HIGH COURT OF GUJARAT

GLOBAL INNOVSOURCE SOLUTIONS PVT LTD
Versus
ZEP INFRATECH LIMITED

Date of Decision: 01 September 2015

Citation: 2015 LawSuit(Guj) 2599

Hon'ble Judges: Vipul M Pancholi

Eq. Citations: 2016 194 CompCas 59

Case Type: Company Petition

Case No: 123 of 2014

Subject: Company

Acts Referred:
Companies Act, 1956 Sec 433, Sec 434, Sec 439

Final Decision: Petition dismissed

Advocates: Mr Darshan M Parikh

Cases Referred in (+): 16

Vipul M Pancholi, J.

[1] The petitioner has filed this petition under Sections 433 and 434 read with Section 439 of the Companies Act of 1956, wherein, the petitioner has prayed that the respondent company be wound up under the provisions of the Companies Act of 1956 and Official Liquidator attached to this Court be appointed as liquidator of the respondent company with all the powers under the Companies Act to take charge of the assets of the respondent company and to conduct its affairs in the course of winding up.

[2] Heard learned advocate Mr.R.C.Jani for the petitioner and learned advocate Mr.Darshan Parikh for the respondent.

[3] Learned advocate Mr.R.C.Jani submitted that respondent company is incorporated on 18.02.1994 under the provisions of Companies Act of 1956. The respondent

company is incorporated for the main objects which are stated in para No.7 of the petition. Learned advocate Mr.Jani submitted that on 21.07.2010 the representatives of the respondent company visited the office of the petitioner and expressed that they are desired to hire services of the petitioner on contractual basis at various establishments of the respondent company situated at Bihar, Jharkhand, Orissa, Madhya Pradesh and Uttarakhand. After proper negotiations, the petitioner and the respondent executed a Caretaker Services Agreement on 21.07.2010. Said agreement was extended from time to time. Learned advocate Mr.R.C.Jani has referred to the said agreement which is annexed at Annexure:B. As per paragraph No.5 of the said agreement, the service provider was required to raise a monthly consolidated bill for all the care taking personnels deployed in a given telecom circle by Zeppelin Mobile Systems India Ltd. The said amount was also required to be paid within 30 days of the receipt of the bill after deducting advance payment.

[4] It Is The Case Of The Petitioner That They Have complied with the terms and conditions of the Caretaker Services Agreement and perform their part of the agreement. Petitioner made regular payments/salaries to the concerned persons engaged by them and borne the other expenses incurred for the respondent company for their various establishments situated at aforesaid places. Respondent accepted and enjoyed the services given by the petitioner for the entire duration of the agreement without raising any objection or raising any dispute.

[5] Learned advocate for the petitioner thereafter submitted that petitioner raised different invoices from time to time. However, the respondent did not release the payments on due date. The petitioner relied upon the assurances given by the respondent from time to time and continued to provide its services. It is pointed out by the learned advocate Mr.Jani that Rs.43,52,701/ was outstanding and in spite of repeated requests made by the petitioner from time to time, respondent has not made any payment. Petitioner thereafter sent Email dated 03.08.2011 and called upon the respondent to pay the outstanding amount. At this stage, learned advocate Mr.Jani submitted that respondent gave evasive reply on 29.06.2012, wherein, false allegations were leveled against the petitioners. It was alleged that petitioner has forcibly closed the respondent's establishment at Patna office and had threatened to destroy the office equipments, as a result of which, heavy loss is caused to the respondent. Petitioner therefore wrote letter dated 11.07.2012 and denied the allegations leveled by the respondent in its letter dated 29.06.2012. It is further submitted by learned advocate Mr.Jani that once again the respondent sent a letter dated 16.07.2012 and repeated the said allegations and informed the petitioner that loss of Rs.2 Lac is caused to the respondent and the same shall be debited to the account of the petitioner. It is further submitted that respondent has adopted the same

modus operandi with other service providers also, with a view to avoid their liability to make the payment.

