

IN THE HIGH COURT OF FIJI
AT SUVA
COMPANIES JURISDICTION

Winding Up Action No. HBE 54 of 2014

IN THE MATTER OF QUEST INVESTMENTS LIMITED
AND
IN THE MATTER OF THE COMPANIES ACT (CAP 247)

BETWEEN : **QUEST INVESTMENTS LIMITED**

APPELLANT

AND : **METROMIX CONCRETE (FIJI)**

RESPONDENT

Counsel : **Ms. Saumatua S. for the Appellant**
Mr. Singh S. for the Respondent
Date of Hearing : **9 October, 2018**
Date of Judgment : **15 October, 2018**

JUDGMENT

INTRODUCTION

1. An order for winding up was made on 24th July, 2018 by Master. The hearing of this matter had concluded in 2015 hence the law applicable is Companies Act (Cap 247) and Rules under said statute in terms of Section 750 of the Companies Act, 2015. The Respondent (Petitioner) had issued Section 221 notice of the Companies Act (Cap 247) and it was not served to the registered office. It was served to operational place of business and the Appellant (Company) was represented by a counsel who had sought several adjournments to settle the debt. There was no dispute about the debt, contained in the winding up notice which is the basis of the winding up petition. Though ample time was allowed, for the settlement of the debt, there was no progress in the settlement of the same, and finally the matter was fixed for hearing. At the hearing counsel for the Company objected to the service of the Winding Up Petition and affidavit verifying petition, to Company's place of business, and did not dispute the debt. Master made an order for winding up and Company and also appointing provisional liquidator. The Company seeks to set aside it and a stay of the winding up order and appointment of provisional liquidator.

FACTS

2. The Petition of the Winding Up action served and affidavit verifying petition on 1st October, 2014. The affidavit of service was filed on 22nd October, 2014.
3. In the said affidavit of service it is stated that affidavit verifying petition was served to the Company's place of business as it was no longer operating from the last registered office.
4. The matter was first called on 6th November, 2014 and counsel who appeared for the Company had informed the court that they do not wish to file objections and sought time to settle the matter. (see the minutes of Master dated 6th November, 2014).
5. The winding up was advertised on 14.11.2014 in the Government Gazette and also in the local news paper Fiji Times on 12.11.2014.
6. There were two supporting creditors who had shown interest for the support of the winding up the Company.
7. There was no objection filed disputing the debt but at the hearing objected to the service and stated that service of the petition was not to the registered office as required by law.
8. Master ordered winding up of the Company on 24th July, 2018, and following orders were made
 - a. *The Quest Investment 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 \$750 and ordered to be paid out of the assets of the Company.*
9. Notice and Grounds of Appeal was filed on 14th August, 2018.
10. An application for stay of execution and summons for directions was filed on 29.8.2018.

11. The application for stay was forwarded to me as an urgent application on 21.9.2018 and directions were made to have expedited hearing of the matter, considering issues before the court were purely legal.
12. The Petitioner objected to the locus standi of the Company to seek stay of winding up as a provisional liquidator was appointed and winding up order was made by Master on 24th July, 2018.
13. Counsel who appeared for the Company in the winding up action state that there is residuary power vested with the Board of the Company even after an order of winding up was made and he provided High Court decision delivered on 25.8.2017 (unreported) Winding Up Action No 7 of 2017 (Vivek Investments (Pte) Ltd).

ANALYSIS

14. The Petitioner at the outset objected the locus standi of the counsel for the Company as he had not sought leave of the official receiver for the appeal as well as for the application for stay.
15. The Master in its ruling had made an order for winding up and had also made an order appointing official receiver as the provisional liquidator of the Company on 24.7.2018.
16. It is trite law that the Company cannot proceed with any court action once an order for winding up is made unless leave is obtained no action can proceed against the Company. (See Section 229 of Companies Act (Cap 247))
17. An application for stay of winding up can be made in terms of Section 252 of the Companies Act (Cap247) and it states

"252(1) The court may, at any time after an order for winding up, on the application either of the liquidator or the official receiver of 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 as conditions as the court think fit."

18. In Fiji in terms of Companies Act (Cap 247) winding up order can be stayed only in terms of Section 252(1) of the Companies Act (Cap247) and the parties who can make such an application are
- a. Liquidator.
 - b. Official Receiver.
 - c. Creditor.
 - d. Contributory.
19. So no application for stay can be made by any other party other than parties specified. There is no residuary power vested with the Board of Directors of the Company already wound up in relation to the stay of the winding up order in Fiji, as such power is statutorily determined and granted to specific parties and the wound up company cannot seek such an order.
20. I have perused the High Court decision submitted to me at the hearing and the rationale in the said case was based on UK decision, Re Union Accident Insurance Co Ltd [1972] 1 All ER 1105 and in UK at that time there was no specific provision similar to Fiji hence it was held in that case that the board of the company against whom an order for winding up made had residuary powers for appeal against such an order. Re Union Accident Insurance Co Ltd [1972] 1 All ER 1105 at 1113 held, (Per Plowman J)

