**HIGH COURT OF GUJARAT**

**MIDWEST LEASING LIMITED**
***Versus***
**AMBALAL SARABHAI ENTERPRISES LIMITED**

**Date of Decision:** 18 April 2001

**Citation:** 2001 LawSuit(Guj) 219

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**Hon'ble Judges:** K M Mehta

**Eq. Citations:** 2001 4 GLR 3441

**Case Type:** Company Petition

**Case No:** 103 of 1992

**Subject:** Company

**Acts Referred:**
Companies Act, 1956 Sec 397

**Final Decision:** Petition dismissed

**Advocates:** Dharmesh V Shah, Nanavati Associates

**Cases Referred in (+): 8**

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**K M Mehta, J.**

**[1]** Rule. Mr. Chudgar for Nanavati Associates waives Rule on behalf of Respondent No. 1.

M/s. Midwest Leasing Limited has filed this winding-up petition against M/s. Ambalal Sarabhai Enterprises Limited (hereinafter referred to as the Company). The said petition was filed somewhere in April, 1992.

**[2]** The facts of the case are as under :

That on 21st March, 1988, the petitioner and the Company entered into a lease agreement for supply of equipment, namely, PODBI ELNIAK CENTRIFUGAL Contractor at a monthly lease of Rs. 1,95,000/-. On 5-12-1991 the petitioner addressed a letter to the Company demanding payment of outstanding dues about

19 lacs due till then. On 21-12-1991 the Company addressed a letter to the petitioner informing to make the payment in future.

Thereafter, petitioner addressed a statutory notice dated 6-2-1992 under the provisions of Companies Act demanding Rs. 28,90,241.64. The Company received the notice, but did not reply the same. Thereafter, present petition was filed somewhere on 14th April, 1992 before this Court and on 22nd September, 1992, this Court issued notice to the Company.

On 11-11-1992 an affidavit-in-reply was filed by the Company and in Para 15 of the reply it was stated that about Rs. 44.87 lakhs have been paid by the Company to the petitioner on respective dates. It appears that thereafter the Company has filed Company Application No. 239 of 1999 somewhere on 6th July, 1999. In that application, it has been stated that somewhere on 14th August, 1995, the Company and M/s. O. P. Mall and Associates of Calcutta had entered into a Memorandum of Understanding whereby M/s. O. P. Mall & Associates agreed to take over the said Company as a going concern along with the liabilities as on 7-9-1993. It has been stated that pursuant thereto a joint meeting was held on 27-7-1995 at Mumbai in presence of Chairman of M/s. Midwest Leasing & Finance Limited, Managing Director of Ambalal Sarabhai Enterprises Limited, Senior Partner of Crawford Bayley & Co., Solicitors and also Director of Ambalal Sarabhai Enterprises Ltd. It has also been stated that, thereafter M/s. O. P. Mall & Associates paid Rs. 7 lakhs somewhere in August, 1995 to the petitioner and petitioner has acknowledge the said Rs. 7 lakhs. The said letter has also been produced along with application.

Thereafter, on 29th January, 1997, one C.V.S. Narayanan on behalf of Ambalal Sarabhai addressed a letter to Midwest India Industries Limited. In that letter, it was stated that there was a meeting in Bombay on 27-7-1995, where Managing Director of Midwest India Industries Limited Mr. A. R. Mehta and Mr. O. P. Mall took place in presence of Mr. Udeshi, a Senior Partner of Crawford Bayley & Co., and it was agreed that the parties would enter into a tripartite agreement by which liability for payment of outstanding lease rental would be assumed by O. P. Mall Associates. It was further stated in the said meeting the amount payable was also quantified at a sum of Rs. 1.01 Crore and out of this a sum of Rs. 22 lakh has already been paid to Midwest India Limited leaving a balance of Rs. 79 lakh to be paid in 9 equal instalments of Rs.7 lakh each and two further instalments of Rs. 8 lakh each. Mr. O. P. Mall has paid the first instalment of Rs. 7 lakh on 23-8-1995. It was further stated that on 22nd November, 1997, the Company had transferred its West Bengals Unit to M/s. O. P. Mall & Associates and deed of conveyancing was executed by the Company. It was also stated that in view of the settlement arrived

at between Ambalal Sarabhai Enterprise Limited and M/s. O. P. Mall & Associates, a Civil Suit No. 142 of 1997 was also filed and same was approved by the Honble Calcutta High Court in this behalf.

Thereafter, on 21st November, 1998, a further affidavit-in-reply was filed by the Company in the present petition. On 7th December, 1998, this Court (Coram : M. S. Shah, J.), passed an order directing the respondent Company to pay Rs. 2,50,000/- to the petitioner towards the dues and same was received by the petitioner by demand draft on 7th December, 1998.

Thereafter, on 1st July, 1999, as indicated earlier, a Company Application No. 120 of 1999 was filed by the respondent Company for joining M/s. O. P. Mall & Associates to be joined as party in the present petition.

