of the order should not be so interpreted as to defeat the purpose of the Government indicated by this omission.

The intention of the Government gathered from the order, as a whole, also thus bears out that the word "such" as used in Sub-clause (a) of Clause (3) of the order must be interpreted so as to refer not merely to futures in sugar or gur but to futures in sugar or gur which possess the further characteristic of being prohibited from, being entered into after the appointed day.

15. Lastly we may deal with the third argument of the learned counsel for the appellants that, on the interpretation we are inclined to accept, it would appear that the prohibition against payment or receipt of or agreement to pay or receive margins in connection with futures in sugar or gur would be redundant.

It was argued that once the entry into futures in sugar or gur was already prohibited, there could be no question of payment or receipt of margins in respect of the prohibited futures and the interpretation, which would make this prohibition relating to payment or receipt of margins redundant, should not be accepted by us.

We are unable to agree that the provisions prohibiting payment or receipt of margins would become redundant on the interpretation which we have accepted above. It appears to us that this provision was made with the specific; object that, even in respect of futures entered into with the permission of the Central

Government or an officer authorised by the Central Government in that behalf after the appointed day the Government should be able to keep control over the payment of margins.

The expression "save with the permission of the Central Government or an officer authorised by the Central Government in this behalf" places a limitation not only on entry into futures in sugar or gur but also on payment or receipt of or agreement to pay or receive margin in connection with the futures.

The Government, therefore, seems to have considered it advisable that, even if entry in sugar or gur after the appointed day be permitted, the further steps taken by the businessmen in respect of them of paying or receiving margins should also be under the constant control and supervision of the Government. The question of redundancy thus does not arise.

Further, there is the aspect of enforcement of these laws by application of penal consequences. Even if it be accepted that without a specific prohibition for payment or receipt of margins in Clause (3)(a) of this order no such margins could be paid or received in respect of the futures which were already prohibited, any such payments or receipts would amount to entry into void transactions which could be avoided through civil courts, but the per- , sons paying or receiving margins would not be liable to punishment for such action under any law.

On the other hand, the result of introducing this prohibition against payments or receipts or margins in connection with such futures in Sub-clause (a) of Clause (3) of this order was that a breach of this prohibition became a criminal offence punishable u/s 7 of the Essential Supplies Temporary Powers Act, 1946. It is,, therefore, very likely that this specific prohibition in respect of margins was introduced in this order for the purpose of ensuring that a breach would become punishable as a criminal offence so that this prohibition was likely to be more strictly adhered to by the persons concerned. Consequently the contention that, on the interpretation accepted by us, this prohibition relating, to margins would be reduncfant, cannot be accepted.

The correct interpretation both on the basis of the plain language used as well as on the basis of the intention of the Government gathered from the provisions of the Order in their entirety would lead to the conclusion that Sub-clause (a) of Clause (3) only prohibited entry into futures in sugar or gur after the appointed day and made a further provision in respect of payment or receipt of margins in connection with only those futures and that there was nothing in this order rendering outstanding transactions of futures in sugar or gur, which remained to be performed wholly or in part, void and unenforceable by law.

This is the reasoning which, in addition to the reasons already given by the Division Bench, has led us to the view that the decision arrived at was perfectly correct so that, even if it had been open to us to set aside the decision of the Bench in appeal,

we would have no reason at all to do so.

16. Having disposed of this preliminary point, we have now to deal with the points in dispute between the parties which formed the subject-matter of the issues which were framed by the learned single Judge. Of these issues the first two relate exclusively to the claim for the winding up order made on behalf of the petitioners in their capacity as creditors.

The remaining seven issues relate principally to the claim made by the petitioners for the winding; up order in the capacity of contributories, though some of these issues also have a bearing on their claim in the capacity of creditors. In these circumstances, we consider it advisable to deal with those issues first which arise in respect of the claim of the petitioners as con tributaries and come later to the first two issues which relate to their capacity as creditors only. In dealing with these issues it appears to us that it would be convenient to take at the very outset issues 4(vi), 8 and 9.

17. These three issues relate to the proper constitution of the Board of Directors and consequently, affect the validity of all the transactions entered into by the respondents company. It is to be noticed that issue no. 4(vi) as framed challenges the proper constitution of the Board of Directors at the time when the winding up petition was presented in court.

Issue No. 8 dealt with the proper constitution of the Board of Directors immediately before 15th of February, 1950, which was the day on which the Notification prohibiting entry into futures in sugar or gur came into force. Issue No. 9 covers a preliminary objection raised on behalf of the respondents that the petitioners were estopped from raising issue No. 8.

There was no specific issue on the question whether the directors had, in the eye of law, vacated the office even before the 14th of March, 1949 when the Board passed the resolution bringing into effect the scheme for entry into transactions in futures for Phagun Sudi 15 Sambat 2006. During the course of arguments before us, however, learned Counsel for the appellants has argued the question o&#65533; the vacation of office by a number of Directors and of there being no properly constituted Board of Directors only with reference to the resolution of the 14th of March, 1949.

In fact, learned counsel during the course of arguments made a specific statement before us that, in case we do not accept the contention that there was no properly constituted Board of Directors on the 14th of March 1949 and that some of the Directors had vacated office before that clatei, he would not press the point that the Board of Directors was not properly constituted on or before the 15th of February, 1950. or on the date when the winding up petition was presented.

On the other hand, his statement was that in case we hold that there was a properly constituted Board of Directors on the 14th of March, 1949, he! would put forward a reverse case that there was a properly constituted Board of Directors on the 15th February, 1950 also and that the Board of Directors continued as such right upto the date of presentation of the winding up petition.

The point that some of the Directors had vacated office before the 15th of March, 1949 and the Board of Directors had ceased to be properly constituted by that date, was as we have just said above, not specifically taken anywhere in the pleadings on behalf of the appellants but it appears from the judgment of the learned single Judge that this point was raised before him during the course of argument.

We have also allowed that point to be argued before us in view of the circumstance that there was no grievance on behalf of any of the respondents that they were not aware that this point was going to be argued while the petition was presented and tried by the learned single Judge; nor was it contended mat they had, in any way, been pre-judiced by the failure on the part of the petitioners to raise this point in the pleadings, inasmuch as they did not give the necessary evidence on the point.

This argument could not be raised on behalf of the respondents because the point has been argued on behalf of the appellants on the basis of facts, which have been admitted on behalf of the respondents. The respondents'' company came into existence in the year 1931 before the amendment of the Indian Companies Act 1913, by the Indian Companies Amendment Act 1936 (Act XXII of 1936).

At the time when the company was incorporated, there was no specific prohibition in the Indian Companies Act restraining the directors of a company from entering into contracts with the company. It was for the first time by amendment in the year 1936 that Sections 86-F and 86-I were introduced dealing with this point. Section 86-F was as follows :

"86-F. Sanction of directors necessary for certain contracts--Except with the consent of the directors, a director of the company or the firm of which he is a partner or any partner of such firm, or the private company of which he is a member or director, shall not enter into any contracts for the sale, purchase or supply of goods and materials with the company, provided that nothing herein contained shall affect any such contract or agreement for such sale, purchase or supply entered into before the commencement of the Indian Companies (Amendment) Act, 1936 (XXII of 1936)."

Section 86-1 is as follows :

"86-1 Vacation of office of director --(1) The office of a director shall be vacated if-

(a) he fails to obtain within the time specified in Sub-section (1) of Section 85 or at any time thereafter ceases to hold, the share qualification, if any necessary for his appointment, or

(b) he is found to be of unsound mind by a Court of competent jurisdiction, or

(c) he is adjudged an insolvent, or

(d) he fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made, or

(e) he or any firm of which he is a partner or any private company of which he is a director without the sanction of the company in general meeting accepts or holds any office of profit under the company other than mat of a managing director or manager or a legal or technical adviser or a banker, or

(f) he absents himself from three consecutive meetings of the directors or from all meetings of -the directors for a continuous period of three months whichever is the longer without leave of absence from the Board of Directors, or

(g) he or any firm of which he is a partner or any private company of which he is a director accepts a loan, or guarantee from the company in contravention of Section 86D, or

(h) he acts in, contravention of S. 86F.

(2) Nothing contained in this Section shall be deemed to preclude a company from providing by its articles that the office of director shall be vacated on grounds additional to those specified in this section."

The contention on behalf of the appellants was that almost all the Directors of this company were carrying on business and entering into contracts with the company without the consent of the Board of Directors in contravention of the provisions of Section 86-F even after this provision of law had been introduced in 1936 and they continued to do so right till the year 1949, which resulted in automatic vacation of the office of directors by these persons in accordance with Section 86-I(1)(h).

It was pleaded in the winding up petition that most of the directors directly or through the firm of which they were partners or through partners of their firm, had entered into contracts for the sale and purchase of gur with the company and had thus contravened the provisions of Section 86-F of the Indian Companies Act and thus automatically vacated office of the directors under the mandatory provisions of Section 86-I(l)(h) of the said Act,

In the paragraph in which this pleading was included, the petitioners went on to say that because nearly all the directors were concerned or interested directly or indirectly in the arrangement arrived at in the resolution of 15th of February, 1950 they could not vote thereon nor could their vote be counted for the purpose of forming a quorum.

This part of the pleading, amounted to challenging the validity of the resolution of 15th February, 1950 not only on the ground that most of the directors had vacated

their office but also on the ground that they were not entitled to participate In the meeting of the 15th of February, 1950 as they were directly concerned or interested in the arrangement arrived at in the resolution of 15th of February 1950 under the prohibition laid down in Section 91B of the Indian Companies'' Act of 1936.

When the appeal was argued belore us this legal aspect was urged by learned counsel again not with reference to the resolution of 15-2-1950, but with reference to the resolution of 14-3-1949, when the Board of Directors sanctioned the scheme for transactions in futures for Phagun Sudi 15, Sambat 2006.

It was urged that, if the directors, who were interested in that arrangement be excluded, the number of directors whose votes u/s 91-B could be taken into account, fell below the prescribed quorum for the meeting of the Board of Directors so that the resolution of 14th of March, 1949 was invalid and all contracts entered into by the company in pursuance of that resolution were, therefore, void and unenforceable in law.

Both the points of law raised with regard to the constitution of the Board of Directors or the voting rights of the directors were thus urged before us only for the purposes of challenging the validity of the resolution of 14-3-1949 and it is in this aspect that we proceed to deal with them.

18. So far as the first point of vacation of office by the directors u/s 86-1 (1) (h) of the Indian Companies Act read with Section 86-F of the Act is concerned, the admitted case of the respondents is that, out of the eleven directors constituting the Board of Directors of the respondents Company, nine did in fact enter into contracts with the company. The only two directors, who did not enter into contracts with the company, were Deep Chand and Qabool Singh.

19. Deep Chand, who is the Chairman of the Board of Directors himself, in his evidence admitted that, during the period between the election of the Board of Directors in 1948 and 14-3-1949 when the resolution in question was passed, all the directors except he himself and Qabul Singh had entered into transactions with the company. This was also the admitted case of the respondents company itself as well as the other respondents.

It is also admitted that, umder the Articles of Association of the Company, the prescribed quorum for a meeting of the Board of Directors was four. If the contention on behalf of the appellants be accepted that the nine directors who had been carrying on transactions with the company had automatically vacated office, it would mean that the company was functioning with only two directors with the consequent result that no proper meeting of the Board of Directors with the required quorum could possibly have been held.

The contest on behalf of the respondents is not on the question of fact as to whether these nine directors were carrying on transactions with the company but

on the saving clause incorporated in Section 86-F of the Indian Companies Act, which permits directors of a company to enter into contracts with the company with the consent of the directors. The prohibition u/s 86-F of the Indian Companies Act, is not absolute.

There is the exception that even a director of the company can enter into contracts with the content of the, directors. In the present case, it was admitted on behalf of the respondents that there was no specific resolution at any meeting of the Board of Directors conveying consent of the directors to the entry into contracts by other directors with the company in accordance with Section 86-F of the Indian Companies Act.

But it was urged that this particular company, by its very constitution, envisaged that directors must carry on business with the company and consequently it must be held that there was implied consent of all the directors to the entry of contracts by other directors with the company. For this purpose, reliance was placed on Rules 5, 46(a) and 47 (b) of the Articles of Association which have already been quoted earlier.

Under Rule 5, no person or firm was entitled to remain as a member of the company who was found not to be doing any transaction or business through the company at Mazaffarnagar for continually six months. In such circumstances, the company was to give him a week''s registered notice asking him thereby why. his name should not be struck off from the, membership of the company and his share be put to sale.

Under Rule 46 (a) every member of the company who owned at least ten shares of the company in his own name or in the name of the firm of which he was a proprietor or partner could be elected as a director of the company. Rule 47, Clause (b) dealt with the vacation of the office of directors inter alia on the grounds of being adjudged an insolvent or making any agreement or composition with his creditors or if the cover money on transactions due from him was not paid in the office of the company within the fixed time.

It was urged that these rules included in the Articles of Association clearly showed that every director, who had to be a member of the company, was required to enter into transactions and in case he failed to do so for a continuous period of six months, he was liable to be removed from the membership of the company which would automatically have resulted in his removal from the office of the director also.

Of course, failure to carry on business for a continuous period of six months, did not automatically terminate either that membership of the company Or the directorship, but a member, who did not enter into any transactions during a continuous period of six months at least became liable to be removed by service of a week''s registered notice in writing asking him to show cause. Then in Rule 47 (b), there is the specific provision of vacation of office by a director if the director fails to pay the cover money due from him in the office of the company within the fixed

time.

The question of payment of cover money by a director could only arise if he had already entered into transactions with the company. This rule also thus specifically envisaged entry into transactions by the directors with the company. It has not been suggested that the transactions or business mentioned in Rules 5 and 47 Clause (b), refer to transactions different in nature from those which the nine directors in question were entering into with the company in the year 1948 and 1949.

In fact, on behalf of the appellants, the argument has proceeded on the basis that these rules must be held to refer to similar transactions. But a stand has been taken on behalf of the appellants on the specific language of Section 86-F of the Indian Companies Act, which requires consent of the directors and which, according to the appellants, must be express consent given by the directors at a meeting of the Board of Directors properly constituted and having proper quoram. On behalf of the respondents it has been urged that Section 80-F should not be so interpreted as to require a resolution of the Board of Directors recording their content at a meeting but should be held to cover even Implied consent of the directors.

The implied consent, according to the respondents, must be presumed from the fact that all the directors office as such being fully aware of the requirements of the rules mentioned above and in thus accepting office of a director, each director impliedly gave his consent to directors carrying on such transactions and business with the company. Implied consent is also sought to be inferred from the actual conduct of the directors, who went on entering into contracts with the knowledge of one another and who never objected to the entry into such contracts by the directors during the whole period that the company has been carrying on its business.

This contention of the respondents about the existence of implied consent of all the directors to the carrying on business with the company by the directors, in our opinion, has great force and must be accepted. Initially when the company was constituted, there was no prohibition under law to the directors carrying on business with the company and at that time, of course, no question could arise of such an implied consent being inferred.

The Indian Companies Act was, however, amended in the year 1936, when Section 86-F was introduced. For the first time, a limitation was placed on the directors in carrying on business with the company of which they were directors. Even this limitation, as we have said earlier, did not lay down an absolute prohibition. Every director was permitted to carry on business with the company provided the directors consented.

In the case of the present company, even after this Section 86-F was introduced in the Indian Companies Act, no steps were taken, either by the general body of share-holders or by the directors, to amend their articles of association so as to omit the requirement of every member having to carry on business with the company.

The directors, who continued to function after the introduction of Section 86-F, as well as the directors of the company who were elected subsequently when the Board of Directors had to be reconstituted, must be deemed to have been aware of the requirements of Section 86-F, and yet they did not deem it necessary at any stage to take a move that the articles of association be amended.

They thus acted in a manner which can only lead to the inference that they wanted all the directors to continue carrying on business with the company, which was essential in order that the directors should not become liable to removal from membership of the company. It was in pursuance of this implied decision that the directors'' thereafter did actually continue to carry on business with the company, and when they did so, it cannot be held that they took the risk of being removed from the membership or the directorship of the company.

