

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

In the matter of an appeal in terms of section 5(2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, against an order pronounced by the High Court exercising its jurisdiction under section 2 of the said Act.

SC Appeal No. 179/2018

SC HC LA Application No. 111/17

Provincial (Commercial) High Court Case No.
31/2013(CO)

(IN THE COMMERCIAL HIGH COURT)

In the matter of an application for winding up by Court under and in terms of Part XII of the Companies Act No:7 of 2007.

Kurukula Arachchige Don Lenard Priyanka
Nanayakkara,

No. 396/5, Koswatte Rd,

Kalapaluwewa, Rajagiriya.

PETITIONER

G.K. Sudath Kumara,

Chartered Accountant,

3rd Floor, Yathama Building,

Galle Road, Colombo 03.

LIQUIDATOR

AND THEN BETWEEN

Dr. Noel Pratheepan Somasundaram

No. 721/1, Birds Park Residencies,

Madinnagoda, Rajagiriya.

PARTY NOTICED

Vs.

G.K. Sudath Kumara,
Chartered Accountant,
3rd Floor, Yathama Building,
Galle Road, Colombo 03.

LIQUIDATOR – RESPONDENT

AND NOW BETWEEN

Dr. Noel Pratheepan Somasundaram
No. 721/1, Birds Park Residencies,
Madinagoda, Rajagiriya.

PARTY NOTICED – APPELLANT

Vs.

1. G.K. Sudath Kumara,
Chartered Accountant,
3rd Floor, Yathama Building,
Galle Road, Colombo 03.

**LIQUIDATOR – RESPONDENT –
RESPONDENT**

2. Kurukula Arachchige Don Lenard Priyanka
Nanayakkara,
No. 396/5, Koswatte Rd,
Kalapaluwewa, Rajagiriya.

PETITIONER – RESPONDENT

3. Maddumage Dona Chandani Amarathunga,
Commissioner of Labour
Department of Labour
Narahenpita, Colombo-05

**INTERVENIENT – PETITIONER –
RESPONDENT – RESPONDENT**

4. Mr. Don Raja Elmo Jayamaha
"The Next", N-104,
Niwasipura, Ekala

PARTY NOTICED – RESPONDENT

Before : **P. Padman Surasena J**

Kumudini Wickremasinghe J

A.L. Shiran Gooneratne J

Counsel : Romesh de Silva, PC with Riad Ameen, Susitha Nawaratne and Rushika Rodrigo instructed by Paul Ratnayake Associates for the Party-Noticed-Appellant.

Nishkan Parathalingam with Mrs. Upeka Sooriya Patabendige instructed by Sumali Costa for the Liquidator-Respondent-Respondent.

Susantha Balapatabendi, PC, ASG with Ms. Indumini Randeny, SC for the Intervenant-Petitioner-Respondent-Respondent.

Argued on : 31-01-2023

Decided on : 04.04.2024

P. Padman Surasena J

The Petitioner-Respondent is a person who had made certain investments in 2006 in the Company by the name of Touchwood Investments (Private) Ltd. which had promised him

returns in 2012. As Touchwood Investments (Private) Ltd. had informed him of its inability to make payments as promised, the Petitioner-Respondent on or around 24-07-2013 had filed a Petition seeking an order from Court for the winding up of Touchwood Investments (Private) Ltd. It is upon this Petition that the Commercial High Court had made an order dated 05-06-2014 to wind-up the said Company. It is in that process that the Court had appointed G.K. Sudath Kumara as the Liquidator. He has been named in this Appeal as the Liquidator-Respondent who will hereinafter sometimes be referred to as the Liquidator.

