

13TH APRIL, 2007. SC. 284/2001

ADO IBRAHIM & COY. LTD. APPELLANT
AND
BENDEL CEMENT COY. LTD. RESPONDENT

agreed balance to be paid by the Edo State Government and Respondent, in respect of the mining lease. Appellant finally averred that respondent is irredeemably insolvent and is presently indebted to several other persons. Appellant/petitioner prayed inter alia, that the respondent be wound up by the court under the Companies Act, as it is just and equitable to do so.

Respondent in its opposing affidavit denied many of appellant's averments. Respondent averred that it has always declared profit whenever made, and that appellant was not its creditor. Respondent averred further that appellant have not made out a prima facie case for its winding up. While appellant filed application for leave to advertise the Winding-up Petition, respondents filed a motion for an order dismissing the said petition for being incompetent, as it was based of a debt disputed bona fide. The trial court upheld the petitioner's contention in respect of his capacity as a contributory and struck out his contention as a creditor. Respondent appealed to the Court of Appeal which found in favour of the petitioner that he was entitled to present the petition as a contributory. However, that court considered the competence of the petition under the just and equitable ground, and struck it out as incompetent. Dissatisfied, the petitioner has now appealed to the Supreme Court.

ISSUE FOR DETERMINATION

"Was the court below right to have allowed the appeal on ground that the petition was not competent under the "just and equitable" ground of section 408(e) of CAMA 1990."

HELD (Unanimously dismissing the appeal on varied reasonings per MUHAMMAD JSC)

Jurisdiction - Issues

1. Generally, an appeal court deals with specific issues placed before it on appeal. See *Badejo v. Minister of Education* (1996) 9-10 SCNJ 51 at page 91. This by no means suggests that an appeal court, on the contrary, lacks every power, competence or jurisdiction to consider other issues/points which are cognate to the matter decided by the trial court but for some reasons the trial court failed, omitted or refused to consider, and which in the opinion of the appeal court, such consideration of those

issues is the only way to assist in the effective disposal of the matter on hand. (p. 1873 B)

Court of Appeal - Powers

2. But the trite position of the law should be appreciated and that is that the court below, as rightly observed by learned Counsel for the respondent, has been vested with ample powers such that it can hear an appeal before it by way of a re-hearing and can make any necessary order that could, in its opinion effectively dispose of not only the appeal before it but the entire suit placed before the trial court. Section 16 of the Court of Appeal Act of 1976 (now contained in the Laws of the Federation of Nigeria, 2004, vol. 4 Cap. C36, section 15 thereof) provides for the general powers of the court below.

Order 1 Rule 20 and Order 3 Rule 23 of the Court of Appeal Rules, 2002 are very relevant as well. Thus, in the light of the above provisions which guided the court below, I do not think as did the learned Counsel for the appellant, that the court below was wrong to have enumerated and considered the conditions which a petition brought under the just and equitable ground must satisfy. Although it is the contention of the learned Counsel for the appellant that the merit or competency of the petition in the capacity of a contributory was neither raised, challenged nor pronounced upon by the trial court, it is appropriate to remind the appellant that relief no. 4 of the reliefs it prayed for in its petition reads as follows:-

“4 In the circumstance it is just and equitable that the company should be wound up.” (p. 1876 A/G)

APPEALS - Jurisdiction - Striking out

3. The practice whereby an Appeal Court assumes the complete jurisdiction of a trial court is never an innovation nor in doubt. It is a practice legally backed up by law and by judicial precedence. It is resorted to by the Appeal Courts in order to avoid unnecessary delays in the final settlement of disputes. I consider it to be a potent and very progressive means of quick dispensation of justice especially where the courts are always inundated with long lists of cases.

Again in the case of *Badejo v. Minister of Education* (1996) 9-10 SCNJ, 51 this court held that the Court of Appeal, in circumstances of this nature, did not need any further address from Counsel before it could strike out the suit in the High Court as it did in this matter. It is to be recalled that the whole of this case was resolved on affidavit evidence. After all, it is the duty of an appellate court to consider and give the necessary appraisal to all the pieces of evidence forming part of the record before it. (p. 1880 F/1881 D)

C
NOTABLE POINTS OF INTEREST
MUHAMMAD JSC

1. Requirements for winding up on a just and equitable ground

A just and equitable ground for winding up a Company is a remedy most suitable for contributories. Where a contributory brings a petition under this head as was found by the trial court and where the trial court is of the opinion that the Petitioner is entitled to the order of winding up, it must make the order unless it appears to the court that some other remedy is available to the Petitioner and that he is acting unreasonably in seeking a winding up order instead of pursuing that other remedy (S.411 (2) of CAMA).

It should be noted that the learned trial Judge considered only subsection (1) of section 410. He completely ignored subsection (2) of that section and other relevant sections of CAMA. This is the omission that the court below spotted and went on, consequently to correct. The court below went ahead, rightly in my view, to set out the requirements of the law as stipulated by CAMA relating to presentation of a petition for winding up a Company under the just and equitable ground. The court below properly and rightly too, assumed the jurisdiction and powers of the trial court by evaluating the depositions in the affidavit evidence which was placed before the trial court and came to the final conclusion by making an order, allowing the appeal before it and striking out the petition before the trial court on the ground that the petition could not succeed on the just and equitable ground for the winding up of the respondent company. (p. 1877 C/1878 E)

2. Striking out order is based on the law

The considerations relied upon by the court below to make the order of striking out the petition are as reproduced below:-

“The petition ought to show:-

(1) that as a contributory the Petitioner has no other remedy apart from the winding -up.

(2) that the Petitioner is not acting unreasonably.

(3) that there will be assets for distribution (i.e. that he has something to benefit or interest in the winding-up.

(4) that the petition is not opposed by the majority shareholders.”

Section 408 of the CAMA has empowered a court with requisite jurisdiction to exercise its discretion in winding-up a Company. The section furnished grounds upon which such discretion can be exercised. The last ground as contained in section 408(e) reads thus:

“408 A Company may be wound-up by the court if -

(e) the court is of opinion that it is just and equitable that the Company should be wound up.”

