

**SUPREME COURT OF INDIA**

Severn Water Purification, INC

Vs

Chloro Controls (India) Pvt. Ltd.

(C.K. Thakker and Tarun Chatterjee)

Appeal (civil) 1351 of 2008(@Special Leave Petition (C) No. 6161 of 2006)

18/02/2008

**JUDGMENT**

**C.K. THAKKER, J.**

1. Leave granted.

2. Both these appeals have been instituted against common judgment and order passed by the Division Bench of the High Court of Judicature at Bombay (Original Side) dated February 20/21, 2006 in Appeal Nos. 449-450 of 2005 in Company Petition No. 857 of 2004. First appeal has been filed by Severn Trent Water Purification Inc. while the second appeal is filed by Chloro Controls (India) Pvt. Ltd.

3. The facts giving rise to the present appeals, in brief as noted by the Division Bench of the High Court are as follows.

4. Severn Trent Water Purification Inc., USA (hereinafter referred to as "Severn Trent") filed a petition for winding up the Capital Controls (India) Private Limited (hereinafter referred to as 'the Company') on just and equitable grounds under Section 433(f) of the Companies Act, 1956 (hereinafter referred to as 'the Act'). The learned Company Judge by his order dated 21st April 2005 admitted the company petition. Aggrieved thereby two appeals came to be filed. One appeal (Appeal No. 449 of 2005) was filed by Chloro Controls (India) Private Limited, which has 50% shareholding in the company and the other appeal (Appeal No. 450 of 2005) was filed by the Company. As both the appeals arose out of one and the same order passed by the Company Court, the appeals were heard together and decided by a common judgment.

5. The petitioner set up the case in the petition for winding up of the Company thus:

(i) Severn Trent is a Corporation organized and existing under the laws of the State of Pennsylvania, USA having its office and place of business at 3000 Advance Lane, Colmar, Pennsylvania 18915, USA.

(ii) Severn Trent was formerly known as Capital Controls (Delaware) Company, Inc.

(iii) In or about 1990, Severn Trent's group acquired Capital Controls Company, Inc. and subsequently the name of Capital Controls Company, Inc. was changed to Severn Trent Water Purification, Inc. with effect from 1st April, 2002.

(iv) On March 31, 2003, Capital Controls (Delaware) Company Inc. amalgamated with and merged into Severn Trent and pursuant to the merger agreement, Capital Controls (Delaware) Company, Inc. went out of existence.

(v) Reference to Severn Trent includes reference to the Capital Controls Company, Inc. as well as Capital Controls (Delaware) Company, Inc. and, therefore, Severn Trent in its present name is entitled to the rights and benefits of the Capital Controls (Delaware) Company, Inc. and Capital Controls Company, Inc. and to file and maintain the company petition.

(vi) Chloro Controls (India) Private Limited, a company controlled by Mr. M.B. Kocha and Capital Controls (Delaware) Company, Inc. set up joint venture company - Capital Controls India Private Limited (the company) in Mumbai with the object of manufacturing (in India) and distributing

within the geographical boundaries of India, Nepal, Bhutan and Afghanistan certain gas chlorination water treatment systems and a single product line of brine electro chlorination system from component parts supplied by Severn Trent. For the said purpose, a Joint Venture Agreement was executed by the parties on November 16, 1995.

(vii) Authorised capital of the company is Rs.75,00,000 (Rupees seventy five lakhs) divided into 7,50,000 equity shares of Rs.10/- each. Severn Trent holds 3,75,000 equity shares being 50% of the equity share capital of the company. The other 50% of the shareholding of the company is held by Chloro Controls (India) Private Limited.

(viii) Chloro Controls (India) Private Limited filed Suit No.233 of 2004 against Severn Trent with the sole object of circumventing the dispute resolution provisions in the Joint Venture Agreement entered into between the parties.

(ix) Due to wrongful stand and intransigence of Chloro Controls (India) Private Limited, there was total deadlock on joint venture and management. Despite several meetings between the parties and exchange of ideas aimed at resolving differences, relations between the parties became more and more strain.

(x) Severn Trent, therefore, terminated the Joint Venture Agreement vide its letter dated July 21, 2004 due to breaches committed by Chloro Controls (India) Private Limited and Mr. Kocha. In the termination notice, Severn Trent called upon Mr. Kocha to take steps for winding up of the company.

(xi) Severn Trent had alleged that if Mr. Kocha would be allowed to continue to run the company, the basic substratum of the company would be eroded and the company could be saddled with liabilities leading to depletion of net worth.

(xii) The company had been incorporated in the nature of partnership/quasi-partnership and both parties had equal share in the company. The parties were severely

Deadlocked on several issues, there was total break down and Severn Trent had lost confidence in Kochas. Severn Trent felt that the company would not return to the normalcy or could run the business profitably and it was just and equitable to wind up the company.

