

(2005) 04 GUJ CK 0060

In the Gujarat High Court

Case No : Company Petition No"s. 59 to 66 of 1999

Patel Kashiram Gangaram

APPELLANT

Vs

Unicure Remedies Pvt. Ltd.

RESPONDENT

Date of Decision : 07-04-2005

Acts Referred:

Companies (Court) Rules, 1959 — Rule 96
Companies Act, 1956 — Section 433, 434, 58A

Citation : (2005) 61 SCL 21

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : Rajendra K. Golani, for the Appellant; A.S. Vakil, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Puj, J.—All these petitions are filed by the petitioning Creditors u/s 433(e) read with Section 434 of the Companies Act, 1956 for winding up of the respondent Company.

2. On 14.03.2001, this Court has admitted all these petitions. However, publication of advertisement was deferred till 28.03.2001. The Court has observed that on that day i.e. on 28.03.2001, the learned advocate for the respondent Company shall come forward with the instructions regarding deferment of the publication. When all these matters were taken up for hearing regarding publication of advertisement on 16.10.2001, this Court has passed further order regarding advertisement and the petitions were ordered to be advertised in local daily Newspapers "Indian Express" English and "Jansatta" - Gujarati that final hearing was fixed on 29.11.2001. Advertisement in the Official Gazette was dispensed with.

3. Being aggrieved by the said order, the respondent Company carried the matter in appeal before the Division Bench of this Court and by common order dated 18.01.2002 in O.J. Appeal Nos. 39 to 46 of 2001, the Division Bench of this Court

permitted the respondent Company to withdraw the appeals with a liberty to approach the learned Company Judge under Rule 96 of the Companies (Court) Rules, 1956. The Division Bench has also held that the direction for publishing the advertisement would not operate till 06.02.2002 in light of the statement made by the learned counsel appearing for the respondent Company to the effect that the respondent Company would make an application on or before 06.02.2002.

4. Thereafter, the respondent Company has moved Company Application Nos. 30 to 37 of 2002 praying for an order directing the petitioners not to publish advertisement of the captioned Company Petitions and prayer for revocation of the order dated 16.10.2001. This Court vide its order dated 08.04.2004 has allowed all these applications and revoked the order dated 16.10.2001 whereby the Court has directed publication of advertisement of admission of Company Petition Nos. 59 to 66 of 1999. The Court has also recorded the request made on behalf of the learned advocate appearing for the respondent Company that the respondent Company may be permitted to urge the matter on merits even against order of admission dated 14.03.2001 and observed in this regard that in light of the Provisions of Rule 96 read with requirement of Form No. 48 of the Rules and the settled legal position, it was not necessary to make any order in this regard.

5. The respondent Company thereafter filed Company Applications Nos. 125 to 134 of 2004 praying for revocation of the order dated 14.03.2001 and for dismissal of Company Petition Nos. 59 to 66 of 1999. The respondent Company has also prayed in the said application for stay against the further proceedings in the said Company Petitions. While disposing of the said Company applications Nos. 125 to 132 of 2004 vide its order dated 28.07.2004, this Court has revoked the order of admission passed in Company Petition Nos. 59 to 66 of 1999 on 14.03.2001 whereby all these petitions were admitted. As far as dismissal of the Company Petitions is concerned, the Court has not expressed any opinion in the said order and the said issue was kept open. The Court has permitted the parties to make their submissions before the Court at the time of hearing of the Company Petitions afresh and they were also permitted to raise all these issues including the issue regarding admission of the petitions and the office was directed to place Company Petition Nos. 59 to 66 of 1999 for hearing on admission board.

6. It is in the above circumstances, all these Company Petitions are placed for admission hearing before this Court.

7. Mr. R.K. Golani, learned advocate appears for the petitioners and Mr. A.S. Vakil, learned advocate appears for respondent Company in all these matters.

8. Affidavit-in-reply was filed on behalf of the respondent Company on 08.02.2000. The petitioners have filed their separate affidavits-in-rejoinder in each of these petitions and additional affidavit-in-sur-rejoinder was filed by the

respondent Company on 20.10.2004. The affidavit-in-reply to additional affidavit-in-sur-rejoinder was filed by some of the petitioners on 05.12.2004. During the pendency of all these petitions before this Court, the petitioners of Company Petition No. 64 and 66 of 1999 have expired. No application was moved to bring the legal heirs on record on behalf of these two petitioners. These two petitions are accordingly abated.

