

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

In the matter of an Application for Leave under and in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by the High Court of Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

In the matter of the winding up of FA IMPEX (PRIVATE) LIMITED under Part IX of Companies Act No. 17 of 1982, having its registered office at No. 46, Sri Mahindarama Road, Colombo 9 and also a place of business at NO. 213/1, Main Street, Colombo 11 and presently at 23, Sea Street Colombo 11.

Adani Exports Ltd
“Adani House”, Near Mithakhali Circle,
Navrangpura,
Ahmedabad, 380 009,
India.

S.C. APPEAL NO. 91/2014
SC HCCA LA NO. 32/2014
WP/HCCA/COL/66/2009(F)
D.C. Colombo Case No. 119/CO

Petitioner

Vs.

1. Fa Impex (Pvt) Ltd having its registered office at No. 46, Sri Mahindarama Road, Colombo 9 and also a place of business at No. 213/1, Main Street, Colombo 11 and presently at 23, Sea Street, Colombo 11.

1st Respondent

2. Seylan Bank Ltd,
Ceylinco Seylan Tower,
No. 90, Galle Road,
Colombo 03.

Intervenient-Petitioner-2nd Respondent

3. Rahamatulla Abdul Rahuman,
B/04, First Floor,
St. James' Flats,
Colombo 15.

Creditor-Petitioner-3rd Respondent

AND

Fa Impex (Pvt) Ltd having its registered office at No. 46, Sri Mahindarama Road, Colombo 9 and also a place of business at No. 213/1, Main Street, Colombo 11 and presently at 23, Sea Street, Colombo 11.

1st Respondent-Appellant

Vs.

Adani Exports Ltd
"Adani House", Near Mithakhali Circle,
Navrangpura,
Ahmedabad, 380 009,
India.

Petitioner-1st Respondent

Seylan Bank Ltd,
Ceylinco Seylan Tower,
No. 90, Galle Road,
Colombo 03.

Intervenient-Petitioner-2nd Respondent

Rahamatulla Abdul Rahuman,
B/04, First Floor,
St. James' Flats,
Colombo 15.

Creditor-Petitioner-3rd Respondent

AND NOW BETWEEN

Fa Impex (Pvt) Ltd having its registered office at No. 46, Sri Mahindarama Road, Colombo 9 and also a place of business at No. 213/1, Main Street, Colombo 11 and presently at 23, Sea Street, Colombo 11.

1st Respondent-Appellant-Petitioner

Vs.

Adani Exports Ltd
"Adani House", Near Mithakhali Circle,
Navrangpura,
Ahmedabad, 380 009,
India.

Petitioner-1st Respondent-Respondent

Seylan Bank Ltd,
Ceylinco Seylan Tower,
No. 90, Galle Road,
Colombo 03.

**Intervenient-Petitioner-2nd Respondent-
Respondent**

Rahamatulla Abdul Rahuman,
B/04, First Floor,
St. James' Flats,
Colombo 15.

**Creditor-Petitioner-3rd Respondent-
Respondent**

**Before: Buwaneka Aluwihare, P.C., J.
K.K. Wickremasinghe, J.
Janak De Silva, J.**

Counsel:

Nilanga Perera for the 1st Respondent-Appellant-Petitioner

A.A.M. Illiyas, PC with Tharindu Rathnayake for the Petitioner-1st Respondent-Respondent

Palitha Kumarasinghe, PC with Chinthaka Mendis for the Intervenient Petitioner-2nd
Respondent-Respondent

Written Submissions tendered on:

31.07.2014 and 13.01.2022 by the 1st Respondent-Appellant-Petitioner

22.09.2021 and 26.11.2021 by the Petitioner-1st Respondent-Respondent

13.11.2014 and 24.11.2021 by the Intervenient Petitioner-2nd Respondent-Respondent

Argued on: 27.10.2021

Decided on: 01.06.2023

Janak De Silva J.

