HIGH COURT OF GUJARAT

DLF INDUSTRIES LIMITED
Versus
ESSAR STEEL LIMITED

Date of Decision: 17 April 1998

Citation: 1998 LawSuit(Guj) 191

Hon'ble Judges: H L Gokhale

Eq. Citations: 1999 3 GLR 1968, 2001 103 CompCas 467

Case Type: Company Petition

Case No: 278 of 1997

Subject: Company

Editor's Note:
Companies Act, 1956 - Secs 433(e), 434(1), 439 - Winding up of company - When there is bona fide dispute as to the Debt Court will not pass order to wind up the company - Principles in this regard narrated -

Companies Act, 1956 - Sec 439 - Company (Court) Rules, 1959 - Rule 21 - When affidavit in support of winding up petition does not comply with the requirements, petitioner can file another affidavit - No pedantic and strict adherence to forms required - Petition dismissed

Acts Referred:
Companies Act, 1956 Sec 434(1), Sec 433(e), Sec 439

Final Decision: Petition dismissed

Advocates: H S Munshaw, Nanavati Associates

Cases Cited in (+): 1
Cases Referred in (+): 8

H. L. GOKHALE, J.

[1] The petitioner-DLF Industries Limited is a company registered under the Companies Act. It engages itself amongst other in manufacturing and establishing

power plants based on diesel, steam and hydro-turbine generators. The respondent-Essar Steel Limited is also a public limited company. It carries the business of manufacture of hot briquetted sponge iron and other iron products. It also engages itself in civil, mechanical and electrical works including construction of various types.

[2] It is the case of the petitioner that on 10th March 1993 the respondent-company placed an order for design, engineering, supply, erection and commissioning of steam-turbine generator set at its plant at Hajira in District Surat. The minutes of the meeting signed on 10-3-1993 were followed by three detailed purchase orders dated 17th May 1993. The three purchase orders were as follows :

> "(a) P.O.7/4.22/L/005 dated 17-5-1993 for Design & Engineering - value of Rs. 90 lacs.
>
> (b) P.O.7/4.22/L/016 dated 17-5-1993 for Manufacturing, Testing & Supply of 11.1 MW Steam-Turbine Generator along with auxiliaries and accessories - Basic value Rs. 627 lacs - Total value, including excise duty, CST and freight Rs. 6,94,68,400.00.
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> (c) P.O.7/4.22/L/007 dated 17-5-1993 for Erection, Commissioning & Performance Testing of 11.1 MW Steam Turbine Generator Set - Contract value Rs. 33 lakhs."

[3] It is the case of the petitioner that the work entrusted was duly completed. However, an amount of Rs. 93,28,324.55 remained to be paid. This was as per the reconciliation statement of the respondent itself forwarded to the petitioner along with its letter dated 6th June 1996. Since the payment was not forthcoming, the petitioner served a notice dated 17th May 1997 under Sec. 434(l)(a) read with Sec. 433(e) of the Companies Act calling upon the respondent to pay that amount failing which they proposed to file a winding up petition. In that very notice, the petitioner also invoked the Arbitration clause of the agreement between the parties "for settlement of all disputes." The notice was replied by the respondent's letter dated 20th June 1997 accepting the offer of Arbitration and appointing Mr. Justice S. L. Talati, retired Judge of the Gujarat High Court, as their representative in the Board of Arbitrators. The petitioner-company was not satisfied with this reply. Hence, it filed this petition on 8th July 1996 under Sec. 439 of the Companies Act submitting that the respondent-company be wound up contending that it was unable to pay its debts in terms of Sec. 433(e) of the Act principally relying upon the deeming provision under Sec. 434(1)(a) of the Act. It is also stated in the petition that the respondent had become commercially insolvent and that it be wound up in public interest.

[4] The respondent filed its reply through one Shri K. M. Patel, Senior Officer, affirmed on 8th September 1997. The respondent-company principally raised three submissions,

namely -

(a) that the affidavit in support of the petition is defective. The person affirming the affidavit does not state that he is a Principal Officer of the company. The affidavit does not refer to "this" particular petition as being affirmed and also that it is not in form No. 3 as required by Rules 18 and 21 of the Company (Court) Rules, 1959;

(b) that the petitioners are not entitled to the amount that they have cLalmed. In fact, it is the respondents who are entitled to cLalm some substantial amount from the petitioner. The generator supplied by the petitioner is not giving the power production of expected mark of 11 KW and that a number of materials are pending to be supplied and some of the materials supplied are defective. It is the case of the respondents that there is a bona fide dispute with respect to the amounts that have been cLalmed by the petitioner; and

(c) that there is an agreed alternative remedy available to the petitioner, namely, to resort to Arbitration to which the petitioners themselves have already resorted to. That being so, this petition to wind up the respondent ought not be admitted or entertained.