**[3]** Both these matters were heard together at length. The learned Advocate for the Company raised the contention that the Company raises a disputed question of fact as to whether liabilities is of the Company or M/s. O. P. Mall & Associates. In fact, in this case, the petitioner had demanded amount from M/s. O. P. Mall & Associates and M/s. O. P. Mall & Associates had already paid Rs. 7 lakhs to the petitioner. It was further stated that whether the liability of the payment is of the company or Mr. O. P. Mall is a disputed question of fact, and therefore, this petition raises a disputed question of fact, and therefore, the present winding up petition is not maintainable at law.

**[4]** Mr. Dharmesh Shah, learned Advocate for the petitioner has relied upon definition of bona fide from the Law Lexicon page 229. Bona fide defines as in good faith; without fraud or deception; honestly, as distinguished from bad faith; openly; sincerely. That we say is done bona fide, which is done really, with a good faith, without any fraud or deceit. The expression bona fides means only good faith or honesty of dealing (Mathunsa Rawthan v. Apsa Bin, 12 IC 444 : 21 MLJ 969).

He has relied upon judgment of the Honble Apex Court in the case of Harinagar Sugar Mills Co. Ltd. v. M. W. Pradhan, reported in AIR 1966 SC 1707. He has relied upon Paras 10 and 11 of the said judgment which reads as under :

In service of notice of demand of debt by a creditor on a solvent company did not entitle the creditor to a winding-up order if the company bona fide disputed the existence of the debt. In that case, it was found that there was a bona fide dispute between the parties and that the notice issued was a vehicle of oppression and an abuse of the process of the Court. But the same cannot be said in the present case. In Re : Gold Hill Mines, 1883 (23) Ch. D 210 also a winding-up petition was dismissed on the finding that it was an abuse of the process of the Court, it being a petition to compel payment of a small debt which was under bona fide dispute.

He has also relied upon the decision in the case of Ficom Organics Ltd. v. Laffans Petrochemicals, reported in 2000 (99) Comp. Cases 471. On Page 478 the Honble Court observed as under :

After considering the material on record, if the Court comes to the conclusion that the defence raised by the company is not only not bona fide, but the defence is reeking with mala fides or the companys conduct leading to the dispute (in respect of which the companys defence is found to be not bona fide) was dishonest, the Court would admit the petition and pass an order for advertisement;

(2) Where the Court comes to the conclusion that the defence is not bona fide (as distinguished from the conclusion that the defence is mala fide), the Court may give the company an opportunity to pay the debt to the petitioner within the stipulated time-limit. If the debt is not paid, the Court would ordinarily admit the petition, unless a strong case is made out for not admitting the petition. The Court may, in its discretion, even pass a conditional order of admission without an order for advertisement while giving the finding that the companys defence is not bona fide;

(3) Where the Court gives only a prima facie or tentative finding that the companys defence is not bona fide, before admitting and advertising the petition the Court must also give a prima facie or tentative finding that the company is commercially insolvent, that is, the company is unable to pay its debts as a going concern;

(4) Where the Court gives a finding that the defence raised by the company is bona fide one, i.e., substantial, non-payment of such debt cannot amount to neglect to pay debt as contemplated by Sec. 434(1)(a) and the petition would have to be dismissed. In such a case, the company Court may give only a prima facie, i.e., tentative finding because the controversy can be finally decided in the civil suit. Of course, such a finding is bound to result in the company (defendant in the suit) getting unconditional leave to defend (which would be perfectly just and proper) in case the petitioner files a summary suit for recovering the debt in question.

Mr. Dharmesh Shah, learned Advocate for the petitioner contended that in this case, there was an old contract thereafter a new contract has come into force, and therefore, there was novatio in the eye of law. For contending that he has relied upon judgment of the Honble Supreme Court in the case of Lata Construction & Ors. v. Dr. Rameshchandra Ramniklal Shah & Anr., reported in JT 1999 (9) SC 359. In Para 11 the Honble Apex Court observed as under :

One of the essential requirements of Novation; as contemplated by Sec. 62, is that there should be complete substitution of a new contract in place of the old. It is in

that situation that the original contract need not be performed. Substitution of a new contract in place of the old contract which would have the effect of rescinding or completely altering the terms of the original contract, has to be by agreement between the parties. A substituted contract should rescind or alter or extinguish the previous contract. But if the terms of the two contracts are inconsistent and they cannot stand together, the subsequent contract cannot be said to be in substitution of the earlier contract.

**[5]** On the other hand, Mr. Chudgar, learned Advocate for the respondent has contended that the present petitioner has filed this petition and used machinery of winding-up as method of recovery. He has submitted that the machinery of winding-up cannot be allowed to be utilised merely as a means of realising the due of the company. In support of the same he has relied upon the judgment of the Honble Apex Court in the case of Amalgamated Commercial Traders (P) Ltd. v. Krishnaswami, reported in 1965 (35) Comp. Cases 456 where the Honble Supreme Court after quoting with approval passage from Buckley on the Companies Acts on Page 463 has observed as under :

It is well-settled that a winding-up petition is not a legitimate means of seeking to enforce payment of the 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. At one time, petitions founded on disputed debt were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the Court may decide it on the petition and make the order. If the debt was bona fide disputed, as we hold it was, there cannot be neglect to pay within Sec. 434(1)(a) of the Companies Act. 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. (vide Buckley on Companies Act, 13th Edition, Page 451).