[6] Learned advocate Mr.R.C.Jani for the petitioner thereafter contended that petitioner issued a statutory notice dated 21.01.2013 and called upon the respondent to make the payment of outstanding amount of Rs.43,52,701/ with interest at the rate of 18% per annum from August 2010 till payment. It is contended that the said notice was duly received by the respondent. However, neither any payment is made nor any reply is given by the respondent. The petitioner has therefore filed this petition.

[7] On the other hand, learned advocate Mr.Darshan Parikh appearing for the respondent company has submitted that the dues are not admitted by the respondent company and there is a reasonable and bonafide dispute with regard to claim made by the petitioner. At the outset, learned advocate Mr.Parikh contended that on the date of filing of this petition, a claim of Rs.37,70,670/ with respect to alleged invoices issued by the petitioner is barred by law of limitation and therefore, this Court may not entertain this petition only on this ground. He further contended that the petitioner and its subcontractors with the help of antisocial elements caused damage to property of the respondent as well as created nuisance at Patna office of the respondent. Respondent has informed the petitioner by communication dated 29.06.2012 as well as by communication dated 16.07.2012 that the loss of more than Rs.20 Lacs caused to the respondent will be debited to their account and the same will be recovered from the amounts due to the petitioner. It is further submitted by learned advocate Mr.Parikh that the respondent will have to recover huge amount from the petitioner in view of the fact that the respondent is facing a huge demand by way of penalty from one of its customer. This demand is raised by the said customer for the loss suffered by it in view of the acts of omission and commission on the part of the petitioner who as a contractor of the respondent, was responsible to provide services to the said customer and failed to do so. At this stage, learned advocate pointed out that in view of Clause 1 of the agreement entered into between the petitioner and the respondent, the respondent is entitled to recover the damages suffered by it from the petitioner. Learned advocate referred the said communication, which is produced at Annexure:E, page 48 of the compilation.

[8] Learned advocate Mr.Parikh thereafter submitted that because of the aforesaid demand of more than Rs.6.45 Crores from the client of the petitioner, because of the actions/inaction on the part of the petitioner, the respondent had caused temporary set back. It is pointed out that the respondent company has earned a profit of Rs.545.53 lacs for the year ended on 31.03.2013 and though company is not likely to make any profit in the year 201314 due to loss of contract and holding up of its receivable, the company has not lost its substratum. The respondent company has continuous monthly

sales order worth Rs.80 lacs and the work is in progress for its new manufacturing activities. He therefore requested that in view of these facts, this Court may not pass order of winding up for the respondent company.

[9] Learned advocate Mr.Parikh thereafter contended that invoices issued by the petitioner are of different dates starting from August 2010. However, the petitioner has issued the statutory notice on 21.01.2013 and the present petition is filed after a period of more than 14 months from the date of issuance of the notice i.e. in April 2014. Thus, there is a delay in filing the petition and most of the claims for different invoices are time barred and therefore this petition be dismissed only on this ground.

[10] Learned Advocate Mr.Darshan Parikh Appearing For the respondent has placed reliance on the decision rendered by the Division Bench of this Court in the case of Tata Iron and Steel Company Limited v. Micro Forge (India) Limited, 2000 2 GLR 1594. Thereafter, learned advocate for the respondent has placed reliance upon another decision rendered by the Division Bench of this Court in the case of Ashok Fashions Limited v. Meghdut Acid and Chemicals, 1997 1 GLH 59.

[11] Learned Advocate Mr.Parikh Thereafter Relied Upon the decision rendered by High Court of Punjab & Haryana in the case of Om Packages v. Agro Dutch Foods Ltd., 2001 103 CompCas 766(P & H) and more particularly, observations made in paragraphs No.6, 7 and 11, which read as under:

