

IN THE HIGH COURT OF FIJI
AT SUVA
COMPANIES JURISDICTION

Winding Up Action No. HBE 59 of 2014

IN THE MATTER of BUILDERS STORE LIMITEDa
limited liability company having its registered office at
7 Dhanji Street, Samabula.

AND

IN THE MATTER of the Companies Act 1983.

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Mr. Shelvin Singh: for the Petitioner.
Ms. Chetty: for the Respondent.

Date of Hearing : 17th August, 2015
Date of Judgment : 09th December, 2015

JUDGMENT

INTRODUCTION

1. The Petitioner, Lohar Investments Limited instituted this winding up proceedings against the debtor company, Builders Store Limited seeking the following orders inter alia;
 - i. *That the company may be wound up by the court under the provisions of the Companies Act.*
 - ii. *That the cost of the Petitioner be taxed and paid out of the assets of the Company.*
 - iii. *That the Official Receiver attached to the court be constituted Provisional Liquidator of the affairs of the Company.*
 - iv. *That such other order may be made in the premises as shall be just,*
2. The application is made pursuant to the *Companies Act 1983*.

3. Reference is also made to *s. 2(1) and (4) of the interpretation Act Cap 247, Rev. 1985*, as well as *Legal Notice No. 89 of 1983* respectively.
4. The Winding up Petition was served on the Respondent Company on 28th October 2014 who failed to file any affidavit in opposition.
5. Subsequently, the Respondent Company made an application by Summons to court and sought for an extension of time to file the affidavit in opposition.
6. The Petitioner consented for the extension of time allowing the Company to file and serve their affidavit in opposition which was filed on 16th February, 2015.

BRIEF FACTS OF THE CASE

Petitioner's Case

7. *The Respondent Company, Builders Store Limited owes monies to the Petitioner, Lohar Investments Limited.*
8. *These were advances provided to by Petitioner to the Company from time to time at its request on an interest of 12% per annum.*
9. *The winding up petition was filed on the basis that the debtor company is indebted to the Petitioner in the sum of \$458,218.32 inclusive of 12% per annum interest.*
10. *The Debtor Company has completely failed or neglected to pay the balance now owing or to make any reasonable offers to the Petitioner to secure or compound the same.*

Respondent's Case

11. *The debt is a shareholder's advance given since Mr. Praveen Prakash is a director as well as a shareholder of both, the Petitioner and the Respondent Company.*

12. *Directors of Builders Store Limited had raised a debenture in favour of Lohar Investment Limited to pay off the advance given by the Petitioner given that he was a majority shareholder and demanded payments of his invested sum of monies.*
13. *A resolution has been agreed to by the members of the Company to pay off the advance in 9 months' time frame expiring on 31st March, 2015, but the Winding up Petition was filed before the lapse of this 9 months' time frame. This demand was uncalled for as there was already a plan in place by Builders Store Limited to repay the Petitioner his advance to Builders Store Limited.*
14. *No securities have been registered in respect of the debt.*

Petitioner's Reply

15. The debt is an advance to the Company which the Petitioner provided from time to time together with interest at the rate of 12% per annum.
16. He did not agree to the amortization plan and in any event, no monies have been paid to him.
17. Evidence of a shareholders resolution of 23rd May, 2014 has been provided (at annexure 'B' to his affidavit in Reply) where a payment plan had been accepted but again no payments were made.
18. The signed Debenture documents had been provided to by the Petitioner's lawyers and he did not see any commercial sense in paying stamp duty and registering the documents given that no payments were being by the Company.

THE LAW

19. *Section 220 of the Companies Act [Cap 247] ("the Act") states that a company may be wound up if it is unable to pay its debt.*

20. The Definition of inability to pay the debt has been defined under *section 221* of the Companies Act, where it states that;

“A company shall be deemed to be unable to pay its debts-

- (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding \$100 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 3 weeks thereafter; neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or*
- (b) if 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) if 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”.*

21. As indicated in *Arjun & Sons Timber Mills Ltd v Babasiga Timber Town Ltd* the onus is on the Petitioner to establish that the Company is unable to pay its debt. Justice Pathik stated as follows:

This Petition is brought on the ground that the Company is unable to pay its debts. I find that such is the situation here. The creditor has to prove a negative, that negative being that the Company cannot pay its debts.