9. Mr. R.K. Golani, learned advocate appearing for the petitioners has submitted that the respondent Company, namely, M/s. Unicure Remedies Pvt. Ltd. was, initially, a partnership firm which was known as Unicure Pharmaceuticals and at that point of time, the petitioners had deposited certain amounts with the said Partnership Firm and it was promised and undertaken by the said Partnership Firm to return the amount of deposits with interest @ 15% as and when demanded. The said Partnership Firm was subsequently converted into a Private Limited Company in the name and style of M/s. Unicure Remedies Pvt. Ltd., under the Provisions of Part - IX of the Companies Act, 1956 on 03.03.1993. He has further submitted that by virtue of the said conversion, all assets and liabilities of the Partnership Firm were transferred to the Company and the Company was liable to return the deposits with interest to the petitioners. The petitioners, thereafter, on number of occasions had demanded the return of deposits with interest but the respondent Company was not in a position to pay back the amount and had shown a total lackadaisical approach towards the repayment of the amount of the petitioners. The petitioners have moved separate applications before the Company Law Board (Bombay Bench) under the Provisions of Section 58-A(9) of the Companies Act, 1956 and had, inter alia, prayed that the respondent Company be directed to make repayment of their deposits along with interest due thereon in accordance with the terms and conditions of the deposits.

10. Mr. Golani has further submitted that despite considerable period of time has elapsed and since nothing could be done by the respondent Company, the petitioners have issued statutory notice through their advocate on the respondent Company and though the notices were duly served on the respondent Company, no payment was made to the petitioners. On the contrary, the respondent Company gave a totally defying, evasive and baseless reply to the notices to the petitioners. The petitioners have, therefore, no other alternative but to file these petitions before this Court. The failure of the respondent Company to make the payment of the amount deposited by the petitioners clearly goes to show that the respondent Company is unable to pay the debts to its Creditors which are legal dues and which they are legally liable to make payment. The respondent Company has failed to discharge its liability which shows that the respondent Company has become commercially insolvent and it would be in the interest of public at large to wind up the Company as it would be hazardous to the public at large if the respondent Company is allowed to carry on its business any further.

11. Mr. A.S. Vakil, learned advocate appearing for the respondent Company has submitted that all these petitions are not maintainable either in law or on facts. The petitions are not in proper form. The requirements of the Companies (Court) Rules, 1959 are not complied with. The affidavits filed are also not in proper form and they are not valid. The petitions are, therefore, required to be dismissed on this short ground. Mr. Vakil has alternatively submitted that all these petitions are frivolous, baseless and without any substance. In any case, highly disputed questions of facts are involved in these petitions and adjudication thereof would require a full-fledged trial and hence, the petitions must necessarily fail. The petitions deserve to be dismissed even on the ground that the petitioners have not paid any amount to the Company as the amount was paid by them to the Partnership Firm, namely, Unicare Pharmaceuticals and hence, the petitioners should not have any grievance against the Company.

12. Before entering into the merits of the matter, Mr. Vakil has given the factual background and has submitted that M/s. Unicare Pharmaceuticals was a Partnership Firm formed by one Shri Bharat Shah and one Shri Ambalal Patel. Both the parties had agreed to bring in necessary funds in their own names and also in the names of their friends and relatives. The petitioners happened to be close relatives of the said Shri Ambalal Patel and by virtue of their relationship with the said Shri Ambalal Patel, in the name of the petitioners, the said Shri Ambalal Patel had given deposits to the said Firm in the year 1983 84. The said firm was converted into a Private Limited Company under Part - IX of the Companies Act, 1956 on 03.03.1993. The said Shri Ambalal Patel had taken all the steps for the purpose of the said conversion. Immediately, after the conversion, disputes developed between the said Shri Bharat Shah and Ambalal Patel and at that time, the parties have decided to refer the said disputes to the arbitration of Shri Mayank Patel, Chartered Accountant, as the sole arbitrator. One of the issues before the arbitrator was liability of the Company to repay the amount of deposit placed by Shri Ambalal Patel and his friends and relatives including the petitioners. Various meetings were held from time to time before the said arbitrator wherein both the parties raised appropriate contentions. Ultimately, the said arbitrator gave the award broadly on the following terms:-

(i) Shri Ambalal Patel and his group, including the petitioner, had acquired the shares and deposited the total sum of Rs. 14,50,541.57 p. The arbitrator gave an award to the effect that as against that amount, a sum of Rs. 12,86,000 was to be paid to Shri Ambalal Patel and his associates in final settlement of the claim. The said payment was required to be made after deducting there from certain amounts payable by Shri Ambalal Patel and his groups to Shri Bharat Shah or his associates including the amount payable by one M/s. Centurion Laboratories (a firm taken over by Shri Ambalal Patel) to the Company.