The only presumption is that all of them impliedly consented to all the directors continuing to carry on business with the company so as to comply with the requirements of the articles of association. It is true that two of the directors, Deep Chand and Qabul Singh did not carry on business with the company and yet no steps were taken to remove them from the membership of the company.

But this circumstance does not, in our Opinion, militate, in any way, against our view that there was implied consent of all directors permitting all directors to carry on business with the company. The removal from membership of the company on failure to carry on business with the company, was discretionary and it may be that Deep Chand and Qabul Singh were considered to be persons whose continuance as directors was in the interest of the company, so that in spite of their failure to carry on business with the company, they were not removed from the membership of the company.

The fact, however, that such an exception was made in the case of these two persons does not indicate that the directors were unaware of the requirements of Section 86-F of the Indian Companies Act, or that they had not consented to the directors carrying on business with the company. In this case, therefore, we are in entire agreement with the learned single Judge that all the directors, who carried on business with the company, did so with the implied consent of all directors.

20. On this finding of fact, the contention on behalf of the appellants, however, has been that the consent of the directors contemplated by Section 86-F of the Indian Companies Act, must be express and must have been given at a meeting of the board of directors and that mere implied consent was not sufficient.

This contention has been met by the learned single Judge, and, in our opinion, rightly, by pointing out that Section 86-F of the Indian Companies Act mentions the consent of directors without laying down that the consent must be express consent or that it should be by a resolution, or that it must be given at a meeting of the board of directors, or that the consent should be that of the board of directors.

It appears to us that, if there be a number of persons, each of whom can be designated by applying one single term to him, the same term used in plural would mean the whole body of those persons and, if each and every individual constituting that body does a particular act, it must be held to be an act of that body as a whole. In the present case, the word used in Section 86-F is "directors," where the requirements of consent have been laid down. If every single director gives his consent, we cannot see how it cannot be said to be "consent of the directors."

In fact, it appears to us that wherever the Companies Act used the word ''directors'' without making any mention of a resolution, meeting or board, the power granted to the directors can be exercised by them provided all the directors unanimously exercise that power. In a case where even one single director does not join in the exercise of power, it may be possible to hold that it is not an exercise of power by the director'', but where every single director does join, the exercise of power must necessarily be held to be an exercise "by the directors."

Of course, considering the impracticability of obtaining unanimous and joint action by such bodies as a Board of directors, the law usually makes a provision enabling the exercise of the powers, in cases where unanimity of action is not forthcoming by laying down a fiction of law by which, even though action is not taken by all, it is deemed to be action by all.

This fiction of law is brought about by laying down that act to be done by a number of persons may be done in accordance with the decision of the majority at a meeting of the body held for the purpose. In the case of the Indian Companies Act, where action by director has to be taken, provision has been made in Rule 87 of Table A of the First Schedule to the Act, which lays down that:

"The directors may meet together for the despatch of business, adjourn and otherwise, regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time, summon a meeting of directors."

The quorum of the meeting is not laid down in Table A itself, but, in the case of the present company, the articles of association laid down the quorum at the figure four. This provision thus enables a decision being taken by directors in cases where it may not be possible to act unani-mouvsly. In such a case, a meeting can be held, which must have the necessary quorum. Then a decision can be arrived at by a majority of votes. The effect of this provision is that that decision taken by a majority of votes at the meeting becomes a decision of the ''directors.'' This provision, in our opinion, cannot be read as a mandatory provision laying down the only means of arriving at a decision, which has to be taken by the directors. This is, in fact an enabling provision, which is to fee used as a substitute where the directors as a whole cannot proceed to take a decision unanimously.

It is also significant that the language actually used is also indicative of the enabling nature of the provision. What is laid down is

"that the directors may meet together for the despatch of business ..... and questions arising at a meeting shall be decided by majority of votes ....."

The use of the word ''may'' in the first sentence of this rule, and the expression "questions arising at a meeting in the second sentence bring out the optional nature of this provision.

Had it been intended that all work to be done by directors must be done at a meeting of the board of directors, the legislature would have used the word ''shall'' instead of the word "may" and would not have further narrowed the scope of this rule referring to "the questions arising at a meeting." The use of the word ''may'', and the expression ''question arising at a meeting* thus indicate that there exists an alternative procedure for achieving the same purpose which is to be achieved by acting in accordance with this provision contained in Rule 87 of Table A.

The only other alternative procedure that we can envisage is a unanimous decision or action by all the directors. In this connection another very important aspect, that has to be kept in view, is that, by using a different language in certain other provisions of the Companies Act, the legislature has given an indication that in some cases action must be taken by the directors at a meeting.

This has been done by using the expressions ''resolution of the directors'' "meeting of the directors" or "board of directors," instead of merely using the word "directors". Some of the relevant provisions in this connection have been pointed out by the learned single Judge in his judgment. We may also refer to them in addition to others, to which our attention has been drawn by learned counsel during the course of arguments in these appeals.

Section 87D(2) speaks of approval by the "board of directors." Section 87-D (5) speaks of the consent of three-fourths of "the directors present and entitled to vote on the resolution." The first proviso to Section 86-B requires a director''s power to appoint an alternate or substitute director to act for him to be approved ''"by the board of directors."

These are the provisions which clearly contemplate that a meeting of the board of directors must be held before the action to be taken by the directors can be held to be valid action complying with the requirements of law. It appears to us that there was no difficulty at all for the legislature to use similar language in Section 86F also, if the intention had been that the consent of the directors should be given at a meeting.

The language of the exception which is worded at present as "except with the consent of the directors" could easily be "except with the consent of the board of directors" or "except with the consent granted by a resolution of the directors," or

""except with the consent of the directors at a meeting of the board."

The fact, that the legislature chose to use the present language and did not like to introduce any of these alternative expressions mentioned above, clearly signifies the intention of the legislature that in the case of Section 86-F there should be no requirement of holding a meeting of the directors or a meeting of the board of directors, and that the consent can be given by the directors in any such manner that in law it would mean the consent of the directors. As we have said earlier, if the consent be unanimous, it must be held to be ''consent of the directors.''

Learned counsel for the appellants drew our attention to a number of provisions in Table A where also, the word "directors" has been used without giving any indication that the decision trust be arrived at at a meeting of the board of directors, and urged that, since some of these provisions deal with very important decisions to be taken by the directors, it must be held that the use of the word "directors" in these provisions amounted to laying down a requirement that the decision must be taken at a meeting of the board of directors."

Some of the provisions of Table A, which were relied upon by learned counsel for the appellants in this behalf, are Rule 12 empowering directors to make calls in respect of moneys unpaid on shares, Rule 16 empowering directors to make arrangements on the issue of shares for a difference between the holders, in the amount of calls to be paid and in the times of payment, Rule 20 empowering directors to decline to register any transfer of shares, Rules 24 and 25 empowering directors to serve a notice on a member in respect of any calls or instalments remaining unpaid, Rule 27 empowering directors to deal with forfeited shares or cancelling the order of forfeiture, Rule 31 empowering directors to convert paid-up shares into stock or re-convert any stock into paid up shares, Rule 41 empowering directors to increase the share capital. Rule 71 empowering directors to manage the business of the company, Rule 72 empowering directors to appoint a managing director or a manager, Rule 84 empowering directors to fill up a vacancy occurring on the board of directors, Rule 85 empowering directors to appoint a person as an additional director, Rule 91 empowering directors to delegate some of their powers, and Rule 99 empowering directors to set aside a reserve or reserves out of the profits of the company.

There is no doubt that these are provisions granting important and extensive powers to the directors but we fail to see why it should have been necessary that all these powers must be exercised at a meeting of the board of directors, or by a resolution of the directors. If any of these decisions can be taken by all the directors unanimously, there can be no objection at all to the power being exercised in that manner.

In fact, it seems to us that a decision, which has been concurred in by each and every single director, is likely to be considered a more effective one rather than

decision arrived at at a meeting of the directors by a mere majority of votes. When learned counsel was drawing our attention to these provisions of Table A certain other provisions in this Table also came to our notice.

There is, for example, the provision in Rule 26 empowering forfeiture of shares in respect of which notice has been served under Rules 24 and 25 has not been complied with. Rule 26 requires forfeiture by a resolution of the directors and the use of the word "resolution" in this rule indicates that whenever action is so sought to be taken under this rule, it must be after a meeting of the directors is held and a resolution is passed at that meeting.

Similarly, Rule 94 has been specifically incorporated dealing with acts done at any meeting of the directors. The fact that the legislature in the Act and the Table, has used various expressions, sometimes the mere word "directors" and on other occasions "resolution of the directors or board of directors or meeting of directors" lends support to the argument urged on behalf of the respondents that all these expressions were not used for an identical purpose.

The legislature itself intended to distinguish when action could be taken by the directors only after holding a formal meeting of the board and when it was sufficient that all the directors act unanimously even though without holding a meeting of the board. The view, which we have expressed above, does not appear to have been the subject-matter of any direct pronouncement either in India or in England, But some support) to our interpretation is forthcoming in the decision of Sir W. Page Wood, V. C. in Hallows v. Fernie (1867) 3 Eq 520 where he held:

"By the Companies Act, the majority of the persoas signing the articles of association are competent to form a board of directors. I very much doubt whether it is necessary that those persons should meet together. If anyone of the subscribers to the contract raises a question, he may be entitled to say, ''I will not have this decided without a meeting of us all/ but if they all concur (as in this case), it seems to me hypercritical to say that appointment was irregular."

This view was cited with approval by Stirling J. in In re Great Northern Salt and Chemical Works, Ex parte Kennedy (1890) 44 ChD 472 where it was held:

"What is required of them is, that they shall determine the number of the directors and the names of the first directors; and it seems to me that, if all of them do in any way show their determination on the subject, that determination ought to be treated as valid."

Stirling J. then quoted the remarks in 1867 3 Eq. 520 reproduced above and expressed his own opinion thereafter by holding:

"That seems to me, if I may say so, excellent sense, and, in the absence of any authority which compels me to another conclusion, I shall act on it."

In these two cases in England, thus, it was recognised that, if any decision is to be taken by a body of persons, the decision would be valid, it it is taken unanimously by all the persons even without holding a meeting of the body.

21. Learned counsel for the appellants relied upon some decisions on the English Companies Act, where a similar point came up for discussion. The first case cited before us was In re, East Norfolk Tramways Co., Barber''s case (1877) 5 ChD 963. The question that arose in that case was as to the validity of the appointment of one Mr. Barber as a director.

The company was formed with seven members, who became the first directors under the articles of association. After the repeal of the articles of association they continued to act as directors and were willing to do so until the first general meeting. Then there was a general meeting at which Mr. Barber consented to be a director and elected unanimously.

That meeting was attended by six share-holders, being six out of seven share holders and also six out of seven directors. Then Mr. Barber changed his mind and wrote to say that he would not be a director and would not take any shares. Notwithstanding that, the directors put him on the list of share-holders, and they sent him the allotment.

The requirement under the Companies Act was that a share-holder, not being recommended by the board for election as a director, shall not be qualified for the office of director unless at the time of his election and also during two consecutive months next before his election he be the registered holder of at least twenty shares. Mr. Barbar did not possess the second qualification and had not been recommended by the board.

There was a board meeting before but he was not recommended by that Board meeting or by any other meeting; and consequently, not being recommended by the board, he was not qualified to be elected, unless the argument insisted on behalf of the respondents prevailed. The argument was that the great majority of the board -- six out of seven -- was a majority attending a shareholders'' meeting which elected Mr. Barber; that inasmuch as they elected him they of course would have recommended him, and that therefore it was equivalent to being recommended by the board. Jes-sel, Master of the Rolls, delivering judgment of the Court held:

"First of all, he was not recommended by the board of directors. Six directors out of seven met in a different capacity and for a different purpose, and such a meeting does not make them a board of directors. Moreover, the whole seven did not meet, and it may well be -- I do not say that it was so -- that the seventh, who did not attend, stayed away from the shareholders'' meeting because he knew that no director could be elected except persons qualified as mentioned in the articles, and that therefore nobody could be elected except himself and his present colleagues.

He had a right to say that: ''That was a bad election; I have not been consulted , and if I had been consulted and summoned to a board meeting I| might have attended''."

It was held an those circumstances, that the election was not valid. It is to be noticed that in that case the persons who had attended the meeting were six out of seven directors and not all of them and they had met in a different capacity. That meeting was, therefore, not a meeting of the board of directors. The requirement of the Companies Act was a recommendation by the board and naturally a decision by six out of seven directors meeting in a different capacity could not possibly be held to be a decision of the board.

The requirement under the English Companies Act was a recommendation by "the board" and not a recommendation by "directors". That case, therefore, interpreted the word "board" and not the word "directors." Further, even Jessel, Master of the Rolls, proceeded mainly on the basis that an objection was open to the seventh director indicating that, if all seven directors had been present, he might have been inclined to accept the decision taken at the meeting as a decision by the board.

The views expressed by him thus, instead of going contrary to our direction, contain an indication that, even in that case, it was likely that, if the seventh director had been present, the unanimous decision by all the directors meeting even in a different capacity, could have been treated as a decision of the board. If it could be treated as a decision of the "board", there can be no doubt that it would certainly have been a decision of the "directors".

22. The next case relied upon by the learned counsel for the appellants is D''Arcy v. Tamar Kit Hill and Callington Rly. Co. (1867) 2 Ex. 158. In that case, the question to be considered was, how far a company was bound by a bond, which had been sealed by the secretary, who was the proper person to affix the seal provided he was duly authorised.

The secretary stated that he was authorised by three directors to affix the seal, but, on cross-examination, admitted that the assent of two out of the three had been obtained at a private interview at the house of one of them, where the two signed a letter authorising the issue of the bond, and that, on meeting the third in the street, he had then obtained his assent and his promise to sign the letter. The signature of , the third, however, was not obtained until after the issuing of the bond.

It further appeared that, when the bond was given, there were more than three directors, and it had not been shown that any committee had been appointed u/s 95 of the Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16). The validity of the bond turned on the question whether the authority granted by the three directors was valid under the law. u/s 90 of the Companies Clauses Consolidation Act, 1845 it was laid down that:

"the directors shall have the management and superintendence of the affairs of the company, and they may lawfully exercise all the powers of the company, except ..... but all the powers so to be exercised shall be exercised in accordance with, and subject to, the provisions of this and the special act, and subject also to the control of general meetings." Section 92 of that Act provided that:

"the directors shall hold meetings at such times as they shall appoint for that purpose; in order to constitute a meeting there shall he present at least the prescribed quorum; and all questions shall be determined by the majority of votes of the directors present."

It is to be noticed that the Validity of the action taken by the secretary under the authority of three directors, only had to be fudged in view of the special provisions of the Companies Clauses Consolidation Act 1845, relevant parts of which have been quoted above. u/s 90, the directors were granted the power of management and superintendence of the affairs of the company but this power had to be exercised in accordance with and subject to the provisions of that Act and the special Act.

One of the provisions, governing the exercise of power by the directors, was contained in Section 92 of that very Act. In this it was laid down in mandatory language that the directors were to hold meetings, that in order to constitute a meeting there had to be present at least the prescribed quorum, and that all questions had to be determined by the majority of votes of the directors present.

The Companies Clauses Consolidation Act, 1845, thus, contemplated that, even where the law granted powers to directors without making any mention of board of directors, or a resolution of directors, or a meeting of directors, the power could be exercised by the directors only by holding a meeting with the prescribed quorum, where all questions had to be determined by the majority of votes of the directors present.

It was in these circumstances that the learned Judges hold that the bond was invalid. The provisions of the Indian Companies Act, which we are called upon to interpret, are not similar. There is no mandatory provision in the Indian Companies Act requiring that, where a power is granted to the directors, they must exercise it by holding a meeting of the board of directors with the prescribed quorum and that decision had to be taken by a majority of votes.

