

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA**

*In the matter of an appeal in terms of section 5 C
of the High Court of the Provinces (Special
Provisions) Act No. 19 of 1990 as amended by Act
No. 54 of 2006, against a judgment delivered by
the Provincial High Court exercising its jurisdiction
under section 5A of the said Act.*

SC Appeal No. 85A / 2009

SC HC (CA) LA Application No. 48 / 2009

WP / HCCA / Col / 17 / 2007 [LA]

DC Colombo case No. 17/99/CO

(IN THE DISTRICT COURT)

*In the matter of a Winding Up Application in
terms of sections 255 and 256 of the
Companies Act No 17 of 1982*

Hatton National Bank Limited,
No. 481,
T. B. Jayah Mawatha,
Colombo 10.

PETITIONER

Vs

Lanka Tractors Limited,
No. 45/100,
Nawala Road,

Narahenpita.

RESPONDENT

AND THEN BETWEEN

(IN THE DISTRICT COURT)

In the matter of an application in terms of sections 260, 261, 348, 350 and 352 of the Companies Act No. 17 of 1982 to stay execution of properties belonging to the Company after the commencement of winding up of the Company.

Hatton National Bank Limited,
No. 481,
T. B. Jayah Mawatha,
Colombo 10.

PETITIONER - PETITIONER

Vs

Seylan Bank Limited,
No. 90,
Galle Road,
Colombo 03.

PARTY RESPONDENT

AND THEN BETWEEN

(IN THE PROVINCIAL HIGH COURT)

Hatton National Bank Limited,
No. 481,
T. B. Jayah Mawatha,
Colombo 10.

**PETITIONER - PETITIONER -
APPELLANT**

Vs

1. Seylan Bank Limited,
No. 90,
Galle Road,
Colombo 03.

PARTY RESPONDENT - RESPONDENT

2. Lanka Tractors Limited,
No. 45/100,
Nawala Road,
Narahenpita.

RESPONDENT - RESPONDENT

AND NOW BETWEEN,

(IN THE SUPREME COURT)

Hatton National Bank PLC,
No. 479,
T B Jayah Mawatha,
Colombo 10.

**PETITIONER - PETITIONER -
APPELLANT - APPELLANT**

Vs

1. Seylan Bank Limited,
No. 90,
Galle Road,
Colombo 03.

**PARTY RESPONDENT - RESPONDENT -
RESPONDENT**

2. Lanka Tractors Limited,
No. 45/100,
Nawala Road,
Narahenpita.

**RESPONDENT - RESPONDENT -
RESPONDENT**

Before: **Buwaneka Aluwihare PC J**
P. Padman Surasena J
Janak de Silva J

Counsel: S. A. Parathalingam PC with Shamil Perera PC instructed by
Sudath Perera Associates for the Petitioner-Petitioner-Appellant-
Appellant.

Romesh de Silva PC with Sugath Caldera for the Party -
Respondent - Respondent-Respondent.

Argued on: 28-10-2021

Decided on: 02-02-2023

P Padman Surasena J

The Petitioner-Petitioner-Appellant-Appellant (Hatton National Bank Limited), (hereinafter referred to as HNB), filed petition (case No. 17/99 CO) in the District Court of Colombo praying for the winding up by Court, the company by the name of Lanka Tractors Limited which stands in the caption of this judgment as the Respondent-

Respondent- Respondent. The said winding up application was filed in the District Court on 02nd June 1999.

The learned District Judge, by order dated 14th March 2000, had dismissed the said petition (filed by HNB which prayed for the winding up of Lanka Tractors Limited).

Being aggrieved by the said order of the learned District Judge (order dated 14th March 2000), HNB filed the application bearing No. CA LA 83/2000 in the Court of Appeal seeking Leave to Appeal against the said order of the learned District Judge. The Court of Appeal on 02nd November 2000, granted Leave to Appeal as prayed for, in that application.

Thereafter, the Court of Appeal having concluded the arguments of that case, by its judgment dated 28th June 2001 -, set aside the order of the learned District Judge dated 14th March 2000 and sent the case back to the District Court of Colombo to consider and make an order relating to the preliminary issue of publication.

Thereafter, the learned District Judge by her order delivered on 13th June 2002-, permitted the publication of the Petitioner's claim in three newspapers. Pursuant to the said order, a notice was published in the said papers after which creditors including the Party Respondent - Respondent- Respondent, Seylan Bank PLC, (hereinafter referred to as the Seylan Bank), filed their statements of claim. The claim put forward by Seylan Bank as at 31st August 2002 was for Rs. 44,677,226/92.

In the meantime, during the period between the time of dismissal of the petition filed by HNB praying for winding up Lanka Tractors Limited by the learned District Judge on 14th March 2000, and the setting aside of the said order of dismissal by the Court of Appeal on 28th June 2001, Lanka Tractors Limited, by way of Mortgage Bond No. 475 dated 12th May 2001 had mortgaged some of its properties and obtained credit facilities from Seylan Bank.