> "6. In the reply filed on behalf of the respondent company, the amount claimed by the petitioner was specifically disputed. It was stated that the goods supplied by the petitioner were totally defective and were beyond the specifications prescribed. The rejected material was lifted by the petitioner as is clear from the fax dated 19 7 1995. It is specifically stated that the material supplied was not as per approved samples and was substandard in quality. The respondent company claims to be an export oriented unit and has to compete in the international market. As the goods were not as per specification, the same were rejected and the petitioner was duly informed by the respondent company and the petitioner company failed to lift the rejected material in spite of request and as such the respondent company is not under obligation to pay any amount. In paragraph No. 12 of the reply, it is stated that the matter was decided amicably and accordingly a sum of Rs. 50,000 paid by way of cheque was duly accepted and encashed by the petitioner company. As such the petitioner has no cause of action against the respondent company.
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> 7. From the above narrated more or less undisputed facts, it is clear that there was an agreement between the parties to supply the goods. The rate was fixed and also that the material to some extent was rejected and there was a dispute of payment

between the parties. Certainly a sum of Rs. 50,000 has admittedly been paid by the respondent company to the petitioner. The present winding petition raises serious questions of dispute which cannot be settled without recording evidence in regard to the matters in controversy. The nature of serious and complex dispute between the parties is even clear from the fact that the supplies were admittedly rejected by the respondent company but it is to the extent of material which was rejected. To determine the exact amount of rejected goods and further whether the petitioner failed to lift the materials in spite of request, are the basic and serious questions of dispute. From the averments made in paragraph No. 5 of the petition, it is clear that all alleged supplies were made prior to 15 7 1995, and in the letter dated 18 7 1995, the petitioner had admitted to the rejection and lifting back of the material. The relevant part of the said letter reads as under :

"We further draw your kind attention towards the payment of our bill No. 1103 dated May 26,1995, and bill No. 1164 dated June 22,1995. Kindly expedite the release of the payment of the abovesaid bills by bank draft and oblige. We also submit below our account of the corrugated boxes which were rejected by you and have been lifted back by us.

Sl.no.	Bill no.	Date	No. of CTNS	Total
1.	1688	27-3-1995	4000	
2.	1689	27-3-1995	1146	5146 CTNS

Rejected CTNS sent back to us 3510 CTNS vide your challan No. 143 dated July 15, 1995.

Balance CTNS used by you 1636 CTNS amount to be paid by you at Rs. 18 per CTNS Rs. 29,448. You are therefore requested to release this amount of payment. We once again assure you best of our co operation. Regards. (Sd.)."

11. As already noticed, a sum of Rs.50,000 was paid by the respondentcompany to the petitioner on 1571996, which is alleged to be the full and final payment by the respondentcompany but is disputed by the petitioner. No doubt the petitioner is claiming the payments all through and have even served the requisite notice, which is stated to be a notice under Sections 433 and 434, on 2041996, copy of which is annexed as annexure P19 to the petition. Admittedly, payment of Rs.50,000 which is alleged to be full and final payment, was made in July 1996. It is a settled principle of law that notice which should form the basis of the winding up petition, should be for the amount for which the petition is filed. In other words, the amount

actually due and claimed by the petitioner should be the one mentioned in the notice. The notice not only lacks in regard to the figures but also contends as to what transpired between April, 1996 to July, 1996, when the last payment was made. The winding up petition has been filed on 1911998, after a considerable delay. A winding up petition is not a mode of recovery, if not an alternative mode of recovery simpliciter. The winding up proceedings are serious proceedings and must be taken out without unreasonable delay. On certain cause, it is not possible for this Court to reconcile the averments made in the notice and the petition. A notice for claiming the payment and for institution of a winding up petition in default thereof is the very foundation of a winding up petition and, therefore, it must adhere to the basic ingredients of the section and unreasonable delay should never be considered favourably. It would be more so when the facts are seriously disputed and the documentary evidence imbalances the case of the petitioner against the grant of relief. In the present case, the notice appears to be lacking in basic material facts and figures. Its service is not even admitted. Thus, prima facie, I am of the view that the notice served and an unreasonable delay on the part of the petitioner in filing the present petition and approaching the court for such serious relief leads to adverse inference against the petitioner. Reference in regard to the point of the notice can be made to the judgment of this Court in the case titled as Daulat Ram & Co. v. Sutlej Finance (P.) Ltd, 1989 96 PunLR 283. Furthermore, during the course of hearing, it was conceded by learned counsel for the petitioner that they have already filed a regular suit in the court of competent jurisdiction and the said suit is pending and is being contested by the respondent company."

