

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 10 of 2023

BETWEEN: **GREEN ACE VALLET SUPPLIES & ELECTRICAL PTE LIMITED** a
limited liability company having its registered office at Tulalevu,
Sigatoka, Fiji.

DEBTOR/ APPLICANT

AND: **GOKAL INTERNATIONAL LTD** a limited liability company having
its registered office at Hong Kong.

CREDITOR/ RESPONDENT

Before: Mr. Justice Deepthi Amaratunga

Counsel: Mr. S. Nandan for the Company
 Ms. L. Prasad for the Applicant

Date of Hearing: 27.2.2024

Date of Judgment: 5.3.2024

JUDGMENT

INTRODUCTION

- [1] Applicant if a foreign incorporated entity, had sought winding up of the Company for failure to pay for the consumer goods supplied by Applicant to the Company. Applicant had accepted the goods and there was no issue as to their quality or quantity but could not produce evidence of a single payment for a single consignment of goods.
- [2] The company accepted service of the Application for winding up, but denied service of statutory demand.
- [3] The Company sought leave to oppose the application for winding up and this was allowed. After considering the material submitted for the opposition it was clear that the Company failed to produce evidence of a single payment though some requests for telegraphic transfer were produced, without evidence of remittance of funds that corresponds to telegraphic transfers. Application for winding up of the Company was granted on 23.8.2023 after hearing the objections of the Company for an order for winding up.
- [4] The Company (in liquidation) had filed summons through its former Director, seeking stay of judgment erroneously stated as judgment of 18.4.2023, pending an appeal. The interlocutory decision granting leave to the Company to oppose the application for winding up, was handed down on 10.7.2023.
- [5] The summons for stay pending appeal was filed on 25.9.2023. As regards to merits of the appeal the only ground advanced at the hearing of summons was alleged failure to serve statutory demand to registered office of the Company.
- [6] There is no dispute as to service of the application for winding up and this is admitted.
- [7] According to affidavit of service, the service was to Registered Office of the Company at Tulavevu, Sigatoka.
- [8] In the affidavit in support seeking leave to file affidavit in opposition sworn by Sujeet Kumar filed on 14.4.2023 at paragrah3 he stated;

“On or about 25.3.2023 the bailiff called me to pick the documents. I went and received the documents which seems to be winding up notice and affidavit in support”.

- [9] The statutory demand was dated 30.11.2022 and this was annexed to the affidavit in support of the Application for winding up. There was prima facie evidence of service of the statutory demand.
- [10] According to statutory demand the debt was USD 76,977.91 and the Company could not produce any payment. Instead it had taken a technical objection of service of statutory demand. According to paragraphs 6 and 7 of the affidavit in support of the Application for winding up, (Form D3) of the statutory demand was served on the Company on 30.11.2022 and more than three weeks had lapsed when the application for winding up was made.
- [11] In terms of Section 517 a defect in demand is not a ground to set it aside unless ‘substantial injustice’ will be caused if it was not set aside. So a technical defect itself will not qualify for setting aside a statutory demand unless substantial injustice is shown. There was no substantial injustice to the Company shown, but there is substantial injustice due to nonpayment of a substantial debt of US\$76,977.91
- [12] In terms of Section 553 of Companies Act 2015, after winding up order was made by the court the order for winding up can be stayed , but the parties who can seek a stay are stated therein. The liquidator or official receiver or contributory or creditor can make such an application.
- [13] The general provision regarding appeal cannot be applied without necessary changes, considering that the status of the Company changes with the appointment of Official Receiver as liquidator in terms of the law.
- [14] In my mind, former director has no locus to file this summons, seeking stay of winding up, after winding up order was made. Even if I am wrong on that, the Company could not prove payment for the goods it received in 2019. A substantial time period had lapsed since then.

[15] Stay of winding up order is refused considering overall balance of convenience.

ANALYSIS

[16] An order for winding up of the Company was made on 23.8.2023. Statutory demand was served on the Company on 30.11.2022 in terms of affidavit in support of this application (Form D3, in Companies (Winding up) Rules 2015.

[17] The Company sought leave to oppose in terms of Section 529 of Companies Act 2015 and after a hearing leave granted to the Company to oppose by the decision handed down on 10.7.2023.

[18] After granting leave for the Company to oppose, Application for winding up was heard and order for winding up made on 23.8.2023.

[19] In terms of Section 530 of Companies Act 2015, 'on the making of a winding up order, the company must lodge a copy of the order with 'the Registrar of Companies for registration of the same. This is due to legal consequences where former Directors of the Company, and employees are terminated.

