GUJARAT HIGH COURT

Mohanlal Ganpatram

Vs.

Sri Sayaji Jubilee Cotton

Company Peth. No. 6 of 1962

(P.N. Bhagwati, J.)

18.02.1964

ORDER

(1-23). x x x x

P.N. Bhagwati, J.

24. Before I examine the various arguments which were advanced before me on the merits of the petition I must refer to two objections of a preliminary nature which were urged by Mr. I.M. Nanavati, learned advocate appearing on behalf of Bharat Kala Bhandar Limited in answer to the petition in so far as the petition was directed against Bharat Kala Bhandar Limited, Mr. C.C. Gandhi, learned advocate appearing on behalf of the Company and the learned Advocate General appearing on behalf of the Directors, also supported Mr. I.M. Nanavati in these preliminary objections. The first preliminary objection was that in a petition under Section 397 or 398 of the Companies Act, 1956, the Court has no jurisdiction to set aside a transfer effected by a Company in favour of third party except in a case falling under Section 402(f). The argument briefly was that Sections 397 and 398 of the Companies Act, 1956, were on a true construction aimed at putting, an end to a continuing state of affairs and not at compensating the minority share-holders for a wrong which was no longer a continuing wrong and that the remedy given by those Sections being a preventive remedy, no order could be made by the Court setting aside a transfer already past and concluded between a Company and a third party unless such order was expressly authorized as in a case covered by Section 402(f). The petitioners were, therefore, not entitled, so ran the argument, to have the sale of the movable and immovable properties of the Company effected in favor of Bharat Kala Bhandar limited, set aside even if the allegations made by them in the petition were well-founded and they were in a position to show that such sale was a link in the chain of conduct which could be said to be oppressive to the petitioners and other minority share-holders or prejudicial to the interests of the Company. The second preliminary objection which was urged in the alternative was that even if the power of the Court under

Sections 397 and 398 of the Companies Act, 1956, extended to making an order setting aside a transfer already made by a Company, in favour of a third party, such power could not be exercised in the present case, since Bharat Kala Bhandar Limited was, on the facts and circumstances of the case, protected by the doctrine of indoor management. The validity of these preliminary objections turned on the true interpretation to be put on the provisions of Sections 397, and 398 of the Companies Act, 1956. I shall therefore, immediately proceed to examine the scope and ambit of these sections.

25. Sections 397 and 398 are part of a fasciculus of Sections commencing from Section 397 and, ending with Section 407 and this fasciculus of Sections occurs in Section A dealing with Powers of Court under Chapter VI headed "Prevention of Oppression and Mismanagement". Under Section 397 any member of a Company who complains that the affairs of the Company are being conducted in a manner oppressive to any member or members including any one or more of themselves, may petition the Court which, if satisfied that the Company's affairs are being conducted in a manner oppressive to any member or members and that the facts justify the making of a winding up order on the ground that it is just and equitable to do so but that this would unfairly prejudice such member or members, may make such order as it thinks fit with a view to bringing to an end the matters complained of. This Section corresponds to Section 210 of the English Companies Act, 1948. Section 398 considerably enlarges the scope of the remedy by providing that any members of a Company who complain that the affairs of the Company are being conducted in a manner prejudicial to the interests of the Company or that a material change has taken place in the management or control of the Company, and that by reason of such change, it is likely that the affairs of the Company will be conducted in a manner prejudicial to the interests of the Company, may apply to the Court and the Court may, if it is of the opinion that the affairs of the Company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the Company, it is likely that the affairs of the Company will be conducted as aforesaid, make such order as it thinks fit with a view to bringing to an end or preventing the matters complained of or apprehended. It is obvious that this remedy provided by Section 398 is of a much wider nature than the remedy under Section 397, since unlike the remedy under Section 397, it is not limited by the requirement that the facts must be such as justify the making of the winding up order against the Company on the ground that it is just and equitable to do so. The question of construction which arises for determination on these provisions is as to what is the extent of the power of the Court under Section 397 or 398. Does the power of the Court extend to the making of an order, setting aside or interfering with past and concluded transactions between a Company and a third party which are no longer continuing wrongs or is the power of the Court confined to the making of an order preventing future oppression or mismanagement ? Mr. S.B. Vakil, learned advocate appearing on behalf of the petitioners, pleaded for former construction on the ground that such construction would enlarge the power of the Court rather than limit it and in support of this plea he relied on the well-known rule of interpretation that in the case of provisions of a remedial nature, which Sections 397 and 398 undoubtedly were, the construction to be made should be such as will

suppress the mischief and advance the remedy and add force and life to the cure and remedy according to the true intent of the makers of the Act, pro bono publico. Now Mr. S.B. Vakil is certainly right in his submission that Sections 397 and 398 being designed to suppress an acknowledged mischief, they should receive liberal interpretation and the Court should give such construction as will advance the remedy, but even applying this principle of interpretation, it is not possible to accept the construction contended for on behalf of the petitioners. The reasons are as follows :