[5] Shri Anil Seth, Senior Advocate, with Shri H. S. Munshaw appeared for the petitioner and Shri K. S. Nanavati, Senior Advocate, with Shri Keyur Gandhi represented the respondents. All the learned Advocates have taken me through the pleadings on record and have cited various relevant judgments governing the controversy before the Court. Voluminous material has been placed on record and all the learned Counsels have ably assisted me in analysing the factual as well as legal aspects.

[6] As far as the first submission of Mr. Nanavati is concerned, the relevant Rule 21 of the Company (Court) Rules reads as follows :

"21. Affidavit verifying petition :- Every petition shall be verified by an affidavit made by the petitioner or by one of the petitioners, where there are more than one, and in the case the petition is presented by a body corporate, by a director, secretary or other principal officer thereof; such affidavit shall be filed along with the petition and shall be in Form No. 3 :

Provided that the Judge or Registrar may, for sufficient reason, grant leave to any other person duly authorised by the petitioner to make and file the affidavit." The form of the affidavit given in Form No. 3 is as follows :

FORM NO. 3 Company Petition No._____of 19_____ Affidavit verifying petition 1, A. B., son of_____aged_____residing at_____do, solemnly affirm and

say as follows : 1.1 am a director/secretary/_____/ of_____Ltd., the petitioner in the above matter (and am duly authorised by the said petitioner to make this affidavit on its behalf.)* (Note: This paragraph is to be included in cases where the petitioner is the company.) 2. The statements made in paragraph_____of the petition herein now shown to me and marked with the letter "A" are true to my knowledge, and the statements made in paragraphs_____are based on information, and I believe them to be true. Solemnly affirmed, etc.

*Note : To be included when the affidavit is sworn to by any person other than a director, agent or secretary or other officer of the company."

[7] Based on the above rule and form, Mr. Nanavati submits that one who makes the affidavit has to be a Director or Secretary of the Company and where the affidavit is sworn by any other person, he must state that he is duly authorised person. He further states that as per para 2 of the above form, the affidavit must state that particular paragraphs of the petition shown to him and marked with letter "A" are true to his knowledge and the statements in the remaining paragraphs are based on the information. In the instant case, the affidavit affirming this petition reads as follows :-

"1. I am working as Vice-President (C&F) and am also the General Attorney of the Petitioner-Company. I am acquained with the facts of the case and competent to depose to the same.

2. The petitioner has this day filed the Company Petition for winding up the respondent-company in accordance with the provisions of Companies Act, as the Respondent is unable to pay its debts.

3.1 state that the statement of facts contained in paras 1 to 10 of the Company Petition are true and correct to my knowledge derived from the records of the Company and the submissions made in paras 11 and 12 of the petition are based on the legal advice received and believed to be correct.

4. The annexures attached to the Company Petition are true copies of the original."

[8] Mr. Nanavati, the learned Counsel for respondent, submits that this affidavit is affirmed in Delhi before a Notary on 7th July, 1997. The petition is not mentioned to be the one annexed at Annexure-A thereto. Paragraph No. 2 of the affidavit states that the petitioner has filed the petition "this day" whereas the petition has come to be filed on 8th July 1997. Mr. Nanavati, therefore, submits that it is difficult to say that this affidavit is affirmed with respect to this very petition. Mr. Nanavati has principally relied upon the judgment of the Punjab High Court, first of all of a single Judge in the case of Moot Chanel Wahi v. National Paints Pvt. Ltd., reported in 1986 (60) Comp. Cases 198 which is confirmed by the Division Bench of that Court in 1986 (60) Comp. Cases 402.

In that judgment the single Judge as well as the Division Bench have held that from Rules 11,18 and 21 of the Company (Court) Rules, 1959 it is evident that the petition for winding up is required to be accompanied by an affidavit in due form and if it is not so, no value can be attached to it. The judgment holds that the affidavit is to be filed so that the contents of the petition are treated as evidence and in the absence of the affidavit being in the exact form, that cannot be permitted. The judgment also holds that a subsequent correction of the affidavit is not permissible.