6. Severn Trent, in Company Petition No. 857 of 2004, filed on September 22, 2004 in the High

Court of Judicature at Bombay under Section 433 (f) of the Act sought the following reliefs;

(a) That the Company viz., Capital Controls India Private Limited, be wound up under the just and equitable grounds by and pursuant to the orders and directions of the Hon'ble Court;

(b) That the Official Liquidator of this Hon'ble Court be appointed as Liquidator of all the assets, properties and affairs of the Company with all powers and authorities under the provisions of the Companies Act, 1956;

(c) That pending the hearing and final disposal of the petition, the Official Liquidator of this Hon'ble Court be appointed as Provisional Liquidator of all the assets, properties and affairs of the Company with all powers and authorities under the provisions of the Companies Act 1 of 1956;

(d) That till such time that a Provisional Liquidator is appointed by the Court, an interim injunction be granted restraining the Company and/or the Kochas from doing the following:

1. Conducting the affairs of the Company, except by way of resolutions passed at meetings of the Board of Directors of the Company with the affirmative vote of at least one direction nominated by Severn Trent;

2. Operating the Company's bank accounts, except as may be jointly operated with the authorized signatory nominated by Severn Trent;

3. Dealing with any other assets, movable or immovable of the Company and be directed to preserve the machinery, equipments, etc. installed;

4. Entering into fresh contracts in the name of the Company and for as representatives of the Company;

5. Making any further purchases and payments without the consent of Severn Trent or without approval of the Board of Directors;

6. Borrowing monies or drawing on existing credit facilities;

7. paying Chloro Controls directors or their family members monies allegedly owed by the Company;

8. running the website of the Company.

(e) Till the time of appointment of the Provisional Liquidator, Mr. Kocha may be removed from the post of Managing Director and committees appointed by the Board may manage the affairs of the Company;

(f) For ad-interim reliefs in terms of prayer (c), (d) and (e) above;

(h) For such further and other reliefs as the nature and circumstances of the case may require;

(i) For the costs of the petition and the order to be made thereon.

7. The Company as well as Chloro Controls (India) Private Limited opposed the admission of the Company Petition. The Company objected to the maintainability of the petition for winding up on several grounds. It was, inter alia, contended that (i) Severn Trent was not a shareholder on the company's register and, therefore, had no standing to maintain the petition for winding up; (ii) Capital Control (Delaware) Corporation was the registered holder of 50% of the equity share capital of the Company. Merger of Capital Controls (Delaware) Company Inc. into and with Severn Trent was not intimated to the company prior to the filing of Arbitration Petition No.121 of 2004 by Severn Trent under Section 9 of the Arbitration and Conciliation Act, 1996; (iii) at no point of time, any application for transfer of share certificates and/or substitution of the name of Severn Trent had been made; (iv) the assignment of shares by the Capital Controls (Delaware) Company, Inc. to Severn Trent without the consent of Chloro Controls (India) Private Limited or for that matter of M.B. Kocha was contrary to the Shareholders Agreement and could not be given effect to.

8. Severn Trent filed a rejoinder explaining its position regarding the merger. Severn Trent annexed certain documents which in its opinion were in the nature of merger documents and submitted that the company as well as Kochas had all along accepted Severn Trent as shareholder and that there was no 'assignment' as contemplated under Clause 24 of the Shareholders agreement and, therefore,

consent of Chloro Controls (India) Private Limited or of Mr. Kocha was not required. Severn Trent also asserted that it has stepped into the shoes of Capital Controls (Delaware) Company Inc. and was entitled to maintain a petition for winding up of the Company.

9. This stand of Severn Trent was countered by the Respondents by filing sur-rejoinder wherein it was denied that Severn Trent had stepped into the shoes of Capital Controls (Delaware) Inc. The Company also questioned legality and veracity of merger documents that were relied upon by Severn Trent. They contended that the petition ought to be dismissed as there was 'abuse of process of law' by Severn Trent in publishing premature advertisement of company petition.

10. The learned Company Judge by an order dated April 21, 2005, admitted the Company Petition indicating prima facie, the following grounds,

1. The shareholding of Capital Controls (Delaware) Inc. has vested in Severn Trent in the light of the amalgamation/merger;

2. There was no breach of shareholders agreement since the agreement did not prevent the merger of two companies;

3. The provisions of Section 439(4)(b) of the Companies Act pertaining to devolution through death of a former holder were applicable in the present case, and

4. There was complete deadlock in the functioning of the business of the company because there were only two shareholders and both the shareholders were holding 50% equity capital. Unless both the shareholders concur in conducting the business of the company the business could not be proceeded with and/or carried on and the company could not be allowed to function and run in that way.

11. The learned Company Judge in the light of the above findings admitted the Company Petition on April 21, 2005 and issued the following directions;

(i) Petition to be admitted and returnable on 19.8.2005. Respondent waives service.

(ii) Petition to be advertised in Free Press Journal, Janmabhoomi and Maharashtra Government Gazette. The petitioner to deposit a sum of Rs.2,000/- in the office of the Prothonotary and Senior Master, High Court, Bombay for utilization thereof to issue the advertisement if the petitioner fails to issue the advertisement.

12. Aggrieved by the decision of the learned Company Judge, Chloro Controls preferred Appeal No. 449 of 2005 while the Company filed Appeal No. 450 of 2005. Both the appeals were heard by a Division Bench of the High Court of Bombay and disposed of by a common judgment and order dated 20th/21st February, 2006. The Division Bench set aside the order of the Company Judge, holding that Severn Trent is not entitled to file a petition for winding up as a contributory, unless it is registered as a member in the register maintained by the company. It, however, remitted the matter on the question of maintainability in its capacity as a Creditor of the Company to the Company Judge for consideration. The Bench also observed that it would be open to the respondents to oppose the admission of the petition on all grounds, including that of premature advertisement by Severn Trent.