Even in that case, notice was of the fact that there were more than three directors, when only three of them had purported to grant the authority to the secretary, so that the authority had not been given unanimously by all the directors. It was in view of this circumstance that Bramwell J. remarked :

"But it is here shown affirmatively that the seal was not properly affixed; for this could not be done, except by the authority of such a number of directors as had power to act for the company acting jointly and as a board. This is clearly the

intention of the Act; and it is an obvious consideration that, if it were otherwise, a quorum of directors might meet at one place with power to act for the Company, and another quorum might, at the same time, meet at another place, with equal power and come to an opposite determination. But it is manifest that the seal was affixed without the authority of the directors meeting as a board, and the bond is therefore void,"

Learned counsel for the appellants relied particularly on the remark of Bramwell J., quoted above, where he envisaged a decision being taken by two different acts of directors forming the prescribed quorum for a meeting of the board of directors. That difficulty would certainly arise if it were held that a decision by a number of directors constituting the quorum would be a decision of the directors.

But that is not the view, at which we have arrived. The view we have expressed above is that the decision to be a decision of the directors must be arrived at unanimously by all the directors, and if this happens, no question can possibly arise of another set of directors coming to a contrary decision.

In fact, the views of Bramwell J. lend support to our view, that it is only when the decision is not taken unanimously by all the directors, that it becomes necessary to hold a meeting strictly in accordance with the rules; and, thereafter, the decision of the meeting is deemed, by a fiction of law, to be a decision of the directors.

Once a meeting is held in the prescribed manner and a decision is arrived at in that meeting, that decision would not become invalid simply because another meeting is subsequently held in a different manner or in the same prescribed manner but attended by different members constituting the board of directors. The former decision at the regularly held meeting, remains valid because the law gives to that decision all the sanctity of a decision of the directors.

23. The decision in In re Haycraft Gold Reduction and Mining Co. (1900) 2 Ch. 230 relied upon by the learned counsel for the appellants, is also of no help. In that case, the validity of a resolution for voluntarily winding up of the company passed at an. extraordinary general meeting, came up for consideration. The extraordinary general meeting was called by ttie secretary of the company without any authority granted by a meeting of the board of directors to issue notices for the meeting.

The secretary had, however, spoken on the telephone to one director and had a conversation with the chairman, in whose office he was a clerk and had written letters to the other directors. Some of the replies, which were produced in Court, indicated that the secretary had been left to fix his own day. There was, however, nothing to show that any single director had been asked to approve of the resolution as proposed, which involved the appointment of Mr. Gordon as liquidator. Cozens Hardy J. held that:

"In the present case I cannot regard the omission to convene a board meeting to consider matters of such vital moment as a winding-up of the company and the appointment of a liquidator as a mere irregularity. I believe that one or more of the directors, with the deliberate purpose of screening themselves from the investigation suggested by the report of the committee, ingeniously devised and carried out a scheme by which the chairman''s clerk should be appointed liquidator and the company should be dissolved and the books destroyed at the earliest possible moment."

Cozens-Hardy J. relied upon the decision by the Court of Exchequer in (1867) 2 Ex 158 cited above. The case before Cozens-Hard> J. also turned on the special provisions of the Articles governing the company concerned. The secretary had not been authorised to issue notices for the extraordinary general meeting by all the directors unanimously.

He had obtained the consent of only two directors, who, under the articles of association, formed a quorum for the meeting of the board of directors. The circumstances were thus very similar to those, which were considered in 18671 2 Ex. 158. The two cases being similar, our discussion of the earlier case covers this later case also.

24. Another case relied upon by the learned counsel is In re State of Wyoming Syndicate (1901) 2 Ch. 431. In that case also, the question related to the validity of an extraordinary meeting called by the secretary without authority being granted for issue of notices by a meeting of the board of directors. That case carries us no further than the case in (1900) 2 Ch. 230 just discussed.

25. The last case relied upon by the learned counsel on the point, is Barren v. Potter; Potter v. Berry (1914) 1 Ch. 895. The matter, which came up before the Court, related to the affairs of the British Seagemito Company, Ltd., which was incorporated as a private company in fanuary, 1912. The articles of association provided that the number of directors should be not less than two or more than ten.

Article 26 provided that the quorum of directors for transacting business should, unless otherwise fixed by the directors, be two. The articles also incorporated clause 85 of Table A of the Companies Clauses (Consolidation) Act, 1908, which granted powers to the directors to appoint a person as an additional director, who was to retire from office at the next following ordinary general meeting but was to be eligible for election by the company at that meeting as an additional director.

Article 87 of Table A, which was also incorporated in the articles of association of the company, gave power to the directors to regulate their business, as they thought fit and gave the chairman a second or casting vote in case of equality. In the commencement of the year 1914 there were two directors only, W. J. Potter, the chairman and managing director, and Canon Barren.

The conduct of the company''s business was as a standstill as Canon Barren refused to attend any board meeting with Mr. Potter. On 9-2-1914, Canon Barren sent out a notice convening an extraordinary general meeting for February, 1924, at the registered office of the company, for the purpose of passing a resolution terminating the appointment of Mr. Potter as managing director of the company, and proposing that one Charles Berry be appointed an additional director.

On February 21, Mr. Potter sent through the post to Canon Barren a notice requesting him to attend a board meeting at the company''s office on February 24 at 2-40 P. M. This notice, however, was not in fact received by Canon Barren until a later date after his return from London. Canon Barron arrived by train at Paddington Station on February 28, and, on his arrival, was met on the platform by Mr. Potter, who, there seeing Canon Barron alight, walked by his side along the platform and said to him, "I want to see you, please."

Canon Barron replied, "I have nothing to say; to you," Mr. Potter then said, "I formally propose that we add the Revered Charles Herbert, Mr. William George Walter Barnard, arid Mr. John Tolehurst Musgrave as additional directors to the board of the British Seagemito Company Limited. Do you agree or object?" Canon Barron replied, "I object and I object to say anything to you at all."

Mr. Potter then said, "In my capacity as chairman I give my casting vote in their favour and declare them duly elected." He continued to walk with Canon Barron a few steps and then said. "That is all I want to say: thank you. Good day." On 24th February the extraordinary general meeting of the company was held, at which the first resolution was put to the meeting and carried on a show of hands. Mr. Potter then demanded a poll, stating that he would fix a place and time.

In default of the chairman, Canon Barron put the second resolution for appointment of Charles Berry as an additional director to the meeting. With this resolution there was an amendment adding two other persons as additional directors. This revolution was declared to be carried. Mr. Potter, however, ruled it to be illegal, as the power lay with the directors and not with the company.

In these circumstances Canon Barron applied for issue of writ against Mr. Potter and the persons purporting to have been appointed as additional directors at the alleged board meeting at the railway station. Mr. Potter issued his writ in the cross-action, claiming a declaration that the appointment of the additional directors at the general meeting was ultra vires and invalid. The cases came up for interlocutory injunction. Warrington J., on the above facts, had to consider whether a directors'' meeting had been held at which a valid appointment was made of the three additional directors proposed by Mr. Potter. He held :

"The answer, in my opinion, is that there was no directors'' meeting at all for the reason that Canon Barron to the knowledge of Mr. Potter insisted all along that he would not attend any directors'' meeting with Mr. Potter or discuss the affairs of the

company with him, and it is not enough that one of two directors should say "This is a directors'' meeting" while the other says it is not. Of course, if directors are willing to hold a meeting they may do so under any circumstances, but one of them cannot be made to attend the board or to convert a casual meeting into a board meeting, and in the present case I do not see how the meeting in question can be treated as a board meeting. In my opinion, therefore, the true conclusion is that there was no board meeting, but that Canon Barron came with the deliberate intention of not attending a board meeting. If he had received the notice sent to him by Mr. Potter summoning him to a board meeting, different considerations might have arisen, but he had not received it and came with the fixed intention of not attending any such meeting. There was therefore no board meeting at which Canon Barron was present. Mr. Potter was alone present, so that there was no quorum, and I must hold that the three additional directors named by him were not validly appointed."

It is, no doubt, true that under the articles of association, power to appoint an additional director had been given to the directors without specifying that the decision of the directors must be taken at a meeting of the board of directors. But what Mr. Potter wanted to be declared valid, was not a unanimous decision of all the directors but a decision, which according to him, was valid because it had been arrived at by a majority of votes at a meeting of the board of directors.

Wurrington J. rejected the plea that there had been a meeting of the board of directors. The question whether, if Mr. Potter and Mr. Canon Barron had both concurred in the appointment of the three additional directors proposed by Mr. Potter, their appointment would or would not have been valid, even if arrived at at an informal meeting of the railway station of the two sole directors of the company, was not considered at all.

The case, therefore, does not at all deal with the effect of a decision arrived at unanimously by all the directors, where the law or the articles of association grant power to directors without laying down the requirement of a decision being arrived at at a meeting of the board. Thus, none of the cases relied upon by learned counsel for the appellants, in any way, goes against the view, which we have taken above.

26. Learned counsel for the appellants on this point also placed reliance on Rule 56 of the articles of association of the present company, which is to the following effect:

"A resolution in writing signed by all the Directors for the time being shall be as valid and effectual as if it had been passed at a meeting of the Directors duly called and constituted."

The argument of the learned counsel was that this article contained a special rule giving validity, in effect, to a resolution in writing, signed by all the directors as if it had been passed at a meeting duly called and constituted and such a provision necessarily implies that any resolution in writing and not signed by all the directors for the time being, would not be valid and effectual.

Pursuing this argument, learned counsel urged that in view of this rule any decision orally or impliedly consented to by the directors, would be invalid and ineffectual. It appears to us that the purpose of this rule is not properly appreciated in putting forward this argument. We have already indicated above that the Companies Act and the rules incorporated in the articles of association of various companies envisage decisions to be taken by directors, as well as, decisions to be arrived at by the board of directors, or by a resolution of the directors, or at a meeting of the directors.

This Rule 56 incorporated in the articles of association of this Company, is really meant to cover cases where the decision of the directors, under the law or the rules, has to be arrived at by the board of directors, or at a resolution of the directors, or at a meeting of the directors. In all such cases, it would be necessary to hold a meeting of the directors in the absence of such a rule.

The effect of this rule is that, even where a meeting of the directors is necessary, this requirement is dispensed with, provided the resolution is recorded in writing and is signed by all the directors for the time being. It does not touch those cases where power is granted to the directors without laying down any requirement of a resolution being passed at a meeting of the directors.

This rule does not, therefore, have any bearing at all on the question of the validity of consent or implied consent of directors, as required u/s 86F of the Indian Companies Act. It was also urged by the learned counsel that the scheme of the Indian Companies Act was that the share-holders should be entitled to the benefit of the collective wisdom of the directors and, consequently, wherever the law or the rules require an action to be taken by the directors, it must be taken after holding a formal meeting of the board of directors, where the directors can exchange views with one another.

To us, it appears that, if a unanimous decision is given by all the directors, there can be no doubt at all that that decision is the result of the collective wisdom of all the directors; and, whenever such a decision is arrived at, either by an express resolution or by implied consent, the benefit of the collective wisdom of the directors does come into existence.

The further argument that consent is a positive act and, from mere failure to raise an objection, consent of the directors should not be presumed, also does not appeal to us. As we have indicated earlier, in the present case, consent of the directors to all driectors carrying on business with the company, has been inferred not merely from their failure to raise an objection to the other director carrying on business with the company, but from the fact that they actually continued to function as directors, even when they knew that this limitation had been imposed by the Amendment Act of 1936, and did not proceed to amend their articles of association, so as to take away the requirement that all directors-should carry on business with the company.

It was urged that at least two of the directors, Lala Deep Chand and Qabul Singh did not themselves carry on business with the company and no inference should be drawn that there was their implied consent to business being carried on with the company by the directors.

Even these two directors were fully aware of the law and the rules and, though they preferred not to carry on business with the company, it does not mean that they did not consent to the other directors doing so. Further both of them have appeared as witnesses in this case and have clearly stated that the directors were carrying on business with the company with the implied consent of one another, meaning that all directors had consented to any of the directors to carry on business with the company.

27. The last argument advanced by learned counsel on this point was based on a decision of the Bombay Hign Court in Walchandnagar Industries Ltd. Vs. Ratanchand Khimchand Motishaw, . In that case also the provisions of Section 86-F of the Indian Companies Act came up for consideration, and one of the .questions that arose was whether consent contemplated by Section 86-F was a general consent or a consent, which was referable to a particular or specific contract or contracts. It was held that:

"Section 86-F requires that the board of directors should consider both the nature of the contract that the director wants to enter into and also the case of the particular director who wants to enter into that contract before the consent is given. It is only on a consideration of both these factors, viz. the nature of the contract and the qualifications of the director, that a proper consent within the meaning of Section 86-F can be given for entering into a contract. If Mr. Mody''s contention were to be accepted, the board of directors, without considering what the nature of the contract was, without considering the value, without considering the particular material in respect of which the contract was to be entered into, in application and generally can agree to a director or directors entering into contracts with the company. In other words, power is given according to Mr. Mody u/s 86-F to remove the personal disability which the Legislature has imposed upon the directors, by Section 86-F. In our opinion, the Legislature having imposed a personal disability upon the directors u/s 86-F, the only power that is given to the board of directors is not to remove that personal disability generally, but to remove the personal disability with regard to a particular contract or contracts with regard to which the board of directors has applied its mind."

Relying on these remarks of the Bombay High Court, learned counsel urged that in the present case, the general implied consent of directors to the directors carrying on business with the company, should be held not to comply with the requirements of Section 86-F of the Indian Companies Act.

It appears that the decision in that case cannot be applied to the case before us because the views expressed in that case must be held to have been expressed with reference to the particular facts of that case. In the; case before us, the company concerned was constituted with a special object, which was that the members of the company should carry on business of a particular type with the company. Not only the members, but even the directors'' of the company were fully aware of the nature of the contracts that were to be entered into by the members of the company and the directors with the company.

The specific amount for which the contracts were to be entered into, was of course, not laid down in advance, but, from their very nature, the contracts were such that there was no possibility at all of any director being able to take unfair advantage of his position as such.

We have already indicated above that the procedure adopted for entering into contracts with the company was that two different members had to approach the company to register their contract, after having already entered into a contract with each other through a brother. The company, when registering the contract, purported to act as principal towards both these original contracting parties.

At the time of settlement, one party had to pay losses, which the other party was entitled to as gain, The company itself was not, in fact, concerned with those contracts, as a party making profit or incurring losses. The benefit, which the company earned, was only a commission and some other charges, levied by it under the rules.

In effect, therefore, the company was merely an intermediary between the two contracting parties, and neither of the two parties was in a position to enter into any such contract with the company as could act to the detriment of the company. The contracts between the parties and the company were so in name, though, in lact, the two real parties to every one of those contracts, were members, who registered their transactions with the company.

Such being the nature of the contracts which the company was registering, it does not appear to us that any question could arise of consent of the directors being obtained on every single occasion when, any director desired to register with the company his contract entered into with another member or another director. Implied consent of the directors, in such circumstance, would, in our opinion, fully satisfy the requirements of the law. In the case before the Bombay High Court, the position was quite different.

In that case a director had entered into a contract with the company for supply of certain goods, so that the two principal contracting parties were the director and the company. By obtaining terms favourable to himself, the director could have taken, advantage of his position to the detriment of the company and it may be, as held by that Court, that a general consent given to a director or to all directors to enter; into

contracts of that nature with the company, might go against the principle, which the legislature intended to lay down, when enacting Section 86-F of the Indian Companies Act.

On this point, we are not called upon to express any opinion in the present case. So far as the case before us is concerned, the contracts, which the company registered, were entirely different in character in which, though in law the company appeared as a principal contracting party, in fact and in reality, the company was a mere intermediary.

28. The result of our discussion of the applicability of Section 86-F of the Indian Companies Act, is that in the present case, it must be held that none of the directors vacated office as a result of his carrying on business with the company and consequently it is quite unnecessary for us to go into the further question whether, even if it had been held that they had vacated office the resolution, subsequently passed at the meeting of the directors, was validated by Section 86 of the Indian Companies Act. Issues 4(vi) and 8 must, therefore, be decided in favour of the respondents. So far as issue No. 9 is concerned, it was decided by the learned single Judge against the respondents holding that the appellants were not estopped from raising the issue that some or all the directors, in the eye of law, had vacated office before the 15th February, 1950,

No arguments were advanced before us by learned counsel for the respondents challenging this decision given by the learned single Judge. It also appears to be unnecessary to deal with this issue in detail inasmuch as issues 4 (vi) and 8 having been decided in favour of the respondents, the decision on issue No, 9, even if it be in their favour, would have no effect on the result of the appeal.