The Petitioner-1st Respondent-Respondent (1st Respondent) filed this application in the District Court of Colombo to wind up the 1st Respondent-Appellant-Petitioner (Petitioner). This application was made on 19th March 2003 in terms of the Companies Act No. 17 of 1982 (Companies Act 1982).

By order dated 16th January 2009 the learned District Judge ordered the winding up of the Petitioner. The Petitioner preferred an appeal to the Provincial High Court of Civil Appeal of the Western Province (Holden in Colombo) (High Court). When this appeal was taken up for hearing, the Intervenant-Petitioner-2nd Respondent (2nd Respondent) raised a preliminary objection that no right of appeal has been given to the Petitioner by Companies Act No. 7 of 2007 (Companies Act 2007) to appeal against the winding up order.

The High Court ruled that the issue must be decided by reference to section 532(1) of the Companies Act 2007. It concluded that the provisions of the Companies Act 1982 were applicable to the present case only for the purposes of winding up and that section 307 of the Companies Act 1982, which conferred a right of appeal against any order or decision made up in winding up proceedings, was not open to the Petitioner. Accordingly, the High Court upheld the preliminary objection and dismissed the appeal. The Petitioner appealed.

Leave to appeal was granted on the following questions of law:

- (1) Whether the impugned order is erroneous and incorrect in that, the conclusion that no appeal would lie against a winding up order in the particular circumstances of this case?

(2) Whether the impugned order is erroneous and incorrect in that, the conclusion that no appeal would lie against a winding up order in the particular circumstances of this case on the basis that the Company law is a special law?

During the hearing, a further question of law was raised, namely:

(3) Assuming that the winding up “order” dated 16th January 2009 is appealable, is the proper remedy a Leave to Appeal application?

Questions of Law No. 1 and 2

Learned counsel for the Petitioner submitted that section 532(1) of the Companies Act 2007 preserved the application of section 307 of the Companies Act 1982 to winding up proceedings commenced under the said Act. Therefore, any order or decision made in such winding up proceedings was subject to appeal.

In response, the learned counsel for the 1st Respondent and the Intervening Petitioner-2nd Respondent-Respondent (2nd Respondent) submitted that an appeal is a statutory right and must be expressly created. Reliance was placed on the decisions in *Martin v. Wijewardena* [(1989) 2 Sri.L.R. 409], *Dassanayake v. Sampath Bank* [(2002) 3 Sri.L.R. 268], *Sangarapillai v. Chairman, Municipal Council of Colombo* (32 NLR 92), *Vanderpoorten et al. v. The Settlement Officer* (43 NLR 230), *Kanagasunderam v. Podihamine* (42 NLR 97), *Bakmeewewa, Authorized Officer of People’s Bank v. Konarage Raja* [(1989) 1 Sri.L.R. 231], *Gunaratne v. Thambinayagam and Others* [(1993) 2 Sri.L.R. 355]. It was further contended that the Companies Law is a special law and that any right of appeal should have been granted by the same law. In support of this proposition reliance was placed upon the decision in *Sirisena Perera and another v. Vinson Perera* [(2005) 1 Sri.L.R. 270]. It was contended that section 532(1) of the Companies Act 2007 did not keep alive all sections in the Companies Act 1982 and in particular did not provide for the application of section 307 therein to the present case.

There is no dispute that these winding up proceedings commenced in terms of the Companies Act 1982 which provided a right of appeal against any order or decision made in a winding up proceeding. The dispute is over the legal effect of the repeal of the Companies Act 1982 by the Companies Act 2007.

The analysis must first take into account paragraph 6(3)(c) of the Interpretation Ordinance, which reads as follows:

“6(3)Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected –

...

(c) any action, proceeding, or thing pending or incompleated when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal.”

The interpretation of this section raises two questions. First, we have to determine what is meant by an action, procedure or thing, and whether winding up proceedings falls under these words.

There is a divergence of opinion in some jurisdictions on whether a winding up proceeding is an action in the context of the relevant legal provisions even though the same legal provision was the subject of interpretation.

