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

In the matter of an appeal in terms of Section 5 (1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read with Section 6 of the Act No. 10 of 1996 and provisions contained in Chapter LVIII of the Civil Procedure Code.

Kanthi Fernando,
No. 10, Wijesekara Place,
Kalutara South.

S.C. Appeal (CHC) No. 84/2014
H.C. (Civil) No. 57/2012/CO

Petitioner

Vs.

W. Leo Fernando (Maddagedara) Estates Company Limited,
No. 01, Castle Terrace,
Colombo 08.

Respondents

AND NOW BETWEEN

Kanthi Fernando,
No. 10, Wijesekara Place,
Kalutara South.

Petitioner-Appellant

Vs.

W. Leo Fernando (Maddagedara) Estates Company Limited,
No. 01, Castle Terrace,
Colombo 08.

Respondent-Respondent

Before: Hon. Vijith K. Malalgoda, PC, J.

Hon. Janak De Silva, J.

Hon. K. Priyantha Fernando, J.

Counsel:

Dr. Romesh De Silva, PC with Ranil Samarasooriya and Shanaka Cooray for Petitioner-Appellant

Chrishmal Warnasooriya with Prabuddha Hettiarachchi and M.I.M. Iynullah for Respondent-Respondent

Written Submissions:

Petitioner-Petitioner on 27.10.2023

Respondent-Respondent on 07.07.2017

Argued on: 18.10.2023

Decided on: 24.01.2024

Janak De Silva, J.

The Petitioner-Appellant ("Appellant") instituted this action in the Provincial High Court of the Western Province (Exercising Civil Jurisdiction) Holden in Colombo ("Commercial High Court") seeking an order to wind up the Respondent-Respondent ("Respondent").

The learned Judge of the Commercial High Court dismissed the application with costs. Aggrieved by the dismissal, the Appellant has preferred this appeal.

The Appellant has also filed a leave to appeal application bearing No. SC/HC/LA/46/2014. Parties agreed that they will abide by one judgment given in S.C. Appeal (CHC) No. 84/2014 which is the statutory appeal.

The learned Judge of the Commercial High Court dismissed the application to wind up on the following grounds:

1. The Appellant has failed to submit any documents to corroborate the matters pleaded in the petition seeking the winding up of the Respondent.
2. The Appellant has failed to exhaust alternative remedies prior to the institution of this application.
3. It is not just and equitable to wind up the Respondent Company since the Appellant has not exhausted alternative remedies.

Ground for Winding Up

The winding up application was made pursuant to Section 270 (f) of the Companies Act No. 07 of 2007 ("Act") which reads:

> *"270. A company may be wound up by the court, if-*
>
> > *(f) the Court is of the opinion that it is just and equitable that the Company should be wound up"*

The Appellant sought a winding up order on the basis that there is a deadlock in the Respondent Company and/or in the management of the said Company and/or the ownership of the said Company.

In ***Ceylon Textiles Ltd. v. Chittampalam Gardiner*** **(54 N.L.R. 313)** it was held that the words *"a company may be wound up by the court if the court is of the opinion that it is just and equitable that the company should be wound up"* in Section 162 (6) of the Companies Ordinance No. 51 of 1938 is extremely wide and includes a situation where there is a deadlock. However, L. M. D. De Silva J. added a word of caution in stating (at page 316):

> *"In the decided cases the deadlock has been complete. In fact no deadlock can truly be called a deadlock unless it is complete but the word "complete" serves to direct attention to the true nature of the deadlock that must be shown to exist*

before a liquidation can be ordered. It must be complete not only at any given moment but it must appear reasonably that no remedy can be hoped for by recourse to the courts or otherwise."

It is an established rule of interpretation that where there are statutes made *in pari materia*, whatever has been determined in the construction of one of them is a sound rule of construction for the other [*Craies on Statute Law*, 7th Ed., page 139]. In ***Crosley v. Arkwright*** **[(1788) 2 T.R. 603, 608, (1788) 100 E.R. 325, 328]** Buller J. held that all Acts relating to one subject must be construed *in pari materia*.

The Companies Ordinance No. 51 of 1938 and the Act are *in pari materia*. The interpretation given to just and equitable in the former is applicable to the Act as well. Hence, the ground relied on by the Appellant is one which falls within Section 270 (f) of the Act.

Burden of Proof

The learned Judge of the Commercial High Court took the view that the Appellant has failed to submit any documents to corroborate the matters pleaded in the petition seeking the winding up of the Respondent Company. Court refers to the denial by Mrs. Anula Fernando of the matters pleaded in the winding up petition and states that it is word and against word and hence no reason to accept one version over the other. Accordingly, the learned Judge of the Commercial High Court holds that the Appellant has failed to prove the allegations made in the winding up application.