26. Prior to the enactment of the Companies Act, 1956, the statute relating to Companies was Indian Companies Act, 1913. There was in the Indian Companies Act, 1913, Section 153-C which corresponded to Sections 397 and 398 of the Companies Act, 1956. This Section was introduced in the Indian Companies Act, 1913, by Act 52 of 1951 following the enactment of Section 210 in the English Companies Act, 1948. The genesis of the provisions contained in Sections 397 and 398 of the Companies Act, 1956, is therefore to be found in Section 210 of the English Companies Act, 1948. Now the position which obtained prior to the enactment of Section 210 of the English Companies Act, 1948, was that even if the affairs of a Company were being conducted in a manner oppressive to some part of the shareholders or in a manner prejudicial to the interests of the Company, the aggrieved shareholders had no effective remedy to put an end to such conduct, for unless the case fell within any of the three recognized exceptions to the rule in *Foss v. Harbottle*[1], the Court had no jurisdiction to interfere with the internal management of the Company and even in a case falling within any of the three recognized exceptions to the rule in (1843) 2 Hare 461, all that the aggrieved shareholders could do was to challenge an act already done by the controlling shareholders as part of such conduct and they could not take any effective steps to prevent the continuance of such conduct. The only remedy which the aggrieved shareholders had was to apply for winding up the Company on the ground that it was just and equitable to do so. That remedy was however totally inadequate for it meant killing the Company for the purpose of putting an end to the oppression and mismanagement. But killing the Company would be a singularly clumsy method of ending oppression and mismanagement and such a course might well turn to be against the interests of the minority shareholders. The liquidation of the Company may result in the sale of its assets at break-up value which may be small and the minority who, urged by the oppression of the majority, petitions for a winding up order may in effect play its opponent's game, for the only available purchaser of the assets of the Company may be the very majority whose oppression has driven the minority to seek redress. Hence the Cohen Committee recommended an alternative and less drastic expedient for bringing to an end oppressive conduct on the part of those in control of the Company and this expedient is now embodied in Section 210 of the English Companies Act, 1948. Following the enactment of this Section the Legislature introduced Section 153-C in the Indian Companies Act, 1913, providing an alternative remedy for putting an end to oppression or mismanagement on the part of the controlling share-holders. The remedy given by Section 153-C was a morel, effective and less drastic remedy than the remedy of winding up for if there was oppression or mismanagement, the aggrieved share-holders could

instead of applying for winding up the Company in order to put an end to such oppression or mismanagement, apply for relief under the Section and the Court could make such, order as it thought necessary with a view to putting an end to such oppression or mismanagement and preventing its recurrence. When the Companies Act, 1956, was enacted, what was originally Section 153-C was split up into Sections 397 and 398 and the scope of the remedy was expanded by removing in cases covered by Section 398 the requirement that the aggrieved share-holders must make out a case for winding up under the Just and equitable clause before they can apply for relief under that Section. The object and purpose of the remedy, however, remained the same, namely, to cure the mischief of oppression or mismanagement on the part of controlling shareholders by bringing to an end such oppression or mismanagement so that it does not continue in future. The remedy was intended to put an end to a continuing state of affairs and not to

[1](1843). 2 Hare 461

afford compensation to the aggrieved share-holders in respect of acts already done which were no longer continuing wrongs. It is in the light of this background that the principle of interpretation relied on by Mr. S.B. Vakil must be applied and applying that principle of interpretation the widest power may be inferred for the Court to interfere in the internal management of a Company with a view to putting an end to oppression or mismanagement on the part of controlling shareholders so as to advance the remedy and suppress the mischief. But no power, I am afraid, can be inferred by the application of that principle of interpretation to set aside or interfere with past and concluded transactions between a Company and third parties which are no longer continuing wrongs, unless the Sections by use of clear and unambiguous language confer such power on the Court.

