

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

In the matter of an application for leave to appeal from the Order of the High Court of the Western Province (Exercising Civil jurisdiction and Holden at Colombo) dated 30.08.2019, made under and in terms of Section 5 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 read together with the provisions contained in chapter LVIII of the Civil Procedure Code between

V. Watumal (Private) Limited
No. 21,
2nd Cross Street,
Colombo 11

**SC APPEAL 105/2020
SC HC LA No. 64/2019
HC (Civil) No. CHC 84/2018/CO**

Petitioner

Vs.

1. LOLC Finance PLC
Registered Office
No. 100/1,
Sri Jayawardenapura Mawatha,
Rajagirya.
(1st Intervenient Petitioner)

1st Respondent

2. LOLC Factors Limited
Registered Office
No. 100/1,
Sri Jayawardenapura Mawatha,
Rajagiriya.

Principal Business Office
No. 504,
Nawala Road,
Rajagiriya.
(2nd Intervient Petitioner)

2nd Respondent

AND NOW BETWEEN

V. Watumal (Private) Limited
No. 21,
2nd Cross Street,
Colombo 11.

Petitioner-Appellant

Vs.

1. LOLC Finance PLC
Registered Office
No. 100/1,
Sri Jayawardenapura Mawatha,
Rajagiriya.

1st Respondent-
Respondent

2. LOLC Factors Limited
Registered Office
No. 100/1,

Sri Jayawardenapura Mawatha,
Rajagiriya.

Principal Business Office
No. 504,
Nawala Road,
Rajagiriya.

2nd Respondent-
Respondent

Before : **P. Padman Surasena, J**
Kumudini Wickremasinghe, J
K. Priyantha Fernando, J

Counsel : Shamalie de Silva with Vishwaka
Peiris for the Petitioner-Appellant.

Priyantha Alagiyawanna with
Heshani Gunarathna and Sahan
Gunasekera instructed by Nuwan
Jayasinghe for the 1st and 2nd
Respondents-Respondents.

Argued on : 13.02.2024

Decided on : 13.03.2024

K. PRIYANTHA FERNANDO, J

1. The Petitioner-Appellant (hereinafter referred to as the Petitioner) instituted proceedings in the High Court of the Western Province Exercising Civil Jurisdiction in *Colombo* (Commercial High Court), for the winding up of the Petitioner through Court in terms of Part XII of the Companies Act No. 07 of 2007 (the Act).

2. The first and the second Respondents-Respondents (hereinafter referred to as the Respondents) objected to the winding up application on the basis that this winding up application is an attempt to deny the creditors of the Petitioner of their dues. Upon inquiry, the learned High Court Judge of the Commercial High Court of *Colombo* by his order dated 30.08.2019 dismissed the application of the Petitioner for winding up of the Company. Being aggrieved by the said order of the learned High Court Judge, the Petitioner preferred the instant appeal to this Court. Upon hearing the application for leave to appeal on 28.09.2020, this Court granted leave to appeal on the questions of law (b), (f), and (h) of paragraph 18 of the Petition dated 11.09.2019. Those questions of law are;
 - (1) Has the learned High Court Judge erred in failing to appreciate that by dismissing the application of the Petitioner all stakeholders including the creditors shall be gravely prejudiced in as much as (a) the company has ceased to conduct business; (b) there is no process of collection of its debts on behalf of the Petitioner and (c) no steps are being taken for dissolution of the Petitioner and consequently (d) no distribution can be effected?
 - (2) Has the learned High Court Judge erred in failing to appreciate that the Petitioner has no legal obligation to follow procedure set out in Section 319 and 320 of the Companies act which is applicable only to voluntary winding up procedure and not winding up by Court?
 - (3) Has the learned High Court Judge erred in holding that the winding up procedure is tainted with

illegality for failure to adhere to Section 319(1)(a) of the Companies Act which is entirely inapplicable to a winding up by Court?

3. At the hearing of the appeal, the Counsel for the Petitioner submitted that the learned High Court Judge in the impugned order has come to the conclusion that the Petitioner has failed to comply with the mandatory requirements mentioned in section 319 of the Act and therefore the entire process is tainted with illegality. It is the contention of the learned Counsel for the Petitioner that, section 319 of the Act is relevant to voluntary winding up of a Company, and that it has no application to this case as this is an application for winding up with the assistance by Court.
4. The learned Counsel for the Petitioner further contended that the shareholders of the Company have passed a special resolution that the Company be wound by Court and therefore that is sufficient for the Court to make an order to wind up the Company. It is the position of the learned Counsel that, the grounds (a) to (f) in section 270 of the Act are alternative grounds and therefore, the basis of the resolution being passed by the Company as per section 270(a) of the Act, is in itself sufficient for the Court to make the order for winding up.
5. At the hearing of this appeal, the learned Counsel for the Respondents submitted that the resolution passed by the Company [P-6] was passed on the basis of the audited financial statement [P-4], hence, it is the submission of the learned Counsel for the Respondents that the Petitioner has failed to prove to the satisfaction of the Court that the Petitioner is unable to pay the debts. The learned Counsel further contended that, no material was placed before Court to enable the Court to form such opinion.
6. This winding up application of the Petitioner has been made consequent to the special resolution [P-6] resolved by the shareholders of the Petitioner Company on 31st October 2018, in terms of Section 270 (a) of the Act. [P-6] was passed on the basis of the auditor's report marked [P-4] dated 30th October

2018. It is observed that, the resolution has been circulated among the directors on the day after the auditor's report was issued. On the same day, the shareholders who were also the directors of the Petitioner Company have passed the resolution. On the following day, which was the 1st of November 2018, the application for winding up has been filed in Court.