29. At this stage we consider it convenient to deal with one other argument which, if accepted would cut at the root of the validity of the transactions, which were entered into with the company in connection with the forward contracts for Phagun Sudi 15 Sambat 2006. The point raised by learned counsel for the appellants before us was that, when the resolution of 14th March, 1949 was passed by the board of directors laying down a scheme for entry into forward transactions for Miti Phagun Sudi 16 Sambat 2006, all the directors participated in the meeting and exercised their votes in favour of passing the resolution, while those directors, who were entering into transactions with the company, were interested in this arrangement, so that they were not entitled to vote u/s 91B of the Indian Companies Act.

We may first take notice of the fact that this point was not raised anywhere in any of the two winding up petitions, which were tried by the learned single Judge, and even before the learned single Judge, this contention was riot put forward in this form. What was contended before the learned single Judge, was that the directors had contravened the provisions of Section 91B of the Indian Companies Act in voting on the resolution dated the 15th of February, 1950.

Before us, learned counsel for the appellants changed his ground and challenged, on the basis of contravention of Section 91B of the Indian Companies Act, the validity of the resolution of 14th March, 1949. and not the validity of the resolution of 15th February, 1950. The fact that this point was not raised in the pleadings, at any stage, on behalf of the appellants and that further it was not raised before the learned single Judge at all would itself disentitle the appellants from raising this new ground for the first time in these appeals.

Since, however, we did hear arguments of learned counsel on this point in detail, we consider It advisable to deal with this point also in our judgment. The fact, that all the directors present at the meeting of 14th March, 1949, participated in passing the resolution of that day, is not denied by the respondents. The only question that needed examination in these circumstances, was whether that resolution of 14th March, 1949, was of such a nature that it would be hit by the provisions of Section 91B of the Indian Companies Act.

According to learned counsel for the appellants the scheme, which was formulated by that resolution, was one in which the directors, who participated in the meeting were all interested and consequently, the provisions of Section 91 B of the Indian Companies Act were applicable. It appears to us that this argument cannot be accepted because what the resolution of 14th March. 1949 did was to lay down a scheme for members for entering into transactions in futures after that date and such a scheme cannot be said to be a contract or arrangement within the meaning of this word as used in Section 91-B of the Indian Companies Act. Further, it appears to us that it cannot be held that the directors, as such, were interested in that scheme at the very out-set when the scheme was formulated and had yet to be put into execution subsequently. The scheme was one, which was laid down in pursuance of the general policy of the ^company in carrying on its business and functions. The result of proving the scheme merely was that any member of the company could thereafter enter into contracts with the other members and then register his contract with the company.

As we have already indicated above, in such a scheme the real position of the company was that of an intermediary, even though in law the company appeared as a principal contracting party with each of the two members, who may have registered their contract with the company. At that stage when the resolution of I4th March, 1949 was passed, therefore no specific contracts were being entered into and the scheme also did not bring about any specific arrangement under which rights and liabilities accrued to any of the members, directors or the company.

Whatever rights and liabilities against one other accrued to or were incurred by the membes, the directors or the company, all arose when subsequently, in pursuance of the scheme, contracts were entered into and registered with the company. The word ''arrangement'' in Section 91-B of the Indian Companies Act, in our opinion, would not cover a general scheme of this type under which at the time when the

scheme is approved by the board of directors, no rights or liabilities accrue or are incurred by the members of the company, the directors or the company itself.

The word ''arrangement'' as used in Section 91-B of the Indian Companies Act, is intended to cover such transactions in which a director at once becomes interested, so that he either acquires some rights as a result of it or incurs some liabilities as a result of it. All that the scheme of 14th March, 1949, did was to enable members subsequently to have their transactions in futures registered with the company, and it was not till such registration took place that any member became interested in the scheme approved by that resolution.

Under the scheme, it was open to all the members of the company, in their capacity as members of the company, to register their contracts. It was not a scheme under which any one, in his individual capacity or any director in his capacity as such acquired any particular interest.

Consequently, we have to hold firstly that the resolution of 14th March 1949. did not lay down the terms of any contract or arrangement which could be hit by the provisions of Section 91-B of the Indian Companies Act, and secondly that, even if the directors did at all become interested in that scheme, that interest came into existence subsequently and did not subsist at the time when the resolution was passed.

The resolution of 14th March, 1949 was, therefore, not at all invalid, being not affected by the provisions of Section 91-B of the Indian Companies Act.

In support of his argument that the resolution of 14th of March 1949 would also be affected by the provisions of Section 91-B of the Inrlian Companies Act, learned counsel relied upon the principle laid down in three English cases. The latest one of these cases is Victors Ltd. (In Liquidation) v. Lingard 19271 Ch 323.

In that case, the articles of association of the company provided that no director should be disqualified from entering into contracts, arrangements, or dealings with the company, but that no director should vote as a director in regard to any contract, arrangement, or dealing in which he was interested. The directors of the company personally guaranteed an overdraft granted to the company by a bank.

As a result of negotiations with the bank, they subsequently passed a resolution that, subject to the approval of the bank, first debentures be issued for 30,000 to the bank as security for the overdraft. Debentures were issued in accordance with this resolution. The company ultimately went into liquidation, and an action was commenced by the company against the bank for a declaration that the debentures were invalid and for other consequential relief. It was held that:

"the directors were "interested" in the arrangement come to with the bank in regard to the issue of the debentures, and that the resolution providing for the issue of the debentures was a nullity."

The type of arrangement, that came up For consideration in that case, was clearly very different from the scheme which was laid down in the present case by the resolution of 14th March, 1949. In that case, the directors having guaranteed an overdraft, had incurred personal liability in respect of the overdraft.

The effect of the issue of the debentures was that their personal liability was discharged and was replaced by the debentures issued to the bank as security for the overdraft. The effect of the resolution issuing debentures was to discharge the liability of the directors and to substitute for it debentures issued in favour of the bank giving a right to the bank to claim an interest in the assets of the company on liquidation.

There was thus, in that case a conflict between the personal interest of the directors and their duties towards the company inasmuch as by the resolution they escaped their own personal liability and substituted for it the liability of the company.

No such question could possibly arise when a general scheme of the type brought into existence by the resolution of 14th March, 1949 was approved under which all members of the company were on the same footing and were merely given a right to enter into contracts without accruing any rights or liability by that time.

30. The next English case is In re North Eastern Insurance Co. Ltd. 1919 1 Ch. 198. In that case also the articles of association of the company debarred directors from voting in respect of any contracts in which the directors were interested. There was further a provision that the directors might determine the quorum necessary for the transaction of business, and that, until otherwise determined, three should be a quorum.

A meeting of the board was held at which four directors of the company including Mr. Young and Mr. Dobhie were present. Reference was made to cash advances made to the company by Mr. Young and Mr. Dobbie and a resolution was passed for the issue of a debenture in consideration thereof to Mr. Young who did not act or vote in relation to this resolution. A second resolution for the issue of a debenture to Mr. Dobbie was also passed and on this occasion Mr. Dobbie did not act or vote in relation to this resolution.

Each debenture provided that it should rank equally along with the other as a floating charge, and contained a condition that, after the principal money became payable, the holder of it and the holder of the other debenture, by writing under their hands, might appoint a receiver, the moneys received by him to be applied in satisfaction, pari passu, of the two debentures.

It was held that the issue of the two debentures formed part of one transaction in which both Mr. Young and Mr. Dobbie were equally interested, and that the resolutions were invalid for want of a disinterested quorum.

Subsequently, there was another board meeting on September 4, 1913 when it was alleged a resolution was passed reducing the quorum of directors to two so as to enable the resolution for the issue of the debenture to be passed by the two other directors present. Not counting Mr. Young and Mr. Dobbie at that meeting also, a resolution was passed for the issue of the debenture to Mr. Dobbie and it was held that

"the resolution for the issue of the debenture was invalid for want of a disinterested quorum, and that even assuming that a resolution for the reduction of the quorum was, in fact, passed, such resolution was itself invalid, because it was not passed to the interest of the company, but only for the purpose of enabling Y to obtain an interest in the company''s property."

The circumstances of this case were also very different from the case before us. In that case also debentures were issued to two of the directors, so that there were specific transactions in which the directors were interested. It was not a case where some general scheme might have been passed at a. meeting of board of directors under which the directors could subsequently enter into contracts with the company. That case also, therefore, is not at all applicable to the facts of the case before us.

31. The earliest case relied upon by the learned counsel is In re Greymouth Point Elizabeth Rly. and Coal Co. Ltd; Yuill v. Uraymouth Point Elizabeth Rly. Coal Co. Ltd. 1904 1 Ch. 32. In that case the articles of the company had a similar provision that no directors should vote on any matters relating to a contract or business ''with the company in which he was interested and that two directors should be a quorum for the transaction of business. It was held that

"a quorum of directors meant a quorum competent to transact and vote on the business before the board; and, therefore, that a resolution parsed at a meeting of three directors, two of whom were interested in the subject-matter of the resolution, was invalid."

That was also a case where two directors had made advances to the company and the resolution which came up for examination before the board as to its validity, was for the issue of debentures to those directors. Clearly, that was a case where the resolution related to a contract or arrangement and the two directors were interested in that arrangement.

The resolution impugned was not at all similar to the resolution of 14th March 1949, the validity of which is being examined by us. None of these cases, therefore, lends any support to the argument of learned counsel for the appellants that the resolution of 14th March, 1949 was invalid on the ground that it contravened the provisions of Section 91-B of the Indian Companies Act.

If at all, it may be held that the subsequent resolutions of 7th January, 1950 and 15th February, 1950 were of such a type, as would be hit by the provisions of Section 91-B of the Indian Companies Act. By the resolution of 7th January, 1950, a ceiling price for settling the transactions in futures of Miti Phagun Sudi 15. Sambat 2006, was fixed.

If any director had entered into a contract of sale, such a resolution could be to his benefit whereas if a director had entered into a contract of purchase, that resolution could possibly affect him adversely. Similarly the resolution of 15th February, 1950, by which it was resolved that all transactions in futures for Miti Phagun Sudi 15, Sambat 2006 be settled at the rate prevailing on the previous day can be held to be one in which the directors who had already entered into transactions in futures which were to be settled, were interested.

The argument advanced by learned counsel for the appellants could, therefore lead to the inference that the resolutions of 7th January, 1950 and 15th February, 1950 might have been void on the ground that they had been passed at meeting of board of directors in which interested directors had exercised their right to vote in contravention of Section 91-B of the Indian Companies Act.

But when these appeals were argued, learned counsel for the appellants urged that he was not prepared to challenge the validity of these two resolutions on this ground. In fact, feeling that it would be in the interest of the appellants not to have these resolutions of 7th January. 1950 and 15th February, 1950 declared void, learned counsel for the appellants restricted his arguments to the validity of the resolution of 14th March, 1949 and urged that, if that resolution be held to he valid by us, we should not examine the question of the validity of these subsequent resolutions of 7th January, 1950 and 15th February, 1950.

The position was reversed inasmuch as learned counsel for the respondents wanted us to hold, on acceptance of the argument relating to the contravention of Section 91-B of the Indian Companies Act, that at least the resolution of 7th January, 1950, was void and ineffective.

In our opinion, it is not necessary for us to pronounce finally on this point. As long as we hold that the resolution of 14th March, 1949, was valid, the subsequent contracts entered into with the company by all the members of the company, would be valid contracts and they would have to be settled in accordance with the scheme laid down in that resolution of 14th March, 1949, unless, of course, some subsequent law made it necessary to settle these transactions in some different manner.

The point relied upon by the learned counsel that all the transactions were void and winding up of the company would be justified on the ground that the company had continued to act in pursuance of that resolution fails as a result of our view that resolution was a valid resolution.

32. The result of the findings, given so far, is that the position on the 15th February. 1950 was that, under the scheme approved by the valid resolution of 14th March, 1949, various members of the company including some of the directors had entered into valid transactions in futures for Miti Phagun Sudi 15, Sambat 2006 with the company and these transactions had not become void as a result of the notification issued by the Government of India on the 15th of March, 1950.

It was in this situation that the board of directors met on the 15th of February, 1950 and passed the resolution for settling these transactions at the rate which was prevailing on the previous day i.e., on the 14th February, 1950.

This resolution passed by the board of directors on the 15th February, 1950 and the subsequent action taken by the company in actually settling the transactions with the majority of persons, who had entered into transactions, are the main acts done by the directors and the company, which have now to be examined, as they have a very important bearing on these petitions for winding up of the company, and on the majority of other issues that arose in these proceedings.

We, therefore, consider it advisable to examine at this stage, before dealing with other issues, as to how far the directors and the company acted prudently in passing the resolution of 15th February, 1950 and in actually settling transactions with a large number of members of the company in pursuance of that resolution within the next few days, and, while making such settlements, in paying off to persons to whom large sums of money became due as a result of the settlement of the transactions.

While giving the facts, we have already indicated that the transactions in futures for Miti Phagun Sudi 15. Sambat 2006, had been entered into by the sellers and the buyers at varying rates, the average rate being about Rs. 12/13/-. We have also mentioned that in January, 1950, there were very marked fluctuations in the price of Gur and the price continued to rise high.

There arose a feeling in the market that it was necessary to take some steps to stabilise the price, which could only be done by fixing the highest limit of losses which the sellers would suffer in case the price kept on rising. With this end in view, the directors in the meeting held on the 7th January, 1950 passed a resolution fixing Rs. 17/8/-as the selling price beyond which the company would not accept settlements of any of these transactions in futures.

It appears from the evidence, which has been producecf in these cases that, even after January, 1950 and in the month of February. 1950, quotations for futures continued to be much higher than the average rate of Rs. 12/13/- mentioned above. On the 14th February, 1950, the market closed with the quotation of Rs. 17/6/- for such transactions in futures. Then on the 15th February, 1950, came the notification of the Government of India banning entry into transactions in futures after that notification was promulgated.

33. In view of this notification of 15th of February, 1950, the directors of the company had to decide what action should be taken in respect of all outstanding tran1sactions in futures in Gur, which had been registered with the company. There has been some controversy as to the actual information about the contents of this notification, which was available before the meeting or the directors of 15th February, 1950, was held and a resolution. was passed to settle the transactions at the rate prevailing on the previous day.

According to the pleadings of the appellants in para 10 of the first petition for winding up, the decision of the Central Government was announced on the 14th of February, 1950 by a Press Note broadcast throughout India through PTI and All India Radio, and was extensively published throughout the country in the morning papers on 15th February. 1950. On behalf of the respondents, it was pleaded that, though there may hive been an announcement on the All India Radio and publication in the newspapers, the directors did not actually see the contents of the notification, and were not able to know the exact nature of it.

They, however, held the meeting on the 15th February, 1950 because a requisition was received by them from the dealers of Muzaffarnagar informing them that on the radio there had been an, announcement that the Government had imposed, restrictions on transactions of Gur in futures and had stopped such transactions.

The prayer in that requisition was that, since there were a number of outstanding transactions the company should fix a proper rate for settlements, so-that the Parties could make final settlements in respect of them. It has been stated in evidence on behalf of the respondents that it was because of this requisition received from the dealers that this meeting of the board of directors was held on the 15th February, 1950.

On behalf of the appellants, it has been urged that, in fact, the exact contents of the notification had come to the notice of the directors and this meeting was held after notice of those contents. The controversy arose because it appears that in the Press Note, which was issued by the Government of India, there was not only a mention of thef fact that the Government of India had banned movements of gur, Gurshakkar and khandsari sugar by rail within or outside U. P., but it was also said that it had prohibited Futures and Options in gur, gur shakkar and rab and had also made a provision that all such transactions entered into before the commencement of the order or remaining to be-fulfilled, shall be void and not enforceable by law.

The contention is that the directors knew that all outstanding transactions had been declared void and not enforceable by law and yet, with a dishonest intention, they proceeded to hold a meeting on the 15th February, 1950 to fix a rate for settling outstanding transactions. On this point, the pleadings and evidence of Mohan Lal appellant appear to be contradictory.