[20] In terms of Rule 23 Companies (Winding Up) Rules 2015, it is mandatory for the Applicant to immediately inform the liquidator and within seven days of the passing and entering of the order for winding up to serve the liquidator a sealed copy of the order and also to advertise the same in prescribed form. Applicant had complied with the advertisement of the winding up order and this was submitted by an affidavit filed on 19.10.2023

[21] In the Application for winding up an order for winding up was made on 23.8.2023 and in terms of Section 538 (a) the "official Receiver, by virtue of his or her office", became the provisional liquidator. This is the position by default. So in terms of Section 530 read with Rule 23 of Companies (Winding Up) Rules 2015, the winding up of the Company by Official Receiver had begun the process of winding up.

- [22] These facts were supported by an email from official receiver attached to the affidavit in opposition and there was an advertisement of the winding up order against the Company (in liquidation).
- [23] Section 531 of Companies Act 2015 states,
“When a winding up order has been made or a provisional liquidator has been appointed under section 537, no action or proceeding must be proceeded with or commenced against the company, except by leave of the court and subject to such terms as the court may impose.”
- [24] After winding up order is made Director of the Company in receivership under Official Receiver cannot seek a stay of winding up order in terms of Section 553 of Companies Act 2015. Former Director cannot seek a stay of winding up proceedings due to unique nature of such application.
- [25] Section 553 (1) of Companies Act 2015 states
*“553(1) The court may, at any time after an order for winding up, on the application either of the **liquidator or the official Receiver** or any **creditor or contributory**, and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the court thinks fit.” (emphasis added)*
- [26] From the above provisions it is clear that only Official Receiver or Creditor or Contributory can make an application for stay and a former Director of the Company in receivership cannot make an application for stay of winding up in terms of Section 553 of Companies Act 2015. This is a general provision for stay of winding up at any time after such order was made.
- [27] The Company(in liquidation) cannot stall the winding up process on technical ground as the time is the essence of winding up, and statute had specific time period for the conclusion of such action. It is futile to grant an order for winding up within six months as stipulated in the statute or any extended time by the court and to grant a stay of the same till final determination of an Appeal. So

the general provision contained in High Court Rules 1988 for stay of judgment, cannot be applied to order for winding up without necessary changes.

- [28] Section 528(1) of Companies Act 2015 the time period for determination of this application was six months and despite granting leave for the Company to oppose , the order for winding up concluded within six months stipulated under the Act. General inclination of a debtor is to delay the payment and extend the period of credit. This can be done through litigation as delay in litigation is hard to eliminate. Winding up is an exception to such delay as relief can be obtained within a short period of time. Stay of an order for winding up needs to be granted only in limited circumstances and when there are default of due payment of USD 76,977.91 from 2019 a technical objection to service of demand cannot be considered as meritorious ground of appeal to stay.
- [29] It is clear that legislature had prevented debtors abusing the process of winding up and prolonging an application for winding up more than six months. The court is granted power to extend that time period beyond six months, but again the window of opportunity is limited without granting general discretion to court.
- [30] In the light of the above, a stay of winding up application cannot be considered as a general stay of a judgment in terms of High Court Rules 1988. Another reason, is the change of status of the Company after an order for winding up was made. This makes difficult for the Company (in liquidation) to made an application to court as it had changed its status from its former status prior such an order was made.
- [31] This raises issues such as payment of legal costs if the application is not successful. There is an issue as to proper representation without Official Receiver's concurrence. This summons seeking stay of winding up was filed by a former director of the Company (in liquidation), while Official Receiver proceeding with the process winding up of the Company.
- [32] Accordingly Section 553 of Companies Act 2015, the parties who can seek stay of winding up, and the restrictions applies and this application is dismissed *in limine* without considering merits.

[33] Official Receiver had neither granted consent nor was notified about this application. It is clear that former Director of the Company cannot file this summons seeking stay of winding up without exhausting seeking concurrence of the Official Receiver, which is the minimum requirement after order for winding up made.

[34] Even if I am wrong on the above, stay of judgment is discretionary. Inability of a legal entity to pay its creditors when the debt is more than \$10,000, creates a legal fiction as to insolvency of the debtor company. This legal fiction had granted the Applicant to seek winding up of the debtor. The debt is substantial and this had arisen from goods supplied and received by the Company, but had failed to pay for the items received. The debt had arisen in 2019 and substantial time period had lapsed, so a discretionary remedy such as stay of winding up order cannot be granted considering circumstances.

[35] Without prejudice to above the grounds for stay of judgment is discussed below.

Whether if no stay is granted the applicant's right to appeal will be rendered nugatory.

[36] According to deponent of the affidavit in support the Company is solvent and its stock at hand is worth more than \$150,000 and it was illegally held under distress. These are statements of former Director of the Company (in liquidation) without any supporting documents. No accounts or supporting documents submitted as to the stock at hand or other assets of the Company (in liquidation).

[37] If so this is a matter for Official Receiver can deal with assessment of debt and the ability to settle them in timely manner. The amount of debt can be ascertained upon proof of debt.