22. As stated in *section 221 of the Act*, a company is deemed to be *insolvent* (unable to pay its debt) if it fails to pay its debt within 3 weeks of the creditor issuing a statutory demand. Justice Pathik went on to state (in *Arjun* [supra])

No question of statutory demand arose in GLOBE (supra) but the Companies Act Cap. 247 have provided for certain situations where deemed inability to pay debts arises. Even if the company can show that it is able to pay its debts, it will do no good whatsoever. If the situation exists, it is deemed unable to pay its debts whether or not that is in fact correct.

It was so held in CORNHILL INSURANCE PLC v IMPROVEMENT SERVICES LTD and OTHERS (1986 1 WLR p.114) as follows:-

"Held, refusing the application, that where a company was under an undisputed obligation to pay a specific sum and failed to do so, it could be inferred that it was unable to do so; that, accordingly, the defendants could properly swear to their belief in the plaintiff company's insolvency and present a petition for its winding up."

23. The Dispute as to the debt must be bona fide and substantial. The Court in Winding up Action HBE 0035 of 2007 -*Sani-tronics & System (Fiji) Limited*, quoted the following statement of Scott. J in HBE No. 003 of 1994 *Ramans Emporium Limited*-

'Of course the mere assertion that the debt is disputed will afford no protection since otherwise the winding up procedure could simply and easily be avoided.'

'The burden in these proceedings is on the company to bring forward a prima facie case which satisfies the court that there is something to be tried.' (See *Re-Great Britain Mutual Life Assurance Society (1880) 26 Ch D 246 at 253*).

24. Where the Company does not deny being indebted but disputes the amount of the debt, the court has found this as not being sufficient enough to dismiss the Petition. In the present case, the Petitioner's case is that Lohar Investments gave advances of monies to the Respondent Company, Builders Store Limited totalling up to \$458,218.32 as at 04th September, 2014. This was in fact advance and not shareholders investment in the Company. On the other hand, Builders Store Limited's contention is that it was not an advance rather shareholders investment. But, at paragraph 5(f) of the Respondent Company's submissions, the Company's Counsel submitted that *"the Directors of Builders Store Limited had agreed on a 9 months repayment plan to pay off the monies to Lohar Investment Limited and the Petitioner was aware of this repayment plan, however a winding up Petition was filed by the Petitioner prior to the expiry of the 9 months time frame."* Why a repayment plan if the Company's contention is that it was an investment in to Builders Store Limited? Further, reference is also made to the contents of the e-mail dated Friday 23rd May, 2014, Filed as annexure "B" within the affidavit of Parveen Prakash filed 10th March, 2015, which is self explanatory.

(Emphasis added).

In Sani-tronics & System (Fiji) Limited, the court with approval, quoted the following statement of His Lordship Mr. Justice Pathik in HBE 4 of 2003 *Avon Investment Limited*-

'In this case, there is no doubt that a specific sum or a liquidated sum was owed by the Company, but I find that only to avoid payment the Company says that it disputes the balance amount owing. In this kind of situation, In re Tweed Garages Ltd. 1926 1 Ch 407 at 408 where the company admitted the existence of the debt to the Petitioner but disputed the amount of debt alleged in the Petition, it was held:

'that the only qualification required of the Petitioner was that it was a creditor, and that where there was no doubt (and there was none here) that the Petitioner was a creditor for a sum which would otherwise entitle it to a winding up order, a dispute as to the precise amount was not a sufficient answer to the Petition.'

ANALYSIS and DETERMINATION

25. Lohar Investments Limited ("the Petitioner") commenced proceedings by a winding up petition to wind up Builders Store Limited ("the Company") on the basis that it is unable to pay its debt of \$458,218.32 inclusive of interests at the rate of 12% per annum (up to 04th September, 2014) thereon, being the amount owing for monies advanced to the Company.
26. On 08th September 2014, the Petitioner served a Demand Notice ("s.221 notice") to the Company pursuant to section 221 of the Companies Act ("the Act") for the payment of the debt.
27. The s.221 notice was served on the Company at its registered office situated at 7 Dhanji Street, Samabula; P. O. Box 9573, Nakasi.
28. Despite service of the s.221 notice, the Company made no payments.
29. On 16th October January 2014, the Winding-up Petition ("the Petition") was presented to the Chief Registrar of High Court, Suva.
30. The Winding-up Petition was listed to be heard before the Chief Registrar of the High Court on 28th November, 2014 at 10am, for the Petitioner or his barrister and solicitor to appear for the purposes of rule 28 of the Companies (Winding Up) Rules, 1983.