27. Turning to Sections 397 and 398, I find that the language of these Sections also far from conferring any power on the Court to set aside on interfere with past and concluded transactions between a Company and third parties which are no longer continuing wrongs, confines the power of the Court to making an order for the purpose of putting an end to oppression or mismanagement on the part of controlling share-holders. It is undoubtedly true that the power of the Court under Sections 397 and 398 is very wide - it is conferred in terms of the widest amplitude - and the Court can make such order as it thinks fit, but this power is conditioned by the purpose for which it can be exercised, namely, "with a view to bringing to end the matters complained of' in a case under Section 397 and "with a view to bringing to an end or preventing the matters complained of or apprehended" in a case under Section 398. These words indicate the confines within which the power of the Court under Sections 397 and 398 must operate. Now what are these confines ? The answer is clear from the language of Sections 397 and 398. The remedy under Section 397 can be invoked only when the affairs of the Company are being conducted in a manner oppressive to a shareholder or shareholders and similarly the remedy under Section 398 can be invoked only when the affairs of the Company are being conducted in a manner prejudicial to the interests of the Company. Of course when I say this I am referring only to the first part of Section 398 and leaving out of consideration the second part to which I

shall refer a little later. Sections 397 and 398 thus clearly postulate that there must be at the date of the application a continuing course of conduct of the affairs of the Company which is oppressive to any share-holder or share-holders or prejudicial to the interests of the Company and it is this course of oppressive or prejudicial conduct which would form the subject-matter of the complaint in the application. Now the purpose for which an order can be made under Sections 397 and 398 being to bring to an end the matters complained of and the matters complained of in an application under these Sections being a course of conduct on the part of controlling shareholders in the management of the affairs of the Company which is oppressive to any shareholder or share-holders or prejudicial to the interests of the Company it is clear that an order can be made under these Sections only for the purpose of bringing to an end such course of oppressive or prejudicial conduct, that is, for the purpose of putting an end to oppression or mismanagement on the part of controlling shareholders so that there may not be in future such oppression or mismanagement. The language of Sections 397 and 398 leaves no doubt as to the true intendment of the Legislature and it is transparent that the remedy provided by these Sections is of a preventive nature so as to bring to an end oppression or mismanagement on the part of controlling shareholders and not to allow its continuance to the detriment of the aggrieved shareholders or the Company, The remedy is not; intended to enable the aggrieved shareholders to set at naught what has already been done by controlling shareholders in the management of the affairs of the Company. If such were the intention of the Legislature, which as I will presently show it could never have been, the language of Sections 397 and 398 would have been different and the Legislature would not have confined the power of the Court by limiting the purpose for which it can be exercised under the sections. That the remedy provided by Sections 397 and 398 is essentially preventive in character is also borne; out by the second part of Section 398 which applies when a material change has taken place in the management or control of a Company and by reason of such change it is likely that the affairs of the Company would be conducted in a manner prejudicial to the interests of the Company and empowers the Court in such a case to make an order with a view to preventing the matters apprehended, namely, the prejudicial conduct of the affairs of the Company, so that such prejudicial conduct may not at ail result from such change and may Be totally prevented. Whereas the first part of Section 398 applies to a case where the affairs of the Company are being conducted in a manner prejudicial to the interests of the Company and it is required to put an end to such existing course of prejudicial conduct, the second part of the Section applies where there is no existing course of prejudicial, conduct but prejudicial conduct is apprehended by reason of a material change in the management or control of the Company and what is, therefore, required is the prevention of occurrence of such prejudicial conduct. These then are the confines within which the remedy provided by Sections 397 and 398 operates. But it must be remembered that within these confines the remedy is a very potent and effective remedy, since the power it confers on the Court is extremely wide and the Court can pass such order as it thinks necessary for the purpose of putting an end to oppression or mismanagement on the part of controlling shareholders. The nature of the order would depend on the state of affairs prevailing in the Company and the nature of the restrictions required to put an end to such state of affairs. The necessity of interference under these Sections may arise in an

infinite variety of circumstances and the Legislature has, therefore, left the discretion of the. Court unfettered in the matter of making an appropriate order. Such power can, however, be exercised by the Court only for the purpose of bringing to an end oppressive or prejudicial conduct in the management of the affairs of the Company.

