

IN THE HIGH COURT OF FIJI
AT SUVA
COMPANIES JURISDICTION

Winding Up Action No. HBE 57 of 2015

IN THE MATTER of HERRY'S CONSTRUCTIONS
LIMITED.

AND

IN THE MATTER of the COMPANIES ACT (Cap 247)

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Mr. Liverpool - for the Petitioner
Ms. Renee Lal - for the Respondent

Date of Judgment : 25th July, 2018@ 9 am

RULING

[Petition for Winding up of Respondent Company pursuant to Companies Act, Cap 247]

INTRODUCTION

1. On 07th December, 2015, R. C. MANUBHAI & COMPANY filed a petition to wind up HERRY'S CONSTRUCTIONS LIMITED on the basis that it is unable to pay its debt amounting to \$19,028.24, plus Post Judgment Interest at the rate of 5% per annum being the amount due and owing pursuant to High Court Judgment in Action No. HBC 296 of 2005 and Court of Appeal Judgment in Action No. 0061 of 2012 and sought for the following orders:
 - (a) That Herry's Construction Limited be wound up by the Court under the provisions of the Companies Act Cap 247;
 - (b) That the Official Receiver be appointed Provisional Liquidator of the Company;
 - (c) That the costs of the Petition be taxed and paid out of the assets of the company; and
 - (d) That such further or other order may be made in the circumstances as shall be just.
2. The Respondent Company filed an affidavit deposed by Hari Deo Narayan in his capacity as the Managing Director of the Respondent Company, filed 24th December, 2015, opposed the Petition stating -

"The debt is well and truly disputed on the basis that the alleged debt is the result of a Credit Account with the Petitioning Creditor. This account was opened in the name of the Company by one Ravinesh Shankar whom I was carrying out construction works for. Ravinesh Shankar had a contact in the Petitioning Creditors credit Department and between the two of them they opened the account with a credit limit of \$10,000. The account opening form is properly executed by the Company having only being executed by one Director. The form was completed by Ravinesh Shankar and the staff of the Petitioning Creditor and I was simply asked to sign it. Accordingly, the account terms and conditions do not apply to the Company.
3. The matter was heard both parties were directed to furnish court with written submissions. Only the Petitioner had furnished his written submissions not the Respondent. It is noted from the file record that further extension was granted to the Respondent to furnish her written submissions, but to date has failed to do so.

THE LAW

4. *Section 220 (e) of the Companies Act [Cap 247]* ("the Act") states that a company may be wound up if it is unable to pay its debt.
5. As indicated in *Arjun & Sons Timber Mills Ltd v Babasiga Timber Town Ltd [1994] FJHC 219; [1994] 40 FLR 260 (11 November 1994)* the onus is on the Petitioner to establish that the Company is unable to pay its debt. Justice Pathik stated:

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. (Emphasis added).
6. 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".

7. As stated in *section 221 (a) 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 has 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."

(Emphasis added)

ANALYSIS and DETERMINATION

8. The issue that needs to be determined by this court is "Whether the Petitioner is entitled to have the Respondent Company Herry's Constructions Limited wound up" by this court under *section 220 (e)* of the Companies Act Cap 247.
9. 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.
10. R.C.MANUBHAI & COMPANY commenced proceedings by a winding up petition to wind up HERRY'S CONSTRUCTIONS LIMITED on the basis that it is unable to pay its debt of \$19,028.24 together with the post judgment interest at the rate of 5% per annum.
11. According to the Petitioner, this debt remained unpaid to date and prompted the Petitioner, R. C. MANUBHAI & COMPANY to commence and proceed with this Winding Up action to recover the Debt of \$19,028.24 and post judgment interest at the rate of 5% per annum.

12. On 19th October, 2015, the Petitioner issued and sent 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 within 21 days of the receipt of the Notice. Twenty-one days lapsed since the Petitioner had served the Notice and the Respondent has failed to make any payments nor the Petitioner has received any money from the Company.
13. The **s.221** notice was served on the Company on 19th October, 2015 by leaving a copy at the Company's office at Khalsa Road in New Town.,
14. Despite service of the **s.221** notice, the Company made no response and/or received any payments as can be ascertained from the parties and the written submissions. Except an affidavit in opposition was filed.
15. Pursuant to **Rule 22 (1)**, the Winding-up Petition ("**the Petition**") was presented to this Court. The Petitioner filed its Petition on 07th December, 2015 and in compliance with **Rule 25** an affidavit verifying the said Petition was deposited by the Petitioning Company's Group Management Accountant, Mr. Lakhmal Karunarathana on 08th December, 2015.
16. In terms of **Rule 23**, the Petition was advertised in the Fiji Gazette on 22nd April, 2016 and in the Fiji Sun on 30th April, 2016.
17. Subsequently, the Winding-up Petition was listed to be heard before the Master of the High Court for the Petitioner or his barrister and solicitor to appear for the purposes of **rule 28 of the Companies (Winding Up) Rules, 1983**.
18. On 21st June, 2016, 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**.
19. On 02nd November, 2016, the Court proceeded to hear the Petition for the **Winding Up** of the Petitioner against the Respondent Company.
20. Where the debt is **disputed** (as in this case through the affidavit of Hari Deo Narayan), 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)