It must be noted that the above section quoted is an existing law in the Federal Republic of Nigeria. All courts of law are enjoined by the Evidence Act section 74 of Cap. 112 of LFN 1990 (now contained in section 74 of LFN, 2004, Cap E14) to take judicial notice of such laws, enactments and other subsidiary legislations. This court has crowned the legitimacy of that provision in the case of Abaye v. Ofili (1986) 1 N.W.L.R. (pt. 15) 134 (Sc. 49/84). What the court below did was to consider the implication of section 408 (e) and other provisions of the CAMA which the trial court failed to do. Further, from the excerpts I quoted earlier from the judgment of the court below, I find it difficult to agree with the learned Counsel for the appellant that there was no fair hearing by the court below when considering the affidavit evidence contained in the Record of appeal before it. (p. 1879 A/1880 A/C)

MUSDAPHER JSC

3. Lower courts erred in their findings about status of the petitioner

In my view, the finding of the trial court which was affirmed by the Court of Appeal, that the appellant as a contributor was entitled to wind up the respondent company was not borne out of the claim of the appellant in his petition. I have carefully examined the petition of the appellant and I could not find that the petition to wind up was presented on the basis that the appellant was a contributory pursuant to section 410 of CAMA. Thus, both the trial court and the Court of Appeal were in error to have assumed that the appellant filed the petition on the basis of his being a contributory. He filed his petition to wind up the company merely as a creditor. (p. 1882 E)

D ADEREMI JSC

4. When a Company may be wound up for owing

I would like to hold that not in all cases where there is a dispute as to the amount owed by the company that a court of law will refuse an application by a creditor for winding-up of the company on the ground of inability to pay. This court, in the case of Tandy v. The Harmony House Furniture Co. Ltd (1964) N.S.C.C. (vol.3) 21 per the judgment of Brett JSC at page 24 quoted with approval, the reasoning of Sir George Jessel M.R. in a case of winding-up petition by a creditor where towards the end of his judgment the Master of The Rolls said and I quote: -

“Moreover, it seems to me that it would be in many cases, be quite unjust to refuse a winding-up order to a petitioner who is admittedly owed monies which have not been paid merely because there is a dispute as to the precise amount owingIt would be wrong to put these petitioners to the trouble and expenses of quantifying the precise amount which is owing to them in other proceedings and in all the circumstances of the case.”

Thus, where there is an admission or a reasonable inference of an admission from the company that it is unable to pay the sum which it admits it is owing and the amount is colossal such that its assets, if left untouched, will not in the nearest future, having regard to galloping infla-

tion, be sufficient to pay off the just debt, when they are then realized then a winding-up order may be made. But when an amount claimed by petitioner/creditor is such that it is negligible when compared with the totality of the assets of the company, I would think the justice of the matter will be adequately met if a court of law exercises restraint in B acceding to the winding-up prayer and waits for the determination of the suit relating to the disputed sum. Sanity in commercial practice demands this. (p. 1889 H)

5. Winding up order should not be made hastily

The need to establish, with certainty, the sum owed by the company before proceeding with a winding-up petition cannot be over-emphasized. An order of winding-up hastily made will not only impact adversely on the totality of the company but on the public which supplies its D workforce and which workforce could be thrown out unceremoniously to the market of the unemployed; thus foisting further hardship on the society. This court in *Air Via Ltd v. Oriental Airlines Ltd.* (2004) 9 NWLR (pt.878) 298 counseled that care and utmost caution must be exercised E by the court in its dealing with cases involving the termination of the life of a legal fiction - a company. A winding-up order, if made, would have been most unjust. (p. 1890 G)

REPRESENTATION

Chief Charles Adogah for the respondent with him Mr. N. Adogah and K. O. Obamoge.

Appellant not in court, not represented but served.

CASES REFERRED TO

Air Via Ltd v. Oriental Airlines Ltd. (2004) 9 NWLR (pt.878) 298

Tandy v. The Harmony House Furniture Co. Ltd (1964) N.S.C.C. (vol.3) 21

Abaye v. Ofili (1986) 1 N.W.L.R. (pt. 15) 134 (Sc. 49/84)

Badejo v. Minister of Education (1996) 9-10 SCNJ, 51

Emir v. Imieyeh (1999) 4 SCNJ 1 at page 21

Okoya v. Santilli (1990) 2 N.W.L.R. (pt.132) 322

Oshoboja v. Amuda (1992) 6 N.W.L.R. (pt. 250) 690

Fatuode v. Onwoamanam (1990) 2 N.W.L.R. (pt. 132) 322

Akpan v. Otong (1996) 10 N.W.L.R. (pt. 476) 108

B IBWA v. Pavex International (2000) 4 SCNJ 200.

Ebrahimi v. Westbourne Galleries Ltd. (1973) A.C. 360

LEAD JUDGMENT BY MUHAMMAD JSC

C The appellant herein was the petitioner at the Federal High Court, Benin City with the respondent as respondent to the petition. In the petition which was filed on the 21st November, 1995, the petitioner averred that the respondent was incorporated under the Companies Act in the month of June, 1964 with its registered office at No. 6 Reservation Road, D Benin City. The nominal Capital of the respondent Company was N20 million divided into 10,000,00 shares of N2.00 each. The appellant claimed to be a member of the respondent holding 20% of its share capital having acquired 22,000 shares of the respondent's nominal share capital on the, E 27th March, 1965. The Government of the then Bendel State, held 80% of the respondent's Share Capital. Appellant averred further that he was a creditor to the respondent and as a lessor, he assigned to the respondent the unexpired term of his Mining Lease M.L. 17825 by an agreement F dated 30th April, 1973. Appellant claimed that he had only two members in the respondent's Board of Directors which consisted of 15 Directors.

The appellant averred further that since he acquired the said shares in 1976, the respondent had neither declared any profit nor distributed any dividend. The respondent, he averred, operated with colossal loss. G

In relation to the Mining Lease referred to above, the appellant claimed that the lease expired on 28th September, 1990 but the respondent continued to extract limestone from the area covered by the lease which he applied for a renewal in accordance with the Minerals Act. Appellant H maintained that from the said expiry date to the end of December, 1992, the respondent had extracted from the said ML 17825 a total of 364, 704 tonnes of limestone for which appellant was to have earned &120 per tonne. The appellant made a claim for this sum but following negotiations

between the appellant, the respondent and Edo State Government, it was agreed that the respondent shall pay the sum of N7.0 million. Appellant averred further that the respondent was rescued by its majority share holder, the Edo State Government, which subsequently paid to the appellant the sum of N3.0 million. The outstanding balance of N4.0 million had neither been paid by either the Edo State Government or the respondent itself despite several demands by the appellant. Appellant finally averred that the respondent is irredeemably insolvent and is presently indebted to several other persons. The appellant at the end, couched his prayers as follows:

“Your petitioner therefore humbly prays as follows:-

(1) The Company is indebted to your petitioner in the sum of N4.0 million.

(2) Your petitioner has made application to the company for payment of its debt but the Company has failed and neglected to pay the same.

