

IN THE HIGH COURT OF FIJI
AT LABASA
COMPANIES JURISDICTION

Winding Up Action No. 01 of 2015

In the Matter of Jogi Brij Lal
And Sons Limited a body corporate
having its registered office at Nasea,
Labasa

AND

In the Matter of the Companies Act

AND

In the Matter of application for a
Winding Up Order pursuant to Section
212 and 220 of the Companies Act.

BETWEEN : Subhash Rai Chand

Petitioner

AND : Vijay Kumar

Respondent

BEFORE : The Hon. Mr Justice David Alfred

Counsel : Mr. A Kohli for the Petitioner
Mr A Sen for the Respondent

Date of Judgment : 18 January 2016

JUDGMENT

1. This matter came up before me on 13 July 2015 when I gave directions, at the Petitioner's Counsel's request, on the date lines for the filing of the written submissions and Reply by Counsel.
2. On 27 November 2015 the matter again came up before me. As written submissions had been filed, I informed Counsel that I would consider them and reserved my judgment to a date to be notified.
3. In the course of reaching my decision, I have perused:
 - (1) The Winding Up Petition.
 - (2) The Affidavit Verifying Petition (the Affidavit).
 - (3) The Affidavit in Opposition of the Respondent.
 - (4) The Answering Affidavit of the Petitioner.
 - (5) The Written Submission of the Petitioner's Solicitors.
 - (6) The Written Submission of the Respondent's Solicitors.
 - (7) The authorities cited.
4. I now proceed to deliver my judgment. By his Petition (the Petition) filed on 13 April 2015 the Petitioner seeks, inter alia, to have Jogi Brij Lal And Sons Limited (the Company) wound up by the Court under the provisions of the Companies Act, 1983 and the Official Receiver constituted the Provisional Liquidator of the Company.
5. The grounds upon which the Petitioner is making his application are set out in para 6 of the Petition as follows:
 - (a) The respondent has been conducting the affairs of the company which are prejudicial to the interests of the company;
 - (b) The respondent has been siphoning company funds for his own personal use and to purchase properties for his own use;
 - (c) The respondent has falsified company accounts and has been filing false accounts with the Fiji Revenue and Customs Authority as a result of which the company has to pay penal tax;
 - (d) The respondent has failed to file the Annual Returns of the company;

- (e) The respondent has failed to call any meetings;
- (f) The respondent has failed to give the petitioner any notice of any meetings;
- (g) The respondent has removed the petitioner as the director of the company without informing him;
- (h) The respondent has appointed the respondent's wife as the secretary;
- (i) The respondent has failed to keep proper books of accounts of the company.

6. The Petitioner submits, in para 8 thereof, that the above justifies his contention that the affairs of the Company are conducted in a manner oppressive to the Petitioner, as a minority shareholder, and that it would therefore be just and equitable that the Company be wound up.
7. In the Affidavit, the Petitioner states, the Company was formed by his late father with its shareholders being his father, his brothers the Petitioner and Jagdishwar Lal (Jagdishwar), and himself; that all held one share each, drew \$600.00 each per month as directors and participated in the running of the business and were involved in the management of the Company; that after the death of his father, the Respondent acquired the deceased's share so that at the present time, the Respondent holds 50% of the shares, the Petitioner holds 25%, and the estate of Jagdishwar holds 25%; that the Respondent did not allow him to have any say in the management of the Company; that he was ousted from the Company and his employment terminated; that the Respondent had been siphoning the Company funds to purchase properties of his own; that the Respondent had committed fraud on the minority shareholder; and that having lost all confidence in the management of the Company and faith in the directors, the Company should be wound up.
8. The Respondent, in his Affidavit in Opposition, denied the Petitioner's allegations, and averred that it was the Petitioner who departed from the Company business; that the Petition was an abuse of the process of the court; that the Petitioner had not complied with the relevant requirements of the

Companies Act and that it is not just, fair and equitable to grant the reliefs sought by the Petitioner.