13. Severn Trent being dissatisfied with order in appeal, filed Special Leave Petition (Civil) No. 6161 of 2006 in this Court. Notice was issued on April 13, 2006 and accepted on Caveat by the respondents. Another Special Leave Petition (Civil) No. 9530 of 2006 was filed by Chloro Controls (India) against that part of Division Bench order which left open the issue whether Severn Trent could file winding up petition as a Creditor and remitted it for consideration to the learned Company Judge. It is also aggrieved by the order passed by the Division Bench not dismissing the petition though Severn Trent had advertised the Company Petition without the order of the Company Court as required by law. In that Special Leave Petition, notice was issued on Aug, 22 2006 and accepted by the other side.

14. The matters appeared on Board from time to time. The Registry was directed to place them for final hearing and that is how, both the matters have been placed before us.

15. We have heard the learned counsel appearing on both the sides at considerable length. We have also given most anxious and thoughtful consideration to the rival submissions. Primarily, three questions arise for our consideration;

1. Whether a winding up petition filed by Severn Trent is maintainable in the capacity as a contributory?

2. Whether a winding up petition filed by Severn Trent is maintainable in the capacity as a creditor?

3 Whether a winding up petition filed by Severn Trent is liable to be dismissed at the threshold on the ground of premature advertisement by Severn Trent without an order of the Court as required by law?

1. Whether a winding up petition filed by Severn Trent is maintainable in the capacity as a contributory?

16. Before advertizing to the above question, it is necessary to keep in mind the relevant provisions of the Act at the time company petition was presented. Part VII of the Act relates to 'Winding up proceedings'. Whereas Section 425 of the Act lays down 'Modes of winding up', Section 433 enumerates 'Circumstances in which a Company may be wound up by Court'. The said section reads thus: 433. Circumstances in which company may be wound up by Tribunal A company may be wound up by the Tribunal,

(a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;

(b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;

(c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

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

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

(f) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up;

(g) if the company has made a default in filing with the Registrar its balance sheet and profit and loss account or annual return for any five consecutive financial years;

(h) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;

(i) if the Tribunal is of the opinion that the company should be wound up under the circumstances specified in section 424G: Provided that the Tribunal shall make

an order for winding up of a company under clause (h) on application made by the Central Government or a State Government.

17. Section 439 of the Act permits presentation of petition for winding up. It is also an equally important provision and may be quoted in extenso; 439. (1) An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section,

(a) by the company; or

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

(c) by any contributory or contributories; or

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

(e) by the Registrar; or

(f) in a case falling under section 243, by any person authorised by the Central Government in that behalf. (2) A secured creditor, the holder of any debentures (including debenture stock) whether or not any trustee or trustees have been appointed in respect of such and other like debentures, and the trustee for the holders of debentures, shall be deemed to be creditors within the meaning of clause (b) of sub-section (1).

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

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

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

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

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

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

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

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

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

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

(8) Before a petition for winding up a company presented by a contingent or prospective creditor is admitted, the leave of the Court shall be obtained for the admission of the petition and such leave shall not be granted

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

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

18. Section 439 has to be read with Section 428 which defines the term 'Contributory'. It reads thus: 428. Definitions of 'Contributory'. The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up, and includes the holder of any shares which are fully paid-up; and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory.

19. Bare reading of Section 439 makes it clear that it is couched in positive as well as negative words. Whereas sub-section (1) of the said section permits the presentation of application for winding up of a Company by any person enlisted therein, it clarifies that the said provision is 'subject to the provision' of the said section and, hence, the entire section has to be read with a view to consider the right of a person presenting a petition for winding up of a Company.

20. Sub-section (4) of Section 439 is in negative form and declares that a contributory shall not be entitled to present a petition unless it is covered either by clause (a) or by clause (b) of the said provision. As regards shares held by the contributory, clause (b) enacts that a contributory shall not be entitled to present a petition for winding up of a company unless the shares in respect of which he is a contributory have been; (i) originally allotted to him; or (ii) held by him and registered in his name for at least six months during the eighteen months immediately before the commencement of the winding up; or (iii) devolved on him through the death of the former holder.

21. Section 41 of the Act defines 'Member' thus:

41. Definition of "member".(1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members.

(2) Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members, shall be a member of the company.

(3) Every person holding equity share capital or company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be a members of the concerned company.

22. Sub-section (2) of Section 41 referred to above clarifies that a person who agrees in writing to become a Member of a Company and whose name is entered in its register of members, shall be a member of the company.

23. Section 108 provides that a Company shall not register transfer of shares unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee and specifying the name, address and occupation, if any, of the transferee, has been delivered to the company alongwith necessary certificate or letter of allotment. Section 109 deals with transfer of shares by legal representative of deceased Member of the Company. Section 109A relates to nomination of shares while Section 109B provides for transmission of shares. Section 110 requires making of an application for registration for transfer of shares (or other interest) of a Member in the Company either by transferor or by transferee. Section 111 provides legal remedy of an appeal in case the Company refuses to register transfer of shares or transmission of shares by operation of law.

24. From the above scheme of the Act, it is abundantly clear that a contributory's right to present a winding up petition must be one either under clause (a) or under clause (b) of sub-section (4) of Section 439. It is nobody's case that clause (a) of Section 439(4) is attracted in the instant case. Hence, Severn Trent can only claim the right to present a winding up petition under clause (b) of sub-section (4) of Section 439 of the Act. As already seen earlier, in the following three eventualities, a winding up petition can be presented by a contributory;

(i) Shares must have been originally allotted to him; or

(ii) Shares must have been held by him and registered in his name for at least six months during the eighteen months immediately before the commencement of the winding up proceeding; or

(iii) Shares must have devolved on him through the death of former shareholder.