Though in paragraph 10 it has been stated that the radio announcement took place on the 14th February, 1950, in para 12, Mohan Lal petitioner changed his case and alleged that it was on the morning of 15th February, 1950, that he came to know of this notification, whereupon he proceeded to Muzaffarnagar, where he was informed that in contravention of the provisions of the notification the management was intending to make payments to themselves and others on the pretext of settling all pending contracts at rates prevailing on 14th February, 1950.

In his evidence on oath, Mohan Lal again changed his case and stated that it was on the night of 14-2-1950 that he heard an announcement on the radio about the Government Press note banning Gur transactions. He further stated that he then consulted his lawyers on 15-2-1950 and thereafter proceeded to Muzaffarnagar.

This statement on oath that he heard the announcement on 14-2-1050 in the night, contradicts the earlier statement made by him in para 12 of his petition that he came to know of this notification on the morning of 15-2-1950. It does appear that some Press note was issued and there was also an announcement on the radio.

Whether the announcement took place on the night of 14th February or the morning of 15th of February, 1950, does not seem to be very material. There is, of course, no evidence to show that that radio announcement was actually heard by any of the directors, or the manager of the company.

There is, therefore, no reason to disbelieve their statement that they proceeded to hold the meeting in pursuance of the requisition, which had been received by them from the dealers of Muzaffarnagar, who had also entered into transactions in futures. The case set up by the appellants that the directors proceeded to fix a rate for settlement of outstanding transactions in spite of the announcement of the Government that those transactions shall be void and not enforceable by law, does not, therefore, find support from the evidence.

It appears that, so far as directors are concerned, they proceeded to hold a meeting on 15-2-1950 and to pass the resolution, which they did, because of the practice, which had prevailed on similar occasions in the past. Evidence has been given in this case in respect of some similar occasions when futures or options were banned by the Government of India or the Government of Uttar Pradesh.

The first of such occasions that has been brought to our notice, is when on 18-5-1942, the Central Government issued the Food Grains (Futures and Options Prohibition) Order 1942. In that notification, as originally issued, the Government had directed that every future in Food Grains entered into before the commencement of that order and outstanding for settlement, shall be settled at the prevailing market rate applicable to the agreement at the close of transactions on 27-5-1942.

The next notification is dated 11-12-1942, issued by the U. P. Government known as the Gur (Future and Options Prohibition) Order 1942. By Clause (4) of this Order all futures and options in Gur entered into before the commencement of that order and outstanding wholly or in part for settlement, were declared to be void within the mean-ing of the Indian Contract Act.

This part of the notification was, however, subsequently amended by the notification dated 22-12-1942 No. 17214-1/C. S. 386-42 published in U. P. Gazette 2-1-1943, p. 2, Part I under which outstanding transactions in futures were directed to be settled at the rate prevailing on 10-12-1942 and the clause in the notification dated 11-12-1942 mentioned above, was amended so as to omit the direction that outstanding futures in Gur entered into before the commencement of that order were to be void.

So far as options in Gur were concerned, the direction contained in the notification of 11-12-1942 declaring them void remained unaffected. Subsequently the U. P. Government issued the U. P. Food Grains (Futures and Options Prohibition) Order, 1943 and on this occasion all contracts in futures and options in food grains entered into before the commencement of that order and outstanding wholly or partly for settlement on the date of the order were directed to be settled at the rates prevailing at the close of the transactions on 2-1-1943.

This order was issued on 3-1-1943. On 20-4-1943 there was issued, the U. P. Oil Seeds (Futures and Options Prohibition) Order, 1943 and under this Order, all contracts in futures or options in oil seeds entered into before the commencement of the Order and outstanding wholly or in part for settlement on the date of the order, were directed to be settled at the prevailing market rate applicable to such settlements at the close of transactions on 19-4-1943. On 22-1-1946, the Food Grains (Futures and Options Prohibition) Order 1946 was promulgated and in this case again only options in food grains entered into before the commencement of the order and remaining to be performed were declared void and not enforceable by law.

So far as futures were concerned, the provisions of that notification were very similar to the provisions contained in the notification, with which we are concerned. Only entry into transactions in futures after the issue of the notification, was prohibited so that outstanding transactions in futures could be settled. This time, of course, the Government did not itself lay down at what rate those outstanding transactions in futures were to be settled.

It was in this background and this past history that the directors had to decide what action they should take when the notification of 15-2-1950 was issued by the Central Government. Naturally, they were fully justified in presuming that all outstanding transactions in futures in Gur had not been declared void and that the proper course for them was to settle those transactions at the rate prevailing on the

previous day, i. e., on 14-2-1950.

Not only did this particular company adopt this course, but it appears that similar companies functioning in neighbouring places also acted in the same way. The three cases which have been brought to our notice, are those of (1) the Chamber of Commerce Hapur (2) the Dadri Nababir Chamber of Commerce Ltd.. at Ghaziabad and (3) the Shaharanpur Beopar Chamber Ltd., Saharanpur.

These three companies had also under the schemes prepared by them, entered into transactions in futures for various dates including Phagun Sudi 15, Sambat 2006 and all of them resolved that all outstanding transactions were to be settled at the rates prevailing on 14-2-1950. It cannot, therefore, be said that the directors of this particular company acted in any extraordinary way in order to gain benefit for themselves.

They did so in order to follow the practice, which had come into existence in the past and which was also adopted by similar bodies in neighbouring places. It also appears to us that their conduct in adopting this course, was a prudent conduct inasmuch as, after the issue of the notification of 15-2-1950, there could be no further quotations for transactions in future because entry into all such transactions after that date had been banned.

The rates for the transactions in futures were all the time well below rates for ready Gur. The evidence given clearly proves that at least during the months of January and February, 1950 that the rate for ready delivery was between Rs. 2/- to Rs. 6/- higher than the rate for transactions in futures. The directors must have felt that in case they did not decide that settlements should take place at the rate prevailing at the close of the transactions on 14-2-1950, difficulty might arise, as parties to the transactions might claim that settlements should be made at the rate prevailing for ready delivery.

The rates for ready delivery were very high and continued to rise in January and during the first half of February, 1950. The evidence on the record shows that even subsequently, in spite of the issue of the notification dated 15-2-1950, the rates for ready delivery did not fall subsequently. In fact, on 14-2-1950, the quotations for transactions in futures stood at Rs. 17-6-0, whereas the quotation for ready delivery was between Rs. 22/- and Rs. 23/-.

When the notification was issued on 15-2-1950, the quotation for ready delivery varied between Rs. 21/- and Rs. 22/-. By 23rd February, it again rose to a figure between Rs. 22/- and Rs. 23/-. On 27-2-1950, the rate was Rs. 22-8-0. on 28th February, Rs. 22-4-0 and the same on 1-3-1950. On 2-3-1950 the rate fell to Rs. 20/- and on 3rd and 4th March, it was Rs. 20-8-0.

The rate for ready Gur even on the due date of settlement for those particular transactions, viz., Miti Phagun Sudi 15, Sambat 2006, corresponding to 4-3-1950,

was Rs. 20-8-0, being Rs. 3-2-0 higher than the rate, which was decided as the rate of settlement by the resolution of 15-2-1950. The apprehension of the directors of the company that, in spite of this notification, there was no prospect of the ready delivery rate coming below the quotation for transactions in futures at the close of 14-2-1950, thus turned out to be correct.

It appears that the directors had been chosen because they were competent businessmen and knew the market and had sufficient mature judgment to be able to envisage future conditions of the market and that in this particular case their judgment has been fully vindicated. Them was, of course, in existence, the resolution of 7-1-1950, under which the company had decided that it would under no circumstances accept settlements at a rate higher than Rs. 17-8-0.

But it seems that there was some doubt how far that resolution was enforceable It was contended on behalf of the respondents before the learned single Judge as well as in these appeals before us that that resolution of 7-1-1950 was not binding on the parties, who had entered into contracts with the company and it is to be noted that some of these respondents, who had put forward this plea, had themselves entered into transactions in futures for purchases with the company.

It would naturally be to their benefit, if it could be held that the resolution of 7-1-1950 was not binding on them so that they could claim settlements at the rate of Rs. 20-8-0, which was the prevailing rate for ready delivery on 4-3-1950, instead of being compelled to settle, either at the maximum rate of Rs. 17-8-0 on 7-1-1950, or at the rate of Rs. 17-8-0 fixed by the resolution of 15-2-1950.

Considering the situation that existed on 15-2-1950, in the light of what we have said above, we must hold that the act of the directors, in passing this resolution for settling outstanding transactions at the rate prevailing at the close of 14-2-4950, was a prudent act on their part, and was in the interest of smooth carrying on of business by all the members of the company.

34. The next conduct of the directors, which has to be examined, is that of actually settling with the buyers in pursuance of this resolution of 15-2-1950 and in making large payments to them in spite of the fact that some of the sellers did not settle with the company in accordance with the resolution of 15-2-1950. It has been admitted on behalf of the respondents that when the transactions were actually settled at the rate of Rs. 17-6-0, decided upon in the resolution of 15-2-1950, large sums of money became payable to the buyers and these large sums were disbursed principally out of the deposits with the company in respect of Chook and margin.

It was strenuously contended on behalf of the appellants that this conduct of paying away such huge sums of money was an imprudent act on behalf of the directors, which seriously endangered the solvency and existence of the company. To us, it appears, however, that the action, which the directors took, was in fact very much in the interests of the company and that action could only result in benefit to the

company.

As we have said earlier, it was envisaged that there was no possibility of the rate for ready delivery ever falling below Rs. 17-6-0, which was the rate for settlement fixed by the resolution of 15-2-1950. In settling with the buyers at that rate, the company was only paying off these persons, who could '' have claimed larger sums in case it was found that they would be entitled to lay a claim for settlement at the rate for ready delivery when quotations for transactions in futures had ceased, as a result of the ban on entry into transactions in futures after the issue of the notification. There was some argument before us as to whether, when the quotations in futures were no longer in existence, the buyers or the sellers could claim settlements at the rate for ready delivery or whether the transactions had to be settled at the last quotation for transactions in futures.

It appears to us to be unnecessary to go into this question, as, for reasons to be indicated by us later, we intend to hold that in these appeals we should not go into the question as to the rights in respect of settlements between the buyers and the sellers on the one side and the company on the other, and that this matter should be left for decision in the regular civil suit, which his already been instituted by the appellants against the company.

Whether the settlements had to take place at the rate for ready delivery or at the rate which was the last quotation for transactions in futures or at the maximum rate prescribed by the resolution of 7-1-1950, in every case the buyers have been entitled to amounts not less than the amounts, which were actually paid to them in pursuance of the resolution of 15-2-1950.

There was a possibility that they might claim larger amounts but there was no possibility at all that their claims could be settled for smaller amounts. Consequently, in paying off the buyers after settling with them at the rate of Rs. 17-6-0, the company only stood to gain. In case, thereafter, the company had to settle with the sellers at Rs. 17-6-0 the company would neither gain nor lose and would only earn the usual commission or obtain other income, which the company used to do under the scheme.

On the other hand, if it be held that the company would be entitled to settlement with the sellers at the rate for ready delivery or at the maximum rate prescribed by the resolution of 7-1-1950, the company would obtain larger amounts from the sellers than the amounts paid by the company to the buyers, and the difference between these amounts would be gain to the company.

The action of the company in paying off the buyers was, therefore, a very prudent act because as a result of it the company did not stand to lose at all, whereas there was a possibility of its making gains. The further payments that were made by the company, were to the brokers, whose security deposits were refunded.

These payments also seem to be fully justified because they were made on the demand of the brokers, who desired that their amounts should be refunded. If the company had not been able to meet this demand, there would only have been a loss of confidence in the solvency of the company. The company was holding these security moneys in a sort of trust and was bound to repay those moneys to- the persons on whose behalf these amounts were held. In refunding these amounts, therefore, the action taken by the company was quite proper.

It is immaterial that as a result of these payments, the ready funds in deposit with the company were very substantially reduced or even that the company had to go to the extent of arranging for credit with the banks on the basis of its assets. Even the action of taking loans for purpose of paying off the buyers, which payment was to the benefit of the. company, was fully, justified.

35. Having dealt with these general points, we may now take up the specific issues, which need our consideration. Issue No. 4 (viii) is automatically answered by the findings given by us above. This issue is based on the allegation thar large amounts had been misapplied by the directors. The amounts in question, which were referred to, are the amounts which were paid out to the buyers and the brokers, and we have already held above that these payments were fully justified, so that it is impossible to call their action mis-application of funds.

We may incidentally take note of the fact that as a result of settlement with the buyers by the company and their being paid off at the rate fixed by the resolution of 15-2-1950, the persons, who lost all chances of possibly obtaining higher profits at the expense of the company, include some of the directors themselves. None of the directors was a seller, They were all buyers and the action, which was taken was to prevent the buyers from claiming larger amounts from the company.

In such a situation, it cannot be said that the directors mis-applied any amounts at all. The findings given by us above, also dispose of issue No. 4(i). The fraud and mis appropriation alleged on behalf of the appellants was also based only on these payments which had been made to the buyers in pursuance of the resolution of 15-2-1950 and clearlv our findings given above lead to the conclusion that there was no question of any fraud or misappropriation by the directors in the action actually taken by them.

36. On the findings given above, the answer to issue No. 4(vii) must be that the payments made to some of the directors, if any, as a consequence of the resolution dated 15-2-1950, were made bona fide, so that it is not at all necessary to go into the question whether they are recoverable.

This question as well as the question whether the applicants have become entitled to recover the amounts as creditors, are not being decided by us in these appeals for the reasons, which will appear later. The consequence is that the step taken by the directors in making these bona fide payments cannot form the basis of winding

up petitions by a person claiming as a contributory.

37. Issues Nos. 4(ii), (iii), (iv) and (v) also depend for their decision very largely upon the facts found above. We have held that the payments which were made by the company to the holders of the bijaks were all bona fide and prima facie in accordance with the terms of the contract. The result, of course, has been that the company now has an outstanding claim against the appellants.

Even in respect of this claim the entire amount of money due to the company is already in its hands. These facts clearly give an inference that so far as the capital of the company is concerned it is still intact and no part of that capital has been lost to the company. In the circumstances, it cannot be held that it has become impracticable for the company to carry on its objects, or that the objects have substantially failed.

It is true that upto the time when the first winding up petition was presented, the company was confining its business mainly to transactions in Sugar but as the Articles of Association lay down that that was not the sole commodity in which the company could carry on business. We have already quoted above at the beginning of this judgment, five of the objects for which this company was incorporated.

It appears that the business in respect of futures in Sugar was being carried on by the company under the objects mentioned as clauses (a) and (e) in that part of our judgment. The object in clause (a) is to promote and protect the trade, commerce and manufactures of India, and in particular the trade, commerce and manufactures of grain, cotton, sugar, jagree and pulses.

The object in clause (e) is to deal in ready stock of grain and in khattis or other quantities and to carry on the business of forward sale or purchase of grain or other vegetable products. Sugar, which was the main commodity of business of the company, was only one of the various commodities mentioned in these clauses.

In the first clause in addition to sugar, there is a mention of grain, cotton, jagree and pulses. In clause (e) there is specific mention of business in grain and the word ''sugar'' will only be covered by the expression ''other vegetable products''. Thus the company in view of its objects, had the option of carrying on business in a large number of commodities. The place, where the company happened to be situate, was probably such that it was convenient to take up business in sugar and gur and it appears that this business was on a sufficiently large scale so that the company was unable to launch into business in respect of other commodities.

When there was a ban on Futures and Options in Sugar and Gur, which also was in force as a temporary measure only the company could either wait till the temporary ban was lifted and resume its business in these commodities, or in the alternative, take up business in some other commoditv, which was included within the lists of commodities in respect of which the company was to carry on its business in

accordance with the objects laid down at the time of its incorporation.

What happened was that very soon after the company had to give up its business in respect of Gur, the first winding up petition was presented in this Court and a receiver was appointed. This result was that the company had no opportunity to decide as to which other commodity would be the subject of its future business. In the circumstances, there is nothing to show that there was no bona fide intention to carry on business.

It is true that even the security deposits of the brokers were paid back to them but this also is no indication that the company was intending to close down its business altogether, very likely those brokers were only interested in transactions in Gur. They demanded return o&#65533; their deposits as they at least could no longer carry on their business. Refusal to return back the deposits to the brokers might have created a panic.