7. The special resolution [P-6] clearly states that as per the auditor's report the Company is unable to pay the debts as they fall due and therefore the Company be wound up by Court in the best interest of the Company and its shareholders. Thus, it is clear that this winding up application was made in terms of Section 270 (d) of the Act as the Company is unable to pay its debts and the resolution has been passed on that basis. Therefore, it is incumbent upon the Petitioner to prove to the satisfaction of the Court, the inability of the Petitioner to pay its debts as defined in Section 271 of the Act.

Section 271

“A company shall be deemed to be unable to pay its debts where—

- (a) a creditor by assignment or otherwise, to whom the company is indebted in a sum exceeding fifty thousand rupees then due, has served on the company by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks from the date of so leaving, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;*
- (b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company, is returned unsatisfied in whole or in part; or*
- (c) it is proved to the satisfaction of the court that the company is unable to pay its debts, and in*

determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.”

8. There is no evidence of any demand being served on the Petitioner by a creditor as per Section 271(a) of the Act. There is also no evidence of any judgment or decree in favour of a creditor for execution, in terms of Section 271 (b) of the Act. Hence, it is for the Petitioner to prove to the satisfaction of the Court that the Company is unable to pay its debts, taking into account the contingent and prospective liabilities of the Company as per Section 271(c) of the Act.

9. In **Company Law by Kanaganayagam Kang-Isvaran**, section 271(c) of the Act was discussed as follows:

“... A “contingent liability” is a liability that will occur only if a specific event happens; a liability that depends on the occurrence of a future and uncertain event. ...

A “prospective” liability is a legal or accounting term of art, which has been defined as a present debt not yet finally established or quantified. ...

A company’s contingent or prospective liabilities have to be taken into account, and therefore it may be unable to pay its debts although it has been paying its debts as they become due, if its existing or probable assets will be insufficient to meet its liabilities, including its contingent and prospective liabilities.

What has to be proved under section 271(c) is not whether the Company’s assets exceed its liabilities, but whether it is unable to meet its current demands. If a company’s assets are insufficient to meet its liabilities, and it is found that the company is heavily indebted, all its assets being under mortgage or pledge, and there is no chance of the business progressing

or making a profit, there is a case made out for winding up by the Court.”

10. Section 273 of the Act provides for the powers of Court on hearing a winding up petition. As per section 273(2) of the Act, where a winding up Petition is presented by shareholders of the Company on the ground that it is just and equitable that the Company should be wound up, where the Court is of the opinion that it is just and equitable that the Company should be wound up, the Court shall make such order, unless the Court is of the opinion that some other remedy is available and they are seeking to wind up without pursuing the other remedy.
11. It was submitted by the learned Counsel for the Petitioner that taking into account the current financial position of the Petitioner Company as exhibited by the Auditor’s report [P-4] and the prevailing economic situation of the country, there is no reasonable prospect of earning a profit.
12. As submitted by the learned Counsel for the Respondent, the audited accounts of the Petitioner Company have not been produced. The report [P-4] simply states that if the Company does not take steps to improve its cash flow position, it will be unable to finance its short-term liabilities and debt repayments. Without taking any steps to improve its cash flow position as stated in the report [P-4], the directors who are also the shareholders of the Company hurriedly passed the resolution to wind up the Company on the following day itself and made the application to Court the next day. The Petitioner Company has therefore failed to submit sufficient material to prove to the satisfaction of the High Court, that the Company is unable to pay its debts as defined in Section 271(c) of the Act. The learned High Court Judge has correctly concluded that the Petitioner has not annexed the audited accounts or has not set out the contingent or prospective liabilities of the Petitioner. The auditor’s report [P-4] has not set out the assets and liabilities of the Company to satisfy the Court that the Company is unable to pay its debts.
13. The Petitioner has therefore failed to satisfy Court that it is just and equitable that the Company should be wound up. In the

above premise, the question of law (1) is answered in the negative.

14. Although it is not necessary to discuss the questions of law (2) and (3), as per the above reasoning and the answer given to question of law No. (1), for the sake of completeness I will resort to discuss them.
15. The learned High Court Judge in his judgment has said that the Petitioner Company has failed to comply with the requirements provided in sections 319 and 320 of the Act, thereby the entire winding up process is tainted with illegality.
16. The Act provides for winding up by Court, the relevant sections commence with section 270 of the Act. This application was made clearly in terms of section 270 of the Act for the winding up of the Company by Court. That is why the application was filed in Court and moved to follow the procedure laid down for Court assisted winding up.
17. Sections commencing from section 319 of the Act provides for voluntary winding up. As it is not assisted by Court, certain additional safeguards such as the requirement that the resolution passed be published in the Government Gazette within fourteen days, are provided. In terms of section 320, the Company and every officer of the Company who fails to comply with the said provision shall be guilty of an offence.
18. Such requirement to give notice by publication in the Government Gazette is not provided for applications for Court assisted winding up. Therefore, sections 319 and 320 has no application to the instant case.
19. While questions of law No. (2) and (3) will be answered in the affirmative, I must state that no prejudice has been caused to the appellant by the said findings of the High Court as the learned Judge of the High Court has considered the application on its merits.

20. As per the reasons stated above and the answer provided for the question of law No. (1), the appeal stands dismissed with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE KUMUDINI WICKREMASINGHE

I agree

JUDGE OF THE SUPREME COURT