The Liquidator had got to know that Touchwood Investments (Private) Ltd. (hereinafter sometimes referred to as the Company under liquidation) had caused the transfer of its various assets which are immovable properties to the Party-Noticed-Appellant. Thereafter, the Liquidator had filed the Motion dated 23-11-2015 in the Commercial High Court under Section 367 read with Section 370(1) of the Companies Act No. 07 of 2007. This Motion has been produced, marked **P1**. According to this Motion, the Liquidator had informed Court that the Company under liquidation had transferred the five properties referred to in the said Motion under (a), (b), (c), (d), (e) to the Party-Noticed, namely Dr. Noel Pratheepan Somasundaram during the period specified in Section 373(2) of the Companies Act No. 07 of 2007. It was in those circumstances that the Liquidator had complained to the Commercial High Court that the said transactions entered into by the company under liquidation are voidable in terms of Section 367 of the Companies Act as the said transactions had taken place at a time when the company under liquidation was unable to pay its debts as they fell due, and within the specified period and enabled another person to receive more than the person would otherwise have received or likely to have received in the liquidation proceedings.

Upon the Motion **P1** being filed, the Commercial High Court had issued notice on the Party-Noticed. Thereafter the Party-Noticed-Appellant, having come to Court, had sought a dismissal of the relief sought by the Liquidator as per the Motion **P1**, and the learned Judge of the Commercial High Court had then fixed the matter for inquiry. At the commencement of the inquiry, the Party-Noticed-Appellant had contended that the burden to prove the matters stated in the Motion **P1** must be on the Liquidator and therefore it is the Liquidator who shall commence the leading of evidence in order to prove the matters stated in his Motion **P1**.

In contradistinction to the above position, the Liquidator had taken up the position before the Commercial High Court that it must be the Party-Noticed-Appellant who has the burden of proof and therefore it is he who must satisfy Court that the transactions referred to by the Liquidator are not voidable under the law.

Having considered the material adduced by both parties, the learned Judge of the Commercial High Court, by his order dated 02-11-2017, had held that the Party-Noticed-Appellant must commence the inquiry.

Being dissatisfied with the Order dated 02-11-2017 of the Commercial High Court, the Party-Noticed-Appellant had preferred the instant appeal to this Court. When the Leave to Appeal Application relevant to the instant Appeal was supported, this Court having considered the submissions of the learned Counsel for both parties, by its Order dated 12-11-2018, had granted Leave to Appeal on the following questions of law:

- 1) *Whether the Court erred in law and/or misdirected itself when it determined the issue of who should commence the inquiry, in respect of the Petitioner, by reference to documents annexed by, and matters pleaded by, Mr. Don Raja Elmo Jayamaha.*
- 2) *Whether the Court erred in law and/or misdirected itself in law when it failed to appreciate that it is the Liquidator who should commence an inquiry under Section 370 of the Companies Act No. 07 of 2007 in relation to an application by the Liquidator under Section 367.*

Since the Liquidator had filed the Motion **P1** under Section 367 read with Section 370(1), let me at the outset reproduce below the said sections of the Companies Act No. 07 of 2007.

Section 367 of the Companies Act No. 07 of 2007.

367. (1) *A transaction by a company is voidable on the application of the liquidator, if the transaction —*

(a) took place—

(i) at a time when the company was unable to pay its debts as they fell due; and

(ii) within the specified period; and

(b) enabled another person to receive more towards satisfaction of a debt than the person would otherwise have received or be likely to have received in the liquidation.

(2) *Unless the contrary is proved, for the purposes of subsection (1), a transaction that took place within the restricted period is presumed to have been made at a time when the company was unable to pay its debts as they fell due.*

(3) A transaction with a person shall not be set aside under this section, unless the company was influenced in entering into the transaction by a desire to produce in relation to that person, the effect mentioned in paragraph (b) of subsection (1).

(4) A company which has entered into a transaction with any connected person is presumed, unless the contrary is shown, to have been influenced by a desire to produce in relation to that person, the effect mentioned in paragraph (b) of subsection (1).

Section 370(1) of the Companies Act No. 07 of 2007.