31. The Affidavit of Shelvin Singh Verifying Petition was sworn on 20th October, 2014 and filed.
32. The Petition was duly advertised in the *Fiji sun* newspaper on 08th November, 2014, and in the Republic of the Fiji Islands Government Gazette on 14th November, 2014.
33. On 23rd June, 2015, the Petitioner's Memorandum of Due Compliance was filed pursuant to rule 28 of the Companies (Winding Up) Rules and the High Court Practice Direction No. 2 of 1986.
34. The Company disputes the debt on the basis that-
 - a. That the monies claimed by the Petitioner as debt was in essence the Petitioners investment in Builders Store Limited in his capacity as a shareholder and therefore was the shareholders advance.;
 - b. The Petitioner only commenced winding up proceedings when Builders Store Limited failed to provide personal guarantee or securities for the invested/advanced the sum of monies totaling \$458,218.32 to the Petitioner; and
 - c. The Respondent Company, Builders Store Limited is not indebted to the Petitioner in the given circumstances.
35. Where the debt is disputed (as in this case), the Company must prove that the dispute is on substantial grounds. Justice Pathik in *Arjun & Sons* [supra] stated:

The Company says that the debt alleged is disputed. To be able to succeed in a case of this nature, the Company has to prove that the dispute is on 'substantial grounds' *Re Lympne Investments Ltd* [1972] 2 All ER 385).

(Emphasis added)

36. Justice Pathik had a similar view in *Vivross Development Ltd v Australia and New Zealand Banking Group Ltd* [2002] FJHC 245; HBC 0290d. 2001s (15 February, 2002), Justice Pathik stated:

The question therefore is whether the debt is disputed on substantial grounds. If so, whether the Court ought to grant the relief sought by the plaintiffs.

It is a general principle that a petition for winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the Court and should be dismissed with costs (Palmer's Company Law Vol.3 15.214 and cases cited therein). In Palmer (ibid), on the principles involved it is further stated:

To fall within the general principle the dispute must be bona fide in both a subjective and an objective sense. Thus the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the court should ignore. There must be so much doubt and question about the liability to pay the debt that the court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the court that there is something which ought to be tried either before the court itself or in an action, or by some other proceedings.

(Emphasis Added)

37. The Company has failed to adduce sufficient evidence to establish a *prima facie* case which satisfies this Court that *there is something which ought to be tried either before the court itself or in an action, or by some other proceedings*, let alone any evidence to establish its solvency.

CONCLUSION

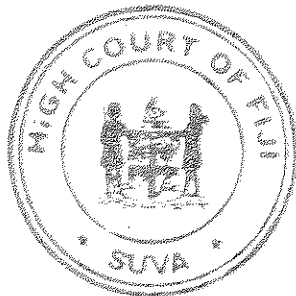
38. There is clear evidence which indicates that a debt is owed by the Company to the Petitioner. The Petitioner issued a statutory demand which the Company failed to satisfy within 3 weeks of its issue. The Petitioner has complied with the requirements of the Act and the Rules.

39. The Company has failed to provide any evidence to establish a dispute on substantial grounds as required in terms of the Companies Law. It is insufficient for the Company to simply assert that the debt is disputed. There is no evidence before this Court to indicate the Company is solvent or that it is able to pay its debts.
40. For the above reasons, the Petitioner's application seeking winding up of Respondent Company Builders Store Limited, is hereby acceded to and I now proceed to make the following orders.
41. I make the following orders.

FINAL ORDERS

- a. That BUILDERS STORE LIMITED is hereby wound up under the provisions of the Companies Act.
- b. That the Official Receiver is appointed Provisional Liquidator of the Company.
- c. That the costs of the Petitioner be taxed and is hereby ordered to be paid out of the assets of the Company.

Dated at Suva this 09th of December, 2015.



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VISHWA DATT SHARMA
MASTER OF THE HIGH COURT
SUVA

cc: *Mr. Shelvin Singh of Shelvin Singh Lawyers, Suva.*
Ms. Chetty of Neel Shivam Lawyers, Suva.