[12] Learned advocate Mr.Parikh thereafter referred the decision rendered by High Court of Delhi in the case of Wimco Ltd. v. Sidvink Properties (P.) Ltd., 1996 86 CompCas 610 (Delhi) and more particularly, observations made in paragraph No.7, which reads as under:

"7. Learned counsel for the petitioner has drawn my attention to the provisions of section 434 and has argued that as the respondent has failed to reply to the two letters written by the petitioner and also to the statutory notice it should be deemed that the respondent has neglected to pay its debt. I am afraid that there is a fallacy in this argument. The mere omission of the respondent to comply with the statutory notice and in not sending any replies to the communications already given by the petitionercompany to the respondentcompany would not mean that the respondent has admitted the liability. The question which has to be decided in order to bring about the enforcement of the deeming provisions of section 434 of the Companies Act is whether there exists any debt or not which the

respondentcompany is liable to pay to the petitioner. In case there is a bona fide dispute about that debt, the question of applying the deeming provision would not arise because unless and until the court has, prima facie, come to the conclusion that there exists a debt which the respondent is liable to pay to the petitioner the statutory presumption that the company has neglected to pay on receipt of the statutory notice would not come into force. In the present case, it is quite evident that there is a bona fide dispute raised with regard to the liability of the respondentcompany."

[13] Learned advocate Mr.Parikh for the respondent thereafter relied upon the following decisions on the point of Section 14 of Limitation Act.

I. In the case of Anil Pratap Singh Chauhan v. Onida Savak Ltd. etc., 2003 AIR(Del) 252

II. In the case of Diwanchand Kapoor v. New Rialto Cinema (P) Limited,1987 6 CompCas 810(Delhi)

III. In the case of Jayprakash v. Satnarayansingh, 1993 AIR(SCW) 2946

IV. In the case of Yeshwant Deorao v. Walchand Ramchand, 1951 AIR(SC) 16

[14] Learned advocate Mr.Jani appearing for the petitioner in rejoinder contended that the present petition is filed within limitation period and there is no delay as alleged by the respondent. However, learned advocate fairly admitted that for some of the invoices issued by the petitioner, the claim of the petitioner is time barred. However, for some of the invoices issued by the petitioner, the present petition is within period of limitation and therefore this Court may entertain this petition on its own merits. Learned advocate Mr.Jani thereafter contended that the alleged dispute sought to be raised by the respondent is nothing but an afterthought and the said dispute cannot be termed as bonafide and reasonable dispute and therefore this Court may ignore the said dispute raised by the respondent and in the facts of the present case, this petition may be admitted and order of publication of advertisement be issued at this stage.

[15] I have considered the arguments advanced on behalf of learned advocates for the parties. I have also gone through the documents produced and material placed on record. From the record, it is revealed that Caretaker Services Agreement was executed between the petitioner and the respondent on 21.07.2010 and the same was extended from time to time. The petitioner performed its part of the agreement and provided services to the respondent. The petitioner raised various invoices from time to time and as per the case of the petitioner an amount of Rs.43,52,701/ is outstanding. Petitioner made demand for the outstanding payment. Respondent gave reply on

29.06.2012 and 16.07.2012, in which it is categorically stated by the respondent that the staff and officers of the petitioner have created nuisance at Patna office and Patna office of the respondent has been forcibly closed on various dates in June, 2012. Damage was caused to the property of the respondent company and the respondent company has suffered a huge business loss. It was also informed to the petitioner that the said loss will be debited from the account of the petitioner and the same would be recovered from the petitioner. In spite of the said reply given by the respondent, petitioner issued the statutory notice in January 2013 and thereafter, the present petition is filed after a period of 14 months from the date of issuance of the notice i.e. in April 2014. It is an admitted position that for different invoices raised by the petitioner, one petition is filed and out of various invoices, claim of some of the invoices is time barred.