Learned Advocate for the respondent-Company stated that rules as regards the disposal of winding-up petitions based on disputed claims are thus stated by the Honble Supreme Court in the case of Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Pvt. Ltd., reported in 1972 (42) Comp. Cases 125 : AIR 1971 SC 2600. (Relevant Page 131 of Com. Cases) :

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 claimed 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 : In Re : London and Paris Banking Corporation). Again, a petition for winding up by a creditor who claimed 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 : In Re. Brighton Club and Norfolk Hotel Co. Ltd.).

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 : In Re. A Company). 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 : In Re. Tweeds Garages Ltd.). 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.

He has also relied upon the judgment of this Court in the case of Tata Iron & Steel Co. v. Micro Forge (India) Ltd., reported in 2000 (2) GLR 1594. In Paras 19 and 21 the Honble Court has observed as under :

Para 19 - It is, also a settled proposition of law that in a case of disputed debt or a disputed question of fact, the Company Court would raise its hands and it would be for the parties to get the disputes adjudicated in a competent civil Court as it requires leading of evidence, documentary, as well as oral and appreciation of the same, which is the domain of the original Civil Court. In our opinion, there are many disputed questions of facts, in the present case, apart from the fact that the debt itself is disputed.

Para 21 - The serious controversy is about the liability for payment of duty. Both the companies have divergent pleas. Whether it was a High Sea Sale or ex-Kandla Sale, is also in dispute. The version of the petitioning company is that the contract was on the basis of High Sea Sale, whereas, the contention of the respondent-Company is that the contract was of ex-Kandla Sale, and therefore, liability for payment of customs duty is very much in dispute. In this connection, letters have been exchanged and since it is a disputed question of fact, it could be resolved before a competent forum or a Civil Court and not at least before the Company

Court. In our opinion, this aspect ought to have weighted much with the Company Court. Apart from the dispute of debt, there are other disputed questions, like whether it was High Sea Sale or ex-Kandla Sale and such other aspects.

He has also relied upon the judgment of this Court in the case of DLF Industries Ltd. v. Essar Steel Ltd., reported in 1999 (3) GLR 1968. In Para 22 the Court has held as under :

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 eaning of Sec. 434(1)(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. Mr. Chudgar, learned Advocate for the respondent has stated that he relies upon Clauses 3, 4 and 5 of the observation of the learned Judge. He has further submitted that in this case, the liability of the payment has been transferred to O. P. Mall Associates and in fact the petitioner has realised Rs. 7 lakhs from him in this behalf and he has also raised further demand to O. P. Mall in this behalf. That shows the liability of the company was transferred to the knowledge of the petitioner and in fact he has acted upon the same.

Learned Advocate for the respondent has also stated that the winding-up petition is not an alternative forum for realising the debt. He submitted that for realising the debt the petitioner has filed present winding-up petition in this behalf.

**[6]** I have considered the rival contention in this behalf. In view of the decisions of the Honble Supreme Court in Amalgamated Commercial Traders (P.) Ltd. (supra), Madhusudan Gordhandass case (supra) and the Division Bench judgment of this Court in the case of Tata Iron Steel Co. (supra) and judgment of this Court in the case of DLF Industries Ltd. (supra), in my view, the Company raises a bona fide dispute regarding payment of debt and the liability of the Company is discharged and O. P. Mall has taken the liability of the Company by making payment and in fact Rs. 7 lakhs has been recovered from O. P. Mall and subsequently he has also demanded from O. P. Mall. That itself shows that the liability of the company was discharged and O. P. Mall has taken liability of the company.

In my view the Company raises a defence which is in good faith and one of substance; the defence is likely to succeed and as well as on fact and in fact the Company has proved on fact that petitioner has obtained Rs. 7 lakhs from O. P. Mall and thus Company adduces prima facie proof of the facts on which the defence depends.

However, it is not for me to decide the liability of the company. suffice it to say, that the company has raised a bona fide dispute when he stated that the liability is discharged and O. P. Mall has liability to make the payment.

Therefore, in view of the judgment of the Honble Supreme Court in the case of Amalgamated Commercial Traders (P.) Ltd., Madhusudan Gordhandass case (supra) and Division Bench judgment of this Court in the case of Tata Iron & Steel Co., I am of the view that the winding-up petition is not maintainable at law as petition raises disputed question of fact in this behalf. I have also considered the three judgments which is cited by the petitioner, however, that principles are binding on me however in the facts and circumstances of the case those principles are not applicable here, and therefore, I have no alternative but to dismiss the petition at this stage. However, the petitioner is at liberty to move appropriate forum at appropriate stage in this behalf because I am not adjudicating any rights of the parties in this behalf. In view of this, the Company Petition and Company Application are accordingly stands disposed of in this behalf. Rule is discharged.

**[7]** It is needless to say that if Company files any appropriate proceedings before the appropriate forum the respondent-Company will have also its rights to contend whatever the amount which has been paid earlier in this behalf.