370. *(1) A liquidator who wishes to set aside a transaction that is voidable under section 367 or section 369 or a charge that is voidable under section 368 shall—*

(a) file in the court a notice by way of a motion to that effect specifying the transaction or charge to be set aside and, in the case of a transaction, the property or value which the liquidator wishes to recover, and setting out the effect of subsections (2), (3) and (4) of this section ; and

(b) serve a copy of the notice as filed in court under paragraph (a), on the other party to the transaction or the grantee of the charge and or every other person from whom the liquidator wishes to recover the property or value.

Section 373(2) of the Companies Act No. 07 of 2007.

373 *(2) For the purposes of sections 367, 368 and 369 "specified period" means—*

(a) in the case of a transaction entered into with or a charge granted to a connected person—

(i) the period of two years before the commencement of the winding up; and

(ii) in the case of a company that is being wound up by the court, the period of two years before the filing of the petition in the court, together with the period commencing on the date of the filing of that petition and ending on the date on which the order of the court was made;

in any other case—

(i) the period of one year before the commencement of the winding up; and

(ii) in the case of a company that is being wound up by the court, the period of one year before the filing of the petition in the court, together with the period commencing on the date of the filing of that petition and ending on the date on which the order of the court was made.

Let me next briefly set out the five impugned transactions mentioned in the Motion produced, marked **P1** by the Liquidator. They are as follows:

- a) *By Deed No: 974 attested by Mr. V.G. Karunasena Notary Public of Colombo the land known Touchwood Kent Estate ii situated at Ambokka and Maningomuwa in Udasiya Pattuwa in the Grama Sewake division No E422D within the Galhitiyagama Divisional Secretariat in the extent of six acres [A6] was sold by the Company being wound up by Court on the 13th March 2014, for a consideration of Rupees Seven Hundred and Twenty Thousand (Rs. 720,000/-) to Noel Pratheepan Somasundraram bearer of National Identity Card No. 681910174V of No. 721/51, Birds Park Residencies, Madinnagoda, Rajagiriya.*
- b) *By Deed No. 975 attested by Mr. V.G. Karunasena Notary Public of Colombo the land known as Touchwood Kent Estate ii situated at Ambokka and Maningomuwa in Udasiya Pattuwa in the Grama Sewaka division No E422D within the Galhitiyagama Divisional Secretariat in the extent of Twenty Acres One Rood and Four point Forty Two Perches [A20 R1 P4.42] was sold by the Company being wound up by Court in 13th March 2014, for a consideration of Rupees Two Million Four Hundred and Forty Thousand (Rs. 2,440,000/-) to Noel Pratheepan Somasundraram bearer of National Identity Card No. 681910174V of No. 721/51, Birds Park Residencies Madinnagoda, Rajagiriya.*
- c) *By Deed No. 976 attested by Mr. V.G. Karunasena Notary Public of Colombo the land known as Touchwood Kent Estate ii situated at Ambokka and Maningomuwa in Udasiya Pattuwa in the Grama Sewaka division No E422D within the Galhitiyagama Divisional Secretariat in the extent of One Acre [A1] was sold by the Company being wound up by Court on 13th March 2014, for consideration of Rupees One Hundred and Twenty Thousand (Rs. 120,000/-) to Noel Pratheepan Somasundraram bearer of National Identity Card No. 681910174V of No. 721/51, Birds Park Residencies Madinnagoda, Rajagiriya.*