As Lanka Tractors Limited had defaulted the re-payment of the aforesaid credit facilities, Seylan Bank had taken steps to auction the property relevant to the said Mortgage Bond by way of Parate Execution. When Seylan Bank published the resolution of its board of directors which exercised its powers of Parate Execution in the newspaper on 10th March 2006-, HNB had made the application dated 21st March

2006 to the District Court of Colombo in terms of Sections 260, 261, 348, 359 and 352 of the Companies Act No. 17 of 1982 (hereinafter sometimes also referred to as the Companies Act), seeking an order to stay the said execution on the basis that the said execution proceedings had commenced after the winding up of Lanka Tractors Limited and hence would have the effect of nullifying the liquidation proceedings. This was on the basis that the said auction, if held, and the properties thereby sold, would cause an irreparable damage and irremediable loss to HNB and all other creditors (other than Seylan Bank) in the liquidation proceedings resulting in nullifying the effect of the liquidation proceedings. In the said application, HNB had also prayed that the Mortgage Bond relevant to the pending execution be set aside on the basis that it is a fraudulent preference under Section 348 of the Companies Act and/or in terms of Section 350 of the Companies Act. This application by HNB was on the basis that in terms of Section 352 of the Companies Act, Seylan Bank had no right to proceed with such execution of the property of Lanka Tractors Limited after the commencement of its winding up proceedings.

Having considered the submissions of the parties, the learned District Judge by his order dated 05th March 2007, restrained Seylan Bank from continuing with the Parate Execution of the relevant property. The learned District Judge in the same order had further held that the Mortgage Bond in question could not be declared null and void as there was insufficient material in that regard. In other words, the learned District Judge by its order dated 05th March 2007, though restrained Seylan Bank from carrying out the said Parate Execution, refused to declare that the relevant Mortgage was void.

Being aggrieved by the said order of the learned District Judge (dated 05th March 2007), HNB sought leave to appeal from the Provincial High Court of Civil Appeal of the Western Province in order to have the said order set aside and obtain a declaration that the relevant Parate Execution proceeding is null void.

HNB in its petition before this Court states that: the Provincial High Court of Civil Appeal of the Western Province on 30th July 2007 granted Leave to Appeal against the learned District Judge's order dated 05th March 2007 and the matter was fixed for argument; when the case was taken up for argument on 15th November 2007 Counsel

for Lanka Tractors Limited took up a series of preliminary objections; arguments relating to the preliminary objections were concluded on the 3rd and 21st February 2008; High Court reserved its order on the preliminary objections for the 10th March 2008; thereafter the order had to be put off for number of dates as one of the Judges of the bench was elevated to the Court of Appeal; subsequently on 3rd February 2009, the judgement was delivered on the whole case despite the fact that the High Court had reserved its order only on the preliminary objections raised by Lanka Tractors Limited.

HNB complains before this Court that the learned Judges of the Provincial High Court of the Civil Appeal by their Judgment dated 3rd February 2009, wrongly dismissed the whole appeal.

Being aggrieved by the said judgment of the Provincial High Court of Civil Appeal, HNB sought Leave to Appeal from this Court and accordingly, on 30th June 2009, this Court granted Leave to Appeal on the questions of law set out in paragraphs 28 (1), 28 (2), 28 (4) and 28 (5), of the petition dated 16th March 2009. At the time the Court decided to grant Leave to Appeal to the afore-stated four questions of law, at the instance of Seylan Bank, two more questions of law (No. 5 and 6 below) were also framed. It was thereafter that HNB framed another question of law (No. 7 below) as a consequential question of law. The said questions of law being renumbered by me as 1-7 respectively, are to the following effect.

- 1) In the light of the conclusion that the disposition of property after a winding up application has been filed, is void and such disposition includes a mortgage as well, whether the Provincial High Court of Civil Appeal has erred in law when it held that the mortgage was in order as it was executed after the original petition was dismissed and prior to its restoration by the Court of Appeal, when in fact all claims against Lanka Tractors Limited are fixed as at the commencement of the winding up;
- 2) Whether the Provincial High Court of Civil Appeal has erred in law when they failed to take into account the fact that the Court of Appeal by its order dated 28-06-2001 had restored the HNB's application for winding up of Lanka Tractors Limited which resulted in the winding up of Lanka Tractors Limited deeming to

have commenced at the time of the filing of the application for winding up which was 02-06-1999 which was prior to the mortgage in question;