[16] In View Of The Aforesaid Facts And Circumstances of the present case, decisions rendered by this Court are required to be considered.

[17] In the case of Tata Aryan and steel company limited , Division Bench of this Court has observed and held in paragraphs No.15 and 27 as under:

> "15. Certain important chronicles and contours to be kept in the mental radar, before reaching to the conclusion in a winding up petition, can be articulated, as under:
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> (1) The remedy under section 433 in general and under clause (e) in particular is not a matter of right, as such, and it is the discretion of the Company Court. It does not confer any right on any persons to seek order that the company should be wound up. It is a provision empowering the court by a statutory provision to pass order of winding up in an appropriate case.
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> (2) Merely because any one of the circumstances enumerated in section 433 of the Companies Act, exists, the Court is not bound to order winding up of the company. Nobody can aspire to wind up the company as a matter of course. The Court has wide power and discretion. In this connection, inability to pay debts, is required to be judged from various set of facts and circumstances. It may also be stated that inability to pay debts in all cases, ipso facto, could not be construed as an appropriate case for winding up.
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> (3) The debt is a money which is payable or will be payable in future by reason of peson's obligation. The expression 'debt' would refer the liability to pay and it rests on certain contingencies, conditions and casualties. Even if the debt is proved and even if the inability to pay the debt is also shown, it is not a launching pad, in all cases, for successful winding up order. Inability may arise for variety of reasons

and the Court is obliged to consider whether inability is the outcome of any deliberate or designed action or mere temporary shock and effect of economy and market. In a given case, it may happen that a party may become unable to pay its debts for a while, but that by itself is not a criterion for exercise the power to wind up, ipso facto.

(4) It is necessary for the Company Court to consider the financial status, strength and substratum of the Company, in overall context. It is possible, at times, there may be a cash crunch. It may be also, possible, at times, the temporary cash crisis despite high sale and heavy turnover and, therefore, in such a situation, mere disability or only on the ground of inability to pay would not constitute a ground empowering the Court to wind up the Company.

(5) If the Company is an ongoing concern having regular business and employment of employees, the Court cannot remain oblivious to this aspect. The effect of winding up would be of putting an end of the business or an industry or an entrepreneurship and, in turn, resulting into loss of employment to the several employees and loss of production and effect on the larger interest of the society.

(6) Even dividend declared by the company regularly and having profit in the light of the profit and loss account, though temporarily, there may be inability to pay the debt or in case of any eventuality, the company is unable to make the payment of dues and that by itself could not be construed as a ground to winding it up.

(7) Winding up of a company, as such, is nothing but a commercial death or insolvency and, therefore, the Company Court is obliged to take into consideration not only the temporary inability, or disability to make the payment of debts, but the entire status and position of the company in the market.

(8) When grounds on which the winding up order can be denied, upon an evaluation of the facts of the case, after admission, exists from the record already placed before the Court, it would be a sound exercise of discretion to reject the petition instead of admitting it. This view is very much celebrated.

(9) Inability to pay debts in terms of section 433(e) read with section 434(1) (a), demand of the debt would raise a presumption as to inability to pay its debts. But such a presumption is rebuttable. Such a presumption may be rebutted on existing material and what evidence is sufficient depends on the facts and circumstances of the case.

(10) If the Company has shown considerable growth in a reasonable span and is a growth oriented enterprise, even in case of temporary inability would not be

sufficient to drive it to wind up.

(11) Though, ordinarily, an unpaid creditor may aspire for an order of winding up, then 'ex debito justitiae' rule is not of inflexible mandate, but is, as such a matter of discretion of the Court.

(12) Section 433 is also indicative of the fact that even if one or more grounds mentioned in section 433 exist, it is not obligatory for the Court to make an order of winding up. The court has discretionary power. The Court must in each case exercise its discretion in deciding whether in the circumstances of the case, it would be in the interest of justice to wind up the company. It is a well known rule of prudence that even in case where indebtedness to the petitioning person is undisputed, the Court does not pass order for winding up where it is satisfied that it would not be in the larger interest of justice to wind up the Company.