Section 4(4) of the Limitation Ordinance, Cap. 347 of Hong Kong provided that:

“An action shall not be brought upon any judgment after the expiration of 12 years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of 6 years from the date on which the interest became due”

“Action” is defined in section 2 of the said Ordinance as including “any proceeding in a court of law”. In **Re: Li Man Hoo [2013] 4 HKLRD 247** the Hong Kong Court of Appeal held that a winding up petition falls within this definition. However, in England and Australia, which has similar provisions, a more restrictive meaning has been adopted and it has been held that the relevant limitation provision does not bar the presentation of a winding-up petition. [See **Ridgeway Motors (Isleworth) Ltd v ALTS Ltd [2005] 1 WLR 2871**, **Dennehy v Reasonable Endeavours Pty Ltd (2003) 130 FCR 494**, **O’Mara Constructions Pty Ltd v Avery (2006) 230 ALR 581**].

In **Collett v. Priest [(1931) A. D. 290 at 298]** De Villiers, C. J., held that that the essential feature of a 'suit or action' under section 50 of the Charter of Justice or under section 39 of Transvaal Proclamation 14 of 1902, or of a 'suit ' under section 24 of Cape Act 35 of 1896, is that it is a proceeding in which one party sues for or claims something from another, and that no proceeding which lacks this feature, such as sequestration proceedings, an application for winding up of a company etc., can be properly described as a 'suit or action' or as a 'suit' under any of these sections.

The Interpretation Ordinance does not define what constitutes an action. According to section 5 of the Civil Procedure Code, an action is a proceeding for the prevention or redress of a wrong. One may ask whether this definition should be used to define the word *action* in the Interpretation Ordinance.

However, I do not believe there are any such difficulties in interpreting the word *proceeding* in paragraph 6(3)(c) of the Interpretation Order, which is broader in scope. In **Perumawasam Silva et al. v. Balasingham (A. G. A., Kalutara)** (53 NLR 421 at 423) it was held that this section must be read in a wider sense. Hence, I hold that the present winding up application falls within the word *proceeding* in section 6(3)(c) of the Interpretation Ordinance.

The second issue is the meaning to be attributed to the words *may be carried on and completed as if there had been no such repeal*. We must examine whether these words are to be read, as meaning the culmination of the *action, proceeding or thing* in the original court or as encompassing appellate proceedings as well.

Here, it is important to examine whether an appeal and the original action, proceeding or thing are the same. An examination of the papers filed in this appeal reflects that as the action advanced through different forums, both original and appellate, the caption filed in the original court has been suitably adopted based on the respective petitioner or respondent. This indicates that it is accepted in practice that an appeal is a continuation of the initial action rather than a new proceeding or action.

Indeed, the common law position is that an appeal is not a fresh action but only a continuation of the original proceedings and a stage in that action itself [See **Garikapati Veeraya v. Subbiah Choudhary and others** (AIR 1957 SC 540), **Shiv Shakti Co-op. Housing Societty, Nagpur v. M/s Swaraj Developers and Others** [AIR 2003 SC 2434], **Malluru Mallappa (D) THR. LRS. v. Kuruvathappa & Ors.** (Civil Appeal 1485 of 2020)]. This view has been adopted in **Sudharman De Silva v Attorney General** [(1986) 1 Sri LR 9 at 13], **W.L.M.N. De Alwis (Deceased) and others v. Malwatte Valley Plantations Ltd. and another** [SC/HCCA/LA 47/16, S.C.M. 21.06.2019].

Accordingly, a reading of section 6(3)(c) of the Interpretation Ordinance in harmony with this position in common law means that any repeal of any existing law shall not, in the absence of any express provision to that effect, affect or be deemed to have affected any *action, proceeding or thing* pending or incompleated when the repealing written law comes into operation, and such *action* may be carried on and completed up to the conclusion of the appeal as provided in the repealed law.

Therefore, I hold that in the absence of any express provision to that effect in the Companies Act 2007, the repealing of the Companies Act 1982 by the Companies Act 2007 should not be interpreted to affect or be deemed to have affected the right of appeal granted under section 307 of the Companies Act 1982.