(3) The Company is insolvent and unable to pay its debts.

(4) In the circumstance it is just and equitable that the Company should be wound up.

(5) That the Bendel Cement Company Limited RC 3863 be wound up by the Court under the provisions of the Companies and Allied Matters Act.”

In an affidavit opposing the petition, the respondent denied many of the appellant's averments. Notable among such denials are that it is not true that the appellant was a creditor of the respondent Company. The respondent averred that it had always declared profits whenever made. On the Mining Lease, the respondent averred that the appellant went to Okene High Court and obtained an injunction against the respondent restraining it from quarrying the limestone deposit which was assigned to the respondent pending the determination of the suit. The respondent had to source for this raw material elsewhere at very great expense to keep the factory and the workers going. Before the appellant went to court at Okene, efforts were made to negotiate settlement out of court but the appellant refused all entreaties made to him. On the payment of N3.0

million made to the appellant by Edo State Government the respondent stated that the appellant obtained the said amount and other benefits bestowed on it by the respondent in circumstances amounting to deceit and misrepresentation. The respondent averred that the appellant had not made
B out a prima facie case for the winding up of the respondent Company and that there was no action pending against the respondent in any court, anywhere and no judgment has been obtained against it in any sum by any person or body of persons. The allegation that the respondent is irredeemably insolvent, is blatantly false. Respondent finally averred that
C the remedy for a share holder of a Company who has a claim or disputed claim against the Company cannot enforce his claim by way of an action for winding up of the Company.

On the 14th December, 1995, the appellant filed an application before the trial court for leave to advertise the petition. The application was fixed for hearing by the trial court on 30th January, 1996. However, before the application for leave to advertise the petition was heard, the respondent filed a motion on Notice on the 19th December, 1996. This
D motion on Notice, which the respondent referred to as “the Preliminary objection”, sought inter alia to restrain the petitioner from further prosecution of the petition and for an order dismissing the said petition on the sole point that it was incompetent having been presented on the basis of
E a debt bona-fide disputed.

The contention of the petitioner was that the petition was brought in two capacities to wit: (i) as a creditor and (ii) as a contributory. The learned trial Judge upheld the petitioner’s contention in respect of his capacity as a contributory and struck out his contention as a creditor.
F

Dissatisfied, the respondent filed his notice and Grounds of appeal to the court below. The court below in its judgment of 4th April, 2001 found against the respondent (then appellant) in favour of the petitioner that he was entitled to present the petition as a contributory. The court
G below however, went on at that stage to consider the competency of the petition under the just and equitable ground. The petition was accordingly struck out. The petitioner was dissatisfied with the decision of the
H court below and he filed his Notice and Grounds of Appeal to this court.

In this court, the parties did not file their respective briefs within the time permitted by the rules. They subsequently sought for and obtained extension of time on various dates within which to file their respective briefs of argument out of time.

On the hearing date of the appeal neither the appellant nor his B counsel was in court though duly served with hearing notices against that date. The respondent's counsel was however in court. The appeal was deemed fully argued and adjourned for judgment to today.

In the brief of argument filed by the learned counsel for the appel- C lant one issue was distilled from the three grounds of appeal, that is:-

“Was the court below right to have allowed the appeal on ground that the petition was not competent under the “just and equitable” ground of section 408(e) of CAMA 1990.”

In his brief of argument, learned counsel for the respondent adopted D in its entirety the issue formulated by the appellant.

In his submissions on the sole issue before this court, learned counsel for the appellant stated that the finding by the trial court on the capacity of the appellant to present his petition as a contributory was E sufficient to sustain the petition at that stage. The inquiry as to the merit or competency of the petition in the capacity of a contributory, made by the lower court was never raised, challenged nor pronounced upon by the trial court and it was erroneous for the court below to countenance F and accede to such non-issue as it was of no consequence. Learned counsel cited the case of Dejonwo v. Dejonwo (2000) FWLR (Pt. 25) 1313 at 1318. He further argued that it was incumbent on the court below to dismiss the appeal once it found that the petitioner was entitled G to present the petition in his capacity as contributory. It was wrong for the court below to enumerate and consider the four conditions which a petition brought under the just and equitable ground must satisfy at that stage of the proceedings. Learned counsel made reference to section 411(2) of CAMA, Company Law and Practice in Nigeria by O. Orojo (3rd H ed. 1992) p. 463 thereof; Halsburys Laws of England (4th ed.) paragraph 1001.

Learned counsel for the appellant submitted that having set out

factors to consider in a petition to wind-up on the Just and Equitable ground, the court below failed to hear the parties fairly. In resolving the factors in respondent's favour, it was further argued, that the court below considered only the affidavit in opposition to the petition without
 B considering the petition of the appellant in addition to any other process germane to those factors. It was argued for the appellant that as an insider he had no other remedy. Further, paragraph 4A(vi), (vii) and 4B(vi) of the petition show that the object of the respondent has failed irredeemably. There was no raw material base or any prospect of acquiring one.
 C Learned Counsel cited the cases of *Re-Haven Gold Mining Co.* (1882) 20 Ch.D 15; *Re-German College Go* (1882) 20 Ch.D 169. Learned Counsel for the appellant went on to submit that the onus of showing that some other remedy was available or that the petitioner was acting unreasonably
 D as statutorily contemplated by section 411(2) CAMA was on the respondent. Learned Counsel urged this court to allow the appeal and set aside the judgment of the lower Court.

In his response, learned Counsel for the respondent submitted that
 E the dismissal of the case by the lower court did not occasion any miscarriage of justice to the appellant. The lower court correctly applied the law in the instant case. He further argued that the lower court had ample powers under section 16 of its Act of 1976, to hear an appeal before it by
 F way a re-hearing and make any necessary order that could effectively dispose of the appeal. The lower court, he argued, was right when it proceeded to inquire whether the appellant's petition could be sustained on the ground that the appellant was a contributory of the respondent. Learned Counsel submitted that the lower court was right in finding that
 G the petition was opposed by the majority shareholders and the petitioner did not show that he had no other remedy apart from the winding up proceedings. It also failed to show that there would be assets for distribution. Learned Counsel finally submitted that it was not in dispute that
 H the appellant did not disclose sufficient materials to justify the granting of the prayer sought in the petition. He cited the case of: *In the matter of Format Produce And Shipping Line Ltd. v. Establishment De Commerce General* (1971) A.N.L.R. 250. Learned Counsel urged this court to dis-

miss the appeal.