[38] It is the liquidator who can assess the value of the stock and or other assets of the Company and report the same to court and make an application for stay in terms of section 553 of Companies Act 2015. This is another reason that stay of winding up is restricted in terms of Section 553. An allegation as to solvency of the Company (in liquidation) cannot be independently ascertained without supporting material and or Official Receiver's report in terms of Section 553(2)

of Companies Act 2015. As Official Receiver is not a party to this summons, the obligation to submit material facts to support solvency was with former Director.

- [39] So if there are assets to pay the debt of the Applicant, Official Receiver seeks a stay of winding up and there is no evidence of such assets to pay the creditors including the Applicants. This will be done after a meeting of all creditors if there are sufficient funds as alleged in affidavit in support of this summons. The right to appeal is not made nugatory due to refusal of the stay in the circumstances of this action. Official Receiver can proceed with the call of creditors and proof of debt in terms of law.

Whether the successful party will be injuriously affected by the stay

- [40] Applicant of winding up will be injuriously affected by allowing a deemed insolvent company to operate if order of winding up is stayed. This is mainly due to depletion any remaining assets of the Company including stocks, if it is allowed to operate, without payment of a debt that had arisen in 2019 with the supply of goods.

The bona fides of the applicant

- [41] Bona fides of the former director to rely on technical defect, to stay winding up, without proof of a single payment for consignments of goods the Company received and also presumably sold in 2019, is also doubtful considering the past conduct .
- [42] The conduct of the Company relating to payment are also deceptive as telegraphic transfer applications made through a Bank, without actual funds being remitted. Such conduct by the Company is evidenced at hearing of the application for winding up.
- [43] In the light of such conduct a reasonable suspicion raised as to bona fide of the former Director.

The effect on third parties

- [44] It is alleged that there are four persons employed. This is not a reason to allow a defaulting company for a substantial amount as nonpayment of substantial debts can seriously affect employment of its creditors. Timely payment of credit is important for survival of legal entities and their employees. So employment of four persons is not a reason to favour granting of stay order for winding up.
- [45] After winding up order made the employees of the Company (in liquidation) cannot legally claim for employment with such an entity. So this is not a reason that favours grant of stay of winding up.

The novelty and importance of questions involved

- [46] There is no novelty in the appeal as technical defects cannot override 'inability to pay its debt' when they are due. The paramount consideration in winding up application is the debt.
- [47] Section 517 of Companies Act requires 'substantial prejudice' for setting aside of demand for technical issues. So there is no novelty in the alleged ground that relied at hearing.

Public interest in the proceedings

- [48] There is no public interest in this winding up action. It is a debt between two commercial entities in their line of business.

The overall balance of convenience and the *status quo*

- [49] By virtue of the statutory provisions the *status quo* of the Company has changed. At the moment provisional liquidator is Official Reviver hence the process of winding up had begun with advertisement of the order for winding up. According to affidavit in support of this summons for stay, the stocks of the

Company are also under distress. So granting a stay of winding up will not serve any purpose as to operation of the Company.

[50] Balance of convenience favours the Applicant of winding up as their debt is overdue for over five years. It is futile to stay winding up order, on a technical ground. The paramount consideration in an application for winding up is the inability to pay the debt when payment was due. The Company had defaulted payment since 2019.

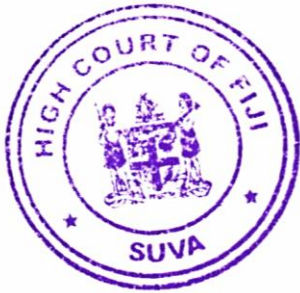
[51] The paramount consideration is nonpayment of debt of USD 76977.91. There is no dispute as to receipt of the goods or their merchantable quality. As long as there was no evidence of payment of it for the goods they received setting aside of statutory demand will not serve any purpose. If there is a debt of over \$10,000 the Company is deemed insolvent. This is a legal fiction and a wind up order can be made.

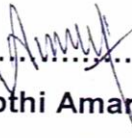
CONCLUSION

[52] This summons seeking stay is struck off *in limine* in terms of Section 553 as former Director of the Company (in liquidation) cannot seek a stay of winding up action. Without prejudice to that, the Company was granted leave to oppose and was not successful as there was no evidence of payment or transfer of funds for the goods received. Balance of convenience lies with the refusal of stay of order for winding up made on 23.8.2023. The summons for stay is stuck off. No cost awarded considering circumstances of the case.

FINAL ORDERS:

- i. Summons for stay of winding up filed on 25.9.2023 is struck off;
- ii. No order as to cost.




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Deepthi Amaratunga
Judge

At Suva this 05th day of March, 2024.

Solicitors:

Sherani & Company

Reddy and Nandan Lawyers