One important matter pleaded by the Appellant is that she holds 50% of the shares of the Respondent Company and is also a Director. It is true that the Appellant has not tendered any documentation to establish that she is a shareholder and a Director. Nevertheless, this pales into insignificance upon a consideration of the affidavit filed by Mrs. Anula Fernando opposing the winding up application. She has, at paragraph 32 of her affidavit, admitted that the Appellant and she are the only shareholders and Directors of the Respondent Company. In this context the requirement of any documentation to corroborate these two matters does not arise.

The learned Judge of the Commercial High Court erred in overlooking the admissions made in the affidavit filed in opposition to the winding up application while taking cognizance only of the denials made therein.

Another important matter pleaded by the Appellant is that Mrs. Anula Fernando has constantly failed and neglected to have any board meetings, divulge any accounts, have any shareholders meetings, furnish audited accounts, have a general meeting or furnish information in respect of the running of the company. Admittedly, the Appellant has not tendered any documentation in support of these allegations. However, she has affirmed to such matters in her affidavit.

Nevertheless, as the learned Judge of the Commercial High Court himself states, requiring such evidence from the Appellant amounts to asking her to prove the negative. In ***Laxmibai (Dead) Thru Lr'S. & Anr vs Bhagwanthbuva (Dead) Thru Lr'S. & Ors.*** **[Civil Appeal No. 2058 of 2003, Decided on 29.01.2013]** the Indian Supreme held (at para. 15) that a negative fact cannot be proved by adducing positive evidence.

Nanda Senanayake in *Legal Maxims & Phrases*, First Ed. (2023), page 435 states that a negative is usually incapable of proof. The decision in ***New Indian Assurance Company Ltd. v. Nusli Neville Wadiya and Another*** **[Case No. Appeal (Civil) 5879 of 2007, Decided on 13.12.2007]** is cited in support. There, the Supreme Court of India referred (at para. 54) to the legal maxim, *ei incumbit probation qui dicit, non qui negat* (The burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for a negative is usually incapable of proof).

In ***New Indian Assurance Company Ltd. v. Nusli Neville Wadiya and Another*** (ibid.) it was held that it is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons, and reference was made to the statement by Lord Maugham in ***Constantine (Joseph) Steamship Line Ltd. vs. Imperial Smelting Corpn.*** **[(1941) 2 All ER 165, 179]**. This rule is derived from Roman law and is

supportable not only upon the ground of fairness, but also upon that of the greater practical difficulty which is involved in proving a negative than in proving an affirmative.

This Court has affirmed this legal maxim in ***Indrajith Rodrigo v. Central Engineering Consultancy Bureau*** **[(2009) 1 Sri.L.R. 248]**.

This legal maxim has been affirmed by the Supreme Court of India in ***Shambhu Nath Goyal vs. Bank of Baroda and others*** **(1983) 4 SCC 491,** ***Garden Silk Mills Ltd. and another vs. Union of India and others*** **(1999) 8 SCC 744** and ***J. K. Synthetics Ltd. vs. K. P. Agrawal and another*** **(2007) 2 SCC 433 (para 18)**.

The learned Counsel for the Respondent relied on the decision in ***In Re Langham Skating Rink Company*** **[(1877) 5 Ch.D. 669]** where it was held that it is very important that Court should not, unless a very strong case is made, take upon itself to interfere with the domestic forum which has been established for the management of a company.

The decisions in ***McInerney Homes Ltd. v. Cos Acts 1990*** **[(2011) IESC 31]** and ***Re Connemara Mining Company PLC (No. 2)*** **[(2013) IEHC 225]** were also cited where the High Court of Ireland refused to wind up a company on the grounds that the Petitioner had failed to discharge the onus of proving, that it would be just and equitable to wind up the company.

I am mindful of the provisions in Section 101 of the Evidence Ordinance which reads:

> *"101. 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."*

It is the Appellant who is seeking to wind up the Respondent Company. This is sought to be done due to the alleged failure and neglect to have any board meetings, divulge any accounts, have any shareholders meetings, furnish audited accounts, have a general meeting or furnish information in respect of the running of the Respondent Company. These matters have been affirmed to by the Appellant in her affidavit. That

is evidence for the purposes of the winding up application and should have been considered by the Commercial High Court.

Moreover, Mrs. Anula Fernando has, at paragraphs 8 and 19 of her affidavit, denied the allegation on the failure to hold board meetings and the failure to divulge any accounts. She has reserved her right to tender the relevant documents to Court.