In treating this appeal, I think it is pertinent to draw attention to the fact that the appeal is an outcome of a motion on Notice which was filed and moved by the respondent before the trial court. Thus, the trial court did not treat the petition before it on its merit. The court below after affirming the decision of the trial court, went beyond that decision by considering the competency of the appellant's petition. I think I must resolve this issue first and foremost before proceeding any further.

Generally, an appeal court deals with specific issues placed before it on appeal. See *Badejo v. Minister of Education* (1996) 9-10 SCNJ 51 at page 91. This by no means suggests that an appeal court, on the contrary, lacks every power, competence or jurisdiction to consider other issues/points which are cognate to the matter decided by the trial court but for some reasons the trial court failed, omitted or refused to consider, and which in the opinion of the appeal court, such consideration of those issues is the only way to assist in the effective disposal of the matter on hand. Now let me examine what the lower court did in this appeal vis-à-vis the complaint of the appellant. The sole issue for determination was distilled by the appellant from his three grounds of appeal set out in the Notice of appeal as contained on pages 159-162 of the printed record of appeal. I quote hereunder these grounds of appeal albeit shorn of their particulars: -

“GROUND 1

The court below erred in law when it held that “However, different considerations apply where ground being relied upon in the petition is that it is just and equitable to wind up the company. The petition ought to show:

- 1. That as a contributory the Petitioner has no other remedy apart from the winding up.*
- 2. That the Petitioner is not acting unreasonably.*
- 3. That there will be assets for distribution (i.e. that he has something to benefit of interest in the winding up).*
- 4. That the petition is not opposed by the majority share holders:*

GROUND 2

The court below erred in law when it decided the appeal by raising suo motu questions of which the trial court was never called upon to decide and which was neither canvassed by either party both at the trial court and at the court below.

B GROUND 3

The court below erred in law when it gave judgment for the respondent having found as the trial court did that the Petitioner was entitled to present the petition under section 410(1) (d) of the Companies and Allied Matter Act 1990.”

C Further, learned Counsel for the appellant stated in his brief of argument as follows:-

D *“The inquiry as to the merit or competency of the petition in the capacity of a contributory was neither raised, challenged nor pronounced upon by the trial court. It was erroneous for the court below to countenance and indeed accede to such non-issue. The point is that the inquiry embarked upon by the court below at pages 153-155 of the record is outside the purview of the question before the court and therefore of no consequence: Dejonwo v. Dejonwo (2000) FWLR) (pt 25) 1313 at 1318 per Ogundare, JSC”*

“The competency of the petition under the just and equitable ground was never in dispute at the trial court.”

F The most decisive holding of the trial court is on page 81 of the Record and it reads as follows:-

G *“In the final analysis I hold that the petition to the extent that it has been presented on the basis of the petitioner being a Creditor of the Respondent is incompetent. All the paragraphs of the petition which suggest that the Petitioner is a Creditor of the Respondent, namely paragraphs 4A(ii) and 4B (i)-(iv) are hereby struck out. I hold that the Petitioner is entitled to present the petition in his capacity as a Contributory of the Respondent. The Motion therefore succeeds only in respect of the issue of the debt being a disputed debt.”*

The court below in its judgment stated, inter alia, as follows:-

“It is therefore clear that the Petitioner presented the petition in a dual capacity namely as a creditor and as a contributory being a share-

holder of 20% of the share capital or 22,000 shares. On the authorities therefore, the fact that the paragraphs of the Petition relating to indebtedness or insolvency have been removed from the petition will not completely obliterate the Petitioner's right to petition. I agree with the submission of learned Counsel for the Respondent that the Petitioner could still have a capacity to present the petition as a contributory even after the paragraphs relating to his being a creditor have been struck out.

However, different considerations apply where the ground being relied upon in the petition is that it is just and equitable to wind up the company.

The petition ought to show:-

- 1. That as a contributory the Petitioner has no other remedy apart from the winding up.*
- 2. That the Petitioner is not acting unreasonably*
- 3. That there will be assets for distribution (i.e. that he has something to benefit or interest in the winding up).*
- 4. That the petition is not opposed by the majority shareholders."*

A closer look at the excerpts quoted from both the judgments of the trial court and that of the court below, will clearly show that the lower court was in agreement with the trial court on the capacity of the appellant to present his petition as a contributory even after the paragraphs relating to his being a creditor had been struck out. That much the appellant had no quarrel with as it apparently solidified his capacity to present his petition as a contributory only. Its quarrel is with the dictum starting from the word "However" down to the end of the quotes as shown above. It is the submission of learned Counsel for the appellant that the inquiry as to the merit or competency of the petition in the capacity of a contributory was neither raised, challenged nor pronounced upon by the trial court. He considered that to be erroneous of the court below to countenance and indeed accede to such non-issue. He contended that such inquiry by the court below as quoted above is outside the purview of the question before the court and of no consequence. I can understand why the appellant was a bit perplexed. It appeared to it that the court below gave it a judgment by one hand but took it away by the other.

But the trite position of the law should be appreciated and that is that the court below, as rightly observed by learned Counsel for the respondent, has been vested with ample powers such that it can hear an appeal before it by way of a re-hearing and can make any
 B necessary order that could, in its opinion effectively dispose of not only the appeal before it but the entire suit placed before the trial court. Section 16 of the Court of Appeal Act of 1976 (now contained in the Laws of the Federation of Nigeria, 2004, vol. 4 Cap. C36, section 15 thereof) provides for the general powers of the court
 C below and it states:-

*“The court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may
 D direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal, and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct
 E any necessary inquiries or accounts to be made or taken, and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court
 F below for the purposes of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in the case of an appeal from the court below, in that court’s appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction.”*

G **Order 1 Rule 20 and Order 3 Rule 23 of the Court of Appeal Rules, 2002 are very relevant as well. Thus, in the light of the above provisions which guided the court below, I do not think as did the learned Counsel for the appellant, that the court below was wrong
 H to have enumerated and considered the conditions which a petition brought under the just and equitable ground must satisfy. Although it is the contention of the learned Counsel for the appellant that the merit or competency of the petition in the capacity of a con-**

tributory was neither raised, challenged nor pronounced upon by the trial court, it is appropriate to remind the appellant that relief no. 4 of the reliefs it prayed for in its petition reads as follows:-

“4 In the circumstance it is just and equitable that the company should be wound up.”