25. Admittedly, Severn Trent is not the original shareholder. Eventuality (i), therefore, has no application in the present case. Regarding eventuality (ii), it is an Admitted fact that the name of Severn Trent has not been registered in the Register of the Company. In the circumstances, it was contended by the learned counsel for the Company before the learned Company Judge, before the Division Bench of the High Court as well as before us that Severn Trent was not entitled to institute a petition for winding up of the Company.

26. The counsel for the parties, in this connection, invited our attention to numerous foreign decisions. Probably, this is the first case before this Court of the type and, hence, there are no precedents covering the controversy raised before us.

27. Before more than a century, a question came up for consideration before an English Court of Chancery Division in *A Company, in Re*, (1894) 2 Ch 394. In that case, a petition against the company was presented by X who was neither an original allottee of shares nor shares were registered in his name for a particular period required by law. He thus could not have presented the petition under Section 40 of the Companies Act, 1867 (similar to Section 439 of our Act). It was contended on behalf of X that the Company allotted shares to wrong persons who ought not to be allowed to avail themselves of Section 40 of the Act. It was submitted that in equity 'what ought to have been done must be taken as having been done', and X should be treated as original allottee.

28. Negating the contention and holding the petition not maintainable, Vaughan Williams, J. stated;

"There is an express statutory provision as to the qualification of a contributory to present a winding up petition, and that cannot be modified by saying that he ought to be in a position in which he is not. The provisions of sect.40 are not complied with, and I see no reason why the company should not set up that defence." (emphasis supplied)

29. In *H.L. Bolton Engineering Co. Ltd. Re.*, (1956) 1 All ER 799 : (1956) 2 WLR 844 : 1956 Ch 577; the Chancery Court held that Section 224(1) of the Companies Act, 1948 was designed to provide an 'exhaustive list' of those who are entitled to present a petition for compulsory winding-

up. If the petitioner is to qualify as a person entitled to present such a petition, it must be on the ground that he is a contributory at the time of presentation of petition.

30. Relevant part of Section 224(1) reads thus;

"(1) An application to the court for the winding-up of a company shall be by petition presented, subject to the provisions of this section, either by the company or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately: Provided that

(a) a contributory shall not be entitled to present a winding-up petition unless

(i) either the number of members is reduced, in the case of a private Company, below two, or, in the case of any other Company, below seven; or

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

31. Section 224(1) of Companies Act, 1948 is in pari materia to sub-section (4) of Section 439 of our Act, quoted above.

32. Again, in *Gattopardo, Ltd. Re*, (1969) 2 All ER 344 : (1969) 1 WLR 619, a similar question came up for consideration before a Court of Appeal. Attention of the Court was invited to a decision in *A Company in Re*, and the observations of Vaughan Williams, J. Quoting with approval the observations of Vaughan Williams, Russel, L.J. stated; "I am left with the plain language of the section, and I find myself entirely able to agree with the remarks made in the course of argument by Vaughan Williams, J. . . I echo those words." (emphasis supplied)

33. In *J.N. 2 Ltd., Re*, (1978) 1 WLR 183 : (1977) 3 All ER 1104, the Court highlighted the extent and applicability of Section 224 (1) of the Companies Act, 1948. It observed;

"There seems to be no doubt that entry on the register is an essential qualification for a contributory who desires to present a petition, if he is not the original allottee and if the shares have not devolved on him through the death of a former holder; for if neither condition is satisfied, section 224(1)(a)(ii) requires that the shares must have been held by him and registered in his name for at least six months during the preceding 18 months. Plainly, if a transferee is not and never has been on the register, he cannot satisfy that condition. And it would not seem to be an answer that he ought to have been on the register, unless, perhaps, the company has been ordered to place him on the register and has disobeyed that order. (emphasis supplied)

34. Reference was also made to leading commentaries by well-known authors on the subject. In Palmer's Company Law, (24th Edn., Vol. I, p.1377), the learned Author stated; "No contributory of a company is capable of presenting a petition unless

1. either the number of members is reduced below two; or

2. the shares in respect of which he is a contributory or some of them were

(a) originally allotted to him, or

(b) have been held by him and registered in his name for at least six months during the eighteen months before the commencement of the winding up, or

(c) have devolved upon him through the death of a former holder [Insolvency Act, s. 124(2)].

The object of these provisions is to prevent a person buying shares in order to qualify himself to wreck the Company. "Held" means standing in the name of the contributory petitioner. The provisions of section 124(2) must be applied strictly, unless, perhaps, the company itself is in default in allotting shares or registering a transfer". (emphasis supplied)

35. Another renowned author Buckley (Buckley on the Companies Act, 14th Edn., Vol. I, p. 537) also considered the scope of Section 224 of the Companies Act, 1948 and stated;

"This section is apparently exhaustive, so that a person not within its ambit cannot petition, unless authorized to do so by some other enactment" (emphasis supplied)

36. From the above discussion, it is clear that the provisions of the Act must be complied with before presenting a winding up petition under Section 439(4)(b) of the Act. If a person intends to present a petition for winding up of a company as a contributory, he/it has to satisfy the Company Court that his/its case is covered by one of the eventualities contemplated by clause (b) of sub-section (4) of Section 439 of the Act.