- d) *By the Deed No. 977 by Mr. V.G. Karunasena Notary Public of Colombo the land known as Dodangaspitiyehena situated at Bopitiya in Wiyaluwa Korale in the Grama Sewaka division No. 30 within the Kandeketiya Divisional Secretariat in the extent of Six Acres [A6] was sold by the Company being wound up by Court on 13th March 2014, for a consideration of Rupees Seven Hundred and Twenty Thousand (Rs. 720,000/-) to Noel Pratheepan Somasundraram bearer of National Identity Card No. 681910174V of No. 721/51, Birds Park Residencies Madinnagoda, Rajagiriya.*
- e) *By the Deed No. 978 by Mr. V.G. Karunasena Notary Public of Colombo the land known as Dodangaspitiyehena situated at Bopitiya in Wiyaluwa Korale in the Grama Sewaka division No. 30 within the Kandeketiya Divisional Secretariat in the extent of Twenty Six Acres One Rood and Thirty Two point Seventy Eight [A26 R1 P32.78] was sold by the Company being wound up by Court on 13th March 2014, for a consideration of Rupees One Million Eight Hundred and Fifty Four Thousand (Rs. 1,854,000/-) to Noel Pratheepan Somasundraram bearer of National Identity Card No. 681910174V of No. 721/51, Birds Park Residencies Madinnagoda, Rajagiriya.*

For the five reasons I shall henceforth set out below, I am of the view that it must be the Party-Noticed-Appellant who must commence the inquiry.

The first reason is the existence of a presumption in terms of Section 367(2) of the Companies Act. At the same time, one must not forget the legal burden set out in Section 101 of the Evidence Ordinance which states thus:

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

As it is the Liquidator who had made the initial application under Section 367 read with Section 370(1) of the Companies Act, in terms of Section 101 of the Evidence Ordinance, the legal burden is on the Liquidator to establish the fact he asserts.

Although the legal burden according to Section 101 of the Evidence Ordinance is on the Liquidator to establish the fact he asserts, I must also take into account that according to Section 367(2) of the Companies Act, unless the contrary is proved, a transaction that took place within the restricted period is presumed to have been made at a time when the company was unable to pay its debts as they fell due [for the purposes of subsection (1)].

Thus, all what the Liquidator needs to establish at the outset to discharge its legal burden, is the fact that the questionable transactions had taken place within the restricted period referred to in Section 373(2) of the Companies Act. Once that fact is established by the Liquidator, then the relevant questionable transactions which had taken place within the restricted period are presumed to have been made at a time when the company was unable to pay its debts as they fell due. This presumption is drawn unless the contrary is proved. The next question is as to who must prove the contrary. The next set of reasons would show that it must be the Party-Noticed-Appellant who must then prove the contrary.

The second reason is that it would be the Party-Noticed-Appellant who would fail if no evidence at all were given and hence it must be the Party-Noticed-Appellant who must commence the inquiry. According to Section 370(3), after the Liquidator had filed the motion with notice to the party, notice under Section 370(1) of the Act, the Party-Noticed will have 20 working days to make an application under Section 370(3) of the Act. Section 370(3) also provides that if no such application is made, then the questionable transaction will automatically stand set aside. One could draw support for this proposition from Section 102 of the Evidence Ordinance which states thus:

"the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side"

E. R. S. R. Coomaraswamy states on Section 102 of the Evidence Ordinance, as follows:

"This section deals with the incidence of the burden. It places the burden of proof on the party who desires the court to intervene and to determine the rights of the parties in a manner different from the position that would arise if matters were left in status quo. It regulates the incidence of the overall burden".¹

Section 370(3) has provided that the questionable transaction will automatically stand set aside in the absence of any such application. Not providing any evidence; not pursuing the application made under Section 370(3) of the Act; are all as good as not making any such application. Therefore Section 102 of the Evidence Ordinance will apply to the case at hand.

The third reason is because the essential facts necessary for the determination by Court under the circumstances at hand are especially within the knowledge of the Party-Noticed-Appellant.

¹ E. R. S. R. Coomaraswamy; The Law of Evidence; Stamford Lake 2013; at page 255 of Volume II (Book I).

Looking at the above several transactions which are said to have taken place during the relevant time, it is clear that the questionable transfers of immovable property have been effected by way of notarially executed deeds of transfer the beneficiary of which is Dr. Noel Somasundaram who stands as the Party-Noticed-Appellant in this case. In all six transfers, the beneficiary is the Party-Noticed-Appellant. The consideration mentioned in all those Deeds of Transfer have been paid by the Party-Noticed-Appellant. Therefore, it is clear that it is the Party-Noticed-Appellant who knows best, the real nature and the circumstances under which he had purchased these properties from the company under liquidation.

