

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

*In the matter of an application for Appeal to
the Supreme Court from the Order dated 2nd
October 2020 in Case No. CHC
02/2019/CO in the High Court of the
Western Province exercising its Civil
Jurisdiction.*

Heineken Lanka Limited,
(formerly Asia Pacific Brewery (Lanka)
Limited)
Green House
No. 260,
Nawala Road,
Nawala.

Petitioner

SC APPEAL 12/2023

**SC HC LA No. 101/2020
CHC Case No. 02/2019/CO**

Vs.

Ajith Putha Distributors (Pvt) Ltd,
Galahitiyawa,
Madampe.
(Company sought to be wound up)

Respondent

AND NOW

Heinken Lanka Limited,
(formerly Asia Pacific Brewery (Lanka)
Limited)
Green House,

No. 260,
Nawala Road,
Nawala.

Petitioner-Appellant

Ajith Putha Distributors (Pvt) Ltd,
Galahitiyawa,
Madampe.

Respondent-Respondent

Before : **Murdu Fernando, PC,J**
Yasantha Kodagoda, PC, J
K. Priyantha Fernando, J

Counsel : Chandaka Jayasundera, PC with Chinthaka Fernando
instructed by Sundaralingam Balendra for the
Petitioner-Appellant.

Argued on : 31.01.2024

Decided on : 19.02.2024

K. PRIYANTHA FERNANDO, J

1. The Petitioner-Appellant (hereinafter referred to as the 'appellant') instituted proceedings in the Commercial High Court of the Western Province holden in *Colombo* seeking for an order to wind up the company named '*Ajith Putha Distributors (Pvt) Ltd*' (hereinafter referred to as 'respondent'). The learned High Court Judge by his order dated 02.10.2020 dismissed the application of the appellant. Being aggrieved by the said order of the learned High Court Judge, the appellant preferred the instant appeal. This Court granted leave to proceed on the

questions of law raised in paragraph 13 (c) and (e) of the petition dated 19.10.2020. The said questions of law are;

Paragraph 13

- (c) Has the learned High Court Judge misdirected himself in law and facts in holding that “**P13**” amounts to a valid denial of the debt in question by the Company?
 - (e) Has the learned High Court Judge misdirected himself in law and facts in holding that the Company sought to be wound up has disputed the debt and therefore, the Petitioner has failed to establish the fact the Company is unable to pay its debts?
2. This Court issued notices on the respondent company on several occasions. However, the respondent was absent and unrepresented. At the hearing of this appeal, the learned President’s Counsel for the appellant made submissions. This Court has carefully considered the proceedings in the High Court including the order of the learned High Court Judge, the written submissions filed on behalf of the appellant and the submissions that were made on behalf of the appellant.

Facts in brief

3. The appellant has appointed the respondent company by way of an agreement to distribute the products of the appellant since the year 2010. This agreement was periodically renewed. The products that the appellant supplied were sold at the outlets of the respondent company. The agreement that subsisted between the appellant and the respondent has been marked as [P-5]. The appellant has sent the statutory demand marked [P-12] to the respondent company demanding that Rupees 40,779,052.24 which was owed by the respondent. As the respondent failed to pay the outstanding amount as per the statutory demand marked [P-12], the appellant made a winding up application to the High Court.

4. It is the contention of the learned President's Counsel that the learned High Court Judge erred when he held that the document marked [P-13] amounts to a valid denial of the debt in question by the respondent.
5. In reply to the statutory demand P-12, the letter P-13 has been sent to the appellant on 31.10.2018 under the signature of *P.Rasiah*. The learned High Court Judge in his judgment referring to P-13 has taken the view that it amounts to a valid denial of the debt by the respondent.
6. It is the contention of the learned President's Counsel that when P-13 is read in its entirety, there is no denial of the debt. The learned President's Counsel further contended that, P-13 has been sent by *Rasiah* in his personal capacity and it does not amount to a denial of the debt by the company. P-13 is merely a statement by *Rasiah* as the Chairman of the company seeking to have him released from the proceedings and therefore, it cannot be construed as a document disputing the debt.
7. The issues arising from the letter P-13 are two-fold. First, whether the letter P-13 can be considered as amounting to an act and deed of the respondent company. Secondly, whether there is a denial of the debt by P-13. As per the contents of P-13, there is an admission by *Rasiah* that the respondent accepted products from the appellant for distribution. There is a further admission by *Rasiah* that the appellant has forfeited the sum of Rupees 6,000,000.00 that was deposited as security, to recover the monies due to the appellant from the respondent. The grievance of *Rasiah* as per P-13 is the failure on the part of the appellant to inform him of the goods received by his daughter and his son-in-law who acted in the capacity of directors of the respondent company. It is clear that, P-13 is a personal request of *Rasiah* to get himself released from the responsibility.
8. Further, it is pertinent to note that, according to the agreement P-5, the name of the respondent company is '**Ajith Putha Distributors (Pvt) Ltd**'. However, the letter P-13 has not been written on a letterhead of

the respondent company. The name of the company referred to in the letterhead [P-13] is 'AJITH PUTHA (PVT) LTD. AJITH PUTHA TOURS AND TRAVELS'. The rubber stamp underneath the signature of P. *Rasiah* also states 'AJITH PUTHA (PVT) LTD'. This further confirms that the letter [P-13] is not an act and deed of the respondent company, but of P. *Rasiah* in his personal capacity. This has escaped the mind of the learned High Court Judge.

9. As submitted by the learned President's Counsel for the appellant, it was held in the case of ***M/S. Sampat Trading & Company V. M/S Talayar Tea Company Ltd***, In the High Court of Judicature at Madras dated 22.01.2009, that Court must confirm the veracity of the defence of the company to ensure that the dispute of the debt is a genuine dispute.

In [1978] vol. 48 Company Cases page 378 (Bomb.)- ***United Western Ltd***, In re., the High Court of Bombay set out the underlying principles on winding up of companies as follows;

“On a petition under section 483 of the Companies Act, 1956, where the defence is that the debt is disputed, the court has to see first whether the dispute on the face of it is genuine or merely a cloak to cover the company's real inability to pay just debts. The inability is indicated by its neglect to pay after a proper demand and a lapse of three weeks. Such neglect must be judged on the facts of each case. Merely seeking to raise certain disputes for putting off liability for payment of the debt or creating a kind of defence to the claim will not make the debt a disputed one. Disputes which appear to have been created or manufactured for the purpose of creating pleas to cover up the liability for payment of the debt can never be considered to be bona fide and will be of no avail in resisting a winding-up petition.”

The above was cited with approval in *Sampat Trading Company*(*supra*).

10. In the proceedings before the High Court, one Periyasamy Ramasamy Harishchandra Kumara, who is a director of the respondent company has filed an affidavit dated 15.07.2019. The alleged debt was not

denied in that affidavit. However, he has taken up a preliminary objection stating that this dispute has to first be referred to arbitration as per the contract P-5. This objection has been rightly rejected by the learned High Court Judge with reasons. Therefore, in the instant case, it is clear that the defence taken up by the respondent company is not a genuine one.

11. In the above premise, I answer both the questions of law raised by the appellant in the affirmative. The order of the learned High Court Judge dated 02.10.2020 is set aside. I direct the learned High Court Judge to order the winding up of the respondent company and take such further action in that regard in terms of the Companies Act.

The Appeal is allowed.

JUDGE OF THE SUPREME COURT

JUSTICE MURDU FERNANDO

I agree

JUDGE OF THE SUPREME COURT

JUSTICE YASANTHA KODAGODA

I agree

JUDGE OF THE SUPREME COURT