28. This, in my opinion, is the true import of Sections 397 and 398 and it is amply supported by the heading under which these Sections occur. It is now well-settled that headings of this kind can be referred to for the purpose of constructions of the Sections ranged under the headings. In *Inglis v. Robertson*[2], Lord Herchell, called upon to construe Section 3 of the Factors Act, 1889, relied upon the fact that the Section appeared in a group of Sections headed "Dispositions by Mercantile Agents" and after referring to the headings of different parts of the Act, observed : "These headings are not, in my opinion, mere marginal notes but the Sections in the group to which they belong must be read in connection with them and interpreted by the light of them." Lord Collins also said much to the same effect in *Toronto City v. Toronto Rlys*[3]. when he observed; "This clause is the last of a. fasciculus of which the heading is "Track etc., and Railways" and, as was held in Hammersmith; and *City Rly. Co. v. Brand*[4], such heading is to be regarded as giving the key to the interpretation of the clauses ranged under it unless the wording is inconsistent with such interpretation." These observations of Lord Herachell and Lord Collins were

[2]1898 A.C. 616 [4](1869) 4 HL 171
[3]1910 A.C. 312

relied upon by the Court of Appeal in a recent decision in. *Qualter Hall and Co. v. Board of Trade*[5], It is therefore, clear that the heading under which a Section occurs can be referred to as throwing light on the interpretation of the Section unless the language of the Section is plainly contrary to such interpretation. The fasciculus of Sections comprising Sections 397 and 398 occurs in a Chapter headed "Prevention of Oppression and Mismanagement", the sub-heading being "Powers of Court". The heading read with the sub-heading clearly shows that Sections 397 and 398 deal with powers of Court for prevention of oppression and mismanagement in the affairs of the Company and that the remedy given by these Sections is, therefore, of a preventive nature intended to prevent occurrence or continuance of oppression or mismanagement in the affairs of the Company and is not intended to set at naught what has already been done by controlling shareholders in the course of such oppression or mismanagement which is past and concluded and no longer a continuing wrong.

29. Apart from the plain dictate of the language of Sections 397 and 398 there are other considerations which weigh with me in taking the view that a past and concluded transaction between a Company and a third party cannot be set aside on an application under Section 397 or 398. Let us see what are the consequences to which the other construction must logically and inevitably lead and then consider whether the Legislature could have possibly intended such consequences. The effect of accepting that construction would be that If a transaction has been

entered into between a Company and a third party as part of a continuous and continuing course of oppressive or prejudicial conduct, any shareholders who are aggrieved by such conduct would be entitled to ask the Court to set aside such transaction. Now such transaction may not come within any of the three recognized exceptions to the rule in (1843) 2 Hare 461 (supra) and yet the aggrieved shareholders would be entitled to challenge such transaction by taking proceedings in their own right under Sections 397 and 398. The result would be that on this construction the exceptions to the rule in (1843) 2 Hare 461 (supra) would be enlarged beyond the three well-recognized exceptions and whenever any transaction is entered into by a Company with a third party which is part of oppressive or prejudicial conduct on the part of those in management of the affairs of the Company, it would be liable to be challenged at the instance of the aggrieved shareholders. Now could the Legislature have intended to bring about such a result which would have the effect of almost abrogating the rule in (1843) 2 Hare 461 in so far as transactions with third parties are concerned ? Could the Legislature have intended to strike a death-blow to the rule in (1843) 2 Hare 461 which has held the field now for well-nigh over a hundred years and that too in this indirect manner ? I should be certainly slow to accept a construction which would have the effect of producing this consequence.

30. Not only would this consequence ensure but also the basic and fundamental principle on which the three well-recognized exceptions to the rule in (1843) 2 Hare 461 have been evolved would be completely set at naught. In all cases falling within the three well-recognized exceptions to the rule in (1843) 2 Hare 461 the aggrieved share-holders can sue a third party but that is permitted to be done merely as a matter of procedure; the cause of action on which they sue is a cause of action properly belonging to the