(ii) Net amount payable by Shri Bharat Shah group, including the petitioners, therefore, worked out to be Rs. 6,91,522.02 ps.

13. Mr. Vakil has, therefore, submitted that the said award of the Arbitrator was

accepted by both the parties. In discharge of its liability, the Company paid a sum of Rs. 3,87,477.57ps. to various depositors. It also paid a sum of Rs. 2,75,000/- towards liability as to shares. Out of Rs. 6,91,522.02ps., thus a sum of Rs. 6,62,477.57ps. was paid leaving a balance of Rs. 29,044.45ps. He has further submitted that as and when the amount was received by Shri Ambalal Patel and his group, they were required to give necessary documents, receipts etc. in acceptance of the amount received under the award. After receiving the substantial amount, litigation started by members of the group of Shri Ambalal Patel including the petitioners for recovering much larger amount. The respondent Company through Shri Bharat Shah, therefore, made a complaint before the sole Arbitrator and the sole Arbitrator directed the said Shri Bharat Shah and his associates not to make payment of Rs. 29,044.45p. to Shri Ambalal Patel or his associates till such time Shri Ambalal Patel and his associates gave discharge certificates discharging them from their liabilities.

14. Mr. Vakil has further submitted that the petitioners are closely related to Shri Ambalal Patel and whatever amount was payable to the petitioners was included in the amount payable by the Company to Shri Ambalal Patel and his group and the said amount has been considered as liability of the Company in the award of the Arbitrator. According to the said award, whatever was required to be paid by the Company in discharge of all its liabilities including the liability of the amount deposited by the petitioners, the same has been discharged and only a sum of Rs. 29,044.45 p. remained to be paid which the Company is ready and willing to pay to such of the depositors as is acceptable to all the depositors of Shri Ambalal Patel group provided the same is accepted in full and final settlement of all the depositors covered under the award of the arbitrator. All these aspects have been placed on record by the arbitrator, Shri Mayank Patel in an affidavit dated 25.03.1988, a copy of which is annexed along with the affidavit-in-reply. Mr. Vakil has also invited the attention of the Court to the minutes of the meeting of the parties in the arbitration proceedings, the details of agreed balances of Shri Ambalal Patel and his group which were considered by the arbitrator and the details of the payment said to have been made to various depositors of Shri Ambalal Patel and his group against the final amount arrived at as per the award. He has also invited the attention of the Court to a chart giving complete particulars about the claim made by the petitioners as well as the amount paid by the Company from time to time. From these facts, Mr. Vakil has submitted that the claim made by the petitioners is wholly baseless, misconceived and malafide. The question as to the liability, if any of the Company towards various depositors and their associates was adjudicated upon by the sole arbitrator and since the award has been accepted by all the parties and the Company has already acted in accordance with the said award, no amount whatsoever except the amount of Rs. 29,044.45ps. is outstanding at this stage.

15. While dealing with the averments made in the petitions, Mr. Vakil has submitted that the petitioners have indulged into making false statements by stating that the petition before the Company Law Board is pending. As a matter

of fact, the said petition was dismissed by the Company Law Board much before the present petitions had been filed, by an order dated 27.11.1997.

16. About the financial position of the Company, Mr. Vakil has submitted that the respondent Company has a turnover exceeding Rs. 2.30 Crores and has been making profits for the last six years. The Company has employed more than 60 persons. The Company has not defaulted in making any payment of statutory dues. Except for thoroughly baseless and bogus claims made by the petitioners, there is no winding up petition filed against the Company. He has invited the attention of the Court to a chart produced along with the affidavit showing the turnover, profits and the status of the employees, on a year to year basis. He has, therefore, strongly urged that all these petitions should be dismissed with compensatory cost.

17. In rejoinder, Mr. Golani, learned advocate appearing for the petitioners has submitted that the petitioners are not parties to the alleged arbitration proceedings. He has also denied that the petitioners are relatives of Shri Ambalal Patel. The petitioners have not received the amount of deposit from the respondent Company and they have never accepted the award of the arbitrator. The petitioners have not received any notice of arbitration from the arbitrator and the petitioners have not authorised either Shri Ambalal Patel or any one to receive the amount of deposits from the respondent Company. The Company Law Board had dealt with the deposits on independent legal issues and one of such issues being that the deposits of the petitioners were not invited from public after the formation of the Company and the deposits not being time bound, the Company Law Board refused to intervene in the matter. The respondent Company is not doing the business in lawful manner. On the contrary, he pointed out two press notes published in the Newspapers of Vadodara which suggested that the respondent Company was involved in illegal activities. The respondent Company has faced excise raids and has also deceived the patients/customers by supplying less quantity in packing. Considering all these aspects, Mr. Golani has reiterated that the respondent Company is required to be wound up by an order of this Court.