The above position is further buttressed by Section 106 of the Evidence Ordinance which states "*when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*" The provision in section 106 of the Evidence Ordinance is further explained by its two illustrations which are reproduced below:

Illustration (a): 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.

Illustration (b): A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

Thus, one must note that the term 'burden of proof' could operate in two forms: firstly, as a general burden of proof which would not generally shift; secondly, as a particular burden which may shift during the proceedings in Court.

The fourth reason is that it would be the Party-Noticed-Appellant who would wish the court to believe that the five transactions relevant to the inquiry at hand are not questionable transactions falling under Section 367 of the Companies Act and therefore the proof thereof shall lie on the Party-Noticed-Appellant. In this regard, the provision in Section 103 of the Evidence Ordinance would be relevant. It states that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law the proof shall lie on any particular person.

It is true that it is the Liquidator who had made the initial application under Section 367 read with Section 370(1) of the Companies Act. As has been stated in Section 103 of the Evidence Ordinance, the relevant law in this case is the Companies Act No. 07 of 2007 which does not provide that the proof of this fact shall lie on any particular person. Therefore, according to

Section 103 of the Evidence Ordinance, the burden of proof of such fact must lie on the person who wishes court to believe in its existence. It is the Party-Noticed-Appellant who wishes the court to believe that the complained transactions are of such a nature that they would not fall under Section 370 and Section 367 of the Companies Act. If the Party-Noticed-Appellant did not make this application on this basis, the Liquidator would not be called upon to establish that the complained transactions would fall under the relevant sections. This is because the law had provided for automatic setting aside of the complained transactions in the absence of any such application from the noticed party.

On the other hand, if an application is made under Section 370(2) of the Act, then the questionable transaction can only be set aside after hearing and determining that application (the application here means the application made under Section 370(3) of the Act). Therefore, despite the fact that the initial application under Section 370(2) of the Act is made to court by the Liquidator, for further proceedings upon the application made by the Party-Noticed-Appellant under Section 370(3) of the Act would switch the said further proceedings from "automatic setting aside procedure" to one in which the Court would make a determination of the application made by the Party-Noticed-Appellant under Section 370(3) of the Act. This is because it is the Party-Noticed-Appellant who seeks an order from Court that the questionable transactions should not be set aside. Thus, the Court proceedings from that point onwards would be to determine the application made by the Party-Noticed-Appellant.

The Party-Noticed-Appellant had primarily relied on the following paragraph taken from Company Law by Kanaganayagam Kanag-Isvaran and Dilshani Wijayawardana².

"it is important to note that section 370 does not operate to shift the onus of proof for establishing that a transaction comes within section 367 or 369 or that a charge comes within section 368. The onus remains with the liquidator. The section is only a convenient way of disposing of the need for court proceedings where there is no contest. However, if the position is contested liquidator still bears the onus of proof."

The learned authors of the above work, in coming to this conclusion had relied on three cases referred to in its footnotes 29 and 30. These cases appear to have been decided on the provisions in New Zealand's Companies Act of 1955 and 1993. However, in view of the clear provisions in our Evidence Ordinance coupled with the fact that the Companies Act No 07 of

² (2014) at page 690.

2007 had not specified that the proof of this fact shall lie on any particular person, our courts are bound to stick to the law of Evidence in our law.

On the other hand, to my mind, what the authors of the above work may have intended is not what the learned Counsel who appeared for the Party-Noticed-Appellant submits as an argument before us. While I am unable to comment as to the intention behind the above statement made by the writers of the above book, it may well be an assertion of the position that the legal burden remains on the Liquidator to establish the fact he asserts in terms of Section 101 of the Evidence Ordinance, as it is the Liquidator who had made the initial application under Section 367 read with Section 370(1) of the Companies Act. However, in my view, it must not be understood that the said authors have negated the effect of the existence of the presumption in terms of Section 367(2) of the Companies Act by virtue of which presumption, the evidentiary burden should stand shifted to the Party-Noticed-Appellant to establish the position taken up by him that these questionable transactions do not fall under Section 370 and Section 367 of the Companies Act. This is exactly what I have adverted to above.