(13) It is, also, well settled that a winding up order shall not be made on a creditor's petition, if it would not benefit him or the company's creditors in general.

(14) The Court is also obliged to consider that it would be in the interest of justice to give the Company some time to come out of the momentary financial crisis or any other temporary difficulty as winding up is a measure of last resort.

(15) Winding up course cannot be adopted as a recourse to recovery of the debt

(16) The Court must bear in mind one more celebrated principle and consider whether the Company has reached a stage where it is obviously and plainly and commercially insolvent, that is to say, that its assets are such and its existing liabilities are such as to make the Court feel clearly satisfied that currents assets would be insufficient to meet the current liabilities, along with other principles.

(17) It is also necessary to consider whether the respondent Company has become defunct or has closed its business for quite some time, whether it is commercially insolvent. For the purpose of finding commercial insolvency, a mere look into the financial data is relevant to examine about its soundness. In all matters relating to winding up, the Court may have regard to the wishes of the creditors and contributories and may, if necessary, ascertain their wishes appropriately. If the Company is solvent, the wishes of the contributories would carry more weight as they are persons, mainly, interested in the assets.

(18) The element of public policy in regard to commercial morality has, likewise, to be taken into account before determining the winding up issue. The Court has also

to consider the purpose and policy behind section 443 and 557 of the Companies Act.

(19) Winding up is the last thing the Court would do and not the first thing to do having regard to its impact and consequences. Winding up of a company would ensue:

(a) closing down of a company which is engaged in production or manufacture or which provides some services;

(b) it would throw out of employment numerous persons and result in gross hardship to the members of families of the employees;

(c) loss of revenue to the State by way of collection of taxes which other wise should have been collected, on account of customs, excise duties, sale tax, income tax etc.

(d) scarcity of goods and diminishing of employment opportunities.

(20) Winding up petition has to be submitted in prescribed form highlighting all the facts and emphasizing the inability of the Company to pay its debts. The form prescribed under the Company Court Rules, clearly, indicate that the petitioner should provide all necessary material particulars. The petitioner is obliged to show that the financial status or the monetary substratum or the commercial viability of the Company has gone so low and down that winding up is obviously, and evidently, unavoidable.

(21) It is a settled proposition of law that winding up petition is not a legitimate means of seeking to enforce the payment of debt which is disputed by the company, bonafide. Winding up petition ought not to be aimed at pressurising the company to pay the money. Such an attempt would be nothing but would tantamount to blackmailing or stigmatizing the concerned company by abusing the process of the Court.

(22) Winding up petition is not an appropriate mode enforcing bonafide disputed debts as it is nothing but misuse and abuse of the process of the Court.

(23) Winding up petition is not an alternative form for resolving the debt dispute. In certain cases disputes are such that they are fit for resolving through civil court rather than through company court.

(24) What is bonafide and what is not is a question of fact. The expression 'bonafide' would mean genuine, in good faith and when dispute is based on

substantial grounds or when defence is probable and with some substance, it is a bonafide dispute. It must be strictly noted that winding up petition is not an alternate to civil suit."

27. In the present case, there is a bonafide dispute of debt and also substantial dispute of counter claim. The principles, which we have enunciated hereinabove, are extensively, explored in catena of judicial pronouncements. For short, we cannot resist the temptation of referring the following decided cases:

1. Madhusudan Gordhandas & Co. v. Madhu Woolen Industries Pvt. Ltd, 1972 42 CompCas 125 (SC), wherein, it is held that one act of dishonesty on the part of the petitioner is sufficient for rejection of petition.

2. Harinagar Sugar Mills v. Court Receiver, H.C.Bombay, 1966 AIR(SC) 1707, wherein it has been observed, relying on Palmer's Company Precedents that a winding up order is not a normal alternative.

3. Pradeshiya Industrial & Investment Corporation v. North India Petrochemicals Ltd., 1994 3 SCC 348, wherein it is held that mere inability to pay debt without any other evidence itself is not always sufficient to exercise discretion in favour of the petitioner.