[5](1961) 3 W. L. R. 825

Company, but since the persons in control of the management of the affairs of the Company are themselves the alleged wrong-doers and will not, therefore, permit an action to be brought in the name of the Company, the aggrieved shareholders are permitted to enforce the cause of action belonging to the Company. But if the construction contended for by Mr. S.B, Vakil were accepted, the result would be that though a Company may have no cause of action to sue a third party to set aside a transaction entered into by the Company with such third party, the aggrieved shareholders would be entitled to move the Court and at the instance of the aggrieved share-holders the court would the entitled to set aside such transaction, provided only that such transaction was part of oppressive or prejudicial conduct on the part of those in control of the management of the affairs of the Company. The aggrieved shareholders would in that event have a cause of action of their own and in taking proceedings under Section 397 or 398, they would be enforcing their own cause of action and not a cause of action belonging to the Company. One might well ask the question : Did the Legislature intend to confer such a new cause of action on individual shareholders against third parties so as to entitle them to set aside transactions which the Company could not ? I think not. If such were the intention of the Legislature, I should have expected appropriate language and not language indicative only of preventive relief.

31. Another question also arises on the construction advocated by Mr. S.B. Vakil and it is difficult to find an answer to that question. If Sections 397 and 398 are intended to confer a new cause of action on individual shareholders to set aside transactions entered into by the Company with third parties, on what grounds are those transactions liable to be impeached ? No clue to the answer to this question is furnished by the Sections save and except that the transactions would be liable to be set aside if they are part of a continuous and continuing course of oppressive or prejudicial conduct on the part of controlling shareholders. But this would mean that individual share-holder would have a right to ask the Court to set aside any transaction entered into by the Company with a third party on the mere ground that such transaction, though otherwise perfectly legal and valid and hence incapable of being avoided by the Company, was oppressive to the complaining shareholders or prejudicial to the interests of the Company. Such a view would; make it impossible for any outsiders to deal with the Company and far from advancing the interests of the Company, would be clearly detrimental to the interests of the Company, for it would scare away persons dealing with the Company. How would an outsider dealing with the Company know or even have the means of knowing whether the affairs of the Company are being conducted in a. manner oppressive to some part of the shareholders or prejudicial to the interests of the Company ? The result would be that having entered into, a, transaction perfectly lawful and valid with a Company, an outsider may suddenly discover one fine morning that his transaction is bad because it was oppressive to some part of the shareholders or prejudicial to the interests of the Company. Perfected titles to property would on this construction be rendered uncertain. Could the Legislature have intended to bring about such a result ? The answer to my mind is plainly no.

32. Mr. S.B. Vakil sought to support the construction suggested by him by relying on Section 402 which particularizes, without prejudice to the generality of the powers under Section 397 or 398, what orders may be made by the Court under either of the two Sections. Mr. S.B. Vakil pointed out that Section 402 enumerated by way of illustration the different kinds of orders which may be made by the Court under Section 397 or 398 and contended that clauses (e) and (f) of Section 402 clearly showed that a transaction entered into by a Company with a third party could be set aside or interfered with by the Court under Section 397 or 398. The particular orders specified in Section 402 as orders which may be made by the Court under Section 397 or 398 were, argued Mr. S.B. Vakil, illustrative of the kinds of orders which could be made by the Court and since clauses (e) and (f) of Section 402 provided for making of orders setting aside or interfering with transactions between a Company and third parties in. certain specified cases, it was obvious that the power of the Court under Section 397 or 398 extended to making of an order setting aside or interfering with a transaction between a Company and a third party provided that the other conditions of the Section were satisfied. This contention though at first blush attractive, is in my opinion fallacious and for several reasons.

33. In the first instance I do not think that clause (e) of Section 402 can at all be availed of by Mr. S.B. Vakil, Clause (e) of Section 402 does not really deal with a transaction between a Company

and a third party which is past and concluded and is no longer a continuing wrong. It talks of an agreement between a Company and a, third party which is subsisting at the date of the order and provides that such agreement may be terminated, set aside or modified by the order. Such an agreement would nave a continuing effect and if it is entered into as part of a course of oppressive or prejudicial conduct or has brought about a course of oppressive or prejudicial conduct, the Court certainly can, for the purpose of bringing to an end such oppressive or prejudicial conduct terminate, set aside or modify such agreement; Clause (e) of Section 402 deals with a situation such as this and does not profess to strike at any past and concluded transactions between a Company and third parties which are no longer continuing wrongs.