21. Justice Pathik had a similar view in *Vivress Development Ltd v Australia and New Zealand Banking Group Ltd* [2002] FJHC 245; HBC0290d. 2001s (15 February, 2002), Justice Pathik stated:

The question therefore is whether the debt is disputed on substantial grounds 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)

22. Although the **Respondent Company** disputes the Debt of **\$19,028.24**, his contention has been and I reiterate that *"The debt is well and truly disputed on the basis that the alleged debt is the result of a Credit Account with the Petitioning Creditor. This account was opened in the name of the Company by one Ravinesh Shankar whom I was carrying out construction works for. Ravinesh Shankar had a contact in the Petitioning Creditors credit Department and between the two of them they opened the account with a credit limit of \$10,000. The account opening form is properly executed by the Company having only being executed by one Director. The form was completed by Ravinesh Shankar and the staff of the Petitioning Creditor and I was simply asked to sign it. Accordingly, the account terms and conditions do not apply to the Company.*
23. The Petitioner informed court that *"The account was opened on behalf of the Debtor by its Director Hari Deo Narayan. Ravinesh Shankar guaranteed the payments of any outstanding sum to the limit of \$10,000 as the Debtor had entered into a general contract for construction of the Guarantor's premises. Further, all delivery notes were signed off by the Debtor, its Directors, Officers, Employees and Agents. The Debtor had entered into a general contract with the Guarantor which entitled the Guarantor to select items required for construction purposes at the Debtor's expense and all such calculation was done with the approval of the Debtor".*
24. The Petitioner submitted that in light of the **Company's inability to pay its debt**, the Petitioner has duly complied with all the necessary provisions of the **Companies (Winding Up) Rules 1983**, the Company is **insolvent** and is **unable to pay its debt** and the orders prayed in the Petition be granted.
25. For the abovementioned rational, I find that 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.

IN CONCLUSION

26. The **Respondent** was aware of this **Debt** since the following orders were made against the Respondent in the High Court Civil Action HBC No. 296 of 2005 and Court of Appeal Judgment in Action No. HBC 0061 of 2012.
27. Further, when the current Winding Up Petition was filed against the Respondent that he was again served with all the documents together with the Demand Notice. If I may add, this Demand Notice would have reminded him that there is a Debt pending against him owed to the Petitioner. Yet once again the Respondent failed to make any appropriate arrangements rather find ways to defend the current action of Winding Up accordingly.


28. Therefore, this Court judgment in itself establishes clear evidence that the **debt** is owed by the Company to the Petitioner which remains unpaid and has prompted the Petitioner to proceed with and seek the **Winding Up** of the Respondent Company, accordingly.
29. The Petitioner issued a **statutory demand** to recover the Debt 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 of the Winding Up process.
30. The failure of the **Debtor Company** to comply with the statutory demand notice served under section **221(a) of the Act** requires this court to deem that the Debtor Company is unable to pay its debts.
31. In such circumstances, the court is not to determine whether a Debtor Company is **solvent** or not nor it is relevant for this court to determine whether the **Debtor Company** has **assets** to cover its **debts**. By mere operation of the law, pursuant to **section 221(a)**, the Respondent Company must be necessarily deemed **insolvent** if the court is satisfied that the application is not an **abuse of the due process of court**.
32. I therefore find and conclude that the Petitioning Creditor, **R.C.MANUBHAI & COMPANY** has **satisfied** this court that it duly served the statutory demand notice on the Company, pursuant to section 221(a) of the Companies Act but the Debtor Company **HERRY'S CONSTRUCTIONS LIMITED** has failed to pay the **debt** within the statutory period and to date continues to do so without any reasonable cause whatsoever. I am also satisfied and find that the long standing **dispute** between the parties to this Winding Up proceedings before this Court is **bona fide** and not an abuse of the court process.
33. In these circumstances, this court concludes that the Respondent Company, **HERRY'S CONSTRUCTIONS LIMITED** is unable to pay its **debts** and has not shown any cause why the Company should not be wound up.
34. 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**.
35. Accordingly, I have no alternative but to proceed and wind up the **HERRY'S CONSTRUCTIONS LIMITED** as sought by the Petitioner, **R.C.MANUBHAI & COMPANY**.
36. For the above reasons, the Petitioner's application seeking winding up of Respondent Company, **HERRY'S CONSTRUCTIONS LIMITED** is hereby acceded to and accordingly Wind Up the Company.
37. Further, I appoint the Official Receiver as the provisional liquidator accordingly
38. In light of the manner in which the Respondent had the conduct of this matter, I am inclined to order **costs** summarily assessed at **\$1,500** to be paid to the Petitioner by the Respondent within 14 days timeframe hereof.


39. The SCO and the Civil High Court Registry, Suva to the necessary action hereafter and inform the Official Receiver of this Winding Up of the Respondent Company, **HERRY'S CONSTRUCTIONS LIMITED** as required in terms of the Law.
40. I now proceed to make the following Final Orders.

FINAL ORDERS

- a. That **HERRY'S CONSTRUCTIONS 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 Petitioner's costs is summarily assessed at \$1500.00 and ordered to be paid out of the assets of the Company within 14 days.

DATED AT SUVA THIS 25TH DAY OF JULY, 2018


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MASTER
VISHWA DATT SHARMA



cc. *Reddy & Nandan Lawyers, Suva*
Lal Patel Bale Lawyers, Suva