37. Let us now consider some of the decisions referred to by the learned counsel for Severn Trent.

38. In *Bayswater Trading Co. Ltd., Re*, (1970) 1 All ER 608, a petition was presented by an Administrator of a lady, who was a member of the Company and whose name was struck off from the Register. The lady was a substantial shareholder. She died in 1964. The petitioner was her 'personal representative'. Considering the provisions of Section 224(1) of the Companies Act, 1948, the Court held that 'personal representative' of a shareholder was entitled to present a petition for the winding up of the Company, and the word 'contributory' should be construed accordingly. It was held that by the Chancery Court that on a true construction of sub-section (1) of Section 224, the words 'any member' must be so construed as to extend to the 'personal representative' of a deceased member, although not on the register of shareholders.

39. In our considered opinion, the ratio in *Bayswater Trading Co.* does not help *Severn Trent*. It was a case of 'natural person' who was a shareholder of the Company, whose name had been struck off which was sought to be restored. It was not a case of 'corporate entity' or 'juristic personality'. Obviously, therefore, in case of her death, 'personal representative' could present a petition for winding up of the Company and such right available under sub-section (1) of Section 224 could not be denied.

40. This is clear from the observations of Buckley, J., who after reproducing sub-section (1) of Section 224, observed;

"There is nothing there to indicate that a person on whom shares have devolved on the death of a former holder must have been registered as the holder of those shares before he is entitled to present a petition under Section 224, and I think that those words in the proviso of the sub-section clearly indicate that a personal representative of a deceased shareholder is entitled to present a petition and that the word 'contributory' in this sub-section must therefore be construed in a way so as to extend to such a personal representative".

41. *National Bank of Greece & Athens, South Asia v. Metliss*, (1957) 3 All ER 608 : (1957) 3 WLR 1056 : 1958 AC 509 is also distinguishable. There, the Greek Act governing amalgamation of Banking Companies provided that a new Company absorbing another Company by amalgamation would become 'universal successor' to the rights and liabilities in general of the amalgamated Companies without any other formality or act. It was, therefore, held that the 'universal successor' could institute an action or an action could be continued against him.

"The persona of the deceased is recognized as continued in the heir, or, as it is otherwise expressed, he is *eadem persona cum defuncto*. He is no more to be regarded as a new party introduced into a contract than is an executor or administrator of a dead man's estate in English law". (per Lord Keith) (emphasis supplied)

42. It is thus clear that the decision was based on the Greek Law governing amalgamation of Companies. As already adverted hereinabove, in the instant case, neither the foreign law was pleaded nor such evidence has been produced to prove merger/amalgamation. But even otherwise, in our considered opinion, Severn Trent cannot be treated as or said to be 'contributory' unless and until the requirements of law i.e. the provisions of Section 439(4)(b) have been complied with. It is not disputed that the name of Severn Trent has not been registered in the Register of the Company and hence, it cannot present a petition for winding up of the Company in the capacity of a contributory.

43. *Toprak Enerji Sanayi A.S. v. Sale Tilney Technology plc*, (1994) 3 All ER 483 was a case of substitution of party as plaintiff in the place of a foreign company ceasing to exist during the course of proceedings and was not a case of initiating winding up proceedings. The case in our view, therefore, is not relevant to the controversy in present appeals.

44. Strong reliance was placed by the learned counsel for Severn Trent on a decision in *Patent Steam Engine Company, in Re*, 1878 Ch 464 in support of the contention that a petition for winding up can be presented by a person who is holder of a share in the Company although his name is not entered in the Register at the time of presentation of petition. In that case, an order was passed by a Court to allot forthwith to the petitioner, certain preferential shares of the Company and to register them as shareholders and to issue certificates. The order was not complied with by the Company. When a winding up petition was presented by the petitioner, a preliminary objection was raised by the Company that since the petitioner could not be said to be shareholders as their names were not registered, they were not entitled to institute a petition.

45. The contention was negatived and petition was held maintainable by the Court. In a brief order, Bacon, V.C. said:

"In my opinion the technical objection has no weight. The petitioner have been declared by the Court entitled to be shareholders, and the company have been ordered to allot them these shares, and to register them as shareholders in respect of them. These orders the company have failed to comply with, and it is only through their default that the petitioners' names were not on the register upwards of six months ago" (emphasis supplied)

46. In our opinion, the decision in Patent Steam Engine Company will also not help Severn Trent herein. Firstly, the fact-situation in that case and in the case on hand is totally different. There, the Court ordered the Company to allot to the petitioners, certain specified preferential shares and to register them as the holders of those shares. There was non-compliance of the order of the Court by the Company. Based on entitlement order, the petitioners presented a petition for winding up of the Company which was held maintainable in view of the fact that there was default in carrying out the direction of the Court by the Company. In the instant case, despite merger and amalgamation of Capital Controls (Delaware) Company Inc. into Severn Trent, no step has been taken by Severn Trent for rectification of the register and registration of shares in its name. In our opinion, the Division Bench of the High Court is right in observing that it cannot be contended by Severn Trent that in view of dispute between Severn Trent and Kochas, the Company would not have registered shares in the name of Severn Trent. Had Severn Trent applied and the prayer rejected, an appropriate action could have been taken in accordance with law. Secondly, we have 'some' reservation about the proposition of law laid down in Patent Steam Engine Company. It is debatable whether a direction can be issued by a Court to allot shares or to register name of a particular person as a share-holder. It is also doubtful whether an objection as to maintainability of petition can be said to be objection of a 'technical' nature. In fact, when Patent Steam Engine Company was cited in Gattopardo Ltd., Russell, L.J. said; "I reserve for a further occasion, consideration whether the exception in the Patent Steam Engine case is one which is to be supported". Thirdly, we have already held that to present a petition for winding up of a Company in the capacity of a 'contributory', the person must be eligible under clause (b) of sub-section (4) of Section 439 of the Act. If he does not fall in any of the categories enumerated therein, he cannot present such petition. We are, therefore, unable to persuade ourselves that on the basis of the ratio laid down in Patent Steam Engine Company, Severn Trent must be held 'contributory' and granted locus standi to present a petition for winding up of the Company.