4. American Express Bank Ltd. v. Core Health Care Ltd.,1999 96 CompCas 841, wherein, this Court (Coram: R.Balia, J.) has, lucidly, propounded the material principles and important parameters to be considered by the Court before adjudicating and exercising discretionary powers under section 433 of the Companies Act, 1956.

5. Ashok Fashions v. Magdoot Acid & Chemicals, 1998 91 CompCas 655. Dealing with the procedural part, also, as required under the Company Court Rules, 1959, pertaining to winding up has laid down certain principles. What is the requirement for being stated in the petition under rule 95 in case of Creditors petition prescribed requirements under forms No.45, 46 and 47 are dealt with. It is held that if the petition does not disclose the financial status of the respondent Company, which is mandatory in case of a petition by the creditor, and therefore, petition came to be dismissed on that ground."

[18] In Another Decision Rendered By Division Bench Of this Court in the case of Ashok Fashion Limited , this Court observed and held in paragraphs No.14 to 17 as under:

"14. What course is to be adopted by the company court after hearing the petitioner claiming to be a creditor of the company and that the company, though having served with a statutory notice has neglected to pay the amount and inspite of the notice, the company has chosen not to appear before the court There must be material produced by the creditor petitioner before the company court from which it can be found out that a company is a defunct company, it has closed its business, the labour force is already discharged and its manufacturing activities have been closed since long and there are no commercial activities. (If there is temporary closure or temporary suspension, it is required to be borne in mind). These circumstances if present would indicate that there is no question so far as the company is concerned, to revive its operation and, therefore, there cannot be difficulty in admitting and advertising, because the company is not going to suffer any more as its position is not going to alter by the filing of such petition. If on the record sufficient material is placed to indicate that the company is a defunct company and the process is served in accordance with law, the court may adopt the course of even admitting the petition and straightaway directing the advertisement of the company petition.

15. It is also required to be borne in mind that machinery for winding up should not be permitted to be utilised merely as a means for realising its dues from the company. The winding up petition cannot be a substitute for filing a suit or any other remedy which may be available to a creditor in accordance with law. As held in the case of Airwings (P.) Ltd. v. Victoria Air Cargo GmbH, 1995 84 CompCas 688 to raise presumption of inability to pay, it is not enough merely to show that the company has omitted to pay the debt despite service of statutory notice, it must be further shown that the company omitted to pay without reasonable excuse and condition of insolvency in the commercial sense exists. Reading the petition of the respondent, it is clear that the petition is based on the ground that the company is unable to pay its debt in the sense that it is actually unable to pay debts presently due and demanded. However, as observed by Sir William James in European Life Assurance Society, In re [1869] 9 LR Eq 122 at page 128, it is plainly and commercially insolvent, that is to say, that its assets are such and its existing liabilities are such as to make it reasonably certain as to make the court feel satisfied that the existing and probable assets would be insufficient to meet the existing liabilities, language which seems to be the origin of the phrase commercially insolvent. Machinery for winding up should not be permitted to be utilised merely as a means for realising debts due from a company. A winding up petition is not a legitimate means of seeking to enforce payment of debts. It is required to be noted that in a given case, if the notice is given and the amount is not paid, and the petition which is presented before the court discloses the assets