- 3) Whether the Provincial High Court of Civil Appeal has erred in law when they had failed to take into account the fact that the said disposition of the property by Lanka Tractors Limited was done with the sole object of defrauding the creditors of Lanka Tractors Limited thereby creating a diminution of the assets of Lanka Tractors Limited which was not an act done honestly and in the ordinary course of business.
- 4) Whether the Provincial High Court of Civil Appeal has failed to consider the fact that Lanka Tractors Limited had knowledge that Leave to Appeal was granted in the aforesaid application No. CA / LA 83 / 2000 when Lanka Tractors Limited executed the Mortgage Bond in favour of Seylan Bank after the order of dismissal of the application for winding up by the HNB on 14-03-2000;
- 5) Whether a Mortgage Bond is a disposition within the meaning of Section 260 of the Companies Act;
- 6) Whether the HNB's application to the High Court of the Western Province was correct; in that it was a Leave to Appeal application whereas in fact it should have been a final appeal.
- 7) Is the Seylan Bank entitled in law to raise the question of law No. (6) at this stage?

It would be appropriate to deal with the question of law No. (6) and (7) at the beginning itself. The question of law No. (6) has been formulated by Seylan Bank on the premise that HNB's petition to the High Court of Western Province should have been a petition of a final appeal. While this can be gathered from the wordings of the question of law No. (6) itself, Seylan Bank in its written submissions¹ also has confirmed its position by stating therein that "the correct application if at all is for revision and in any event, it is a final appeal". However, what Seylan Bank had sought to advance in the same written submission is the argument that an appeal is only

¹ Written submissions Dated 17-09-2009 filed before this Court by Seylan Bank.

possible when an act specifically gives permission to appeal. It is Seylan Bank's argument that there is no provision in law to permit an appeal against an order made in terms of sections 260 and 261 of the Companies Act. In support of the above position Seylan Bank has relied on authorities: Gunaratne vs. Thambinayagam and others,² Bakmeewewa vs. Raja,³ Martin vs. Wijewardane,⁴ People's Bank vs. Perera,⁵ Dassenayake vs. Sampath Bank.⁶

In my view, the question whether a party has a right of appeal is different to the question whether an aggrieved party should file an appeal or a leave to appeal application against an order with which such party is dissatisfied with. In these circumstances, I find that Seylan Bank has made no submission regarding the question of law No. (6) in respect of which this Court has granted leave to appeal. This leads me to form the view that Seylan Bank has abandoned pursuing the question of law No. (6). In view of such abandonment of the question of law No. (6), the consequential question of law (question of law No. (7)) raised by HNB does not arise. Hence, I would not proceed any further to deal with both the questions of law No. (6) and (7).

The question of law No. (4) raises the issue whether Lanka Tractors Limited had knowledge of leave to appeal being granted to HNB's application No. CA / LA 83 / 2000 when it executed the relevant Mortgage Bond in favour of the Seylan Bank. Let me next consider this question.

HNB filed the winding up application⁹ in the District Court on 02nd June 1999. The learned District Judge dismissed the petition on 14th March 2000. HNB filed the application No. CA LA 83/2000 in the Court of Appeal seeking Leave to Appeal against the said order of the learned District Judge dated 14th March 2000. The Court of Appeal granted leave to appeal on 02nd November 2000.-. It was on 12th May 2001 that Lanka Tractors Limited, by way of Mortgage Bond No. 475 had mortgaged the relevant properties to obtain credit facilities from Seylan Bank. Thus, it is clear that Lanka Tractors Limited, had executed the Mortgage Bond No. 475 to mortgage the

² (1993) 2 SLR 355.

³ (1989) 1 SLR 231.

⁴ (1989) 2 SLR 250.

⁵ (2003) 2 SLR 358.

⁶ (2002) 3 SLR 268.

⁹ The winding up application is dated 02-06-1999.

relevant properties to Seylan Bank, more than 06 months after the Court of Appeal had granted Leave to Appeal against the order of the learned District Judge dismissing the petition for winding up.

Seylan Bank, neither in the statement of objections dated 27th June 2006 nor in the affidavit dated 22nd June 2006 filed by the Chief Manager, Foreign Currency Banking Unit of Seylan Bank T Jegatheeswaran has taken up any position that it was not aware of the fact that the Court of Appeal, on 02nd November 2000, had granted Leave to Appeal against the order of the learned District Judge dismissing the petition for winding up.

Moreover, the fact whether Lanka Tractors Limited was or was not aware that the Court of Appeal, on 02nd November 2000, had granted leave to appeal against the order of the learned District Judge is a matter exclusively within the knowledge of Lanka Tractors Limited. While no party has addressed this issue, I have to proceed on the basis that the said fact was well within the knowledge of Lanka Tractors Limited which was a party to the said proceedings in the Court of Appeal. I have no basis to hold the contrary. Section 106 of the Evidence Ordinance reads thus: "*When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*" Lanka Tractors Limited, has not taken up the position that it was not aware of such fact. Thus, I hold that Lanka Tractors Limited has failed to discharge its burden that it did not have any knowledge of Court of Appeal, granting leave to appeal against the order of the learned District Judge on 02nd November 2000 dismissing the petition for winding up. In those circumstances, I hold that at the time Lanka Tractors Limited executed the Mortgage Bond No. 475, it did so with full knowledge that the winding up process was still alive as the Court of Appeal by that time had granted Leave to Appeal against the order of the learned District Judge dismissing the petition for winding up. Perusal of the judgment of the Provincial High Court of Civil Appeal shows clearly that it had not at all considered this aspect of the case.

