

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Companies Action No. HBE 53 of 2020

IN THE MATTER of **DRIVE THRU HOLDINGS (FIJI) PTE LIMITED** a limited liability company incorporated in Fiji and having its registered office at 21 Dilo Street, Samabula, Suva in the Republic of Fiji, P.O. Box 12184, Suva.

IN THE MATTER of an application for winding up application pursuant to Section 515 of the Companies Act.

BEWEEN: **ASHIKA ANJALEN SHARMA** trading as **TODAY'S ENVIRONMENTAL SOLUTIONS & CONSULTANCY** of 20 Nababa Place, Off Salato Road, Namadi Heights, Suva.

APPLICANT

AND: **DRIVE THRU HOLDINGS (FIJI) PTE LIMITED** a limited liability company incorporated in Fiji and having its registered office at 21 Dilo Street, Samabula, Suva

RESPONDENT

Counsel : **Applicant: Ms. M. Rakai**
 : **Respondent: Mr. N. Sharma**

Date of Hearing : **9.12.2020**

Date of Judgment : **29.01.2021**

JUDGMENT

INTRODUCTION

1. This is an application seeking winding up of a company for failure to honour a debt in terms of Section 515 of Companies Act. Applicant (Petitioner) and Respondent

entered in to an agreement to share profits of a specific work to be contracted to the Company. This work was subsequently awarded through sub contract to the Company and was also fully paid upon successful completion of work. The work assigned to the Company was a specialized work that needed expertise in the field due to hazardous nature of work and material involved. Petitioner had necessary skills and expertise in the field and was also a consultant to the main contractor. The work each party needed to fulfill was not specified in the contract between the Company and Petitioner, but only state profits were to be shared equally. The Company had submitted expenditure for the task, but Petitioner does not agree with such expenses. Winding up is not suitable for determination of such a dispute. By the same token, the Company cannot refrain from payment of undisputed debt, though some part was disputed.

FACTS AND ANALYSIS

2. The dispute relate to amount due to Petitioner from a sub contract of a specific task that required specialized knowledge.
3. There was no evidence that the Company had any knowledge or expertise in the field.
4. Petitioner had necessary expertise in the field and recognized as consultant in the field.
5. Petitioner and the Company had entered in to an agreement to share profits of the specific task without specifying their respective engagement in the task. So, the debt would accrue upon successful completion of task and profits made out of that irrespective of manner in which each party was engaged.
6. Petitioner is entitled to equally share the profits of payment received by the Company for specific task. There is no dispute as to payment and completion of task successfully.
7. So, a debt had accrued to Petitioner from the undisputed amount of profit. The disputed part of profit cannot be determined in this action.
8. High Court is conferred with jurisdiction to wind up companies in terms of Section 512 of Companies Act 2015.
9. In terms of Section 514 of Companies Act 2015 a company is solvent when it can pay its all debts and when it cannot do so it is considered as insolvent.
10. Unless a contrary is proven if a debt of more than \$10,000 was not paid within three weeks with reasonable satisfaction of the creditor, such a debtor company is deemed insolvent in terms of Section 515 of Companies Act 2015.

11. Petitioner and Defendant had entered in an agreement to share profits of a certain task for a third party. There is no issue as to entering of said agreement and completion of task. According to said agreement profits from the said task is to be shared equally between the parties to the said agreement.
12. The task was completed successfully and the Company was paid a sum \$98,370.00 for the said task.
13. The company does not dispute the entering in to the contract and or the payment, but states that the task incurred a cost of \$32,569.76 as expenses hence that needs to be deducted from the payment it received.
14. Hence the undisputed profit from the task was 65,800.24 and Petitioner's undisputed debt is half of that amount.
15. The company in its affidavit in opposition had referred to earlier affidavit filed by them where it had given the expenditure and profits, which makes Petitioner entitled to half of that, which is an undisputed debt.
16. Petitioner had deposited \$\$49,185.00 by consent of parties in order to grant leave to defend winding up to High Court in an interest bearing account.
17. Counsel for the Company states that the agreement between the Petitioner and Company could not be executed due to conflict of interest. This is an afterthought, after institution of winding up action. Even at the time of receipt of the demand notice in terms of Section 515 of Companies Act 2015 such an objection was not raised and this is evident from the Company's solicitors' communication dated 29.7.2020.
18. There was no specific law that was allegedly violated in the said agreement between Petitioner and the Company. If the agreement between Petitioner and the Company had violated a clause in another agreement, why was this not raised or notified before performance of contract and also payment in full?
19. The Company had entered in to an agreement with Petitioner to complete a task and then share profits from the venture. Who was assigned specific deeds and what each party has to do, is immaterial when the Company had given the exact expenses incurred for the project.

20. There was a dispute as to expense stated by Company, which cannot be dealt in winding up action, but considering that Company had admitted an expense of \$32,568.76 for completion of task. So profit of \$65,800.24 admitted in evidence.
21. It should also be noted the Company cannot rely on a clause to a contract where Petitioner was not a party, to refuse the payment.
22. The company states that Petitioner did not work, hence not entitled for payment. This was denied and there was no evidence of such an allegation and or termination of contract in that event, before institution of this action. This contention again has no merits.

Section 523 of Companies Act 2015 states,

‘523.—(1) On hearing a winding up application, the Court may—

(a) dismiss the application;

(b) adjourn the hearing conditionally or unconditionally; or

(c) make any interim order, or **any other order that it thinks fit,**

but the Court must not refuse to make a winding up order on the ground only that the assets of the Company have been mortgaged to an amount equal to or in excess of those assets or that the Company has no assets.

(2)..... (emphasis added)

23. In this winding up action there is undisputed debt of \$32,900.12 being half of the profit admitted by the Company. It had deposited a sum of \$49,185.00 by consent of the parties to obtain leave to object winding up. So winding up of company is not warranted though debt was above \$10,000.
24. There are no other supporting creditors in this winding up application and Company had deposited money in excess of undisputed debt of \$32,900.12. In the circumstances by virtue of Section 523(1)(c) of Companies Act 2015 an order is made to deduct a sum of \$32,900.12 from the money deposited in credit of this case in the High Court, by the Company and paid to Petitioner. The rest of money including any interest if any to be paid to the Company. Subject to payment of \$32,900.12 to Petitioner from the money deposited in credit of this action by the Company, the application for winding up is dismissed. Considering circumstances of case no costs awarded.

FINAL ORDERS

- a. Petitioner is to be paid a sum of \$32,900.12 from the money deposited in High Court in credit of this action.

- b. Subject to above, payment of \$32,900.12, winding up application is dismissed.
- c. Petitioner is to be paid remainder of money deposited in this action after deduction of above sum.
- d. No costs.

Dated at Suva this 29th day of January, 2020.



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Deepthi Amaratunga
Justice Deepthi Amaratunga
High Court, Suva