In these circumstances the refund of those deposits is no indication that the company had no bona fide intention of further carrying on its business. There is also no evidence to indicate that there was no prospect of the company trading at profit thereafter. We have already indicated above that the nature of the business carried on by the company was such that at used to earn commission whereas the profits and losses incurred in the transactions were almost automatically adjusted between the buyers and the sellers.

Transactions of that type in other commodities could certainly be carried on by the company even after the company had taken the step of making payments in pursuance of the resolution dated 15-2-1950. The nature of business of the company was such that it did not need a large capital.

The company could earn its commission without being required to produce large sums of money. The modus operandi of the company was such that, whenever a liability arose on the company to make larger payments to one set of persons who may have entered into transactions of one type, deposits from another set of persons always came earlier in the hands of the company to cover the liability in respect of such payments which might become due.

Consequently, if the company had again started its business in Gur or in another commodity, there is no reason to hold that the company could not continue to function and make its normal profits, as it was doing before. In all these circumstances, it must also be held that the company did never place itself in such a position that it could not carry on its objects and the stratum of the company was never lost. All these four issues must, therefore, be decided against the appellants.

38. Issue No. 4(x) relates to the alleged alteration in the language of the resolution dated 15-2-1950, allegations and counter allegations relating to which have already been given earlier in the judgment. To prove that the resolution was altered, the

appellants nave examined only two witnesses, Banarsi Das, father of the appellant Mohan Lal, and one Har Govind Lal. Both of them have stated that they saw the resolution with their own eyes and that the resolution had been signed by the President and the manager and not by other members or directors of the company. Both of them have further stated that the resolution was recorded in original in the minute book in Urdu, As it now stands, the resolution reads as follows :

P;wads xOges&#65533;Vus xqM ds ok;ns ds reke lkSns can dj fn;s gSa blfy;sa loZ laerh ls fu&#65533;; gqvk ds xqM ok;ns dk Hkko fups fy[ks eqrkchd tks Hkko dy 14&2&50 dks can gwvs Fks dk;e dj fnvs tkosa-

1- xqM folk[k "ka/kjl laor 2007&&& 23&13&6-

2- xqM Qkxu ''kq- 15 laor 2007&&& 17&9&6-

3- xqM Qkxu ''kq- 15 laor 2006&&& 17&6&0-

"Each of the two witnesses was asked to point out, what were the exact alterations that had been made in the resolution so as to give it the present shape. Har Govind Lal in his examination-in-chief stated that the only change in the text of the resolution, which he noticed, was that the word ^^dk;e** which now exists, was not there, instead the word "settled" was written there both in Urdu and in English.

The only other change in the minutes of the meeting of that date in which this resolution was recorded, which was pointed out by Har Govind Lal, was that, in the list of persons present, Mohan Lal''s name did not exist and there were names of 1.1 directors who attended the meeting and not merely ten. Banarsi Das corroborated Har Govind Lal fully in respect of the alterations relating to the addition of the name of Mohan Lal and of the omission of the name of 11th director, who attended the meeting.

The version which he gave about the alteration in the text of the resolution, is however different. According to him the words ^^dk;e dj fn;s tk;** now found in the resolution did not exist at all and in their place the words that existed were ^^settle djok;s tkus gSa** There is thus a difference between the two witnesses who are the only witnesses examined on behalf of the appellants even in respect of the alleged alterations in the text of the resolution.

This itself is a circumstance which makes the evidence of these witnesses doubtful. On the other hand, the manager and most of the directors who were present at the meeting, have been examined on behalf of the respondents and they have stated that the resolution was never altered and that even originally it was recorded exactly as it stands now.

Har Govind Lal plainly stated that, apart from the changes which were pointed out by him and which have been mentioned above, the resolution still stands exactly as it was when he saw it. The significant point in the evidence of these two witnesses is

that neither of them has mentioned that the word ^^Hkko** now found in the resolution did not find place in the original resolution.

This point is of importance because while the word ^^Hkko** existed in the resolution, the meaning conveyed by the resolution is not altered at all materially as a result of the changes which these witnesses alleged, were made in the resolution. The resolution, as it now stands, purports to fix the rates of futures in Gur.

If the resolution be read as it stood according to Har Govind Lal, it would mean that the resolution had settled the rates for the transactions of futures in Gur. In either case, therefore, what the resolution purported to do, was either to fix or settle the rates for the transactions of futures in Gur. If the alteration indicated by Banarsi Das is taken into account, that only means that the resolution which now purports to say that "the rates be fixed," was to the effect "that the rates are settled."

The change alleged by him also does not therefore make any material difference at all to the effect which the resolution had. The resolution, as it stands now, or the resolution as it was according to Har Govind Lal or Banarsi Das, in all cases merely fixed or settled the rates for the transactions of futures in Gur. The resolution in none of these forms purports to settle the actual transactions themselves.

The contention on behalf of the appellants was that in fact, the original resolution did purport to settle transactions and such a resolution unilaterally settling transactions, was void. This argument cannot be accepted, because even the evidence given on behalf of the appellants does not show that the resolution was ever in such a form as to lay down that the transactions themselves were settled and not merely that the rates for those transactions were fixed or settled.

It has not been urged and could not be urged on behalf of the appellants that, when the ban on futures was enforced by the Government, the company was not competent to fix rates for settling the transactions which, thereafter could have had no further quotations in the market because quotations in the market are only available when entry into fresh transactions is permitted. The resolution, as it now stands, or even as it stood according to the witnesses of the appellants, did not compulsorily settle the transactions themselves and the effect of fixing or settling rates was to give option to persons who had entered into contracts with the company to settle those transactions at those rates.

No doubt, it appears that, soon after the resolution was passed, it was misinterpreted by the manager and other officials of the company inasmuch as, in some cases even without obtaining the consent of the contracting party, entries were made in the books of account of the company indicating that the transactions had been settled.

The explanation that has been given on behalf of the respondents is that this step of making entries in the books of account was taken as it was envisaged that every

contracting party would be willing to settle transactions at the rates, which had been fixed by this resolution. The grievance of the appellants is particularly in respect of those transactions in which the appellants were interested.

Those were all transactions of sale and not of purchase. We have already indicated above that the prices were rising and never came to anywhere near the rate which was fixed by the resolution subsequent to the date when the resolution was passed and upto the time when the settlement of the transactions matured. During all this period, the rate was much higher than the rate laid down by the resolution.

The sellers, therefore, only stood to gain by settlement at the rate fixed. The effect of the entries, which were made in the books of account, was that the company only made income to the extent of the commission, which it earned in accordance with the past practice. If these entries had not been made in respect of transactions in which the holders of bijaks of sale were interested, the only effect could have been that those holders would have had to pay larger amounts to the company and the company would have been in a position to make profits in addition to commission.

In these circumstances the entries made in the books of account by the manager or the other staff of the company may have been to the benefit of the appellants but it can, in no case, be held that the course adopted was against their interest. As we have held above, it seems that the course adopted of entering settlement of transactions in the books of account was the result of incorrect interpretation of the resolution by the manager and the staff which was not the action of the company itself.

These circumstances clearly lead to the inference that the alterations which are alleged by the appellants to have been made in the resolution were, in no way, advantageous to the company and there could, therefore, be no purpose in making such alterations. If the witnesses for the appellants had stated that the resolution in the original form had purported to settle the transactions themselves, then it may have been possible for the appellants to argue that these changes had been made in the resolution for the purposes of making it a valid resolution, as an unilateral settlement of the transactions by the company by its resolution would have been invalid. We cannot, therefore, place reliance on the evidence, which only supports a charge of an alteration made without any purpose whatsoever.

39. So far as the other two alterations in the minutes of that meeting are concerned, they also appear to us to be immaterial. The omission or the name of one of the directors can only be accidental. The witnesses examined on behalf of the respondents, no doubt, admit that the minutes were read out, and, when they were read out, the names of the directors who had attended the meeting were recited.

It was urged that, if this had been done, the omission of one name would certainly have been noticed. There is, however, the other aspect that minutes of a meeting are read after they have been recorded. The persons present do not always pay at

tention at the meeting when the names of the persons present are being read. Possibly when the names which were recorded in the minute were being read out, nobody paid any attention so that the omission went undetected.

On the other hand, if the resolution, as originally recorded, had contained names of eleven directors, it seems to be highly unlikely that subsequently an alteration would be made and the persons committing forgery would have been so careless as to omit the name of one of the directors, particularly one, who had taken a prominent part in negotiations with the appellants according to the evidence given on behalf of the appellants.

The name omitted was that of Amba Prasad and according to Mohan Lal, he had met Amba Prasad before the meeting. Even according to Banarsi Das, Amba Prasad was present on the occasion when he went to see the original resolution. The name of such a person could not have been omitted if deliberate alterations were being made in the resolution. The omission of his name could also serve no purpose at all.

40. So far as the addition of the name of Mohan Lal is concerned, that action also appears to us to be of no consequence. It seems that this allegation was put forward by the appellants on the basis that originally the resolution purported to settle transactions themselves and it was suggested that the name of Mohan Lal was added as one of those, who had attended the meeting in order to show that Mohan Lal had acquiesced in the resolution and consequently in the settlement of his transactions.

We have already indicated above that the allegation of neither witness shows that the resolution ever purported to settle transactions. All it did was to settle the rates at which transactions were to be settled. For such resolution the presence or absence of Mohan Lal was immaterial. There is further the fact that Mohan Lal himself admitted that he went to the company''s office at about 9-30 on that date.

His case is that, soon after he returned and sent a letter to the company which was refused and at about 8 P.M. he again sent a telegram, which has been quoted above stating that his letter had been refused etc. Thus, the fact that Mohan Lal went to the office of the company in the morning and the fact that Mohan Lal met the manager and some of the directors in the office there having been admitted, we think that he must have come to know of the meeting, which was going to be held soon-after and it is not surprising that Mohan Lal stayed on to see what was going on at the meeting. Undoubtedly he was vitally interested in the matter and the natural instinct must have been to see what was going on rather than to run away from the meeting.

The first writing from Mohan Lal to the company, which has come in evidence, is the telegram which was sent at 2 P.M. This obviously was sent after the resolution had been passed. The applicants have failed to prove the sending of a letter before the telegram, which was, according to them, refused by the manager of the company.

Several directors and the manager of the company have swor.n to the correctness of the resolution and slight discrepancies in their statements are not enough to discard their testimony.

This being so, we are inclined to the view that Mohan Lal was actually present in the meeting and, though he did not take any part in the discussion, which he could not as he was not one of the directors, he only saw the resolution being passed and thereafter, sent the telegram indicating by implication that he was not present at the meeting and wrongly alleging the refusal of a letter which could be drafted thereafter containing such allegations as he might be advised to put in. We, therefore, hold that the resolution, as now contained in the minute book of the company, is the original resolution and all allegations to the effect that it was altered fradulently are not correct.

41. The argument that there is justifiable lack of confidence in the directors and the management on the ground of this alteration in the resolution, also fails on the view which we have taken that there was, in fact, no alteration in it. The ground which is the subject-matter of issue No. 4(ix), based on this allegation of alteration in the resolution also, therefore, fails.

As we have held above, none of the acts of the directors was either mala fide or wrong. It cannot be said that the directors did anything either against the interest of the minority of members or mismanaged the affairs of the company. There is no just cause for lack of confidence in the directors and in the management of the company. This issue must also, therefore, be decided against the appellants.

42. We may at this stage take up issue No. 6 which can be answered very briefly because of the findings, which we have already recorded above. Under this issue, we have to find out whether the directors settled transactions of Phagun Sudi 15 Sambat 2006 on 15-2-1950, otherwise than at the request of the parties concerned, and to consider whether if they did so, it would furnish a just and equitable ground for passing a winding up order.

We have already held that the resolution of 15-2-1950 did not lay down that the transactions were to be cpmpulsorily settled. All that was done by that resolution, was to fix or settle rates and an option was given to the buyers as well as the sellers to settle the transactions with the company at those rates. We have also held that the subsequent conduct of the manager or other employees of the company in making entries in the books of account of the company indicating that the transactions had been settled, was not in accordance with the resolution and that action is not binding on the company as such.

In cases where the buyers or sellers, after those entries had been made, voluntarily agreed to the settlement at the rates fixed by the resolution of 15-2-1950, the entries subsequently became valid entries giving effect to the settlement. In cases where buyers or sellers did not agree to settle the transactions at those rates, an

adjustment between them had to be made in accordance with the rights as determined by the terms of the contract between the parties and the mere making of entries in the books of account could not affect those rights under the contract.

We have, therefore, to hold under this issue that the directors did not settle transactions on Phagun Sudi 15, Sambat 2006 on 15-2-1950 at all and merely gave an option to the parties concerned to settle them, so that no question arises of their having settled the transactions otherwise than at the request of the parties concerned. In view of this finding on the first part of the issue, the second part of the issue does not arise at all. This issue is also, therefore, answered against the appellants.

43. Another issue that is connected with this matter is issue No. 7, which is as follows :

Was there a valid transfer of the rights of Messrs. Ram Swamp Shadi Ram in favour of the petitioners? If so, did the company act fraudulently in settling the claim with Messrs. Ram Swarup Shadi Ram instead of with the petitioner. Does that amount to a just and equitable ground for winding up the company?

The contention of the appellants was that transactions of 1041 bijaks of sale standing in the name of Messrs. Ram Swarup Shadi Ram were really transactions of the appellants and though this fact was known to the company, the company dishonestly settled these transactions with Messrs. Ram Swarup Shadi Ram after the resolution dated 15-2-1950.

It is urged that this conduct of the company amounted to fraud on the appellants by the directors and this was sufficient to shake the confidence of the appellants in the fair management of the company justifying a winding up order. Before we deal with the evidence in respect of these transactions of bijaks standing in the name of Messrs. Ram Swarup Shadi Ram, wet may take note of the fact that the appellants had claimed the ownership rights not only in these bijaks but also in a number of other bijaks, which stood in the name of several other firms or persons,

One such case, which has to be taken notice of, is that of the firm Dasaundhi Ram Banarasi Das. According to the allegations in the first winding up petition read with annexure 2, it would appear that the appelllants were claiming that there were 250 bijaks of sale transactions standing in the name of Messrs. Dasaundhi Ram Banarasi Das Muzaffarnagar, the ownership of which vested in the appellants.

It was also claimed that a sum of rupees ninety thousand was in deposit in respect of these bijaks for margin and chook. The accounts of the company were put before the Court with the written statements and annexure 2 of the written statement showed that, in fact, Messrs, Dasaundhi Ram Banarasi Das were not holding any bijaks of sale at all. The only bijaks, held by them were bijaks of purchase and the number of such bijaks was 303.

It would thus appear that at least in respect of the claim which has been put forward by the appellants for bijaks held by Messrs. Dasaundhi Ram Banarasi Das, it must be held that the appellants have put forward an entirely false case in this winding up petition. During the trial of the petition, the appellants were unable to adduce any evidence at all to show that any bijaks of sale were held by or in the name of Messrs. Dasaundhi Ram Banarasi Das.

This conduct of the appellants in claiming even such bijaks, which were non-existent, would throw very considerable doubt on the evidence which has been put forward on behalf of the appellants and, in any case, we think that the company had to be very cautious in their dealings with the appellants and they would be justified in not treating transactions standing in the name of others, as transactions of the appellants unless the appellants had unequivocally admitted their claim or liability in respect of such transactions. It is in this view that we proceed to examine evidence in respect of the transactions which stood in the name of Messrs. Ram Swarup Shadi Ram.

44. To prove that the transactions of sale standing in the name of Messrs. Ham Swarup Shadi Ram were really transactions of the appellants, the appellants examined Mohan Lal, one of the appellants themselves, and another witness Ganeshi Lal. They stated that, on 7-1-1950, Trilok Ghand manager and Amba Prasad one of the directors were informed that Mohan Lal was to be treated as owner of the Bijaks standing in the name of Messrs. Ram Swarup Shadi Ram. When this was accepted, Mohan Lal paid the chook required on the transactions standing in that name.