34. The question, therefore, remains to be considered only in so far as clause (f) of Section 402 is concerned. Clause (f) of Section 402 undoubtedly deals with past and concluded transactions between a Company and third parties which are no longer continuing wrongs. But I am afraid it is not .possible to say that this clause is illustrative of a general category of orders which can be made by the Court under Section 397 or 398 setting aside or interfering with transactions between a Company and third parties which are past and concluded and are no longer continuing wrongs. If such were the position, the logical consequence would be that independently of clause (f) of Section 402 the Court would have power under Sections 397 and 398 to set aside transactions amounting to fraudulent preference and such power would extend not only to transactions effected within three months but also to transactions effected beyond three months from the date of the application. But if that be so, it is difficult to see why the Legislature should have introduced in an illustrative provision like clause (f) of Section 402 the limitation that the transaction amounting to fraudulent preference must have been effected within three months before the date of the application. The limitation would in such a case be clearly futile for the Court could always in the exercise of its power under Section 397 or 398 set aside a transaction amounting to fraudulent preference even though it was not within the period or three months. The limitation would have significance only if clause (f) of Section 402 were not illustrative of a general power in the Court under Section 397 or 398 to set aside past and concluded transactions between a Company and third parties but were intended to add to the power of the Court under Sections 397 and 398, for in that event there would be no power in the Court under Sections 397 and 398 to set aside a transaction amounting to fraudulent preference but clause (f) of Section 402 would confer such power on the Court, provided the transaction was within the period of three months. Realising this difficulty Mr. S.B. Vakil argued that the limitation was enacted in clause (f) of Section 402 with a view to excluding from the general power of the Court under Sections 397 and 398 transactions amounting to fraudulent preference effected beyond three months from the date of the application. There are however several difficulties in the way of acceptance of this argument. Firstly, there are no words in clause (f) of Section 402 which indicate that what was intended to be done by that clause was to remove from the range of the power of the Court under Sections 397 and 398 transactions amounting to fraudulent preference which were effected beyond three months from the date of the application. Clause (f) of Section 402 merely describes the character of the transaction which can be set aside by the court and the

description which is given is that such transaction must be a transaction amounting to fraudulent preference effected within three months before the date of the application. It does not say that a transaction amounting to fraudulent preference may be set aside only if it is effected within three months before the date of the application nor does it contain any words indicating that only transactions amounting to fraudulent preference effected within the said period of three months may be set aside and no others. The provision in clause (f) of Section 402 is clearly not a provision which in any way derogates from the general power of the Court under Sections 397 and 398. As a matter of fact and that is the second difficulty which Mr. S.B. Vakil has to meet - the provision in clause (f) of Section 402 is a provision which is enacted without prejudice to the generality of the power conferred on the Court under Section 397 or 398 and it cannot, therefore, be construed as derogating from the power of the Court under Sections 397 and 398 or limiting that power to transactions amounting to fraudulent preference effected within three months before the date of the application. On the construction of Mr. S.B. Vakil, Clause (f) of Section 402 would act as a limitation on the power of the Court under Sections 397 and 398 and would have the effect of curtailing such power, which certainly is not the function of a Section which professes to set out the particular orders which may be passed by the Court without prejudice to the generality of the powers of the Court under Sections 397 and 398. Such a construction would have the effect of prejudicing the generality of the power of the Court under Sections 397 and 398 and would be contrary to the plain language of the enactment. Thirdly, it is difficult to see why the Legislature should have provided a time limit of three months in regard to transactions amounting to fraudulent preference and not provided any time limit at all in regard to other transactions, when the vice which affected both the categories of transactions was the same, namely, they were part of a continuous and continuing course of oppressive or prejudicial conduct and there was an additional vice of fraudulent preference which affected the former transactions. If the Legislature intended the power of the Court under Sections 397 and 398 to be directed against all past and concluded transactions which were no longer continuing wrongs, it is difficult to see why the Legislature should have made a distinction in favour of transactions amounting to fraudulent preference by providing that such transactions can be set aside only if they were effected within three months before the date of the application while other transactions though not suffering from the vice of fraudulent preference may be set aside whether they were effected within or beyond three months from the date of the application. For these reasons I am of the view that clause (f) of Section 402 is not illustrative of any general power in the Court to set aside or interfere with past and concluded transactions between a Company and third parties which are no longer continuing wrongs but embodies an additional power conferred on the Court to set aside transactions amounting to fraudulent preference effected within three months before the date of the application. Clause (f) of Section 402 cannot, therefore, be relied upon by Mr. S.S. Vakil as affording any assistance to his argument.