Thus, I am unable to accept the above argument advanced by the learned Counsel who appeared for the Party-Noticed-Appellant.

For the foregoing reasons, I answer the questions of law in respect of which this Court has granted Leave to Appeal, in the negative. I proceed to affirm the order dated 02-11-2017 pronounced by the Commercial High Court which had held that the Party-Noticed-Appellant must commence the inquiry as the burden of proving that the complained transactions are of such a nature that they would not fall under Section 370 and Section 367 of the Companies Act is upon the Party-Noticed-Appellant.

This Appeal is therefore dismissed with costs.

JUDGE OF THE SUPREME COURT

A. L. SHIRAN GOONERATNE, J

The Party-Noticed-Appellant is before this court aggrieved by the impugned order dated 02/11/2015 where the Commercial High Court of the Western Province holden in Colombo, held that in an application made under section 370 (2) of the Companies Act, the burden was on the Party-Noticed-Appellant to prove his case and accordingly to commence the case.

I have had the privilege of reading the judgment of my brother Hon. Justice P. Padman Surasena in draft and to consider the views expressed therein, and I disagree that for the reasons to be set out hereinafter, the appeal should be allowed. To avoid any repetition, I will refrain from a detailed discussion of the facts relevant to the original application.

The Liquidator had filed a notice by way of a motion under section 370(1). The Party-Noticed-Appellant had applied to Court under section 370(2) within the specified time period.

Had the Party-Noticed-Appellant not applied to Court under section 370(2) or not applied to Court within the specified time period, then section 370(3) would have applied and the presumption in favor of the Liquidator under section 370(3) would have come into operation in having the transaction deemed to be set aside. That is, however, not the case here.

The fact that the Party-Noticed-Appellant had applied to Court within the specified time period under section 370(2) indicates their intention to argue that the transaction is not void.

The Liquidator is relying on section 367 to have the transactions relating to the transfers of lands (described in the Commercial High Court Order) set aside as void.

The presumptions applicable to sections 367 [and 369, although not applicable in this instance] apply only in respect to the time period at which the transactions in question took place. That is, in respect to section 367, section 367(2) states "*Unless the contrary is proved, for the purposes of subsection (1), a transaction that took place within the restricted period is presumed to have been made at a time when the company was unable to pay its debts as they fell due.*", [and in respect to section 369, section 369(4) states "*Unless the contrary is proved for the purposes of subsection (1), a transaction that took place within the restricted period is presumed to have been made at a time when the company was unable to pay its debts as they fell due.*"].

It is important to note that although the Liquidator can rely on the presumptions described above, sections 367 [and 369] require the Liquidator to prove additional matters to succeed in establishing a claim to have the transactions declared voidable under these sections.

That is, with respect to section 367, section 367(1)(b) requires the Liquidator to establish that the transactions in question "*entitled another person to receive more towards satisfaction of a debt that the person would otherwise have received or be likely to have received in the liquidation.*", section 367(3) requires the Liquidator to establish that "*.....unless the company was influenced in entering into the transaction by a desire to produce in relation to that person, the effect mentioned in paragraph (b) of subsection (1).*".