The documentary evidence, however, only shows that a letter was received by the company from Messrs. Ram Swarup Shadi Ram to the effect that thereafter Mohan Lal was to be treated as sole proprietor of these 1041 bijaks. It is also true that the chooks which had to be paid, was paid by Mbhan Lal in two instalments one payment being of Rs. 43,500/- in cash and the other of Rs. 50,000/-by two cheques of Rs. 25,000/- each. On behalf of the company it is not denied that these amounts were paid by Mohan Lal in respect of these transactions.

The case put forward on behalf of the company, however, is that this chook had to be paid in respect of those transactions and. even if Mohan Lal paid the amount of chook, that payment was on behalf of Messrs. Ram Swarup Shadi Ram, so that mere payment by Mohan Lal did not lead to the necessary inference that Mohan Lal was the owner of these bijaks and was entitled to settle or refuse to settle these transactions or would be liable to deliver the goods.

In order that there should have been a completed contract by which the rights of Messrs. Ram Swarup Shadi Ram passed to Mohan Lal, it was necessary that there should have been a tripartite agreement. Originally the contract was entered into with the company by Messrs. Ram Swarup Shadi Ram. In order that these

transactions were later to become transactions of Mohan Lal, Mohan Lal had to state unequivocally that he had become the owner.

Messrs. Ram Swarup Shadi Ram had to endorse this claim of Mohan Lal by stating that they were no longer owners of these transactions and that the rights and liabilities belonged to Mohan Lal and the company had to accept this transference of ownership from Messrs. Ram Swarup Shadi Ram to Mohan Lal. It is clear that, according to the evidence which has been given on behalf of the appellants, such a tripartite arrangement never came into existence.

Messrs. Ram Swarup Shadi Ram, no doubt, gave it in writing that these transactions were to be treated thereafter as transactions of the appellants but at no stage did the appellants anywhere give in writing or even stated verbally in unequivocal terms that they had become owners of these transactions. The company, no doubt accepted payment of chook from Mohan Lal but that was immaterial, because, even if the contract continued to be a contract between the company and Messrs. Ram Swarup Shadi Ram, the company could, in no way, be prejudiced in case the payment for chook was made not directly by Messrs. Ram Swamp Shadi Ram but by someone else on their behalf.

The mere acceptance of the payment does not mean that the company had accepted the position which was being taken up by Messrs. Ram Swarup Shadi Ram that the ownership in these transactions vested in the appellants. It has also to be noted that in January, 1950, when these negotiations took place, the market was a rising one. the transactions were of sale, and consequently all indications were that those transactions would result in heavy losses. The losses were likely to increase and not to decrease.

In fact, it was envisaged that the losses might be so heavy that the company thought it fit to pass the resolution that these transactions in futures would not be settled at a rate higher than Rs. 17/8/-. Even at that maximum rate laid down by that resolution, the holder of these transactions was to lose very large sums of money.

The company, therefore, could not accept transference of the liability in respect of these transactions from Messrs. Ram Swarup Shadi Ram to the appellants merely on a letter sent by Messrs. Ram Swarup Shadi Ram, to whose interest it might have been to claim this transference in order to escape the losses. The more important party whose consent was needed, were the appellants because, if the transference was accepted by the company, they were to become liable to the losses on those transactions.

While the appellants gave no writing admitting that they were owners of those transactions, the company was justified in continuing to treat those transactions as of Messrs. Ram Swarup Shadi Ram, even though they might have been aware that there was some arrangement inter se between the appellants and Messrs. Ram Swarup Shadi Ram under which the transactions were to belong to the appellants

and not to Messrs. Ram Swarup Shadi Ram.

Some attempt was made by Trilok Chand manager of the company to explain away the letter which was received from Messrs, Ram Swarup Shadi Ram by deposing that this letter was not brought to the notice of the directors of the company and could not, therefore, bind the company. That explanation was not accepted by the learned single Judge, nor are we inclined to hold that that explanation is sufficient.

It is not possible to believe Trilok Chand when he stated that this letter was never brought to the notice o  the directors by him. Trilok Chand admits that no letter of protest was sent in reply to Messrs. Ram Swarup Shadi Ram nor was any letter sent to any of the appellants asking them if they accepted the arrangement. This conduct of Trilok Chand is, however, not of great importance.

As we have held above, the legal position was that, as long as the appellants had not given in writing that they were owners of these transactions, the company could justifiably continue to treat these transactions as those of Messrs. Ram Swarup Shadi Ram and proceed in future on that basis, particularly when, as we have held above, the conduct of the appellants showed that the company had to be very careful in dealing with them and in putting responsibility on them for losses likely to be incurred on transactions standing in the name of another firm instead of standing in the name of the appellants themselves.

There is no doubt that, after the resolution on 15th of February, 1950, entries were made in the books of account showing that these transactions had also been settled at the rates fixed by the resolution of 15th of February, 1950 and still later on 24th of February 1950 the necessary papers were received from Messrs. Ram Swarup Shadi Ram indicating that they voluntarily accepted that settlement.

It appears to us to be surprising that the appellants should be trying to challenge this settlement of the transactions with Messrs. Ram Swarup Shadi Ram when the transactions have resulted in losses and not in profit to the holder of the bijaks. At that stage of settlement even if the company had acted in pursuance of the letter which was written by Messrs. Ram Swarup Shadi Ram in January stating that these transactions were to be treated as belonging to the appellants the prudent course for the company would have been not to settle these transactions with the appellants without the concurrence of Messrs. Ram Swarup Shadi Ram.

The receipt of the necessary documents from Messrs. Ram Swarup Shadi Ram for settlement of the transactions was, therefore, in any case necessary. The only omission with which the company can be charged is that they did not obtain similar documents for settlement from the appellants. This, in our opinion, was not at all necessary when the circumstances were such that the company was not bound to treat those transactions as belonging to the appellants.

It is also to be noticed that, even though the company settled these transactions with Messrs. Ram Swarup Shadi Ram, they continued to be cautious inasmuch as, after the settlement, a few thousand rupees remained due out of the deposit in respect of chook and margin from the company to the holder of the bijaks and the company did not pay that amount to Messrs. Ram Swarup Shadi Ram. The chook and margin had been deposited at the rate of Rs. 17/8/- in January whereas in pursuance of the resolution dated the 15th of February, 1950, the transactions were actually settled at the rate of Rs. 17/6A.

The amount at the rate of two annas which remained in deposit in excess was refundable to the real holder of the bijaks. The company was no doubt treating! the transactions as those of M/s. Ram Swarup Shadi Ram because the appellants had not accepted in writing, that they were the holders of these bijaks but the company took the prudent step of not refunding the excess deposit to M/.s. Ram Swarup Shadi Ram lest it might be found ultimately that the amount was really refundable to the appellants and not to other firm. The whole conduct of the company is therefore, justifiable on the ground of the legal rights of various parties and for reasons of prudence.

45. One other aspect of this matter may be also examined. Even if it be held that the settlement of transaction by the company in respect of these bijaks with Messrs. Ram Swarup Shadi Ram was not justified, the only effect would be that the transactions would have remained outstanding with the result that the appellants would have been required to settle them on the due date. At that time, the appellants would have had the option of giving ready delivery of the goods.

In such a case, the company would have gained very considerably as the settlement was made at the rate of Rs. 17/6/- whereas the price of ready grain was very much higher as has already been mentioned earlier. In the alternative, if the appellants had not given delivery of goods necessity would have arisen for settling transactions in accordance with the terms of the contract and even under those terms the settlement would not have been at a rate lower than Rs. 17/6/-. In all these circumstances, we cannot find any ulterior or dishonest motive in the action of the company in settling these transactions with Messrs. Ram Swarup Shadi Ram.

46. In view of our findings of fact that the company did not act wrongfully in settling these transactions with Messrs. Ram Swamp Shadi Ram, it does not appear to be necessary for us to go further into the question whether, even if it had been held that the company had not acted rightly in this matter, there would have been sufficient ground for passing a winding up order.

It was urged on behalf of the appellants, that, wherever there is evidence that the directors of a company had acted dishonestly, a contributory could claim that a winding up order be made because that would justify lack of confidence in the directors. For this proposition learned counsel referred us to a number of cases. The

first case brought to our notice is In Re Bleriot Manufacturing Air Craft Go. Ltd. (1916), 32 TLR 253. One of the grounds given in that case for making up a winding up order is brought out in the following quotation:

"Here the company has considerable capital, and it is alleged that there is misconduct by the directors. It is truly said by Mr. Russell that the mere fact of misconduct is no ground for winding up. The words "just and equitable" are words of the widest significance, and do not limit the jurisdiction of the Court to any case. It is a question of fact, and each case must depend on its own circumstances. When I speak of the conduct of the board of directors I mean Lawson, because his was the controlling hand. I think the moneys of the company have been misapplied, and that the company is so constituted that it is deprived of its usual remedies. This is again sufficient for a winding up."

It is to be noticed that this case instead of helping the appellants on the point before us, goes against them. Mr. Justice Neville, with whose judgment the other learned Judges agreed, conceded the principle urged by Mr. Russell that a mere fact of misconduct is no ground for winding up. In that particular case, however, the misconduct consisted of misapplication of moneys of the company and the company was so constituted that it was deprived of its usual remedies because the misconduct was by Lawson who had controlling hand.

The circumstances in our case are quite different. Even if it be held that the company acted dishonestly in treating the transactions standing in the name of Messrs. Ram Swarup Shadi Ram as theirs instead of treating them as transactions of the appellants, there is nothing to show that the usual remedy applicable to such a case is not available.

In that case what was urged was the difficulty which the contributories or the shareholders had to seek redress by the usual remedy through a shareholder''s meeting because the controlling hand was of Lawson, who was guilty of misconduct. In the present case, the appellants ''are holders of one single share. Even the misconduct is not one which is to the prejudice of the shareholders.

In fact, the grievance of the appellants is that the dishonesty was resorted to by the company against the interest of the appellants, who were contracting parties with the company, which would mean that the dishonest conduct was in the interest of the company as a whole. The appellants in their capacity as a contributory cannot, therefore, make a grievance, because in that capacity they only stood to gain out of that dishonesty.

Further, we are not inclined to accept the view that even if the transactions were those of the appellants and not of Messrs Ram Swarup Shadi Ram, their conduct in treating, those transactions at those of M/s. Ram Swarup Shadi Ram amounted to dishonesty. It was a case where the legal rights were not clear, and the company in its own interest, acted in a particular manner.

The other contracting party, viz., the appellants or Messrs Ram Swarup Shadi Ram could seek their remedy by a regular civil suit. - A dispute which can be the subject-matter of such civil suit, cannot be the basis for holding that there was any dishonesty in the conduct of the company as such.

47. The next case relied upon is Loch v. Blackwood (John) Ltd 1924 A.G. 783. In that case, the conduct that came up for consideration was that the directors had omitted to hold general meetings, or to submit accounts, or recommend a dividend and that they had laid themselves open to. the suspicion that their object in so omitting was to keep the petitioners in ignorance or the companys'' position and affairs and to acquire the petitioners'' shares at an under-value.

Another ground was that certain money were voted as salary to be paid to Mr. McLaren, who with others under his control held the controlling shares. It was held that on such ground a winding up order was justified. Again in that case the facts which were held to justify a winding up order were to the prejudice of the shareholders and were such that the shareholder could not expect redress by the usual method of putting forward their views in the shareholders'' meeting,

48. The third case, to which our attention was drawn by learned counsel was in Re The Newbridge Sanitary Steem Laundry Ltd., a case which arose in Ireland. The case, we are informed, is reported in ILR (1917) SC 67. The reports were not available to us but a typed copy of the judgment was produced before us by learned counsel for the appellants.

Learned counsel for the respondents conceded that it was a correct copy. Consequently, we have taken it into account. That was again a case where a winding up order was made at the instance of the share-holders on the ground that one Llewellyn and his co-directors had acted dishonestly to the prejudice of the share-holders, When the first winding up order was made in that case, it was held by the learned Judge that :

"I do not see how the petitioners can, with any confidence, allow their interest in the company to continue to be controlled by Llewallyn and those who are associated with him, and who have such little sense of propriety as to adopt the resolution I have referred to. In the circumstances, I see no course open to the petitioners for freeing themselves and their property from the vicious management from which it has suffered than to wind up the company."

These remarks were made after finding! that Llewellyn had wrongfully misappropriated a sum of ₹2,230. The case went up in appeal where it was held that Llewellyn had received" on foot of certain contracts, a sum of ₹3268 to be paid to the company. In fact, he paid only a sum of ₹1038 leaving ₹2230 unaccounted for. Subsequently a shareholders'' meeting was held and in that meeting the conduct of Llewellyn was approved.

The appellate Court held that Llewellyn did not hand over the profits of the contracts to the company and it was the merest farce to speak of his having accounted for them to the satisfaction of the company and its auditors. Proceeding further, the appellate court said :

Could anything be more vicious in the management of a limited company, or more unfair to the dissentient minority of the share-holders? Llewellyn, who had misappropriated ₹2230 of the company''s moneys, has in his own hands the controlling voting power at every general meeting; he is himself, with Thomton and Deck, a controlling director; everything he does is supported by the directors and the company. In these circumstances can it be said that the company is carrying; on its business in a way which is fair and just towards the dissentient shareholders?"

The resolution was held to bear no other meaning but that, notwithstanding all that had occurred, the share-holders were determined to support Llewellyn, and to expend the money of the company and of the petitioners in preventing, if possible, Llewellyn being made amenable to justice; and that was a position of the company which fully justified the prayer of the petition. Notice was taken of the fact that for quashing of the winding up order nothing had been done by the company to compel Llewellyn to account for the moneys in respect of which the Court had already decided that he was bound to account.

When the Court questioned the Solicitor-General whether, from the beginning to the end of the evidence, there was to be found a trace of disapproval of the conduct of Llewellyn and his co-directors or any suggestion that this fraudulent course of dealing would not be continued in the future, the Solicitor-General could point to none.

The final finding recorded was that the facts of the case, which showed that a majority of the share-holders, consisting of practically two families, were endeavouring at the expense of the minority to shield a criminal who had stolen the moneys of the company, were stronger than those in any of those cases where an order for winding up had been made.

48-A. Clearly again this was a case where the dishonesty of the controlling directors was held to be a sufficient ground for winding up order because the dishonesty was at the cost of the company and the minority in particular and the minority could not seek redress in the usual way. For reasons we have indicated earlier when dealing with the other cases, this case is also not applicable to the facts before us because, we have held that, even if there was any dishonesty it was not at the cost of the company or any shareholder at all but possibly to their benefit. In these circumstances, the argument put forward by learned counsel for the appellants that a winding up order should be made merely on the ground that there was proof of dishonest conduct by the present company in respect of transactions which stood in the name of Messrs. Ram Swarup Shadi Ram, must be rejected and the issues found

against the appellants.

49. One more ground taken for winding up of the company was that the company carried on business of forward contract in silver, which was ultra vires, the company. This was the subject matter of issue No. 5. It has been found by the learned single Judge that the company was not authorised to take up business of future transactions of silver and nothing has been shown to us on behalf of the respondents to displace this finding.

At the same time, as the learned single Judge has held, this business of future transactions of silver did not result in any loss to the company and, on the other hand, yielded a fair profit and the company consequently gained.

This finding of the learned single Judge Was not challenged before us by learned counsel for the appellants and could not be challenged as it was clearly borne out by the evidence. It was also proved during the trial of this petition that all the transactions in respect of silver had already been settled and all complications on account of these transactions had come to an end before the winding up petition was presented.

No further business in silver was being carried on by the company at that time. In these circumstances we agree with the learned single Judge that there is no just and equitable ground to wind up the company simply because, in the past, they had carried on unauthorised business when that business has only resulted in profit to the company. The view we have taken is fully supported by a decision of their Lordships of the Privy Council in The AIR 1932 1 (Privy Council) , where it was held:

"It is well settled that an ultra vires transaction on the part of the directors is of itself no ground for a winding up order."

It follows that an ultra vires transaction which was to the benefit of the company and its shareholders would still less be sufficient justification for a winding up order.

50. Lastly we may take up the first three issues together as all these three issues arise because of the claim for winding up put forward by the appellants in their capacity as creditors. The first issue requires a finding whether the petitioners or any of them were or was creditors or creditor of the company when the two winding up petitions were presented.