47. Severn Trent, no doubt, contended that 'purposive construction' should be given to the provisions of Section 439 (4) of the Act and Severn Trent must be treated as 'contributory'. It was also submitted that Severn Trent fulfills all the requirements of Section 439(4)(b) of the Act. On March 31, 2003, Delaware Corporation was merged into Severn Trent. Delaware Corporation was thus ceased to exist and the surviving Corporation, i.e. Severn Trent came to be substituted. All assets and liabilities of Delaware Corporation became the assets and liabilities of Severn Trent and Severn Trent became the 'contributory' within the meaning of Section 439 (4) (b) read with Section 428 of the Act. Severn Trent, therefore, could present a winding up petition. According to the learned counsel, if strict and literal interpretation as advanced by the Company is accepted, a corporate entity or a juristic personality can never become a contributory and consequently a share-holder. It was submitted that there was total deadlock between the two groups. It had not been

engineered by Severn Trent, but was the result of illegal acts and wrongful deeds of the Company and Kochas. It is, therefore, impossible that the Company would register the name of Severn Trent in the Register of Company and extend Severn Trent an opportunity to present a winding up petition against the Company.

48. We must express our inability to uphold the contention of learned counsel. In our judgment, sub-section (4) of Section 439 is a 'self-contained Code' as to presentation of petition by a contributory. A person claiming to be a contributory and presenting a petition for winding up of a Company in that capacity must fulfill the conditions laid down in the said section. Moreover, as observed by us, if there is omission, default or illegal action on the part of the Company in not registering the name of the contributory even though he/it can be said to be a contributory by holding the shares as required by clause (b) of sub-section (4) of Section 439, the law provides a remedy. In the instant case, however, no such course has been adopted by Severn Trent. In the circumstances, in our opinion, it cannot be said that the Division Bench of the High Court was in error in holding that Severn Trent could not be said to be a contributory to present a winding up petition.

49. The learned counsel for Severn Trent finally relied upon the last part of clause (b) of Section 439(4) contending that shareholding of the original company (Delaware Company) had devolved on Severn Trent through 'death' of that company which was a former holder. It was also submitted that Section 430 of the Act enacts that if a contributory dies, his legal representatives will become contributories. Section 431 deals with contributories in case of insolvency of a member. Section 432 relates to cases of winding up of a body corporate which is a member. The counsel urged that the Act does not provide for a situation where a corporate shareholder ceases to exist otherwise than by way of winding up. It was also submitted that Section 394(1)(b)(iv) of the Act speaks of dissolution of a company without winding up. In such situations, it is evident that the successor-in-interest will be the surviving entity and, as such, can be said to be contributory for the purpose of presenting a winding up petition. It was, therefore, urged that Severn Trent must be held to be a successor of the original allottee of shares, i.e. Delaware Corporation and the party on whom the shares have devolved, i.e. Severn Trent. The situation in the present case, according to the learned counsel, is akin to 'civil death' of Delaware Corporation. Since there is 'death' of former holder which expression would include dissolution/winding up of a corporate shareholder, the right to present a winding up petition must be conceded to Severn Trent, successor of former holder. It was submitted that it would be incorrect to urge that the use of expression 'he', 'his' or 'him' would apply only to natural persons and not to corporate personalities. If the said view is accepted, winding up petition can never be filed by a successor Company even if it holds shares earlier held by the 'former holder'.

50. The above argument weighed with the learned Single Judge and he observed that though Severn Trent was not the person who was originally allotted shares nor its name was registered in the register of the Company but the expression 'or have devolved on him through the death of former holder' would get attracted inasmuch as upon merger/amalgamation of Capital Controls (Delaware) Company, Inc. in Severn Trent, the former Company i.e. former holder can be said to have been met with 'death' and the shares held by the said Company could be said to have devolved on Severn Trent. If it is so, obviously, a petition filed by Severn Trent as a 'contributory' was maintainable.

51. The learned Company Judge, after referring to Section 439(4)(d) observed as under:

"On considering the said section as quoted above there is no manner of doubt that a contributory is a shareholder of the company. In fact in cases of amalgamation the shareholding of erstwhile company stood automatically transferred and vested from the transferor company to the transferee company and thus the transferee company becomes the successive holder of the said shares by operation of law".

52. The learned Judge proceeded to state;

"Otherwise also prima-facie in my opinion s.439(4)(b) does not restrict the petitioner from filing the present petition because it falls in the last category i.e. 'or have devolved on him through the death of a formal holder'. These words under s.439(4)(b) prima-facie in my opinion takes into account the situation as in the present case whether the company has ceased to exist by virtue of amalgamation of the said company with the petitioner company. The said original company has ceased to exist and thus there is a natural death in the eyes of law and in view thereof by virtue of the aforesaid words contained under section 439(4)(b) prima-facie in my opinion the present petition is maintainable and the same can be entertained".