[9] As against that, Mr. Seth, the learned Counsel for the petitioner, relied upon the judgment of a single Judge of Bombay High Court (G. D. Kamat, J. as he then was) in S. R. Bandekar v. Rajaram Bandekar (Sirigav) Mines, reported in 1997 (88) Comp. Cases 673 where the learned Judge held that the importance of verification is to test the genuineness and authenticity of the allegations and also to make the deponent responsible therefor. In essence, the verification is required to enable the Court to find out whether it will be safe to act on such affidavit. "Pedantic and strict adherence to the mere forms cannot be a principle on which company law has to be administered".

[10] In view of the objection raised by the respondent, the petitioner filed another affidavit affirming this very petition which is affirmed by one Shri Ranjit Singh Cheema on 23rd October 1997 before a Notary in Faridabad. This affidavit states that the deponent is the Managing Director of the petitioner-company. He is shown the petition and he has affirmed that paragraph Nos. 1 to 10 are true to his knowledge and the statements made in paragraphs 11 and 12 are based on his information which he believed to be true.

[11] Now, if we look to the first affidavit, referred to above, the deponent has disclosed his high position in the company. He has also made statement on oath with respect to the contents of the petition and its annexures as required by law. In my view, the first affidavit itself cannot be said to be in any way materially defective requiring the rejection of the petition. The observations of Kamat, J. quoted above aptly apply in the present case. That apart, assuming that there is any defect in the first affidavit, the same is cured in the second affidavit. Such a course of action is permitted by a Division Bench of Bombay High Court in the case of Western India Theatres Limited v. Ishwarbhai, reported in AIR 1959 Bom. 386 (Paral6) which is a binding precedent for this Court. Now, on this aspect, the Hon'ble Supreme Court has indicated as to what approach should be adopted in such a controversy in the case of Malhotra Steel Syndicate v. Punjab Chemi-Plants Limited, reported in 1993 Supp. (3) SCC 565. It is a short order but it indicates what approach the Court should have. It reads as follows :

"We have looked at the form and verification of the affidavit filed before the High Court in support of the application for winding up. We are satisfied that the verification, on a proper and liberal construction, does contain an averment to the effect that the statements made in the affidavit are true and correct to the knowledge of the appellant. We do not think that the affidavit can be described as defective in any respect. But that apart, we are of the opinion that even if there is some slight defect or irregularity in the finding of the affidavit, the appellant should have been given an opportunity to rectify the same." (underlining supplied)

In this view of the matter, as far as the first submission of Mr. Nanavati is concerned, it is difficult to accept the same and the petition cannot be rejected solely on this ground. I have examined this submission in spite of the fact that this plea has not specifically been taken in the reply. In fact, it is the petitioner who has contended that Shri K. M. Patel who has affirmed the reply for the respondent is not the principle officer and therefore, his reply may not be looked into. As far as this aspect is concerned, another affidavit has subsequently been filed by the respondent placing on record that Shri K. M. Patel is a senior officer of the respondent-company authorised to swear the affidavit-in-reply. Hence, I am not prepared to accept this objection to the affidavit of Shri Patel also.

[12] Then coming to the submissions on merits, the petitioners contend that as per the reconciliation statement given by the respondent itself, an amount of Rs. 93,28,324.55 is due from them to the petitioner. The letter of the respondent dated 6th June 1996 (which forwards the reconciliation statement) reads as follows :

"This is with reference to your visit to our office this month. Please find enclosed the reconciliation statement for the financial year 1993-94, 1994-95 and 1995-96 respectively. This statement is for income-tax purpose only and not for final settlement and payment."

It is the contention of the petitioner-company that this is an admitted amount and reliance is placed on a Division Bench judgment of Karnataka High Court reported in 1987 (62) Comp. Cases 239 in the case of State Bank of India v. Hegde & Golay Ltd., wherein it was held that a petition for winding up would be independently maintainable even on the basis of an acknowledgment in balance-sheet. Mr. Seth has placed great reliance on the observation of the Supreme Court in the case of Harinagar Sugar Mills v. Court Receiver, reported in AIR 1966 SC 1707 where quoting from Palmer's Company Precedents, 1960 Edition, the Hon'ble Supreme Court has observed as follows :

"A winding up petition is perfectly proper remedy for enforcing payment of a just debt. It is the mode of execution which the Court gives to a creditor against a company unable to pay its debts."