The second issue relates to the question whether the debt which is claimed by the petitioners is disputed in good faith by the company or not and, if it is disputed in good faith, whether the winding up petitions are maintainable. The third issue is whether the company is in a position to pay up its debts.

We have, at some earlier stages of our judgment, already given an indication that in our opinion this is not a fit case where we should enter into an investigation and decide whether the petitioners have or have not become creditors of the company,

as that matter is already being agitated by a regular civil suit in a civil court, which has been instituted on behalf of the petitioners.

We may, however, mention that the petitioners claim to be creditors of company on three grounds. The first ground was that the result of the notification dated the 15th February, 1950, issued by the Government banning all transactions in futures in Gur was that the outstanding transactions between the petitioners and the company for which the date of due settlement was the 4th of March, 1950, had become void, as a result of which the petitioners became entitled to refund of the margin and chook amounts which they had deposited with the company.

So far as this point is concerned, our finding recorded above is that there is no force in it. We have held that the notification dated the 15th of February, 1950 did not affect these transactions in futures which had yet to be settled and which had not been declared to be void.

51. The second ground urged on behalf of the petitioners was based on the principle of frustration of contract contained in Section 56 of the Indian Contract Act. It was urged that even if it be held that the contracts continued to be valid after the notification banning transactions in futures dated the 15th of February, 1950, there were other notifications the result of which was that the contracts became impossible of fulfilment.

In this connection, it has to be kept in view that the principal term of the contract was for actual delivery of the goods, in respect of which the appellants had contracted with the company. The method of delivery was also laid down in the resolution under which either party could give notice to the other for delivery.

The dates on which the seller could demand that delivery be taken and the dates by which the purchaser could demand that delivery be given, were also laid down in the scheme. It appears, however, that the parties had the option instead of insisting on delivery to settle the rights inter se at certain rates, the method of determination of which was also laid down. It was contended by learned counsel for the appellants that, in addition to the notification banning transactions in futures, the Government also issued two notifications regulating movement of Gur.

One notification was issued on the 15th of February, 1950 and the other on the 1st of March, 1950. Both these notifications were thus prior to the date of settlement, which was the 4th of March, 1950. By the notification relating to movement of Gur issued on the 15th of February, 1950 the only ban was that no Gur could be transported by rail except with the permit of the Central Government or of an officer or authority empowered by the Central Government in that behalf.

By the notification of 1st March, 1950 the ban on transport by railway was tightened inasmuch as it was laid down that no railway could Rccept for transport any Gur from any station in the State of Uttar Pradesh or from any station outside the State

which was situated within a radius of thirty miles from the border of Uttar Pradesh.

Transport by road by means of a mechanically propelled vehicle of Gur was also prohibited from any place in the State of U.P. to any other place in the State which is situated within a radius of thirty miles from the border of that area to any place outside that State. This ban was also, however, qualified, as such movement of Sugar was permissible under a permit issued by the Central Government or by an officer or authority empowered by the Central Government in that behalf.

It seems to us to be unnecessary to go into the question whether, as a result of these notifications, the contract was or was not frustrated. This is a point which can be considered and is bound to he considered in the regular suit which is admittedly pending. It is enough for us to hold here that there could be a number of circumstances on account of which the company could claim bona fide that there had been no frustration of contract. Some of these grounds have been mentioned by the learned single Judge in his judgment.

One very important ground, that may be taken notice of, is that Muzaffarnagar, where delivery of Gur under the contract had to be given, was itself a very big market for Gur and there was a good possibility that Gur was available in sufficient quantities at that very place to enable the petitioners to comply with the terms of the contract. There was a second important circumstance that in any case transport of Gur was permissible under permits obtained from the Central Government or from an officer or authority duly authorised in that behalf and that the appellants never made any attempt to obtain such permits.

We have also not entered into the question whether Muzaffarnagar is a station situated within thirty miles of the border of the State of U.P. and the ban imposed by the Central Government under this notification did or did not apply to movement of Gur to Muzaffarnagar. These are all circumstances which show that the company could bona fide dispute the claim of the appellants that there had been frustration of contracts.

52. The third ground relied upon by the appellants for urging that they had become creditors of the company was based on Section 39 of the Indian Contract Act under which, when a party to a contract refused to perform or disables him self from performing his promise in its entirety, the promisee is entitled to put an and to the contract unless he signifies by words or conduct his acquiescence in its continuance. The appellants relied upon both the alternative clauses of this provision of law.

It was first urged that the company had refused to perform its promise which was evidenced by the fact that, after the resolution of 5th of February, 1950 was passed, the company made entries in its books of account showing that the contract had already been settled, even though the appellants had not signified their assent to such settlement at the rate fixed by the resolution of the 15th of February, 1950.

The second ground was that the company by making payments of huge amounts to the buyers had put itself in such a position that it could no longer carry on the terms of the contract which had "been entered into between the appellants and the company. These are again points on which, in our opinion, the company has a bona fide case.

We have already taken notice earlier of the fact that the entries in the books of account were made by the manager and other members of the staff of the company by a misinterpretation of the resolution of the 15th of February, 1950. It does not appear that the entries which were made in the books of account were actually communicated to the appellants.

Learned Counsel for the appellants relied upon a telegram which was sent by the manager to the appellants on the 16th of February, 1950 in reply to an earlier telegram, which had been sent by the appellants to the company. It was urged that in this telegram the language used indicated that the transactions had actually been settled by "the company which would amount to unilateral settlement of the transactions by the company with the consent of the appellants.

On behalf of the company it is urged that this telegram merely mentioned settlement of rates and not of the transactions themselves. On this, there is a bona fide dispute and there is also a dispute as to whether the effect of this telegram would be that it would amount to a refusal by the company to carry on its part of the promise.

Reliance was also placed on a letter sent to the appellants on the 23rd of February, 1950, in which the company wrote to the petitioners that the company had decided to settle transactions. This letter is sought to be interpreted on behalf of the appellants as laying down that the transactions had already been settled. On behalf of the company, it is urged that the language used in the letter merely indicated that the company had taken a decision to settle transactions and not that the transactions themselves had been settled.

Our attention has been drawn "to the fact that the letter does not use the expression "the company has settled the transactions" and merely says "that the company had decided to settle the transaction." This interpretation may appear to be reasonable on the further ground that this letter contained an offer to the appellants to give delivery in accordance with the terms of the contract.

It is contended that, even subsequently, in the affidavit filed before the learned single Judge on the 27th of February, 1950, the position was clarified on behalf of the respondents and it was made plain that the company was quite prepared to perform its part of the contract. So far as the second question of the company having disabled itself from performing the contract is concerned, this point has also been dealt with by the learned single Judge and the reasoning adopted by him shows that, considering the manner in which the company used to work, it could not

necessarily be held that the company had placed itself in such a position that it could not perform its part of the contract.

On this point also, therefore, there is a bona fide dispute. Further it has been disputed on behalf of the respondents as to whether there was any rescission of the contract by the appellants, particularly before the first winding up petition was presented on the 22nd of February, 1950. On behalf of the appellants it is contended that rescission of the contract was brought out by the appellants when they filed the first winding up petition in this Court on the 22nd of February, 1950.

Reliance was also placed on behalf of the appellants on the subsequent correspondence on this point. At the same time, it has been urged on behalf of the respondents that, even if it be held that the respondents have refused to perform their part of the contract at some stage, that refusal was retracted subsequently and before there was any rescission of contract by the appellants.

All these are contentions which need to be properly examined and decided and, in our opinion, disputes on these points are such that the conduct of the company in challenging the claim of the appellants must be held to be bona fide. In the circumstances, we confirm the finding of the learned single Judge on the second issue that the debt of the appellants was disputed bona fide by the company and this was a circumstance which had to be taken into account in dealing with the petition for winding up presented by the appellants based on their claim as creditors of the company.

53. We have already indicated above that a number of complicated questions arise, which have to be investigated for deciding the question whether the appellants have become creditors of the company. Such matters can most appropriately be decided in the civil suit which is already pending at the instance of the appellants.

54. Then there is the doubtful question whether, if we were to decide these questions in these proceedings arising out of petition for winding up, the decision would or would not operate as res judicata in the civil suit. On behalf of the appellants, it was contended that it would be appropriate for us to decide all these questions and the decision would govern the pending civil suit also.

On the other hand, it was contended by learned counsel for the respondents that a decision given by us between the appellants claiming as creditors and the respondents in these proceedings for winding up, would not operate as res judicata in the civil suit in which they are suing the company for the actual amount claimed by them.

We have considered it unnecessary to go into the question, whether decisions given by us in these proceedings would or would not operate as res judicata in the civil suit as, in our opinion, when the position is doubtful and even otherwise it is more appropriate, we should refrain from deciding these questions and should leave the

parties to obtain decisions on them in the civil suit. The result is that the first issue need not be answered by us at all.

55. So far as the third issue is concerned, the inability of the company to pay its debts which is the subject matter of this issue was urged by the appellants only on the basis of their claim against the company. It had to be conceded by learned counsel for the appellants that in case it is held that the contracts between the appellants and the company are held by the civil court to be still binding on them, it cannot be urged that the company was in such a position that it could not pay its debts.

It would be only if it is held that these contracts were no longer pending binding (sic) and the appellants were further entitled to the refund of the money deposited by them as chook and margin in respect of the disputed transactions that it may be found that the company is unable to pay its debts. Even then, it might be possible for the company to claim refund from the buyers of amounts which have been disbursed to them so as to meet the claim of the appellants.

The finding on issue No. 3 is thus entirely dependent on issue No. 1 and wo have decided to refrain from giving any finding on issue No. 1. We therefore hold that this issue also need not be finally decided by us and it is sufficient for the proper disposal of this winding up petition, to say that at present no such findings can be given that the company is unable to pay its debt while a suit is pending between the appellants and . the claim in the suit is being contested by the company in good faith.

56. In these circumstances, it was urged by learned counsel for the appellants that, in any case, we should not uphold the order of the learned single Judge dismissing these winding up petitions and should, on the other hand, hold them up awaiting the final decision in the civil suit. The principles applicable to such cases have been summarised in Palmer''s Company Precedents, Sixteenth Edition, Part II at pp. 103 and 104, where it is said :

"The court will not, except in special circumstances, order a, petition to stand over for a long period. It wall either make! an order or dismiss the petition; for if, after adjournments, a winding up order is made, the order would date back to the presentation of the petition, and avoid, therefore, or imperil, anything done by the company in the meantime.

Besides, it is not fair to a company that winding up petition should be kept hanging over its head indefinitely.

Cases occasionally occur in which it is expedient to order a petition to stand over, e.g., where the petitioner is a judgment creditor, but the company desires to impeach the judgment, or where the debt is admitted and there is a reasonable hope of the debt being paid if the petition is ordered to stand over for a short time.

Sometimes a petition is ordered to stand over for some months, in order to give the company an opportunity of raising further funds, or making a further attempt to prosecute its objects. In such a case the company asking for the petition to stand over must, as a rule, show some reasonable prospect of the debt being paid as a condition of the indulgence."

57. In Buckley on the Companies Acts, Twelfth Edition at pages 452 and 433 also, the same principles have been enunciated. These principles have been culled from various decisions in England.

58. On behalf of the appellants reliance was placed on two cases in particular. The first case is The The Company Vs. Sir. Rameshwar Singh . In that case, two civil suits were pending and it was held that the proper order to be made under the circumstances of that case would be that the winding up proceedings be stayed until the determination of the two suits.

The first suit was instituted by the company itself against its ex-directors for the recovery of a sum of rupees six lacs, the charge against the ex-directors being negligence of duty. The second suit was instituted by one of the directors against the company for recovery of a sum of Rs. 2,83,747/- alleged to be due to him on account of advances made by him with interest.

When the winding up petition was presented by the claimant in the second suit, the company applied for ''the stay of proceedings in connection with the winding up petition on the ground that the petition was an abuse of the process of the Court. It appears from the facts of the case that the amount claimed by the creditor was admitted to be due and was contested only on the basis of a counter claim which the company was claiming against him. The suits were ripe for hearing and there was the fact that the application for stay of the winding up proceedings was made by the company itself,

59. The second case relied upon is Mohammed Amin Bros. Ltd. Vs. Dominion of India and Others, . In that case the company had been assessed to tax and the claim, of the Government was of a debt in the nature of revenue from the company. Against that assessment, the company had filed an appeal after the debt had been held to be due. The company itself then applied for staying the winding up proceedings awaiting decision of that appeal.

60. In both the cases the otter proceedings which were pending, were ripe for hearing. In one case both the suits were to come up for hearing very shortly. In the other, judgment had already been delivered and the matter was only in appeal. In both the cases, therefore, holding up of the winding up proceedings was decided on the basis, that it would be in the interest of the company. These cases, in our opinion, are totally inapplicable to the facts of the case before us.

Here the winding up petitions were presented long ago. The first petition was presented more than eight years ago in February, 1950. The second winding up petition was presented about a year later, in the year 1951. After the presentation of the first petition, a provisional liquidator was appointed by this Court, and, though that application for appointment of a provisional liquidator was subsequently dismissed, the business of the company came to stand-still and for a long period of over eight years, the company has not been able to carry on its business.

If the proceedings in these winding up petitions are held up, the company would, for the further period during which that order remains in force, be unable to carry on its business because of the provisions of Section 227(2) of the Indian Companies Act under which a winding up order dates back to the date of the presentation of the petition. The effect of this would be that the transactions entered into by the company during this period may all be liable to be set aside on the ground of being void.

There are no prospects of an early decision by the civil suit and, even after that suit is decided by the trial Court, it is likely to be taken up to higher Courts in appeal. The result naturally would be that the company will not be in a position to function and carry on its business. Such an order would therefore, be very much against the interest of the company.

61. In AIR 1932 1 (Privy Council) their Lordships of the Privy Council had occasion to depricate the fact that, in that case a winding up order had been made two years after the presentation of the petition, when it was found that the petition ought never to have been presented,

In the present case also, if the civil suit is decided against the appellants the only conclusion would be that these winding up petitions should never have been presented and there would have been a delay not merely of two years but a very much longer period. Any order by us which would bring about such a position, will not be justified.

62. We may also refer to the views of Lord Cairns in In re, Metropolitan Rly. Warehousing Co., Ltd. (1867) 17 LT 108 at p. Ill, where he said:

"I am averser to adjourning or suspending the petition for this reason that I think it is always a very inconvenient thing for a company to have a pending petition for a winding up order hanging over their heads. I think that the court should, as far as possible, either make an order upon the petition for the winding up of the company, if it is a fit case, or if not dismiss the petition. There are many cases in which it cannot be done; but where it can be done I think that is the better course, and the more so because it is well known that if the petition is adjourned, it is adjourned with this consequence imminent over the company: if the wind ing-up order is made, the winding up would date back to the presentation of the petition and avoid therefore, Or imperil, anything that was done by the company in the meantime. I

think that the better course is to dismiss this petition."

63. We may also take notice of the fact that, in our opinion, the holding up of proceedings in these two winding up petitions would not materially benefit the appellants while it will seriously prejudice the company. The prejudice to the company has already been indicated above. "So far as the appellants are concerned, they have not succeeded in showing that, if the company is allowed to function in future, there is any likelihood that the assets of the company which are at present available for the satisfaction of the claim of the appellants if found to be correct, are likely to disappear in the future.

In fact, the circumstances disclosed by the evidence appear to us to indicate that, if the company is allowed to function, the probability is that the assets of the company will increase as the modus operandi of this company is such that it does not, as a rule, put its own assets in jeopardy and makes income principally by earning commission on transactions in which the amounts of profit and loss are borne by other parties.

In view of these circumstances, we consider that the prayer put forward by learned counsel for the appellants that we should set aside the order of the learned single Judge and hold up proceedings on these winding up orders, must be rejected.

64. In the view we have taken on the points discussed above, it is not necessary for us to express any opinion at all on other grounds of defence, which were taken on behalf of the respondents, for example, that the action of the company was sub sequently ratified at a meeting of the shareholders. Our conclusion is that the learned single Judge was fully justified in dismissing both these petitions and consequently we dismiss both the appeals with costs which will include Rs. 1000/- as fees for counsel for the respondents in both appeals.