35. Reference may also be made in this connection to Section 406 which makes Sections 539 to 544 in the form set forth in Schedule XI applicable in relation to an application under Section 397 or 398. Section 406 read with Section 543 as set forth in Schedule XI enables the Court in an

application under Section 397 or 398 to bring to book delinquent directors, managing agents, secretaries and treasurers, managers and other officers of the Company and to enforce the company's claim against them if they have misapplied or retained or become liable or accountable for any money or property of the Company or committed any misfeasance or breach of trust in relation to the Company. The Court can, therefore, in cases covered by Section 543 as set forth in Schedule XI award, on an application under Section 397 oar 398, at the instance of the aggrieved share-holders, compensation to the Company and through the Company to the aggrieved share-holders, in respect of past and concluded transactions which are not continuing wrongs. Just as clause (f) of Section 402 enables the Court to set at naught transactions amounting to fraudulent preference effected within three months before the date of the application under Section 397 or 398, even though they are no longer continuing wrongs so also, Section 406 enables the Court to award compensation in respect of past and concluded transactions falling within Section 543 as set forth in Schedule XI, even though they are no longer continuing wrongs. These are the only two cases in which on an application under Section 397 or 398, the Court is empowered to give relief in respect of past and concluded transactions which are no longer continuing wrongs and they are really in the nature of exceptions to the general principle manifest from the language of Sections 397 and 398 that the power of the Court under both the Sections is confined only to making an order for the purpose of putting an end to oppressive or prejudicial conduct and the Court cannot make an order setting aside or interfering with past and concluded transactions which are no longer continuing wrongs or giving compensation to the Company or the aggrieved share-holders in respect of such transactions. In this view of the matter it is apparent that the preliminary objection raised by Mr. I.M. Nanavati on of Behalf of Bharat Kala Bhandar Limited and supported by Mr. C.C. Gandhi on behalf of the Company and the learned Advocate General on behalf of the Directors is well-founded and the petition in so far as it claims that the sale of the movable and immovable properties of the Company in favour of Bharat Kala Bhandar Limited should; be set aside and the said movable and immovable properties should be directed to be restored to the Company must, therefore, fail. Since this is the only claim made against Bharat Kala Bhandar Limited, the petition must stand dismissed as against Bharat Kala Bhandar Limited.

(36-48). * * *

49. Realizing this difficulty in his way, Mr. S.B. Vakil on behalf of the petitioners, contended, that in any event the resolution dated 8th December 1957 was illegal and invalid since in passing it, the Directors had committed a contravention of the provisions of Sections 299 and 300 of the Companies Act, 1956, and moreover there was no quorum at the meeting of the Board of Directors which passed the said resolution. Now as I have already pointed out above, the question whether a particular action of the Directors was within the limits of the law or was in contravention of any provision of law is not a proper subject matter of inquiry in a petition under Section 397 or 398 of the Companies Act, 1956. If an action of the Directors is illegal or invalid, the Company or the shareholders may take appropriate action in a Court of law challenging the

validity of such action but a petition under Section 397 or 398 is not an appropriate remedy for the purpose. The only question with which the Court is concerned in a petition under Section 397 or 398 is whether the action of the Directors - whether within the law or outside the law - is oppressive to the minority shareholders or is prejudicial to the interests of the Company. Having regard to this, it is obvious that once I have come to the conclusion that the resolution dated 8th December 1957 was not oppressive to the minority shareholders or is prejudicial to the interests of the Company, all further inquiry in regard to the said resolution must cease so far as this petition is concerned. But Mr. S.B. Vakil contended that the very fact in passing the said resolution the Directors had committed a contravention of a provision of law was sufficient without any further proof to establish that the said resolution was prejudicial to the interests of the Company and that it was not even open to the Company to show that it was not so prejudicial. Whether or not the said resolution was beneficial was, argued Mr. S.B. Vakil, irrelevant where there was violation of a provision of law in passing the said resolution. I cannot accept this contention. It may be that a resolution may be passed by the Directors which is perfectly legal in the sense that it does not contravene any provision of law, and yet it may be oppressive to the minority shareholders or prejudicial to the interests of the Company. Such a resolution can certainly be struck down by the Court under Section 397 or 398. Equally a converse case can happen. A resolution may be passed by the Board of Directors which may in the passing contravene a provision of law, but it may be very much in the interests of the Company and of the shareholders. Such a resolution may be attacked as invalid in a suit or other appropriate proceeding but not being oppressive to the minority shareholders or prejudicial to the interests of the Company, it cannot be challenged in a petition under Section 397 or 398. I do not subscribe to the proposition that every action of the Directors which is in contravention of a provision of law must necessarily be prejudicial to the interests of the Company. These two represent different angles of view and one may exist without the other. I am, therefore, of the opinion that it is not open to the petitioners in this petition to attack the validity of the resolution dated 8th December 1957 on the ground that it was passed by the Board of Directors without a quorum and in contravention of the provisions of Sections 299 and 300.
(50-58). X X X X X