18. For the purpose of meeting with the submissions made in rejoinder by Mr. Golani, the Court has asked Mr. Vakil to make his further submissions and accordingly, he has submitted that the respondent Company has filed its reply way back in February, 2000 and the petitioners have filed their rejoinder in August, 2004 i.e. after more than four and half year. Even if the petitioners are not parties to the arbitration proceedings, the petitioners have taken the benefit of the award of the arbitrator. The petitioners are relatives and/or family members of Shri Ambalal Patel and in support of this, he has invited the attention of the Court to a chart produced along with the affidavit-in-sur-rejoinder which shows the relationship of the petitioners with Shri Ambalal Patel. From the said chart, it clearly reveals that the petitioners are either cousins, Uncle, brother, brother-in-law or father of Shri Ambalal Patel. The Newspaper

report are totally misleading and cannot be relied upon. No company much less the respondent Company can be ordered to be wound up on the basis of any newspaper reports. The petitions are filed on the basis that the respondent Company is unable to pay its debts. A newspaper report much less the newspaper report produced by the petitioner can never demonstrate a Company's inability to pay its debts. With regard to the purported reference to Excise raids, Mr. Vakil has invited the Court's attention to the copy of the order dated 22.04.1998 passed by the office of the Central Excise and Customs and submitted that the said order has become final. The respondent Company has made profits in the year 2000 - 01, 2001 - 02, 2002 - 03 and 2003 - 04. In support of his submission, he has also produced the balance sheets for these four financial years. Over and above this, he has also produced the financial data in respect of the respondent Company for the year 1999 2000 to 2003 - 04. The respondent Company has been issued a Certificate dated 01.09.2004 by the Commissioner, Food and Drugs Control Administration, Gujarat State. A certificate of Quality System Assessment was issued by the President, AQA International certifying that the respondent Company has established Quality Management System i.e. in compliance with the International Quality System Standard ISO 9001 and Q9001 and 2000. On the basis of these evidences, Mr. Vakil has submitted that there is no substance in any of the allegations made by the petitioners and, therefore, all these petitions deserve to be dismissed.

19. Apart from the above factual details, Mr. Vakil has also cited certain authorities in support of his contention that the petitions deserve to be dismissed on various counts. First of all, he has submitted that since the debt is discharged by the respondent Company, there is no reason for the petitioners to file these winding up petitions before this Court. The defence raised by the respondent Company cannot be treated as bogus or sham as there are serious disputes about the debts. The very fact that the petitioners have not made any reference in the petition with regard to arbitration proceedings shows that the petitioners have not come before this Court with clean hands. In this connection, he relied on the decision of this Court in the case of MEHTA INTEGRATED FINANCE LIMITED v. RONAK PRINTS PRIVATE LIMITED (1999) 3 COMP LJ 128 wherein this Court has held that the stand taken by the respondent Company is consistent. The petitioner has not come before the Court with clean hands by not making any reference to the settlement between the parties. In view of the settlement between the parties on the date of the statutory notice, the respondent was not owing any amount to the petitioner and thus there was no admitted debt between the parties. Therefore, in the circumstances, the debt is disputed and as such this winding up petition will have to be rejected. In the present case also, in reply to the statutory notice, the respondent Company has made a reference regarding arbitration proceedings and in para 4 of the reply to the statutory notice, it was stated that the petitioners were closely related to Shri Ambalal Patel and the amount payable to them has already been included as amount payable by the respondent Company to Shri Ambalal Patel and the said amount

has been considered as liability of the Company in the award of the Arbitrator. According to the said report, whatever was required to be paid by the Company in discharge of all its liabilities, including the liability of the amount deposited by the petitioners, the same has been discharged and only a sum of Rs. 29,044.45ps. remained to be paid which the respondent Company is ready and willing to pay to such of the depositors as are acceptable to all the depositors of Shri Ambalal Patel. Despite this specific averment in the reply, there is no averment made by the petitioners and the reply was brushed aside simply by stating that a defiant, vague and evasive reply was filed by the respondent Company.