'The issue is to the extent of those residuary powers, and in particular whether they extend to the launching of the present motion. I think that it may sometimes be helpful to test the matter by considering the other side of the coin, namely to enquire whether the power which the board is said to have lost is one which can be said to have been assumed by the liquidator. If the answer is that it cannot, that may be a good reason for saying that the board still retains it. Clearly, for example, as I have already indicated, the power to instruct solicitors and counsel on the hearing of the winding-up petition is not a power which anyone could suggest has passed to the provisional liquidator and therefore the board retains it. If that is true in regard to the petition itself, it is, in my judgment, equally true of interlocutory proceedings which are such that it would not be appropriate for the provisional liquidator to give instructions on behalf of the company. A motion to discharge the provisional liquidator on the ground that he ought never to have been appointed clearly falls within that category, and in those circumstances I therefore dismiss the motion with costs and make no other order in regard to costs.' (emphasis added)

21. The rationale in the Re Union (Supra) is clear, Plowman J had applied a test, to consider other side (i.e to inquire whether the power to seek stay of winding up order was given to the liquidator). When this test is applied in Fiji Section 252(1) of Companies Act (Cap 247) is explicit as to the parties who could bring such an application for stay and there is no residuary power in the board of the Company against which winding up is made to seek stay of the winding up. If such a residuary power is recognized it would conflict with the existing statutory provision in Fiji.
22. The position is different in Fiji from the existed law of UK at relevant time when Re Union (Supra) was pronounced, and Companies Act (Cap 247) determined four parties who can seek stay of winding up. There is no room for residuary power to the board of the Company as regard to the powers granted in Section 252 of the Companies Act (Cap 247) and also Sec 229 of Companies Act (Cap 247).
23. So, in my mind there is no residuary power in the board of the Company to seek stay of winding up order.
24. So, the Company that was ordered to wound up or its Board do not have power to seek stay of the winding up order and preliminary objection is upheld and on that basis the appeal as well as application for stay is struck off.
25. Without prejudice to above I am considering the only issue raised in the appeal for completeness. It is regarding non service of the winding up notice.

Service of Winding Up petition to the current business place

26. It is an admitted fact that winding up petition was served to the Company's place of business instead of its registered office.
27. Upon the service of winding up petition counsel for the Company had appeared in court and had stated that they would not object to the application, but requested more time to settle the debt.

28. If the Company desired to raise an issue of service of the winding up petition to its business premises it had ample opportunity to do so, but did not.
29. The service of the winding up petition was on 6th October, 2014 and hearing of this matter was conducted on 3rd July, 2015.
30. After seeking nearly one year to settle the debt, it had raised the issue of service of the winding up petition to its principal place of business. This was done after counsel had indicated that they would not object to the application on the first date when the matter was called before Master on 6th November, 2014.
31. If they desired to raise an objection to the service it must be informed to the court as well as to the opposing party as soon as possible without wasting court's time. If not such a technical objection is waived.
32. There is no dispute as to the debt, so any technical objection should be raised without delay. If there is delay, it defeats the purpose of winding up action which is a quick and effective remedy for creditor for relief.
33. Rule 202 of Companies (Winding up) Rules states
- '202(1) No proceedings under the Act or these Rules shall be invalidate by reason of any formal defect or any irregularity, unless the court before which any objection is made to the proceedings is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedies by any order of the court.*
- (2) No defect or irregularity in the appointment of the official receiver or of the appointment or election of a liquidator or member of a committee or inspection shall invalidate any act done by him in good faith'*
34. In my mind there was no injustice to the Company by serving winding up petition to its principal place of business as a solicitor was retained and he had appeared in the court on the first date when the matter was called before Master and had not raised the issue of failure to serve the same on registered office.

35. If there was any injustice through non service to registered office it could have been raised and failure to raise it for nearly one year from the service by the solicitor had waived it, alternatively there was no injustice caused to the Company, by not serving to the registered office, as it was not raised at earliest opportunity. The Company had a representation from beginning and no injustice was caused to them.
36. If there was injustice through non service it must be raised at the earliest opportunity before taking any step in the matter. If not there will be injustice to other party and technical objections cannot be used as tools for abuse of due process.
37. So there are no merits in the appeal and it is dismissed.

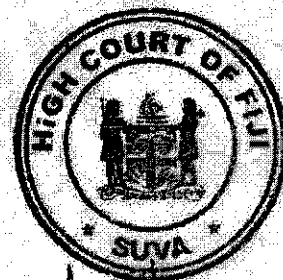
CONCLUSION

38. The Company has no locus standi to bring this appeal and or application for stay. Alternatively the appeal is dismissed as there was no injustice to Company by the service of winding up notice to its business place instead of registered office. The Appeal as well as the application for stay is struck off. No cost is ordered considering the circumstances of the case.

FINAL ORDERS

- a. The Appeal is dismissed and application for stay is struck off.
- b. No costs.

Dated at Suva this 15th day of October, 2018.



Amara
Justice Deepthi Amarafunga
High Court, Suva