In this context, it is apposite to consider the practice of English Courts in winding up applications. In ***Re Travel and Holiday Clubs Ltd*. [(1967) 2 All.E.R. 606]**, on the question of whether the evidence filed (by way of affidavit) was not sufficient to support the charges contained in the petition, it was held (at pages 608-609) that:

> *"The court would not in the exercise of its discretionary jurisdiction, be satisfied with prima facie evidence but would require the petitioner to substantiate his case more fully; that in such cases it would require, where practicable, the evidence of witnesses with direct knowledge of the matters to which they were testifying, and on which they could be cross-examined, and which conformed to the ordinary rules of the admissibility of evidence".*

In ***Colombo Engineering Enterprises (Pvt) Ltd. and Others v. Hatton National Bank Ltd.* [(1999) 1 Sri.L.R. 72 at 75]** the Court of Appeal after an examination of the English practice held:

> *"Whilst no doubt the verifying affidavit is always a necessary document, in all cases it may not always be sufficient to verify the petition. In such cases the Judge clearly has a discretion to allow the testimony of witnesses and their cross-examination. It may appear to be contradictory to the statutory provisions which provide that affidavits should in ordinary circumstances be sufficient prima facie evidence of the statements of the petition, but where the verifying affidavit is not sufficient, then and only then must opportunity be afforded for the adducing of evidence and/or cross-examination of the deponent witnesses."*

I am in respectful agreement with the position articulated upon a consideration of the form of pleadings required to be filed where a company is sought to be wound up on just and equitable grounds.

It has been held that a company may be wound up for a number of reasons on just and equitable grounds. Hence, it will suffice for the petition and supporting affidavit in such a winding up application to set out the heads of complaint with sufficient details to enable the Respondent to respond to the complaints made. Where a prima facie case has been made in the winding up petition, the Court must exercise its wide discretion judiciously and in conformity with procedural fairness.

This appears to be the English practice as well. In ***Fildes Bros. Ltd., Re*** **[(1970) 1 All ER 923**, it was held that in deciding a petition for winding up on just and equitable grounds, facts existing at the time of hearing have to be taken in to account, but *heads of complaint will be as set forth in the petition*.

In the present application, the winding up petition has sufficiently set out the heads of complaint and provided evidence in the form of averments in the affidavit in support. The Appellant cannot be asked to prove by documentary evidence the negative, such as failure and neglect to have any board meetings, shareholders meetings and general meetings.

The best evidence of holding such meetings are the minutes of such meetings. If the Appellant did not take part in such meetings although informed, the best evidence is the notification sent to the Appellant.

In the circumstances of the case, the learned Judge of the Commercial High Court should have exercised his discretion and called for evidence from the Appellant and the Respondent Company prior to making an order on the winding up application. In fact, the Respondent Company had in its written submissions filed in the Commercial High Court, paragraph 8, indicated to Court that it may be prudent to call for oral evidence.

Accordingly, I am in agreement with the contention of Mr. Cooray, learned counsel for the Appellant that the learned Judge of the Commercial High Court erred in not calling for oral evidence and thereby failed to duly and properly exercise his discretion judiciously.

Alternative Remedies

I will examine grounds 2 and 3 relied on by the learned Commercial High Court judge together as they are interconnected.

In this context, I observe that the judgment does not specify the alternative reliefs the learned Judge of the Commercial High Court had in mind.

It appears that the learned Judge may have taken into consideration the alternative grounds set out at paragraph 46 of the written submissions filed by the Respondent Company in the Commercial High Court.

They are:

(i) An action for oppression and mismanagement under sections 224 and 225 of the Act;

(ii) Seeking to appoint an inspector to investigate the affairs of the Company under section 172 (1) of the Act;

(iii) Raising any issue of alleged oppression or mismanagement at the Board Meeting and/or Shareholder Meeting of the Company.

The alternative remedy at (iii) does not arise as the Appellant contends that no such meetings took place.

In so far as sections 224 and 225 of the Act are concerned, the learned counsel for the Appellant drew our attention to section 227 of the Act which reads:

> *"Notwithstanding the provisions of Part XII, at any stage of the winding up proceedings in respect of a company, where a court is of the opinion that to wind up the company would be prejudicial to the interests of a shareholder of the*

company, it shall be lawful for the court to act under the provisions of section 224 or section 225 in like manner, as if an application had been made to the court under the provisions of either of those two sections."

Accordingly, the Court has the discretion to act under sections 224 or 225 of the Act at any stage of the winding up proceedings. Where the Court is not inclined to exercise this discretion, reasons will have to be given. In the present matter, the Commercial High Court has failed to do so if this was indeed an alternative remedy it had in contemplation.

For all the foregoing reasons, I set aside the judgment of the learned Judge of the Commercial High Court dated 11.07.2014.

I direct the Commercial High Court to conduct an inquiry into the winding up application by granting parties the opportunity to lead oral and documentary evidence on the matters pleaded. After such inquiry, the Commercial High Court shall make an order according to law.

The appeal is partly allowed with costs.

Judge of the Supreme Court

Vijith K. Malalgoda PC, J.

I agree.

Judge of the Supreme Court

K. Priyantha Fernando, J.

I agree.

Judge of the Supreme Court