There is another reason to require the express removal by the Companies Act 2007 of the right of appeal provided by section 307 of the Companies Act 1982. The learned counsel for the 1st and 2nd Respondents submitted that such right of appeal is procedural in nature and not a vested right. Hence, it was contended that such a procedural right can be taken away retrospectively. The following extract from **Maxwell on “The Interpretation of Statute” (12th ed., page 222)** was cited in support:

“No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues, and if an Act of Parliament alters that mode of procedure, he can only proceed according to the altered mode. Alteration in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.”

However, a statutory right of appeal is not a mere procedural right but is a vested right. An intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication. [Messrs. Hoosein Kasam Dada (India) Ltd. v. The State of Madhya Pradesh and Others (AIR 1953 SC 221), Garikapati Veeraya v. Subbiah Choudhary and others (supra), Shiv Shakti Co-op. Housing Society, Nagpur v. M/s Swaraj Developers and Others (AIR 2003 SC 2434)].

In Akilandanayaki v. Sothinagaratnam (53 NLR 385 at 400) where Rose, C. J. held:

“The combined effect of sections 6(3)(b) and 6(3)(c) of the Interpretation Ordinance is that if a party had already instituted proceedings to vindicate a vested right, the subsequent repeal of the enactment under which that right was acquired cannot be regarded as operating retrospectively unless there are express words satisfying both sub-sections.”

In summary, there are two reasons to require that the right of appeal under section 307 of the Companies Act 1982 be expressly removed. One is the requirement in section 6(3)(c) of the Interpretation Ordinance. Second, a right of appeal is a vested right, and therefore there must be explicit language to clearly express the intention to take away that right of appeal.

Let me now examine whether such express taking away is seen in the Companies Act 2007. Section 532(1) therein reads:

*“Subject to the provisions of subsection (2), the provisions of this Act with respect to winding up shall not apply to any company of which the winding up has commenced before the appointed date. Every **such company shall be wound up in the same manner and with the same incidents**, as if this Act had not been enacted, and **for the purpose of the winding up**, the written law under which the winding up commenced shall be deemed to remain in full force.”* (Emphasis added)

The learned counsel for the 1st and 2nd Respondents drew our attention to the words *for the purpose of the winding up* and submitted that all what has been kept alive are the provisions providing for the winding up in the Companies Act 1982. It was contended that the right of appeal in section 307 of the Companies Act 1982 is not part of such provisions and is not caught up within the words *for the purpose of the winding up*.

On the contrary, the learned counsel for the Petitioner submitted that such an interpretation would lead to grave and manifest injustice and absurdity as it would take away a right of appeal from a party.

In this context it is interesting to observe the same formulation in section 532(1) of the Companies Act 2007, section 452 of the Companies Act 1982 and section 366 of the Companies Ordinance No. 51 of 1938 as amended. All these three Acts repealed the previous applicable law. The words *and for the purpose of the winding up* are found in all three sections.

Nevertheless, section 307 of the Companies Act 1982 provided for a right of appeal. I am of the view that in these circumstances, those words cannot be used to interpret that they expressly exclude the right of appeal in section 307 of the Companies Act. Moreover, when an appeal is in law a continuation of the original proceedings as explained earlier, such an interpretation is not possible.

Accordingly, I hold that the right of appeal recognized in terms of section 307 of the Companies Act 1982 was not taken away in relation to the impugned winding up proceedings that were to be continued in terms of section 532(1) of the Companies Act 2007.

Questions of law Nos. 1 and 2 are answered in the affirmative.

Question of Law No. 3

Learned Counsel for the 1st and 2nd Respondent submitted that assuming a right of appeal is available against the winding up order issued in the present case, it is not a final order but only an interlocutory order. It was contended that section 307 of the Companies Act 1982 must be read with sections 754(1), (2) and (5) of the Civil Procedure Code and that the remedy available to the Petitioner was to make a leave to appeal application and not a final appeal. Reliance was placed on the decision in **Chettiar v. Chettiar [(2011) BLR 25]** and **H.B. Ajith Ariyadasa v. Paranawithana and another [C.A. (Rev.) 1695/06, C.A.M. 2.6.2009]**.