9. The Answering Affidavit of the Petitioner basically denied the allegations in the aforementioned affidavit of the Respondent.
10. There are 2 preliminary objections of the Respondent that I need to deal with before considering the real issue whether it is just and equitable for the Company to be wound up.
11. The first objection is that the Respondent in a winding up petition cannot be an individual. The Application is made pursuant to Sections 212 and 220 of the Companies Act (the Act). The Respondent's Solicitors in their written submission contend that in a winding up petition, the respondent cannot be an individual and further that the petition can only be brought by the Attorney General. This requires me to peruse Section 212 of the Act and Form 5 in the Schedule to the Companies (Winding-Up) Rules. Section 212 only provides that any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself); or, in a case falling within subsection (2) of section 173, the Attorney-General may make an application to the court for an order.
12. The Respondent's solicitors have failed to pay heed to the "or," which is disjunctive and which means that there are 2 different situations here. Either the member or the Attorney General can make an application. The Attorney General may make an application only if it is a case falling within section 173(2). This subsection provides that if from a report from an inspector, it appears to the Attorney General that it is expedient to do so, he may present a petition for that body corporate to be wound up. This is not the case here.
13. Further the Petition is in Form 5 which is the appropriate form for a petition by a minority shareholder, which is what the Petitioner is.

14. In any event, the Respondent's solicitors has not cited any authority to bolster their contention that an individual cannot be the respondent. On the other hand, the Petitioner has cited the Ruling of the High Court at Lautoka in Winding Up No. 6 of 2013 In the matter of Cumberland Holdings Limited (Cumberland). The Ruling states it is an application for a winding up order pursuant to sections 212 and 220 of the Act. The Petitioner is a minority shareholder and the Respondents are husband and wife and together the majority shareholders of the company. The Acting Master, Mohamed Ajmeer, as he then was, ordered the company to be wound up because the Petitioner had made out a case for a winding up order on the just and equitable ground, as the Master was of the view that the Respondents had conducted the affairs of the Company in a manner which was oppressive, prejudicial or unfairly discriminatory to the Petitioner.
15. In my considered opinion the Respondent can be an individual and this Petition can be granted under Section 220 of the Act which section is specifically stated in the intitulement of the Petition.
16. The second objection is that the petition was not advertised in the Gazette at least 7 days before the hearing. I note from the court file that the Petition was fixed for hearing on 3 July 2015. According to the annexure to the Affidavit of Service sworn by Kamal Chand, the Petition was advertised in the Government of Fiji Gazette on 19 June 2015. This is clearly in excess of the requisite 7 days, laid down in Rule 23 of the Companies (Winding-Up) Rules.
17. The Petition having being filed in the requisite Form 5 and having been filed by a member and having been advertised in the newspaper and Gazette as required by the Act and Rules, I find there is no substance in the Respondent's objections and I hereby dismiss them.
18. I turn now to the nub of the matter which is whether it is just and equitable for the Court to wind up the Company.

19. The leading authority in this area is the decision of the House of Lords (now the Supreme Court) of the United Kingdom in *Ebrahimi v Westbourne Galleries Ltd and Others* [1973] A.C 360. In this case one of the 2 founding shareholders and directors (the Petitioner) of the company was removed as a director and excluded from the conduct of the company's business. The House of Lords held it was just and equitable that the company be wound up. The petitioner had established that the other 2 directors and shareholders were not entitled in justice and equity to make use of their legal powers of expulsion. Lord Wilberforce in his speech said at page 379:

“The words [just and equitable] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure.”

20. The Petitioner in para 14 of the Petitioner's Affidavit states he had been removed as a director of the company without his knowledge and without his consent. The Respondent in para 14 of his Affidavit refers to the above para 14 but does not deny either categorically or at all the Petitioner's statement.

The reasonable inference, then, is that indeed the Petitioner was removed as a director.

21. The Company was, from the available evidence, formed or continued on the basis of a personal relationship involving mutual confidence. But, it is apparent the mutual confidence has been lost and the Petitioner has been excluded from the management of the Company.

22. Charlesworth and Morse's Company Law (16th edition) states that one of the circumstances where an order on the just and equitable ground will be made is where mutual confidence is not maintained or the petitioner is excluded from the management.

23. In re Yenidje Tobacco Co. Ltd [1916] 2 Ch. 428, the company made considerable profits inspite of the disagreement between its 2 sole shareholders and directors who were not on speaking terms. Nevertheless, the High Court held that as mutual confidence had been lost between the two of them, the company should be wound up. The English Court of Appeal affirmed the decision of the High Court judge.
24. At the end of the day, based on the authorities, the Act and all the circumstances of the matter, I am of opinion that it would be just and equitable that the Company be wound up under section 220(f) of the Act.
25. I therefore make the following Orders:
- (1) Jogi Brij Lal And Sons Limited be wound up under the provisions of the Companies Act.
 - (2) The Official Receiver be constituted Liquidator of the affairs of the Company.
 - (3) The costs of this Petition is to be taxed.

Delivered at Suva this 18th day of January 2016

David Alfred
JUDGE
High Court of Fiji