59. Two answers were given to this contention by Mr. C.C. Gandhi on behalf of the Company and the learned Advocate General on behalf of the Directors. The first answer was that the provisions of Section 173 were not mandatory but were directory and that even if there was non-compliance with the requirements set out in those provisions, such non-compliance did not have the effect of invalidating the meeting or the resolution passed at the meeting. This raised the question whether the provisions of Section 173 are mandatory or directory. Now the question as to whether a statute is mandatory or directory is a question which has to be adjudged in the light of the intention of the legislature as disclosed by the object, purpose and scope of the statute. If the statute is mandatory, the thing done not in the manner or form prescribed can have no effect or validity; if it is directory, penalty may be incurred for non-compliance, but the act or thing done is regarded as good. As observed by Maxwell on Interpretation of Statutes, Tenth Edition,

376 :

> "It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may perhaps be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded,"

Lord Campbell in *Liverpool Borough Bank v. Turner*[6], observed :

> "No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification far disobedience. It is the duty of Courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."

It is, therefore, clear that regard must be had to the whole scope and purpose of the statute for the purpose of determining whether the statute is mandatory or directory. Judged by that test, the conclusion is irresistible that Section 173 enacts a provision which is mandatory and not directory. The object of enacting Section 173 is to secure that all facts which have a bearing on the question on which the shareholders have to form their judgment are brought to the notice of the shareholders so that the shareholders can exercise an intelligent judgment. The provision is enacted in the interests of the shareholders so that the material facts concerning the item of business to be transacted at the meeting are before the shareholders and they also know what is the nature of the concern or interest of the management in such item of business, the idea being that the shareholders may not be duped by the management and may not be persuaded to act in the manner desired by the management unless they have formed their own judgment on the question after being placed in full possession of all material facts and apprised of the interests of the management in any particular action being taken. Having regard to the whole purpose and scope of the provision enacted in Section 173 I am of the opinion that it is mandatory and not directory and that any disobedience to its requirements must lead to nullification of the action taken. If, therefore, there was any contravention of the provisions of Section 173, the meeting of the Company held on 5th September 1961 would be invalid and so also would the resolution passed at that meeting be invalid.

60. Mr. C.C. Gandhi and the learned Advocate General, therefore, contended that there was no non-compliance with the requirements of Section 173. Non-compliance with the requirements.

Of Section 173 was alleged on behalf of the petitioners in three respects. It

[6](1960) 30 LJ Ch 379

was first alleged that the agreement of sale between the Company and Bharat Kala Bhandar Limited was not available for inspection to the shareholders and the time and place where the said agreement could be inspected was not specified in the explanatory statement. This contention was based on Sub-Section (3) off Section 173. But that Sub-Section applies only where the item of business consists of according of approval to any document by the meeting. In the present case the item of business before the meeting of the Company held on 5th September 1961 was not according of approval by the meeting to the agreement of sale between the Company and Bharat Kala Bhandar Limited. The item of business was whether the undertaking of the Company should be sold to Bharat Kala Bhandar Limited for the price of 1140,000/- on certain terms and conditions. Whether there was already an agreement between the Company and Bharat Kala Bhandar Limited was immaterial. It was equally immaterial whether the agreement was oral or in writing. All that the meeting was concerned with was whether to accord consent to the sale of the undertaking by the Company to Bharat Kala Bhandar Limited, The agreement of sale between the Company and Bharat Kala Bhandar Limited was not required to be placed for approval of the meeting. Sub-Section (3) of Section 173 had, therefore, no application and there was accordingly no non-compliance with the requirements of that Sub-Section.

(61-66). * * * * **

Petition dismissed.