[Similarly, with respect to section 369, section 369(b) requires the Liquidator to establish that "*the transaction was an uncommercial transaction*", section 369(c) requires the Liquidator to establish that "*when the transaction took place, the Company – (i) was unable to pay its due debts; (ii) was engaged in or about to engage in business for which its financial resources were grossly inadequate; or (iii) incurred an obligation knowing that the company would not be able to perform the obligation when required to do so.*"]

In the New Zealand case of Mike Hastie Handcraft Wools Limited (in Voluntary Liquidation) (Unreported, M.37/87, Napier Registry, 21 December 1988), Greig J dealing with similar provisions in the New Zealand Companies Act, said

"It still remains the position under the Act that the starting point of the procedure is the fact that the disposition is voidable under s. 309 or s. 311 of the Act. In the words of the Act, it is the wish of the liquidator to set aside which motivates the procedure but that depends upon the fact that the disposition is in truth voidable under the sections. That is a matter which the liquidator has to prove and so he must carry both the initial and the ultimate onus, the evidential and the substantive onus to show that this is a voidable transaction. It is the liquidator that makes the claim that it is voidable even though that is by notice which, if there is no opposition, will be sufficient in itself. But where there is opposition it must be, and it ought to be for the liquidator to adduce some evidence to justify that."

Furthermore, in the case of Hastie (referred to above), Greig J went on to say;

"It seems to me that in practice it is better for the liquidator, who is the representative of the company and its affairs, to produce the evidence, not only of the date of the liquidation and the date of the disposition, but also such other material from the records of the company which supports the liquidator's claim that this is a voidable disposition. Then it is for the creditor or disponent to furnish any defensive averment or to produce evidence in support of any positive claim by way of relief or excuse of the avoidance of the disposition."

Considering the above, it is my view that, where the Party-Noticed-Appellant has applied to Court under section 370(2) within the specified time period (as is the case here) the burden of proof does not shift to the Party-Noticed-Appellant to defend their position until the Liquidator has discharged their obligation to establish the requirements under sections 367 [and 369] described above. It is only in the event the Liquidator is able to discharge their obligations with respect to their burden of proof required under sections 367 [and 369] that the Party-Noticed-Appellant will be called upon to defend their position.

It is clear that the burden of proof does not shift from the Liquidator to the Party-Noticed-Appellant irrespective of the action (or inaction) of the Party-Noticed-Appellant under section 370(2). This position is supported by the commentary by K. Kanag-Isvaran and Dilshani Wijayawardana, *Company Law* (2014) at Page 690 which reads as follows:

"It is important to note that section 370 does not operate to shift the onus of proof for establishing that a transaction comes within section 367 or 369 or that a charge comes within section 368. The onus remains with the liquidator. The section is only a convenient way of disposing of the need for court proceedings where there is no contest. However, if the position is contested the liquidator still bears the onus of proof."

It is a known fact that our Companies Act of 2007 is primarily based on the New Zealand Companies Act of 1993 [K. Kanag-Isvaran and Dilshani Wijayawardana, *Company Law* (2014), at p. vii]. This position has been relied upon by Justice Buwaneka Aluwihare, PC in the case of *Jaqa Lanka International (Pvt) Ltd Vs Bank of Ceylon* (SC. APPEAL 50/A/2013) decided on 31/10/2023.

Accordingly, it is permissible to make reference to decisions of the New Zealand courts in respect to matters arising in these proceedings, in the absence of decided cases on the subject matter currently in Sri Lanka. Accordingly, I rely also on the decisions of the New Zealand Courts referred to above in support of my view.

For the above reasons, where the Party-Noticed-Appellant had applied to Court under section 370(2) within the specified time period (as is the case here), I am of the view that the Liquidator should begin the inquiry and establish its claim under section 367 before the Party-Noticed-Appellant is called upon to defend their position.

Therefore, I answer the questions of law Nos. 1 and 2 on which leave to appeal was granted in the affirmative.

For these reasons, the Appeal of the Party-Noticed-Appellant is allowed. The order of the Commercial High Court is set aside. No order for costs.

JUDGE OF THE SUPREME COURT

Having considered both the views presented by my Brothers, I am more inclined to agree with the findings of Hon. Justice A.L. Shiran Gooneratne.

KUMUDINI WICKREMASINGHE, J

JUDGE OF THE SUPREME COURT