Section 307 of the Companies Act 1982 reads:

“An appeal from any order or decision made or given in the winding up of a company by the court under this Act shall lie to the Court of Appeal in the same manner and subject to the same conditions, as an appeal from any order or decision of the court made or given in the exercise of its ordinary civil jurisdiction.”

The right of appeal is granted against *any* order or decision (if I may use that word generically) made in a winding up of a company. It does not refer to a winding up order per se. Nevertheless, the use of the word *any* therein makes it possible to give a wide interpretation to catch all orders or decisions including an order for the winding up of a company.

However, the learned counsel for the 1st and 2nd Respondents contended that the analysis does not stop there and must go on to consider the provisions in sections 754(1), (2) and (5) of the Civil Procedure Code. The words *in the same manner and subject to the same conditions* in section 307 of the Companies Act 1982 was contended to be a reference to the conditions specified in those sections. In particular, it was submitted that a right of

appeal is available only in relation to a *judgment* whereas if it is an *order*, a leave to appeal application is the only remedy.

I agree that section 307 of the Companies Act 1982 must be read with subsections 754(1), (2) and (5) of the Civil Procedure Code. Therefore, we must consider whether the impugned winding up order is a judgment or order within the meaning of these sections.

The 1st and 2nd Respondents cited the decision in **H.B. Ajith Ariyadasa v. Paranawithana and another (supra)** where it was held that the proper application to be made was a leave to appeal application in terms of section 754(2) of the Civil Procedure Code. However, the order impugned in that matter was not an order of winding up. It was an order directing the petitioner to hand over goods listed in the inventory submitted by the liquidator.

In ***Chettiar v. Chettiar (supra. 31)*** it was held:

“Therefore, to ascertain the nature of the decision made by a Civil Court as to whether it is final or not, in keeping with the provisions of section 754(5) of the Civil Procedure Code, it would be necessary to follow the test offered by Lord Esher MR in Standard Discount Co. v. La Grange (supra) and as stated in Salaman v. Warner (supra) which reads as follows:

“The question must depend on what would be the result of the decision of the Divisional Court assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but if given in the other, will allow the action to go on, then I think it is not final, but interlocutory.”

The Court adopted the application test adopted by English courts in determining whether an order or decision is a final judgment. Therefore, the characterization of a winding up order by the English courts must be examined.

In ***Re Reliance Properties Ltd Waygood, Otis and Co Ltd v Reliance Properties Ltd* [(1951) 2 All ER 327]** Evershed MR in placing a winding up order in its proper perspective held (at 327):

“It would be difficult to think of any order made by the court which in substance or character was more final than a winding up order”.

Moreover, Halsbury's *The Laws of England*, 3rd edition (1954) Vol. 6 at 712, states:

“an appeal from a winding up order maybe brought without leave of the court, as the order is a final order and not a interlocutory judgment”

This appears to have been the position in English common law even at the time the 4th edition of this work was published in 1974 [See Halsbury's *The Laws of England*, 4th edition (1974) Vol. 7 at 789. Nevertheless, Halsbury's *Laws of England*, 5th edition (2011) Vol (17) at 255, state:

“An appeal from a winding-up order made by a district judge or circuit judge of the High Court or a registrar of the High Court requires permission of the first instance judge or registrar or a High Court Judge, and permission is required from the judge or the Court of Appeal from appeals from a High Court judge; the Court of Appeal alone can grant permission where the decision of the High Court judge is itself made on appeal”

The difference in approach appears to be based on the English rules of civil procedure, which explicitly state the circumstances in which an application for leave to appeal should be made. Therefore, the present position of English common law cannot be adopted here. A more detailed analysis of the effect of a winding up order in terms of the Companies Act 1982 should be undertaken.

Winding up proceedings are *sui generis* in nature. It is distinct and different from an ordinary action based on a cause of action. The impugned winding up proceedings have been instituted on the basis that the Petitioner is unable to pay its debts. The District Court decided to wind up the Petitioner. The appeal to the High Court was made by the Petitioner against the that winding up order.

