

In Court No. 1 of the District Court of Colombo

Before R.A. Ranarajah, Esq. District Judge

Case No. 217/CO

14.12.2012

Recorded by Steno Nandani Sriyalatha

ORDER

Petitioner has filed a Petition dated 17.11.2006 together with an Affidavit praying for an Order to wind-up Hotel Developers (Lanka) Ltd. on just and equitable grounds.

The Petitioner has made the relevant Application as a contributory Shareholder of 70,000 Shares of Rs. 10 each in the Company sought to be wound-up.

Whilst the Inquiry pertaining to the Application of 17.11.2006 of the Petitioner was proceeding, Attorney-at-Law for the Company sought to be wound-up, Hotel Developers (Lanka) Ltd., now known as Hotel Developers (Lanka) PLC, having filed a Motion dated 15.3.2012 that when this was called on 16.2.2012, the Hon. Judge made Order directing that the Case be called on 15.3.2012 for the Application of the intervenient-respondent be tendered in writing and that as per the said Order made the following submissions on behalf of the intervenient-respondent.

The Parliament of the Democratic Socialist Republic of Sri Lanka had named Hotel Developers (Lanka) Ltd. under No. 1 in the first Schedule to the 'Underperforming Enterprises and Underutilized Assets Act No. 43 of 2011' and that under Section 2 of the said Act, the Assets and Shares of the said Company had vested in the Secretary to the Treasury on behalf of the Government with effect from 11.11.2011 being the date being the date of the said Act came into operation.

Furthermore, as per Section 3 (1) of the said Act, the Cabinet of Ministers (upon Cabinet Decision No. 11/2181/504/132-11) had appointed President's Counsel, Mr. Senaka Walgampaya as the Competent Authority in relation to Hotel Developers (Lanka) Ltd.

It is respectfully submitted that, accordingly by the operation of Section 3 of the said Act, all Shares and Assets owned by the Petitioner and other Parties in this Case had already been vested in the Competent Authority.

It is further very respectfully submitted that, should this Hon. Court proceed with this Case or make Order to wind-up Hotel Developers (Lanka) Ltd., then it would be acting contrary to the express provisions of 'Underperforming Enterprises and Underutilized Assets Act'.

What is respectfully further submitted on behalf of the intervenient-respondent is that :

- a) by the operation of Act No. 43 of 2011, the Petitioner is no longer a Shareholder
- b) there is no legal basis for the Petitioner to have and maintain this action before this Court
- c) the Petitioner's Case ought be dismissed on these grounds

Taking the same stance the Secretary to the Treasury, who is an intervenient party had also filed a Motion dated 15.3.2012.

Parties have caused the inquiry into the Applications made by the said 2 Motions to be concluded by way of Written Submissions.

Company Law in Sri Lanka – Arrita R. Wikramanayake at page 360 had dealt with the provisions of Section 532 (1) of the Companies Act No. 7 of 2007, as follows :

“The provisions of the Act will not apply to winding up proceedings that have commenced before the appointed date. Such proceedings will continue in the same manner and with the same incidents as if the Act had not been enacted, and under the law which was in force at the time the proceedings were commenced.”

The Petitioner has filed the relevant Petition on 17.11.2006 through which he had prayed for an Order to wind-up Hotel Developers (Lanka) Ltd. The said Application had been made under the provisions of the Companies Act No. 17 of 1982. When facts as cited from Company Law in Sri Lanka are taken into focus, included the provisions of the Companies Act No. 17 of 1982 are relevant to the Petitioner’s Application for winding-up.

Section 257 (1) of the Companies Act No. 17 of 1982 had provided a Shareholder to file a Petition praying for the winding up of the Company, thus :

“257. (1) An application to the court for the winding up of a company shall be by petition, presented subject to the provisions of this section either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, jointly or separately;”

Sections 248 and 249 describe/direct/interpret as to what the liabilities of a contributory Shareholder, are and who such contributory Shareholder is in winding-up of a Company.

In Section 249 a contributory is specified thus:

“249. In this Part the expression “contributory” means every person liable to contribute to the assets of a company in the event of its being wound up, and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory.”

Accordingly, it could be held that the Petitioner had come forward on the basis that he is a Shareholder of the Company sought to be wound-up and is liable to be a contributory in relation to the liabilities as a Shareholder at the time of winding-up .