Let me now proceed to consider the question of law No. 02. That revolves around the question whether the winding up of Lanka Tractors Limited should be deemed to have commenced at the time of filing of the application for winding up which was 02nd June 1999.

Section 262 of the Companies Act No. 17 of 1982 is relevant in this regard and is as follows:

“(1) Where, before the presentation of a petition for the winding up of a company by the court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.”

Thus, the plain reading of the above section clearly shows that the date of commencement of the winding up of a company by Court must be taken as the date of filing of the application for winding up. Legislature in its wisdom has mentioned it as a deeming provision for good reasons. It is because the actual winding up order is made after the petition praying for winding up is filed. What happens if the date of commencement of the winding up of a company is taken as the date of the actual order of Court that the company be wound up? In such event, the company under winding up is able to alienate its property leaving nothing for its creditors. If that be the case, any application for winding up would not achieve any practical result. Thus, it is clear that the legislature has intended to restrain (indirectly) the company under winding up from making any disposition after any petition for winding up of that company has been filed. This is the mischief the legislature has intended to suppress. This view is further supported by section 261 which states thus: *“Where any Company is being wound up by court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents.”* This means that the company under winding up has an obligation to stop such dispositions of its property after any petition for winding up of that company has been filed.

Following quotations would show that the above position is consonant with English law principles set out in various legal literature.

Sarah Worthington in Sealy & Worthington's Text, Cases & Materials in Company Law,¹⁰ states the following.

"For many statutory purposes, a winding up takes effect from its 'commencement', which may involve some backdating. IA 1986 s 86¹¹ provides that a voluntary winding up is deemed to commence at the time of the passing of the resolution for winding up. In the case of a compulsory winding up, the liquidation is deemed to commence at the time of the presentation of the petition (and not the making of the order itself), but if the company is already in voluntary liquidation when the petition is presented, the relevant time is when the winding-up resolution was passed (s 129)."

Gower Principles of Modern Company Law¹² comments on the above as follows.

"On the making of a winding up order the winding up is deemed to have commenced as from the date of the presentation of the petition (or, indeed, if the order is made in respect of a company already in voluntary winding up, as from the date of the resolution to wind up voluntarily). This dating back is important since it can have the effect of invalidating property dispositions and executions of judgments lawfully undertaken during the period between the presentation of the petition and the order, and of affecting the duration of the periods prior to "the onset of insolvency" in which, if certain transactions are undertaken, they are liable to adjustment or avoidance in the event of winding up or administration."

¹⁰ Sarah Worthington in Sealy & Worthington's Text, Cases & Materials in Company Law 11th Edition p. 851-852.

¹¹ Section 86 of the United Kingdom's Insolvency Act 1986 states that "A voluntary winding up is deemed to commence at the time of the passing of the resolution for voluntary winding up."

¹² Paul L. Davies and Sarah Worthington in Gower – principles of modern company law 10th edition p. 1157.

Thus, as the winding up application by the petitioner was presented to the District Court on 3rd June 1999, in terms of section 262 of the Companies Act, if an order to wind up has been made, the winding up must stand as having commenced from the date of presentation of the petition to Court.

The Court of Appeal by its order dated 28th June 2001 restored HNB's application for winding up of Lanka Tractors Limited. After its restoration, there is winding up proceedings before Court to which section 262 of the Companies Act must apply. Thus, the effect of the restoration of HNB's application for winding up of Lanka Tractors Limited is that Lanka Tractors Limited must stand as having commenced its winding up proceedings from 02nd June 1999-i.e., the date of presentation of the petition to Court. Therefore, winding up of Lanka Tractors Limited is deemed to have commenced on 02nd June 1999 (at the time of filing of the application in Court for winding up). The Provincial High Court has failed to appreciate that aspect of the case.

It is now time to turn to the question of law No. 05. That is the question whether the Mortgage Bond executed by Lanka Tractors Limited is a disposition within the meaning of section 260 of the Companies Act. At the outset, it has to be noted that the original application dated 21st March 2006 relevant to this proceeding made in the District Court by HNB had been filed in terms of sections 260, 261, 348, 350 and 352 of the Companies Act No. 17 of 1982.