[13] As against the aforesaid submissions of Mr. Seth, Mr. Nanavati has pointed out that what is sought to be cLalmed as an admitted amount is in fact principally consisting of a retention amount which the respondents were entitled to retain under the contract between the parties. The affidavit-in-reply of the above referred K. M. Patel, affirmed on 8th September 1997, disputes that the entire work was satisfactorily completed and in the reconciliation statement relied upon by the petitioners a sum of Rs. 84,68,580/- was shown as debit. In para 9 of his reply, he has specifically affirmed that the amount has been retained under retention clause as agreed and therefore, there was no question of admitting the liability as cLalmed. Not only that, in para 11 of his reply he has pointed out that the commissioning of the power generation set was substantially delayed and whatever is finally completed is unsatisfactory causing a loss of 48,000 units of power per day for the value of Rs. 1,68,000 to the respondent-company. The loss on this account is estimated approximately at Rs. 7.5 crores and it is contended that it is the respondents who have a stronger counter-cLalm. To this reply, an earlier letter dated 15th May 1996 sent by the respondents is annexed wherein it is stated that in spite of complete supplies not being made, the respondent-company has released the payment and that even after 20 months after the scheduled date of commissioning the required components were not received and further that various defects were observed in the trial run from 12th December to 14th December 1995 and that the petitioners had agreed to rectify them. A detailed trial operation chart is also annexed to this affidavit which shows that the maximum load attained was 9.5 MW at the relevant parameters when the expected capacity was 11.1 MW.

[14] To this reply a rejoinder is filed on 15th September 1997. It is contended therein that the arbitration clause does not bar or prohibit a winding up petition. Besides, reliance is specifically placed on clause 3(v) of the payment terms which reads as follows :

"3(v) (Last) 10% on successful completion of Performance Guarantee or within 4 months of date of last despatch."

It is contended that within four months of the last despatch, in any case, the entire amount was required to be paid. Reliance is also placed on clause 33.6 of the contract which states as follows :

"Each party renounces all indirect, special and consequential damages such as those arising from shortfall in production and/or profit."

The minutes of the meeting between the parties held on 14th December 1995 are annexed to this rejoinder to point out that trial operations had commenced. However, these minutes record in paragraph 10(a) thereof that the machine was run upto a load of 9.5 MW successfully from 12th December to 14th December 1995. Points 29 and 30 of the minutes are relevant which reads as follows :

"29. DLF requested that the cooling water temp and pressure is not being maintained as per design value of 32 deg. C and this is resulting in low vacuum, higher generator winding temp and oil cooler temp. ESSAR informed as the vacuum and the temp gauges are to be recalibrated by DLF, this can be established only after that. The matter will be referred to ESSER for further analysis to Fichtner (consultant). If necessary rectification will be carried out by the concerned.

30. DLF requested that main steam parameters at turbine inlet to be maintained as per design value for full load operation."

[15] Thereafter, on behalf of the respondent a sur-rejoinder is affirmed on 29th September 1997 by above referred Shri K. M. Patel and one additional sur-rejoinder is affirmed by one Shri T. Subrahmanyam, their General Manager, on 24th September 1997. This affidavit of Shri Patel encloses therewith the minutes of a meeting held on 27th October 1994 wherein it was recorded that the petitioners were not in a position to carry the pre-supply tests at their premises and that they will carry out those load bearing tests at the factory site of the respondent-company. The affidavit of Shri Subrahmanyam encloses therewith the special terms and conditions which were signed between the parties. Shri Subrahmanyam has affirmed one more affidavit later on on 5th March 1998 placing therewith a chart which shows that at no point of time the requisite power was generated more than 9.6 MW.

[16] Mr. Nanavati, learned Counsel for the respondent, pointed out that under the terms and conditions agreed between the parties, Bank Guarantees were to be given from time to time and payments were to be released accordingly. The entire contract was for an amount of more than 7.5 crores and that the whole dispute was with respect to 10% of the amount. This amount was payable only on the respondents issuing the acceptance certificate. The relevant clause (d) in this behalf reads as follows :

"(d) 10% of basic order value on acceptance certificate. However, if this is delayed by ESSAR for more than 19 months from the effective date of this purchase order, then, this 10% payment shall be released against submission of a separate bank guarantee of equivalent amount valid for further six months."

Mr. Nanavati further pointed out that this concept of acceptance is defined in Part-D of the Bid Document on General Conditions for Equipment Purchase which read as follows :

"ACCEPTANCE, either PROVISIONAL or FINAL, shall mean the acceptance of the equipment and material by ESSAR upon the achievement of the agreed minimum results of tests as defined in the SPECIFICATIONS, and the issuance by ESSAR of an acceptance certificate to this effect."