B

(underlining supplied for emphasis)

A just and equitable ground is one of the grounds upon which a court having jurisdiction can rely to make an order for winding up a Company. See section 408(e) of the Companies and Allied Matters Act, Cap 59, Laws of the Federation of Nigeria 1990. Section 408(e) of same Law contained in Cap. C20 of Law of the Federation of Nigeria 2004. A just and equitable ground for winding up a Company is a remedy most suitable for contributories. Where a contributory brings a petition under this head as was found by the trial court and where the trial court is of the opinion that the Petitioner is entitled to the order of winding up, it must make the order unless it appears to the court that some other remedy is available to the Petitioner and that he is acting unreasonably in seeking a winding up order instead of pursuing that other remedy (S.411 (2) of CAMA). Other contingents to the making of such order include, inter alia, the following;-

D

(i) the contributory must allege and prove that there will be assets for distribution,

F

(ii) that the petition is opposed by a majority of contributories. In this case the court will refuse to make that order unless the main objects of the Company have failed or became impracticable or that the substratum of the company was gone, e.g. where the Company is making a loss or is deeply indebted.

G

(iii) an order will be made where it is shown that the conduct, of the majority is such as to constitute an oppression to the petitioning minority. See: Generally Re-Rica Gold Co. (1879) 11 Ch. D. 36; Re-Willcoks (1973) 2 All E.R. 73; Re-German Date Coffee Co. (1882) 20 Ch. D. 169, Re-Middle borough Assembly Rooms Co. (1880) 14 Ch. D. 104.

H

The finding of the trial court was that the appellant was a contributory to the respondent and not a creditor and by that status, he was

entitled to present his petition for the winding up of the respondent Company. A contributory has been defined to be every person liable to contribute to the assets of a company in the event of its being wound 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. See section 567 first schedule of CAMA contained in Cap. C.20 of LFN, 2004. For the above holding by the trial court, it is apt to quote what the learned trial Judge said:-

“that being the case I hold that the Petitioner as a shareholder of the Respondent Company is entitled to present a petition pursuant to the provision of section 410 (1)(d) of the Decree.”

The section relied upon by the learned trial Judge provides as follows:-

“410(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

“(a) _____

(b) _____

(c) _____

(d) a contributory.”

(underlining supplied)

It should be noted that the learned trial Judge considered only subsection (1) of section 410. He completely ignored subsection (2) of that section and other relevant sections of CAMA. This is the omission that the court below spotted and went on, consequently to correct. The court below went ahead, rightly in my view, to set out the requirements of the law as stipulated by CAMA relating to presentation of a petition for winding up a Company under the just and equitable ground. The court below properly and rightly too, assumed the jurisdiction and powers of the trial court by evaluating the depositions in the affidavit evidence which was placed before the trial court and came to the final conclusion by making an order, allowing the appeal before it and striking out the petition before the trial court on the ground that the petition could not succeed on the just and equitable ground for the winding up of the respondent com-

pany.

The considerations relied upon by the court below to make the order of striking out the petition are as reproduced below:-

“The petition ought to show:-

(1) that as a contributory the Petitioner has no other remedy apart from the winding -up.

(2) that the Petitioner is not acting unreasonably.

(3) that there will be assets for distribution (i.e. that he has something to benefit or interest in the winding-up.

(4) that the petition is not opposed by the majority shareholders.”

In his reasoning process, Akaahs, JCA with whom other Justices on the Panel that heard and determined the appeal agreed stated inter alia.”

“The affidavit in opposition shows that the petition is being opposed by the majority shareholders. The Petitioner has not shown in the petition that it has no other remedy apart from the winding -up of the Company; nor has it shown that there will be assets for distribution. The petition must therefore either allege and the evidence must establish, there is a probability of surplus assets for a return to the contributories or else it must be shown that there are other cogent reasons for the making of the order The petition as it stands cannot be based on the ground that it is just and equitable to wind up the Company. I therefore resolve issues 1, 2 and 4 of the appeal in favour of the appellant.”

Learned Counsel for the appellant challenged the above findings and conclusions of the court below on the premises that it was wrong for the court below to do so because:-

(a) the inquiry as to the merit or competency of the Petitioner in the capacity of a contributory was neither raised, challenged nor pronounced upon by the trial court.

(b) to enumerate and consider the four conditions which a petition brought under the just and equitable ground must satisfy at that stage of the proceeding as the Court below did was wrong as that ground was neither raised, canvassed inquired into or pronounced upon at the trial.

(c) In resolving the four factors set out by the court below under

the just and equitable ground the court below failed to hear the parties fairly as it only considered the affidavit in opposition to the petition.

Section 408 of the CAMA has empowered a court with requisite jurisdiction to exercise its discretion in winding-up a Company. The section furnished grounds upon which such discretion can be exercised. The last ground as contained in section 408(e) reads thus:

“408 A Company may be wound-up by the court if –

(a) _____

(b) _____

(c) _____

(d) _____

(e) the court is of opinion that it is just and equitable that the Company should be wound up.”

It must be noted that the above section quoted is an existing law in the Federal Republic of Nigeria. All courts of law are enjoined by the Evidence Act section 74 of Cap. 112 of LFN 1990 (now contained in section 74 of LFN, 2004, Cap E14) to take judicial notice of such laws, enactments and other subsidiary legislations. This court has crowned the legitimacy of that provision in the case of *Abaye v. Ofili* (1986) 1 N.W.L.R. (pt. 15) 134 (Sc. 49/84). What the court below did was to consider the implication of section 408 (e) and other provisions of the CAMA which the trial court failed to do. Further, from the excerpts I quoted earlier from the judgment of the court below, I find it difficult to agree with the learned Counsel for the appellant that there was no fair hearing by the court below when considering the affidavit evidence contained in the Record of appeal before it. **The practice whereby an Appeal Court assumes the complete jurisdiction of a trial court is never an innovation nor in doubt. It is a practice legally backed up by law and by judicial precedence. It is resorted to by the Appeal Courts in order to avoid unnecessary delays in the final settlement of disputes. I consider it to be a potent and very progressive means of quick dispensation of justice especially where the courts are always inundated with long lists of cases.** My learned brother, Kalgo, JSC in the case of *Emir v. Imieyeh* (1999) 4 SCNJ 1 at page 21, while considering

the general powers conferred on the Court of Appeal by section 16 of the Court of Appeal Act, did observe as follows:-

“By virtue of the provisions of this section, the Court of Appeal has all the powers of the High Court in any appeal before it. And in order to settle completely and finally, the matters in controversy between the parties and avoid multiplicity of legal proceedings, it can grant any remedy or make any order to which any of the parties before it may appear to be entitled. This means that the court shall have full jurisdiction and control over the whole proceedings as if the proceedings were or had been initially instituted before it as a court of first instance, and may re-hear the case wholly or in part as the case may be.”