HNB argues that the Mortgage Bond No. 475 dated 12th May 2001 executed by Lanka Tractors Limited to obtain credit facilities from Seylan Bank is a "disposition of the property of the company, made after the commencement of the winding up", and therefore falls within the meaning of section 260 of the Companies Act. HNB therefore argues that the said Mortgage Bond shall be void as per the said section.

In contradiction to the above argument, Seylan Bank argues that the Mortgage Bond No. 475 dated 12th May 2001 is not a disposition within the meaning of section 260 of the Companies Act. It is the above issue that I have to decide in the question of law No. (5) which I would now proceed to consider.

Section 260 of the Companies Act No. 17 of 1982 is as follows:

"In a winding up by the court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void."

Section 260 unambiguously states that any disposition of the property of the company made after the commencement of the winding up, shall, unless the court otherwise orders, be void. The several items specified in that section i.e., any transfer of shares, or alteration in the status of the members of the company are merely some of such dispositions and hence are not exhaustive. Therefore, what has been declared void by that section is any disposition. Thus, I need to now examine the meaning of the term 'disposition' set out in section 260.

As per Black's Law Dictionary,¹³ the term 'disposition' is defined as follows:

The act of transferring something to another's care or possession, esp. by deed or will; the relinquishing of property <a testamentary disposition of all the assets>.

The District Judge in his order has held that the execution of Mortgage Bond No. 475 dated 12th May 2001 by Lanka Tractors Limited, to mortgage some of its properties to obtain credit facilities from Seylan Bank cannot be considered a disposition within the meaning of section 260 of the Companies Act No. 17 of 1982. However, on appeal, the Provincial High Court of Civil Appeal had held that the said execution of Mortgage Bond No. 475 dated 12th May 2001 is a disposition within the meaning of section 260 of the Companies Act No. 17 of 1982. Neither Lanka Tractors Limited nor Seylan Bank has canvassed the said conclusion by the Provincial High Court of Civil Appeal. However, in the instant appeal HNB had prayed inter alia in its Leave to Appeal application the followings:

- i. to set aside the order of the Provincial High Court of Civil Appeal of the Western Province dated 3rd February 2009 and the order of the District Court dated 5th March 2007;

¹³ 11th Edition page 592.

- ii. to declare that the said Mortgage Bond No. 475 dated 12th May 2001 executed in favour of the Party Respondent (Seylan Bank) is null and void;
- iii. to set aside and/ or rescind the said Mortgage Bond No 475 dated 12th May 2001 executed in favour of the Party Respondent (Seylan Bank).

It is the position of Seylan Bank that mortgages would not be considered as disposition as ownership is retained in the Mortgagor in the case of a mortgage. To the contrary, HNB argues that such mortgage is:

- a) contrary to sections 260 and 261 of the Companies Act in light of the order made by their Lordships in the Court of Appeal reviving this case;
- b) an act done to defraud the creditors of the company in the liquidation proceedings causing diminution of the Company assets; and
- c) would render the liquidation proceedings a mere technicality and the entire purpose of those proceedings made nugatory.

In considering the above arguments, it would be relevant to refer to the following passage taken from Akers and others vs. Samba Financial Group¹⁴ where Lord Mance observed the following regard to section 127 of the Insolvency Act 1986 of the United Kingdom which is similar to aforementioned section 260 of the Companies Act.

"However, it is fair to say that the word "disposition" is linguistically capable of applying to a transaction which involves the destruction or termination of an interest...

And it is possible to claim support for such a view in relation to section 127 from respected authors. Thus, Professor Sir Roy Goode in Principles of Corporate Insolvency Law, 4th ed (2011) at para 13-127 states that "[s]ection 127 bites on beneficial ownership, not necessarily on the legal title". And at para 13-128, he says that "[t]he word 'disposition' ... must be given a wide meaning if the purpose of the section is to be achieved, particularly in view of the fact that there is no exception in favour of transfers

¹⁴ (2017) UKSC 6

for full value"; particularly relevantly for present purposes, this passage continues: "[d]isposition' should therefore be considered to include not only any dealing in the company's ... assets by sale, exchange, lease, charge, gift or loan but also ... any other act which in reducing or extinguishing the company's rights in an asset, transfers value to another person". Sir Roy then explains that on this basis "disposition' includes an agreement whereby the company surrenders a lease or gives up contractual rights". And McPherson's Law of Company Liquidation, 3rd ed (2013), para 7-015, states that section 127 "only [applies to] property which belongs in equity to the company" and "is confined to the company's beneficial interest in property"

Further in Re Leslie engineers Co. Ltd.¹⁵ Oliver J had observed that,

"on the true construction of section 227 of the Act of 1948, the term "dispositions" included dispositions of a company's property whether made by the company or by a third party or whether made directly or indirectly;..."

Accordingly, it is apparent that in the context of winding up, the term disposition covers a wide range of transactions which diminish the value of the company's assets while transferring the same to another.