[17] Mr. Nanavati, therefore, submitted that by acceptance what was meant was the achievement of agreed minimum results of the tests as per the specifications. Inasmuch as at no point of time the minimum standards were achieved, the respondent-company was entitled to encash the Performance Guarantee which they were seeking to do. The respondents have in fact paid more amount than what ought to have been paid and since the respondents wanted to encash the Performance Guarantee that the petitioner has moved the Delhi High Court by filing O. M. Petition No. 98 of 1997 under Arbitration and Conciliation Act, 1996. The petitioner-company itself sought arbitration through that petition filed on 19th May 1997 and in para 18 thereof it has made a statement with respect to cause of action as follows :

"That the cause of action for filing this petition has arisen on 17th May 1997 when the petitioner got the information that respondent No. 2 has sought invocation of the Bank Guarantee."

Mr. Nanavati, therefore, submitted that on the one hand the petitioner has moved Delhi High Court seeking arbitration and obtained an injunction against the encashment of Bank Guarantee and on the other hand have given the notice for winding up dated 17th May 1997. He submitted that the above referred facts clearly indicate that there was a bona fide dispute with respect to material supplied; the performance was not satisfactory, payments more than required were released and yet now a petition to wind up is being filed by the petitioner which is wholly untenable.

[18] Inasmuch as Mr. Seth relied upon the above referred judgment of the Supreme Court in the case of Harinagar Sugar Mills (supra), Mr. Nanavati drew my attention to the observations of the Hon'ble Supreme Court in the very judgment and submitted that the relevant observation in that judgement ought to be looked at in that entirety. It reads as follows :

"In Palmer's Company Precedents, Part II, 1960 Edn., at P. 25, the following passage appears :

"A winding up petition is a perfectly proper remedy for enforcing payment of a just debt. It is the mode of execution which the Court gives to a creditor against a company unable to pay its debts."

This view is supported by the decisions in Bowes v. Hope Life Insurance and Guarantee Co., (1865) 11 HLC 389, Re. General Company for Promotion of Land Credit, (1870) 5 Ch A 363 (380) and Re. National Permanent Building Society, (1869) 5 Ch A 309. It is true that "a winding up order is not a normal alternative in the case of a company to the ordinary procedure for the realisation of the debts due to it; but nonetheless it is a form of equitable execution. Property does not affect the power but only its exercise."

Mr. Nanavati submitted that there is no dispute with respect to power of the Court in an appropriate case. The question is with respect to the propriety of the exercise of the power in a given case and in his view in the instant case, there was no occasion to exercise that power.

[19] Mr. Nanavati then relied upon another judgment of the Supreme Court reported in 1965 (35) Comp. Cases 456 in the case of Amalgamated Commercial Traders (P) Ltd. v. A. C.K. Krishnaswami, wherein the Hon'ble Supreme Court held as follows :

"It is well settled that a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the Court.

If a debt is bona fide disputed there cannot be "neglect to pay" within the meaning of Sec. 434(I)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play, and the ground of winding up, namely, that the company is unable to pay its debts, is not substantiated."

[20] Mr. Nanavati has also relied upon the dicta of the Hon'ble Supreme Court in the case of Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Pvt. Ltd., reported in AIR 1971 SC 2600 wherein paragraph Nos. 20 and 21 the Hon'ble Supreme Court has observed as follows :

"20. Two rules are well settled. First if the debt is bona fide disputed and the defence is a substantial one, the Court will not wind up the company. The Court has dismissed a petition for winding up where the creditor cLalmed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable (See London and

Paris Banking Corporation, (1874) 19 Eq. 444). Again, a petition for winding up by creditor who cLalmed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. (See Re. Brighton Club and Norfolk Hostel Co. Ltd., 1865 (55) Beav. 204).

[21] Where the debt is undisputed the Court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt (See Re. A Company, 94 SJ 369). Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the Court will make a winding up order without requiring the creditor to quantify the debt precisely (See Re. Tweeds Garages Ltd., 1962 Ch. 406). The principles on which the Court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends."

Mr. Nanavati, therefore, submitted that firstly, in the instant case there is no debt due and even if there is any when there is a bona fide defence and of a substantial nature, the Court is not expected to wind up the company.