The Bill had been passed by Parliament as the ‘Revival of Underperforming Enterprises and Underutilized Assets Act No. 43 of 2011’. In taking into consideration, Section 2 (1) of the said Act with its first Schedule. The Company sought to be wound-up had been identified as an underperforming

enterprise. Accordingly, the Shares of the company sought to be wound-up had vested in the Secretary to Treasury.

The Shares of the company sought to be wound-up had so vested on 11.11.2011 being the date on which the Act came into operation.

Then, the Petitioner is not entitled anymore to the Shares of the company sought to be wound-up. On such basis that he is not entitled to the Shares, in winding-up, he does not stand liable to be a contributory to the liabilities. Hence, action cannot be taken bases upon a finding that the Petitioner is still a contributory for the purposes of this Case.

Filing Written Submissions on behalf of the company sought to be wound-up. It has been submitted that:

“Some of the Respondents have taken up the position that the relevant date for the determination of status / *Locus standi* is the date of institution of proceedings, that is *litis contestation*.

- i) the principle of *Litis Contestatio* is applicable ONLY in adversarial litigation, where part A files action against party B, based upon a cause of action as contemplated by the Civil Procedure Code.
- ii) however it is submitted that winding up proceedings are not based upon a cause of action but are special *sui generis* proceedings which are not adversarial, whereby the Petitioner invokes the jurisdiction of Court to wind up a company. Winding up proceedings are in fact between the Petitioner and the winding up Court and are not adversarial. Accordingly the principles of *litis contestation* would not apply.
- iii) in any event, in several types of proceedings including *Rei Vindicatio* actions and actions for Winding up it has been specifically held that the Plaintiff/Petitioner MUST retain the character in which he invokes the jurisdiction of Court, right until the end of such proceedings in order to obtain relief by Court.”

Winding up proceedings

It is well established that in proceedings for winding up the Petitioner must maintain the character in which he filed the application right through out. For the purpose of brevity the principle as enunciated in *Palmer's Company Law (24th edition)* in dealing with just and equitable winding up in England and Wales is set out for the consideration of Court.

Page 1373 – paragraph 88-89 – the first sentence on the page

In considering whether it is just and equitable to wind up a company, the court must have regard to the facts existing at the time of the bearing of the petition, and not to those existing at the time the position was presented”

This could having been satisfied on the facts so submitted, would be acting based upon such submissions in making the Order.

Facts have been adduced to the effect that the application which caused the issuing of the Order having been made by way of Motions had been contrary to the provisions of Section 375 of the Civil Procedure Code. It had been submitted that if a consequential application in a Case is to be made it ought to be done by way of a Petition and an Affidavit. It had also been submitted that by reason of the relevant Application having not been made in such manner it ought to be dismissed *in-limine*.

The following had to be deliberated upon by Justice Balapatabendi in delivering the Judgment in *Edirisinghe Vs. Wimalawardane* and another 2002 [3] SLR Page

“The object of civil procedure is to prevent civil proceedings from being frustrated by any kind of technical irregularity, or lapse which has not caused prejudice or harm to a party. (vide the decision of *Distilleries Co. Ltd., V. Kariyawasam*) in the same case *Nanayakkara, J*, said that :

As Chief Justice Abraham remarked in the case of *Velupillai V. The Chairman, District Council Jaffna* that “the Court of law is a Court of Justice and it is not an academy of law should be always uppermost in one’s mind. The court should not approach the task of interpretation of a provision of law with excessive formalism and technicality. The Code of Civil Procedure provides a series of rules designed to facilitate the orderly and impartial conduct from the stage of drafting of the pleadings until the judgment and execution of decree. Therefore, the rules of procedure have been designed and formulated to facilitate due administration of justice.”

In comparison to such deliberation, the submissions made that the application which resulted in this inquiry had been filed in an irregular manner would be taken into consideration. It had not been established that prejudice would be caused to the Petitioner by making the relevant application by way of a Motion. Accordingly, the preliminary objection is rejected.

By reason of the Petitioner not being a Shareholder of the company sought to be wound up, it cannot be acted upon the basis that the Petitioner is a contributory Shareholder of the Company sought to be wind-up. He not being a contributory to Shares, the Petitioner has no entitlement to have and maintain this action any further.

Facts being as such I make Order dismissing the Petition dated 17.11.2006 of the Petitioner.

Sdg.

(R. A. Ranarajah)

Distict Judge, Colombo

14.12.2012