A mortgage bond in general is executed in such a way that it binds a property taken as a security for the repayment of a debt. In the instant case, Lanka Tractors Limited executed the Mortgage Bond No. 475 dated 12th May 2001 in regard to some of its properties in return for credit facilities from the Seylan Bank. Accordingly, by mortgaging the said properties to Seylan Bank, Lanka Tractors Limited has authorized Seylan Bank to sell it by public auction and recover its dues in case of a failure to settle credit facilities.

In the Australian case of Re Dittmer Gold Mines Ltd.¹⁶ the Supreme Court of Brisbane reached the same conclusion holding that the memorandum of mortgage, although executed after the order for winding-up, was nevertheless a disposition of the property of the company made after the commencement of the winding-up within section 178

¹⁵ (1976) 1 WLR 292.

¹⁶ (No 3)[1954] St R Qd 275.

of The Companies Acts, 1931 – 1942, and was void unless the court otherwise ordered.

It would be relevant to note that the above decision (Re Dittmer Gold Mines Ltd.) was given in regard to section 178 of their Companies Acts, 1931 – 1942 which is in fact identical to section 260 of our Companies Act where the provision reads,

"In a winding-up by the court, any disposition of the property of the company, including things in action, and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding-up shall, unless the court otherwise orders, be void."

Therefore, I find no reason to oppose the afore stated general consensus of courts which have observed the wide interpretation of the term 'disposition'. Moreover, section 352 of the Companies Act would also confirm the position that the legislature has placed expressed restriction on the rights of creditors as to execution attachment in relation to properties of a company under winding up. The said section is reproduced below for easy reference.

(1) Where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company unless he has completed the execution or attachment before the date of commencement of the winding up.

Provided that

(a) where any creditor has had notice of a meeting having been called at which a resolution for voluntary winding up is to be proposed, the date on which the creditor so had notice shall for the purposes of the preceding provisions be substituted for the date of commencement of the winding up;

(b) a person who purchases in good faith under a sale by order of court any goods of a company on which an execution has been levied shall in all cases acquire a good title to them against the liquidator;

(c) the rights conferred by the provisions of this sub-section on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court may think fit.

(2) For the purposes of this section, an execution against goods shall be taken to be completed by seizure and sale, and an attachment of a debt shall be deemed to be completed by receipt of the debt, and an execution against land shall be deemed to be completed by seizure and, in the case of an equitable interest, by the appointment of a receiver.

(3) In this section the expression " goods " includes all movable property. "

Thus, in light of the wide interpretation given to the term 'disposition' and the intention of the legislature to restrict the rights of creditors as to the execution of attachments in relation to properties of a company under winding up it can be stated that even the question of ownership would not be of strict relevance in interpreting whether a particular act could be regarded as a disposition. Therefore, the position taken up by Seylan Bank that mortgages would not be considered as disposition as ownership is still retained in the Mortgagor, cannot be accepted.

As has been clarified above, the term 'disposition' should be given a wider meaning than the 'transfer', which is used to interpret a change of title. This is why the legislature in its wisdom has used the term 'disposition' instead of the term 'transfer'.

What has happened in this case is that Lanka Tractors Limited has mortgaged the relevant properties to Seylan Bank just few months before the pronouncement of the judgment in the Court of Appeal and defaulted the repayment. The resultant position of this act is the commencement of Parate Execution proceedings by Seylan Bank to auction the property and recover its dues. Therefore, there is no doubt that the cumulative effect of the entire process of the execution of Mortgage Bond No. 475 by Lanka Tractors Limited and the subsequent default of repayment thereof which led Seylan Bank to commence Parate Execution of the property, has amounted to an act of transferring the beneficial interest of the relevant property to Seylan bank to enable it to become the owner through Parate Execution. That is the way Lanka Tractors Limited had chosen to relinquish its beneficial interest in the relevant property.

It would be only Lanka Tractors Limited which would know if it had any other purpose/intention other than that mentioned above. But Lanka Tractors Limited had not even attempted to explain why it decided to execute the Mortgage Bond No. 475. In light of the above, it would be absurd to hold that the Mortgage Bond No. 475 executed by Lanka Tractors Limited in favour of Seylan Bank cannot be invalidated on the mere fact that it is only a mortgage. The purpose of this section is clear and wide enough to bring the Mortgage Bond No. 475 under section 260 despite the word mortgage is not found in its list of items. In these circumstances, I have no hesitation to hold that irrespective of the fact that the title does not pass in a mortgage, the Mortgage Bond No. 475 is a disposition within the meaning of section 260 of the Companies Act.