See further *Okoya v. Santilli* (1990) 2 N.W.L.R. (pt.132) 322; *Oshoboja v. Amuda* (1992) 6 N.W.L.R. (pt. 250) 690; *Fatuode v. Onwoamanam* (1990) 2 N.W.L.R. (pt. 132) 322; *Akpan v. Oton* (1996) 10 N.W.L.R. (pt. 476) 108; *IBWA v. Pavex International* (2000) 4 SCNJ 200.

Again in the case of *Badejo v. Minister of Education* (1996) 9-10 SCNJ, 51 this court held that the Court of Appeal, in circumstances of this nature, did not need any further address from Counsel before it could strike out the suit in the High Court as it did in this matter. It is to be recalled that the whole of this case was resolved on affidavit evidence. After all, it is the duty of an appellate court to consider and give the necessary appraisal to all the pieces of evidence forming part of the record before it. See *IBWA v. Pavex International* (supra). It is on that strength that the court below considered the totality of the appeal before it including the suit pending at the trial court and arrived at the decision which gave rise to this appeal.

It is my view that the judgment of the court below is unassailable. I have no reason to tamper with it. This appeal lacks merit and is hereby dismissed by me. I affirm the decision of the court below. The respondent is entitled to N10,000.00 costs against the appellant.

ONU JSC

Having been privileged to read before now the judgment of my learned brother, Muhammad JSC just delivered, I am in agreement therewith that the Appellant's petition is devoid of substance and must perforce fail.

A word or two, I think would suffice in expatiation thereto. The petition filed by the appellant to wind up the company was on the basis of the appellant being a contributory pursuant to section 410 of CAMA and not merely as a creditor. I agree that both the trial court and the Court of Appeal were therefore in error to have considered the petition of the appellant on the basis of its being a contributory only.

In the result, this appeal lacks merit and it is' accordingly dismissed with N10,000 costs to the respondent.

D

MUSDAPHER JSC

I have read before now the judgment of my Lord Muhammad, JSC just delivered with which I agree with the conclusion arrived at, that the appellant's petition was doomed to fail.

In my view, the finding of the trial court which was affirmed by the Court of Appeal, that the appellant as a contributor was entitled to wind up the respondent company was not borne out of the claim of the appellant in his petition. I have carefully examined the petition of the appellant and I could not find that the petition to wind up was presented on the basis that the appellant was a contributory pursuant to section 410 of CAMA. Thus, both the trial court and the Court of Appeal were in error to have assumed that the appellant filed the petition on the basis of his being a contributory. He filed his petition to wind up the company merely as a creditor. The grounds of the petition as contained at the end of the petition read:-

H “(1) *The company is indebted to your petitioner in the sum of N4.0 million.*

 “(2) *Your petitioner has made application to the company for payment of its debt but the company has failed or neglected to pay the same.*

(3) The company is insolvent and is unable to pay its debts.

(4) In the circumstances it is just and equitable that the company should wound up.”

This clearly shows that the reasons for seeking to wind up the respondent, was solely because, the respondent was unable to pay the appellant its debts. The petition was not filed by the appellant petitioner as a contributory, but only as a creditor. The trial court having held that the debt was not proved, it was not only uncertain but premature should have struck out the petition. Both the trial court and the Court of Appeal were in error to have considered the petition of the appellant on the basis of its being a contributory.

The order I make is that the petition of the appellant be and is hereby struck out. Since my conclusion has the same effect with that contained in the leading judgment, I abide by the order for costs contained therein.

OGBUAGU JSC

This is an appeal against the decision of the Court of Appeal, Benin-Division, delivered on 4th April, 2001 (hereinafter called “the court below”) setting aside the judgment of the Federal High Court, Benin! Judicial Division delivered on 2nd April, 1996 - per Abutu, J. holding that, the Petitioner/Appellant, is entitled to present the Petition in his capacity as a contributory of the Respondent in respect of a disputed debt. The court below, struck out the Petition, hence the appeal to this Court.

Three (3) grounds of appeal have been filed. I note that at the trial court, the Appellant brought the Petition to wind up the Respondent on the grounds that,

“(i) *the Company is indebted to the Petitioner.*

(ii) that the Company is insolvent and unable to pay its debts.

(iii) In the circumstance it is just and equitable that they should be wound up “

One sole issue raised by the Appellant which has been adopted by the Respondent, reads as follows:

“Was the court below right to have allowed the appeal on ground that the Petition was not competent under the “Just and equitable” ground of Section 408 (e) of CAMA 1990”.

With the greatest respect, this appeal does not pose any difficulty to me in its determination. This is because, assuming that the Appellant was/is a Contributory as (with respect), erroneously held by the two lower courts, in the case of *In the Matter of Farmart Produce & Shipping Line Ltd. v. Establishment De Commerce General (1971) ANLR 250*, this Court, held that in winding up proceedings, the Petition, must disclose facts upon which the court would rely, in coming to the conclusion that it is just and equitable to wind up the Company. The question that I or one may ask is, Did the Appellant, disclose in its said Petition, that it is just and equitable to wind up the Respondent? I have noted earlier in this Judgment, the grounds for the Petition. I also note, that this case leading to the instant appeal, was contested on affidavit evidence. I note that the court below, at pages 151 and 152 of the Records, painstakingly, reproduced the averments in paragraphs 4(A) (i) to (vii); 4(B) (v) & (vi) of the Petition and the reliefs or prayers sought in Nos. 1 to 4 thereof.

At page 153 thereof, the court below, listed the conditions/requirements of a Petition where the Petitioner, relies on the ground that it is just and equitable to wind up the Company. The Petition ought and indeed, must show:

- “(1) that as a Contributory, the Petitioner, has no other remedy apart from the winding up.*
- (2) that the Petitioner is not acting unreasonably.*
- (3) that there will be assets for distribution (i.e. that he has something to benefit or interest in the winding up).*
- (4) that the Petition is not opposed by the majority share holders.*

I note that the Petition, was opposed by the Respondent who deposed to a counter-affidavit through its Company Secretary/Legal Adviser - Mrs. Celestina Dirisu. I note from the counter-affidavit, that the Appellant held only twenty per cent (20%) of the Respondent’s share capital while the then Edo State Government, held Seventy-Eight per

cent (78%) of the said share capital of the Respondent. I also note that the Appellant never filed any further-affidavit to debunk the material averments in the counter-affidavit.