21. Mr. Nanavati lastly relied upon a recent judgment of the Hon'ble Supreme Court in the case of Pradeshiya Industrial and Investment Corporation of U. P. v. North India Petrochemicals Ltd., reported in 1994 (3) SCC 348. In that matter a cLalm sought to be agitated through winding up petition was subject-matter of an arbitration which was pending between the parties. The Hon'ble Supreme Court held that, therefore, there was no "defmiteness" about the cLalm and did not entertain the petition.

[22] The legal position which emerges from what is stated above is as follows :

(i) Where the debt is undisputed, the Court will not act upon a defence that the Company has the ability to pay the debt but the company chooses not to pay that particular debt;

(ii) A winding up petition is perfectly proper remedy for enforcing a just debt but it is not normal alternative to the ordinary procedure. Propriety does not affect the power but its exercise.

(iii) If however, the debt is bona fide disputed and the defence is a substantial one, the Court will not wind up the company.

(iv) If a debt is bona fide disputed, there cannot be a neglect to pay within the meaning of Sec. 434(l)(a) of the Companies Act. If there is no neglect, the deeming provision does not come into application.

(v) The petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed.

[23] Having noted the legal position and having heard the learned Counsel on facts of the case, above, it is quite clear that the present dispute between the parties is essentially relating to the interpretation of the terms of contract as to whether the works contemplated were fully carried out, whether full performance was being given and as to whether any amount was due and payable either to the petitioner or to the respondents. There is a bona fide dispute with respect to the cLalm put up by the petitioner, and the cLalm cannot be said to be definite, ascertained and admitted. There is a provision for arbitration between the parties and the petitioner-company itself has already invoked the arbitration clause. Not only that, they have obtained injunction in Delhi High Court. That proceeding has subsequently been transferred to Bombay High Court. The petitioner itself has chosen to take the alternative remedy and has now subsequently chosen to file this petition seeking to wind up the respondent-company. As narrated above, there is a bona fide dispute raised by the respondent and it cannot be said to be a moonshine defence or a defence for the sake of defence. In the circumstances, it cannot be said that this is a case for winding up of the respondent-company.

[24] After the matter was heard and placed for orders, some additional material was sought to be placed on record which consists of two fax messages supposed to have been sent by the respondent-company dated 16th January 1996 and 11th August 1995 which state that the Steam-Turbine Generator was giving the requisite 11 MW power. It is sought to be contended through an affidavit that these documents were misplaced and now the same having been found, may be considered. The authenticity of these documents is stoutly disputed by the respondents by filing affidavit of one Shri P. V. Umashankar, Dy. General Manager (Legal) who has stated that they are false and fabricated; apart from being issued on the letter head of a sister concern. As the authenticity of the documents is disputed, I cannot give them any credence since they are not proved on evidence. The petitioner may do that in the Arbitration proceedings. Besides they are being produced at a very late stage. It is rather surprising that such relevant documents were not produced when they ought to have been produced and had been misplaced as contended by the petitioner. Apart therefrom when there are charts signed by both the parties showing that requisite standards were never achieved, I cannot understand as to how such letters on the letter head of a sister concern can contradict the documents jointly signed by both the parties themselves.

[25] There are two other applications filed along with this petition. One is Company Application No. 280 of 1997 which is for interim order restraining the respondent-company from selling, alienating and mortgaging its property. The other one is Company Application No. 479 of 1997 for directing the respondent-company to file an attested true copy of the accounts for the years 1993-94,1994-95 and 1995-96. Inasmuch as (for the reasons stated above) I am not inclined to entertain the main petition, these two applications are also not entertained.

[26] The petition was filed principally contending that the company was unable to pay its debts and invoking the deeming fiction under Sec. 434(1)(a) of the Act. As stated above, there is a dispute with respect to petitioner's cLalm which is a bona fide dispute between the parties and there is an alternative forum which is already invoked by the petitioner. Hence, the ground under Sec. 433(e) read with Sec. 434(1)(a) of the Company Act is not available to the petitioner. It is also stated in the petition that the company had become commercially insolvent and it was in public interest to wind it up. The submission was sought to be advanced on the basis of reports in some magazines. Mr. Nanavati has countered it by relying upon the Annual Report for 1995-96 of the Company to submit that it is a strong and sound concern. On the basis of the material on record it cannot be said that the petitioner has made the submission good. Hence, The challenge is not entertained in that behalf.

[27] The petition is, therefore, rejected. The parties will bear their own costs.

Petition rejected.