I would now deal with the question of law No. (3). The primary issue raised in question of law No. (3) is whether the said disposition of the property by Lanka Tractors Limited was done with the sole object of defrauding its creditors. Section 348 of the Companies Act which describes about Fraudulent reference would be relevant in this regard. It is as follows:

(1) Any conveyance, mortgage, delivery of goods, payment, execution, or
“ *other act relating to property which would, if made or done by or against an individual, be deemed in his insolvency a fraudulent preference, shall if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.*

(2) For the purposes of this section, the commencement of the winding up shall be deemed to correspond with the act of insolvency in the case of an individual.

(3) Any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void to all intents.”

Having considered the arguments in relation to the question of law No. (4), I have already held that Lanka Tractors Limited had executed the Mortgage Bond No. 475 with full knowledge that the winding up process was still alive as the Court of Appeal

by that time had granted Leave to Appeal against the order of the learned District Judge dismissing the petition for winding up.

There can be two inferences from the above conclusion. One is that the disposition of the property relevant to the issue at hand by Lanka Tractors Limited was done with the sole object of defrauding its creditors. The other is that the said disposition of the property was done by Lanka Tractors Limited without any object of defrauding its creditors. As to which object Lanka Tractors Limited had when it had executed the Mortgage Bond No. 475 is only within the exclusive knowledge of Lanka Tractors Limited itself.

I have already mentioned about the rule of evidence that would be applicable in situations of this nature. The said rule is contained in section 106 of the Evidence Ordinance which I have already reproduced before.

The first illustration mentioned under the section of the Evidence Ordinance states thus:

"When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him."

Thus, when taking into the character and the circumstances under which the Mortgage Bond No. 475 has been executed coupled with the fact that it is Lanka Tractors Limited which has the exclusive knowledge of the relevant facts, Lanka Tractors Limited has a legal obligation to prove that it acted with some intention other than that which the character and circumstances of the aforesaid execution suggests. Lanka Tractors Limited, has not taken up any position in relation to the question whether the disposition of the relevant property was done with or without the object of defrauding its creditors. Thus, I hold that Lanka Tractors Limited has failed to discharge its burden that it did not have the object of defrauding its creditors when it executed the Mortgage Bond No. 475 with full knowledge that the winding up process was still alive as the Court of Appeal by that time had granted leave to appeal against the order of the learned District Judge dismissing the petition for winding up.

Learned Counsel drew our attention to the views expressed by the Court of Appeal in the unreported case of L. M. Apparels (Pvt) Ltd. vs. E. H. Cooray & others.¹⁷ In that case, S. N. Silva J. (as he was then) stated as follows:

"Submissions of learned President's Counsel relate to the ambit and effect of the provisions contained in section 260 of the Companies Act and the procedure to be adopted in a matter where the provisions of the section are sought to be applied....."

The provision is identical with section 227 of the Companies Act of England. The ambit of operation of this provision may be more readily comprehended by reference to the commentary in Palmer's Company Law, 23rd ed. vol 1. page 1185. The commentary based on cases decided in England is as follows:

"A disposition of the property of the Company, including things in action and a transfer of shares or alteration in the status of the members of the company, made after the commencement of the winding up, is void unless the Court otherwise orders (1948 Act. 'S 227): but the practice of the Court is to allow such payments or dispositions, pending the petition, if made honestly and in the ordinary course of business. The exercise of the discretion of the Court under this section is controlled only by the general principles of justice and fairness. Such an order may be made prior to the hearing of the winding up order."

The foregoing commentary, made with reference to the practice of court, reveals that the provision is not to be construed as it were a guillotine which indiscriminately strikes down every disposition of property of the company made after the commencement of its winding up, with a reserved power vested in the Court to validate any such disposition. The words "unless the Court otherwise orders, be void" should be understood as subjecting every disposition of property of the company made after the commencement of the winding up, to the scrutiny of Court with a

¹⁷ CA Application No. 584/93, decided on 25th March 1994.

overriding discretion vested in the Court to permit such disposition to stand....”¹⁸

I have held that Lanka Tractors Limited has failed to discharge its burden that it did not have the object of defrauding its creditors when it executed the Mortgage Bond No. 475 when it had the full knowledge that the winding up process was still alive as the Court of Appeal by that time had granted Leave to Appeal against the order of the learned District Judge dismissing the petition for winding up. Although the above conclusion is a sufficient answer to the question of law under consideration, in view of the fact that the above case was cited before us, I would briefly mention about the question whether it would be just and fair in the circumstances of this case for Court to permit this disposition to stand.

Lanka Tractors Limited was fully aware at the time they mortgaged the property to Seylan Bank Limited on or about 12th May 2001 the fact that HNB had sought Leave to Appeal from the Court of Appeal against the dismissal of the winding up petition. In fact, Leave to Appeal had already been granted on 2nd November 2000 by the time the mortgage bond was executed on or about 12th May 2001. Thus, Lanka Tractors Limited has not adduced any basis/material upon which I can hold that the said disposition was made honestly in its ordinary course of business.