The court below found as a fact and held that, the Appellant, as a contributory, did not show that it has no other remedy apart from the winding up of the Respondent. The Petitioner did not show that it could not sue for the recovery of the alleged debt in a civil suit (if possible on the Undefended List). The Appellant, did not show that there would be assets for distribution. In other words, that there is a/the probability of surplus assets for a return to the contributories and so, that he has something to benefit. From all intents and purposes, the majority of the Shareholders, opposed the Petition to wind up the Respondent. The Appellant did not show that it was/is not acting unreasonably. What is more, the Appellant, did not show any other cogent reason for asking for the order of winding up except that the Respondent, was/is owing him some debt. See the cases of *Re: Newman & Howard Ltd, (1961) 2 All E.R. 495; (1962) Ch. 257* and *Re: Haycraft Gold Reduction & Minim Co. (1900) 2 Ch. 230* also referred to by the court below.

So or in effect, going by the authority of *In the Matter of Farmat Produce etc. v. Establishment Etc.* (supra), the Appellant, cannot succeed or could not have succeeded on the ground that it is just and equitable to wind up the Respondent.

As a Creditor, I note that the learned trial Judge at page 81 of the Records, held inter alia:

“..... that the Petition to the extent that it has been presented on the basis of the Petitioner being a Creditor of the respondent is incompetent”

I agree. But with respect, the two trial courts, were wrong to have held that the Appellant, is a contributory. I have in this Judgment, found as a fact and held that as a Contributory, the Appellant failed in this appeal having regard to its claim on the ground that it is just and equitable to wind up the Respondent.

I note that the court below, even held that the Petition, cannot be sustained on the Petitioner’s claim of being a Creditor since the debt, is

bona fide as it was disputed and that there is a pending *Suit No. KGS/OK/2/93* in the Kogi State High Court.

It has to be borne in mind, that there are also grounds for winding up a Company by the court statutorily provided in Section 408 of the Companies & Allied Matters Act, 1990 (CAMA). Also statutorily provided, is that a Petition, shall be presented/brought by a Creditor, pursuant to Section 410 (1) of the CAMA or by a Contributory, pursuant to Section 410 (d) of the CAMA or by all or any of those mentioned in the Section, either together or separately.

I note that the Appellant has contended even in the court below, that its Petition, was brought in a dual capacity - i.e. both as a Creditor and as a Contributory. I agree, having regard to the reliefs in (1) and (2) on the one hand and relief (4) of the Petition on the other hand. I say so, because, at page 153 of the Record, the court below, - per Akaahs, JCA, conceded to this fact when it stated, after reproducing some of the paragraphs of the petition, inter alia, as follows:

"It is therefore clear that the Petitioner presented the petition in a dual capacity namely as a creditor and as contributory being a shareholder of 20% of the share capital or 22,000 shares. On the authorities therefore, the fact that the paragraphs of the Petition relating to indebtedness or insolvency have been removed from the petition will not completely obliterate the Petitioner's right to petition. I agree with the submission of learned counsel for the Respondent that the Petitioner could still have a capacity to present the Petition as a contributory after the paragraphs relating to his being a creditor have been struck out. ..."

[the underlining mine]

It was after the above statements, that the court below, stated, as follows:

"However, different considerations apply where the ground being relied upon in the petition is that it is just and equitable to wind up the company".

What I am saying in effect with respect, is that from whatever angle this appeal is taken, considered or determined, as a Contributory, on the authorities, it fails and the court below was right in striking out the

Petition. Also, as a Creditor, the appeal to this Court, is unmeritorious. In either case, the Petition fails.

Before concluding this Judgment, I note that the Appellant, does not dispute, on decided authorities, the power of the court below under Section 16 of the Court of Appeal Act, to decide as it did. See at least, the case of *Osholoba v. Alhaji Amuda & 2 ors.* (1992) 6 MVL R (Pt.250) 690 @ 705; (1992) 7 SCNJ. 317 - per Uwais, JSC, (as he then was) and recently, the case of *Hon. Inakoju & 17 ors. v. Hon. Adeleke* (Speaker) & 3 ors.. (2007) Vol. 2 MJSC 1; (2007) NWLR (Pt.1025) 427 @ 612 - 613, 655, 710. C

In conclusion, I had the privilege of reading before now, the lead Judgment of my learned brother, Muhammad, JSC. I agree with his conclusion. So also, from the foregoing, I too, dismiss the appeal. I abide by the consequential order in respect of costs. D

ADEREMI JSC

I agree with my learned brother, Muhammad JSC, whose conclusion in his judgment I had the privilege of a preview, that this appeal is unmeritorious. I wish now to proceed to add a few words of my own if only for the purpose of emphasis. E

The reliefs sought by the petitioner (hereinafter referred to as ("the appellant")) in its petition dated 21st November, 1995 are as follows:- F

“(1) *The company is indebted to your petitioner in the sum of N4.0 million.*

(2) *Your petitioner has made application to the company for payment of its debt but the company has failed and neglected to pay the same.* G

(3) *The company is insolvent and unable to pay its debts.*

(4) *In the circumstances, it is just and equitable that the company should be wound up.* H

(5) *that the Bendel Cement Company Limited RC 3863 be wound up by the court under the provisions of the Companies and Allied Matters Act.”*

Sequel to the filing on 14/12/95 by the petitioner/appellant of an application for leave to advertise the petition and which application was fixed for hearing on 30/1/96, the respondent filed a motion on notice on 19/12/96, by way of a preliminary objection, seeking inter alia, an order B restraining the petitioner/appellant from taking any further step in the prosecution of the said petition and an order dismissing the entire petition on the ground that it is irregular, premature, scandalous and an abuse of the process of the court. At the hearing of the preliminary objection, the C sole ground of the argument put up by the respondent was that the petition was incompetent having, according to it, been presented on the basis of a debt bona fide disputed. The petitioner/appellant, in countering this argument, contended that the petition was in a dual capacity i.e. (1) as a creditor and (2) as a contributory.

D After taking arguments of the respective counsel, the learned trial judge held that the petition could not be sustained; consequently he held and I quote: -

E *“In the final analysis I hold that the petition to the extent that it has been presented on the basis of the petitioner being a creditor of the respondent is incompetent. All the paragraphs of the petition which suggest that the petitioner is a creditor of the respondent, namely paragraphs 4A(ii) and 4B(ii-iv) are hereby struck out. I hold that the petitioner is F entitled to present the petition in his capacity as a contributory of the respondent. The motion therefore succeeds only in respect of the issue of the debt being a disputed debt.”*

The court below (Court of Appeal) upheld the above finding when G Akaahs JCA, in the leading judgment, held at page 149 of the record thus:

“There is no dispute that the petition cannot be sustained on the petitioner’s claim of being a creditor since the debt is bona fide being disputed and the matter is pending before the Kogi State High Court in Suit No. KGS/OK/2/93.”