53. The Division Bench again considered the matter and observed that the analogy drawn by the learned Company Judge was not well founded. According to the Division Bench, the category, "or have devolved on him through the death of former holder" would be applicable only to personal representative in his individual capacity and not to corporate entity or juristic personality.

54. In paragraph 37 of the judgment, the Division Bench of the High Court observed;

"37. We are afraid, the analogy drawn by the learned company Judge is wholly fallacious. The category, "or have devolved on him through the death of former holder" is applicable only to personal representative of a person holding shares in the company in his individual capacity. The said expression applies to devolution of rights on the death of natural person and has no application to a corporate entity or the juristic person. The submission of Mr. Shyam Divan that these words could also be applied to the company which has ceased to exist like the Courts have held that the corporate entity was liable to be contempt jurisdiction of the Court does not appeal us. If we accept the reasoning of the learned Company Judge and the submission of the learned senior counsel for the petitioner, it would be tampering with the plain language used in the last category of clause (b) of subsection (4) of Section 439 which we cannot do".

55. In our opinion, the Division Bench of the High Court was right in holding that the phrase "or have devolved on him through the death of former holder" would apply to natural persons who are holding shares in their individual capacity and not to juristic entities.

56. The word 'death' mentioned in a statute normally refers to the seizing of life of a natural person. In Stroud's Judicial Dictionary of Words and Phrases, (Vol. I, 6th Edn. P.610), it is stated;

"Where 'death' is mentioned in a statute, the word generally refers to the ceasing to live of a natural person; it will require a strong context to make the word include the dissolution of an artificial entity, e.g. a partnership or a Company".

57. In *Stewart v. Brown*, 35 SLR 828, the Court held that it was invited to interpret the words 'deceased debtor' as being equivalent to 'dissolved company' and the word 'death' as being equivalent to 'dissolution of partnership'. The Court further held that such interpretation could not be given.

58. Lord M'Laron said;"I am not sure that I understand the theory or principle of construction under which the suggested readings are admissible; but I think it must be a theory in which fancy takes the place of logic, and in which the question proposed is, how the statute is to be made to fit the case, and not whether the conditions of the case fit the statute". (emphasis supplied)

59. In the context of Company Law, winding up of a body corporate is not the same thing as or equivalent to death of a member. An individual and a body corporate expressly have been treated separately which is clear from Sections 430, 431 and 432 of the Act. Under the scheme of the Act, every creditor may present a petition for winding up of a company, but every contributory cannot. A contributory to be eligible and qualified to present a winding up petition must be covered by sub-section (4) of Section 439 of the Act and the Legislature, in its wisdom, excluded certain categories of persons from being entitled to present a petition for winding up as contributory. As already held by us earlier, the provision is exhaustive in nature and its sweep cannot be extended by judicial interpretation. Upholding of argument of *Severn Trent* and conceding the right to present a petition for winding up of a Company though it cannot be said to be a contributory would, in our judgment, result in re-writing of the provision. A Court of law cannot adopt a construction which would result in amendment of a statute. The contention of the learned counsel for *Severn Trent*, therefore, must be rejected.

60. A decision of this Court in *M/s World Wide Agencies Pvt. Ltd. & Anr. v. Margaratt. Desor & Ors.* (1990) 1 SCC 536 has no application to the facts of the case. It was not a case of corporate

personality, but of an individual shareholder and a claim was based by a legal representative of the member.

61. *Saraswati Industrial Syndicate Ltd. v. Commissioner of Income Tax*, 1990 Supp SCC 675 also does not carry the case of *Severn Trent* further. In that case, the question before the Court did not relate to locus of the petitioner to present a petition for winding up of a company as a contributory.

62. *Dr. Saibaba v. Bar Council of India & Anr.*, (2003) 6 SCC 186 and *Union of India v. Rajiv Kumar*, (2003) 6 SCC 516 lay down principles of interpretation of statutes. These principles are well-known and the learned counsel for the Company did not dispute them. They are, however, not applicable to the facts of the case.

63. For the aforesaid reasons, we answer question No.1 in the negative and hold that a winding up petition filed by *Severn Trent* in the capacity as a contributory is not maintainable.

2. Whether a winding up petition filed by *Severn Trent* is maintainable in the capacity as a creditor?

64. So far as second question is concerned, reading of the order passed by the learned Company Judge makes it clear that no such argument was raised on behalf of *Severn Trent* presumably because there was no occasion for such argument inasmuch as according to the learned Company Judge, *Severn Trent* could be said to be a 'contributory' within the meaning of Section 439 (4)(b) of the Act and a petition presented by *Severn Trent* in that capacity was tenable. Since the order passed by the Company Judge was challenged by the Company before the Division Bench and the Division Bench upheld the objection of the Company and reached a conclusion that the learned Company Judge was wrong in treating *Severn Trent* as 'contributory' and granting it locus to present a petition for winding up of Company, that an alternative argument was raised on behalf of *Severn Trent* that *Severn Trent* was also a Creditor of the Company and in that capacity i.e. in the capacity of a Creditor, the petition for winding up of the Company was maintainable.