20. Mr. Vakild has further relied on the division Bench judgment of this Court in the case of ASHOK FASHIONS LTD. v. MEGHDOOT ACID AND CHEMICALS 1998 (1) COMP LJ 439 wherein this Court has observed that 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 the material is placed before the Court to arrive at a tentative decision where the Company is able to pay or not able to pay the dues. In some cases, it is held that mere production of balance-sheet of the Company would not be, by itself, decisive, even though ordinarily, the Court does not go behind the Company's balance-sheet to ascertain its financial position. Apart from that, in the instant case before the Division Bench, the Court found that no facts and figures are given so far as appellant company 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 debt. In the present case, the petitioners have not placed any material to that effect. There is no whisper in the petition about the financial position of the Company. On the contrary, the material produced by the respondent Company along with its affidavit-in-reply and affidavit-in-sur-rejoinder clearly show that the Company is a profit making company. It has earned profit in 2004. The financial data produced by the respondent Company also shows that the Company is having a very sound financial position. Mr. Vakild has, therefore, submitted that in view of this Division Bench Judgment, no case is made out by the petitioners for winding up of the respondent Company and hence, the petitions deserve to be dismissed.

21. Mr. Vakild has further relied on the decision of the Hon'ble Supreme Court in the case of MADHUSUDAN GORDHANDAS AND CO. v. MADHU WOOLLEN INDUSTRIES PRIVATE LIMITED [1972] 42 COMP CASES 125 wherein it is held that Where the petition for winding up of a Company is based on the ground of the inability of the Company to pay its debts, it is well settled that if the debt is

bona fide disputed and the defence is a substantial one, the Court will not order winding up. The principles on which the Court acts are : (1) that the defence of the Company is in good faith and one of substance; (2) that the defence is likely to succeed in point of law, and (3) that the Company adduces prima facie proof of the facts on which the defence depends. The allegation of the substratum of the Company is gone has to be alleged and proved as a fact. The mere fact that the Company has suffered trading losses will not destroy its substratum unless there is no reasonable prospectus of it ever making a profit in the future. In the present case, the defence of the respondent Company is that it has paid the debts of the petitioners and discharged its liabilities. The defence is also that the Company is making profits year after year. The defence is also that the petitioners have not produced any material showing that the financial substratum of the Company is gone. Looking to these facts of the case, the ratio laid down by the Hon'ble Supreme Court in this case is clearly applicable and even on this ground also, the petitions deserve to be dismissed.

22. After having heard learned advocates appearing for the respective parties and after having considered their pleadings as contained in the petitions, reply, rejoinder, sur-rejoinder and also in affidavit-in-sur-sur-rejoinder and after having gone through the documents produced on record along with their respective pleadings and after having applied the ratio laid down by the Courts and, various authorities cited before the Court, the Court is of the view that all these winding up petitions deserve only one fate and that is the fate of dismissal. The reliance is placed on various grounds for dismissal of petitions and those grounds are already considered by the Court while discussing the respective submissions made on behalf of the parties. The Court is of the firm view that despite the fact that the respondent Company in its reply to the statutory notice has clearly stated about the payment of the dues, award of the arbitrator and the relationship of the petitioners with Shri Ambalal Patel, there is no whisper about all these facts in the memo of all these petitions. The petitioners have, therefore, not come with clean hands before this Court and they have suppressed the material facts. The petitioners cannot invoke the equitable jurisdiction of this Court by concealing certain material facts. The question as to whether the petitioners have received the amount as per the arbitrator's award or whether they are relatives of Shri Ambalal Patel etc. can be gone into provided the petitioners have placed those facts before the Court right at the stage of filing petitions and that too when the petitioners have produced the copy of the reply given by the respondent Company. However, the said reply was casually dealt with by observing that it was a vague and evasive reply. As a matter of fact, a detailed exhaustive reply dealing with all the aspects of the matter was given by the respondent Company. There is no denial of the fact stated in the reply. In such a situation, the petitioners ought to have dealt with the issues raised by the respondent Company in the reply and then made a prayer for winding up of the respondent Company. In any case, the respondent Company has succeeded in raising a genuine and bonafide dispute before this Court. When the Court found

that the dispute raised by the respondent Company is genuine and bonafide, it is not advisable nor even desirable to pass an order of winding up. It is also an admitted position which can be found from the record that the respondent Company has been making profits year after year. No other winding up petitions except the present group of petitions is pending before this Court. The Balance-sheets and financial datas produced by the respondent Company show that the Company has earned profits till 2004 and that the financial substratum of the Company is not gone down. Since the Court is satisfied about the merits of the matter, the Court has not gone into the technical aspect of the form in which the present petitions are filed and does not express any opinion on this technical issue raised by Mr. Vakil during the course of arguments.

23. Having regard to the facts and circumstances of the case and considering the legal propositions on the issues which are raised in the present petitions, the Court is of the view that there is no substance or merits in any of these petitions and they deserve to be dismissed and accordingly all these petitions are dismissed without any order as to costs.