H Grounds for winding up a company by the court are clearly spelt out in Section 408 of CAMA which provides: -

“A company may be wound up by the court if-

(a) the company has, by special resolution, resolved that the com-

pany be wound up by the court;

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

(c) the number of members is reduced below two;

(d) The company is unable to pay its debts; B

(e) the court is of the opinion that it is just and equitable that the company should be wound up.”

Section 410 (1) of CAMA describes the categories of those who can bring up petition for winding-up of company; that sub-section provides: C

“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 -

(a) the company D

(b) a creditor, including a contingent or prospective creditor of the company

(c) the official receiver

(d) a contributory E

(e) a trustee in bankruptcy to, or a personal representative of a creditor or contributory

(f) the Commission under Section 323 of this Act

(g) a receiver if authorized by the instrument under which he was appointed; or F

(h) by all or any of those parties, together or separately.”

By the combined effect of Section 408(d) and Section 410 (1)(b) both of CAMA, a creditor, which the petitioner/appellant held itself out to be, can bring up a petition for winding-up of a company that is unable to pay its debts. It should be realized that a wrong signal would be sent to the commercial world if for only a mere dispute as to how much a company is owing, a court of law for that reason will decline to entertain a petition from a creditor for winding-up a company who is unable to pay H the debt owed to him. Such a judicial attitude, if it even exists, will not be in good tune with the intended effect of Sections 408 (d) and 410 (1)(b) of CAMA combined. I would like to hold that not in all cases where there G

is a dispute as to the amount owed by the company that a court of law will refuse an application by a creditor for winding-up of the company on the ground of inability to pay. This court, in the case of Tandy v. The Harmony House Furniture Co. Ltd (1964) N.S.C.C. (vol.3) 21 per the judgment of Brett JSC at page 24 quoted with approval, the reasoning of Sir George Jessel M.R. in a case of winding-up petition by a creditor where towards the end of his judgment the Master-of The Rolls said and I quote: -

C *“Moreover, it seems to me that it would be in many cases, be quite unjust to refuse a winding-up order to a petitioner who is admittedly owed monies which have not been paid merely because there is a dispute as to the precise amount owingIt would be wrong to put these petitioners to the trouble and expenses of quantifying the precise amount*
D *which is owing to them in other proceedings and in all the circumstances of the case.”*

Thus, where there is an admission or a reasonable inference of an admission from the company that it is unable to pay the sum which it admits it is owing and the amount is colossal such that its assets, if left untouched, will not in the nearest future, having regard to galloping inflation, be sufficient to pay off the just debt, when they are then realized then a winding-up order may be made. But when an amount claimed by
F petitioner/creditor is such that it is negligible when compared with the totality of the assets of the company, I would think the justice of the matter will be adequately met if a court of law exercises restraint in acceding to the winding-up prayer and waits for the determination of the suit relating to the disputed sum. Sanity in commercial practice demands
G this. It is for this reason and of course, the fuller reasons in the leading judgment that I cannot but agree with the judgment of the trial court and the Court of Appeal on this part of the judgment. The need to establish, with certainty, the sum owed by the company before proceeding with a
H winding-up petition cannot be over-emphasized. An order of winding-up hastily made will not only impact adversely on the totality of the company but on the public which supplies its workforce and which workforce could be thrown out unceremoniously to the market of the unemployed;

thus foisting further hardship on the society. This court in *Air Via Ltd v. Oriental Airlines Ltd.* (2004) 9 NWLR (pt.878) 298 counseled that care and utmost caution must be exercised by the court in its dealing with cases involving the termination of the life of a legal fiction - a company. A winding-up order, if made, would have been most unjust. B

The trial court held that the petition could be sustained on the ground that the petitioner/appellant being a contributory, was a shareholder. The court below was also in agreement with the trial judge that the petitioner/appellant presented the petition as a contributory as well as C a creditor. At page 153, the court opined: -

“It is therefore clear that the petitioner presented the petition in a dual capacity namely as a creditor and as a contributory being a shareholder of 20% of the share capital or 22,000 shares. On the authorities D fact that the paragraphs of the petition relating to indebtedness or insolvency have been removed from the petition will not completely obliterate the petitioner’s right to petition. I agree with the submission of the learned counsel that the petitioner could still have a capacity to present the petition as a contributory even after the paragraphs related to his being a E creditor have been struck out.”

Going by what its name stands for, a contributory might present a petition on grounds (b), (c) and (e) as set out in Section 408 of CAMA; subsection (e) of Section 408 allows the court, if it is of the opinion that F it is just and equitable that the company should be wound-up, to make an order of winding-up. See *Ebrahimi v. Westbourne Galleries Ltd.* (1973) A.C. 360. The term “CONTRIBUTORY” has been judicially defined to include even a fully-paid up shareholder provided he or she has a tangible G interest in the winding-up, which is usually demonstrated by showing that the company has a surplus of assets over liabilities. See (1) *Re Bellador Silk Ltd* (1965) 1 AER 667 and (2) *Re Chesterfield Catering Ltd.* (1977) CH. 373. The just and equitable provision under which I have said supra H that a contributory can bring a petition for winding-up of a company only, as equity always does, enables the court to subject the exercise of legal rights to equitable considerations; considerations which are of a personal character arising between one individual and another, which

may make it unjust or inequitable, to insist on legal rights, or to exercise them in a particular way. As was observed by Lord Wilberforce in his lengthy quotation in the EBRAHIMI case *supra*, the just and equitable provision does entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. Undoubtedly, a contributory upon entering a company, has his or her own obligations which are crying hard for performance. A quick perusal of the petition does not reveal assets for distribution were the order of winding-up to be made; nor is there anything in the process suggesting that there is no other remedy apart from the winding-up of the company. Were the petitioner to be seen as properly a contributory, the above conditionalities having not been met, the petition would still have failed. But was the petitioner a CONTRIBUTORY? The answer is in the negative; he did not himself act as a contributory and so the court lacks the power to make a case for it in that capacity. It did not seek any of the reliefs as a contributory. No party should be granted a relief not prayed for. The court below and the trial court erred by holding that they considered the petition of the appellant on the assumption that it (petitioner) was a contributory.

In the final analysis, I agree with the conclusion reached that the appeal is unmeritorious and it is hereby dismissed and I would also order a striking out of the petition. I abide by the order relating to costs as contained in the leading judgment.

G

H