With respect to section 265 of the Companies Act 1982, such an order to wind up works in favour of all of the Petitioner's creditors and contributors. It is thus clear that the impugned winding up proceedings are a remedy provided to all creditors and contributors. The substantive issue to be resolved in this winding up proceedings is whether the Petitioner is unable to pay its debts. The impugned winding up order was made by the Court after determining that central issue. In fact, it is an issue which goes to the jurisdiction of the Court.

Moreover, the effect of a winding up order cannot be overlooked in determining whether it is a final judgment within the meaning of sections 754(1) and (5) of the Civil Procedure Code. When a winding up order is made, the servants of the company are *ipso facto* dismissed [**Chapman's case (1886) L.R. 1 Eq. 346**, ***Measures Bros. Ltd. v. Measures (1910) 2 Ch. 248***, ***Gosling v. Gaskell (1897) AC 575***] and results in the dismissal of the directors and the cessation of their powers [***Re Union Accident Insurance Co Ltd (1972) 1 All ER 1105***, ***Fowler v. Broad's Patent Night Light Co (1893) 1 Ch 724***].

There is no doubt that significant steps need to be taken thereafter to complete the winding up proceedings, such as the appointment of liquidators. Nevertheless, as Williams LJ held in **In Re Herbert Reeves & Co. [(1902) 1 Ch. 29 at 31]**:

“...the mere fact that there may be inquiries to be carried out after the order or after the judgment has been delivered does not prevent the order or the judgment from being a final order or final judgment. After you have got an order for winding up a company, there are obviously an enormous quantity of questions which may be raised...”

However, learned counsel for the Respondents drew our attention to several sections of the Companies Act 1982 and contended that a winding up order is not a final judgment. Section 287 grants power to the same court which issued the winding up order to stay the winding up proceedings altogether or for a limited time on such terms and conditions as the court thinks fit. Section 372 gives the Court the power to declare the dissolution of the company void. It was contended that the final judgment is when the Court dissolves a company consequent to an application made by the liquidator under section 304.

I am not convinced that any one of these sections negate a finding that the impugned winding up order is a final judgment within the meaning of sections 754(1) and (5) of the Civil Procedure Code. Section 287 empowers the Court only to stay the *winding up proceedings* in given circumstances. It does not grant power to the Court to vary a *winding up order*. In fact, in **Re Intermain Properties Ltd. [(1986) BCLC 265 Ch D.]** it was held that the Court has no jurisdiction to rescind a perfected winding up order.

No doubt, section 372 empowers the Court to declare the dissolution void. But there is a clear distinction between an order for winding up and an order for dissolution. A winding up order does not result in the extinction of the company [See **Employers Liability Assurance and Corpn. v. Sedgwick Collins Co. [(1927) AC 95]**. A company ceases to exist

only upon an order made for dissolution in terms of section 304(1) of the Companies Act 1982.

For the foregoing reasons, I hold that the impugned winding up order is a final judgment within the meaning of sections 754(1) and (5) of the Civil Procedure Code.

Question of law No. 3 is answered in the negative.

For avoidance of any doubt and to ensure clarity, I have only made a finding that a winding up order made by the Court in terms of the Companies Act 1982 in any winding up proceedings instituted against a company due to its failure to pay its debts is a judgment within the meaning of sections 754(1) and (5) of the Civil Procedure Code.

Accordingly, I set aside the judgment of the High Court dated 7th June 2011. I direct the High Court to hear and dispose of the Petitioner's appeal on the merits expeditiously. The High Court shall make every reasonable endeavour to conclude the appeal by the Petitioner within a reasonable time. The High Court shall give priority to this matter with a view to concluding it expeditiously.

The Petitioner is entitled to the costs of this appeal.

Appeal allowed.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.

I agree.

Judge of the Supreme Court

K.K. Wickremasinghe, J.

I agree.

Judge of the Supreme Court