of the company which are insufficient to meet liabilities including contingent and prospective liabilities and further it discloses the position of fixed assets as well as valuation of plant and machinery of the company, then it can be said that material is placed before the court to arrive at a tentative decision whether the company is able to pay or not able to pay the dues. In some cases it is held that mere production of balancesheet of the company would not be, by itself, decisive, even though ordinarily, the court does not go behind the company's balancesheet to ascertain its financial position. Apart from that, in the instant case, no facts and figures are given so far as the appellantcompany is concerned. No capital is shown. There is nothing to indicate what are the liabilities. The court exercising powers for winding up is exercising its equitable jurisdiction. Therefore, material must be placed before the court and prima facie the material must go to indicate that the company is unable to pay its debts. Even in insolvency proceedings supporting documents are required to be produced to indicate that prima facie there is a case of insolvency. Pleadings and supporting documents on record must indicate that it is a case for winding up. If there is nothing on the record to show that the company is defunct or has discharged its labour force and commercial cum manufacturing activities have come to a grinding halt since long and it is not a temporary suspension thereof, then in a case like this where the respondent has secured the order of admission by not disclosing the true facts about its registered office, which is a decisive factor for determining the jurisdiction of the court and with a view to indicate that this court has jurisdiction by mentioning that the records are available with the Registrar of Companies, Gujarat State, Ahmedabad, and further the process being not served on the appellant company by the respondent in accordance with rule, and in the absence of material which is required to be placed before the court to come to a conclusion that prima facie the company is unable to discharge its debts, we think that the public notice would cause injury to the company. In the case of Hind Overseas (Pvt.) Ltd. v. R.P. Jhunjhunwala and Anr, 1976 AIR(SC) 565, the court has observed :

"34. In an application of this type allegations in the petition are of primary importance. A prima facie case has to be made out before the court can take any action in the matter. Even admission of a petition which will lead to advertisement of the winding up proceedings is likely to cause immense injury to the company if ultimately the application has to be dismissed. The interest of the applicant alone is not of predominant consideration. The interest of the shareholders of the company as a whole apart from those of other interests have to be kept in mind at the time of consideration as to whether the application should be admitted on the allegations mentioned in the petition."

16. Hence, we are of the view that in a case like this, such a course could have been adopted only after assessing the materials produced before the court by the petitioning creditor and on satisfying that the company is commercially insolvent. At this stage, we would like to reiterate the views expressed by this court in the case of Atul Drug House Ltd.,1971 41 CompCas 352 wherein the court held that at the time of admission of a petition for winding up under section 433(f) the petitioner must convince the court not only of a just and equitable ground for so doing but also that there is no alternative remedy open to the petitioner. This is because if such a petition is admitted and there is a public advertisement, it would cause irreparable harm to a solvent company even if the company succeeds ultimately.

17. Learned advocate for the petitioner has drawn our attention to paragraph 17 of the judgment in the case of Kanchanaganga Chemical Industries v. Mysore Chipboards Ltd, 1998 91 CompCas 646:

"17. In Pradeshiya Industrial and Investment Corporation of U.P. v. North India Petro Chemical Ltd, 1994 79 CompCas 835 the Supreme Court has in detail laid down the requirements to be established even prima facie before getting petition under section 433(e) admitted and advertised in paragraphs 26 to 33 of the judgment. If from the materials available on the record it could not be made out that the company is commercially insolvent, then that petition could be dismissed even before issuing notice regarding admission. It is also salutary to note that judicial process should not be an instrument of oppression or needless harassment. There lies responsibility and duty on the courts to find whether the concerned company has become commercially insolvent for purposes of winding up. At the initial stage, courts would be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before even issuing process regarding admission lest it would be an instrument in the hands of creditors as vendetta to harass the debtorcompany needlessly. Vindication of majesty of justice and enforcement of law are prime objects of justice and should not be abused since the company petition for winding up is an interest litigation."

[19] Thus, keeping in mind the decisions rendered by this Court, I am of the opinion that in the present case, the respondent company has raised a dispute in their communications dated 29.06.2012 and 16.07.2012 and thereby complained about the mischief caused by the staff of the petitioner, as a result of which, loss is suffered by the respondent company. Thus, before issuance of statutory notice, the respondent had raised a dispute. The said dispute cannot be said to be an afterthought or sham and bogus. In the opinion of this Court, the dispute raised by the respondent company is a bonafide and reasonable dispute. Further, certain claims of the petitioner in the

petition are admittedly time barred claims and therefore, in the facts and circumstances of the present case, when the respondent company is a going concern as observed herein above and when the respondent company has not lost its substratum, I am not inclined to entertain this petition. Accordingly, the same is dismissed. Notice is discharged.