65. The Division Bench considered the alternative contention and in paragraph 54, observed;

"54. This aspect was not canvassed by the petitioner before the learned Company Judge in response to the preliminary objection raised by the appellants that the company petition was not maintainable and, therefore, not considered by the learned Company Judge. We are of the view that this aspect has to be considered by the learned Company Judge before admitting the petition for winding up on the just and equitable grounds in the capacity as creditor. In so far as the reasons that have been

indicated by the learned Company judge for admitting the petition are concerned, we find these reasons unsustainable. As already held by us, the petition for winding up order as a contributory under Section 433(f) read with Section 439(4)(b) of the Companies Act, 1956

is not maintainable. Until the petition is legally maintainable, the issue of deadlock in the company pales into insignificance".

66. It was contended on behalf of the Company that the Division Bench has committed an error of law in observing that the petition filed by Severn Trent was maintainable in the capacity as a Creditor of the Company and in remitting the matter before the Company Judge. It was submitted that looking to the company petition in its entirety and also the grounds and prayers, it is clear that the petition was not presented by Severn Trent as 'Creditor' of the Company but as a 'Contributory'. The contention as to 'Creditor' was raised belatedly for the first time in argument before the Division Bench which was an afterthought. This is apparent from the observations of the Division Bench in the impugned order in para 54 extracted earlier. It was, therefore, submitted that no such argument could have been permitted and to that extent, the order passed by the Division Bench of the High Court deserves to be interfered with.

67. We have given anxious consideration to the above submission. In our opinion, however, it cannot be said that the Division Bench was in error in passing the impugned order and remitting the matter to the learned Company Judge to consider the question as to maintainability of company petition filed by Severn Trent as a Creditor of the Company. In this connection, our attention has been invited by the learned counsel for Severn Trent to the company petition. In para 16 of the petition, it was stated by Severn Trent that it was also a Creditor of the Company and 'admitted sums owed by the Company to Severn Trent' had not been paid. It was further stated that the Board of Directors of the Company and the Managing Director had acknowledged the Company's liability to Severn Trent in various communications and Board Meetings. It was further stated that in the circumstances, Severn Trent was constrained to issue legal notice on August 4, 2004 demanding payment of all outstanding dues. A copy of the demand notice was also annexed to the company petition. According to Severn Trent, total amount due and payable by the Company to Severn Trent as on July 31, 2004 came to US \$ 575113.29. In ground (i) also, it was the case of the Company that there was intentional refusal by Mr. Kocha to allow the Company to pay its admitted debts to Severn Trent. In paragraph 41, it was stated by Severn Trent that it was just, equitable, necessary and in the interest of justice and 'in order to secure the dues of the petitioner that Provisional Liquidator should be appointed'.

68. It is thus clear that though the case put forward by Severn Trent in the winding up petition was as a 'contributory', the factum of the Company being Debtor and Severn Trent being Creditor and in spite of dues being admitted by the Company, there was non payment on the part of the Company had been mentioned in the petition. The learned counsel for Severn Trent appears to be right that in view of the finding by the learned Company Judge that the petition instituted by Severn Trent as a 'contributory' was maintainable, it was no more necessary for the learned Company Judge to consider the question whether the company petition filed by Severn Trent was maintainable in the

capacity as a Creditor.

69. It was then contended by the learned counsel for the Company that the ground for winding up of Company under clause (f) of Section 433 was not available to Severn Trent in case it had presented a petition as a Creditor of the Company. In this connection, our attention was invited to certain decisions. In our opinion, it would not be appropriate to express any opinion one way or the other since we are of the view that the Division Bench of the High Court was not wrong in allowing Severn Trent to argue that point before the learned Company Judge as that point did not arise before him earlier. We may, however, hasten to add that we may not be understood to have recorded a finding that the petition presented by Severn Trent is maintainable. We clarify that as and when the matter will be taken up by the learned Company Judge, it will be open to the Company to raise a contention that no such petition as presented is maintainable in the capacity as a Creditor.

70 Question No. 2 is answered accordingly.

3. Whether a winding up petition filed by Severn Trent is liable to be dismissed at the threshold on the ground of premature advertisement by Severn Trent without the order of the Court as required by law?

71. So far as the third question is concerned, neither the learned Company Judge, nor the Division Bench has decided it. Before the learned Company Judge, no such contention appears to have been advanced by the Company. Before the Division Bench, it was argued that since there was premature advertisement by the Severn Trent without any order from the Company Court, there was 'abuse of process of the Court' by Severn Trent and the petition was liable to be dismissed only on that ground. Before us also, the above contention was reiterated by the learned counsel for the Company and in support thereof, case-law has been cited. The learned counsel for the Severn Trent, however, submitted that the advertisement was qualified, carefully worded and the facts stated therein were accurate. It was essentially a notice to creditors, contributories and other persons intimating about presenting of winding up petition and there was no mala fide intention or oblique motive in issuing the advertisement. We may only state that since the Division Bench of the High Court has remitted the matter to the learned Company Judge and granted liberty to the Company to oppose admission of the Company petition on all available grounds including the ground of 'premature advertisement', we need not express any opinion one way or the other. As observed by the Division Bench of the High Court, at the time the company petition will be taken up by the Company Judge for admission, it will be open to the Company or contesting respondent to oppose the admission on all grounds available.

72. Question No. 3 is answered accordingly.

73. For the aforesaid reasons, the appeal filed by Seven Trent Water Purification Inc. petitioner of the company petition, deserves to be dismissed and is hereby dismissed. So far as the appeal filed by the Chloro Controls (India) is concerned, it is disposed of in the light of the observations made in the judgment.

74. On the facts and in the circumstances of the case, all the parties are directed to bear their own costs.