The attention of court was also drawn to the case of Express Electrical Ltd v Beavis and Ors.¹⁹ The case concerned with a validation order in a situation where a person had delivered goods to a company at the time when a winding up petition had been filed. The object of a validation order in that a case was to validate the payment made by the company for goods supplied. In that case Lord Justice Sales observed:

The true position is that, save in exceptional circumstances, a validation order should only be made in relation to dispositions occurring after presentation of winding up petition if there is some special circumstance which shows that the disposition in question will be (in a prospective application case) or has been (in a retrospective application case) for the

¹⁸ at page 8.

¹⁹ 2016 BCC 566

benefit of the general body of unsecured creditors, such that it is appropriate to disapply the usual pari passu principle.

I have already cited above, section 348 (1) of the Companies Act. That section specifically encompasses mortgages. I have no difficulty in holding that the execution of mortgage bond on 12th May 2001 i.e., the property relevant to the instant case if executed by or against an individual, would, be deemed in his insolvency a fraudulent preference. If that is so, then such mortgage if made or done by or against a company, shall be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly. (The commencement of the winding up shall be deemed to correspond with the act of insolvency in the case of an individual (section 348(2)).

Attention of the Court was also drawn in this regard to Re Kushler Ltd.²⁰ In that case, the appellant was the liquidator of the company and the respondents were the company's bankers. The appellant sought a declaration of fraudulent preference in respect of all payments made to the respondents between 23rd of February and 23rd of May 1941 which was the date of the resolution for voluntary winding up. The company had an overdraft at the bank which overdraft was guaranteed by a director of the company and secured by the deposit of certain policies belonging to him. Payments were made into the Bank as the result of which the overdraft was extinguished. The liquidator claimed that the payments to the bank constituted a fraudulent preference. In the above circumstances, it was held in that case, that the proper inference to be drawn was that the payments to the bank after May 10th May 1941, were made with a view of giving the bank a preference over the other creditors by so discharging the guarantee.

The sections 260, 261, 348, 350 and 352 of the Companies Act No. 17 of 1982 which HNB has referred to in the caption of its petition filed in the District Court are sections found under the PART IX of the Companies Act No. 17 of 1982. Section 348 thereof covers a mortgage as well. Cumulative effect of those provisions is to prevent the company under winding up, disposing its assets by some means in order to deprive

²⁰ (1943) 2 All ER 22.

its creditors, the value of those properties. In the instant case, Lanka Tractors Limited was well aware that the winding up proceedings against it was in progress. In these circumstances, there is a heavy burden on Lanka Tractors Limited to satisfy court that it did not intend to defraud the creditors by executing the relevant mortgage. However, as I have mentioned before, Lanka Tractors Limited has failed to place any acceptable material to satisfy court that its action was one that was in the course of the ordinary business.

In the above circumstances, I hold that Lanka Tractors Limited had executed the Mortgage Bond No. 475 with the sole object of defrauding its creditors.

What is now left for me is only to consider the question of law No. (1).

I have held that at the time Lanka Tractors Limited executed the Mortgage Bond No. 475, it did so with full knowledge that the winding up process was still alive as the Court of Appeal by that time had granted leave to appeal against the order of the learned District Judge dismissing the petition for winding up. [vide discussion relating to Question of law No. (4)]

I have also held that winding up of Lanka Tractors Limited is deemed to have commenced on 02nd June 1999(at the time of the filing of application in Court for winding up). [vide discussion relating to Question of law No. (2)]

I have further held that the Mortgage Bond No. 475 is a disposition within the meaning of section 260 of the Companies Act. [vide discussion relating to Question of law No. (5)]

I have also held that Lanka Tractors Limited executed the Mortgage Bond No. 475 with the sole object of defrauding its creditors. [vide discussion relating to Question of law No. (3)]

In the light of the above conclusions, I hold that that the Provincial High Court of Civil Appeal has erred in law when it held that the Mortgage Bond No. 475 was in order as it was executed after the original Petition was dismissed and prior to its restoration by the Court of Appeal, when in fact all claims against Lanka Tractors Limited are fixed as at the commencement of the winding up.

Thus, I proceed to set aside the judgment of the Provincial High Court of Civil Appeal of the Western Province dated 3rd February 2009 and the order of the District Court dated 5th March 2007. I hold that the Mortgage Bond No 475 dated 12th May 2001 executed in favour of the Party Respondent (Seylan Bank) is null and void and has no force or avail in law.

Hatton National Bank is entitled to the costs of litigation in both Courts.

JUDGE OF THE SUPREME COURT

Buwaneka Aluwihare PC J

I agree,

JUDGE OF THE SUPREME COURT

Janak de Silva J

I agree,

JUDGE OF THE SUPREME COURT