

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 105 of 2023

BETWEEN: **R PRASAD PTE LIMITED** a limited liability company having its registered office at Suva in Fiji.

PLAINTIFF

AND: **SUNCOURT (WHOLESALEERS) LIMITED (IN LIQUIDATION)** a limited liability company having its registered office at Suva in Fiji in Liquidation.

DEFENDANT

Before: Mr. Justice Deepthi Amaratunga

Counsel: Ms. Choo and Ms. Narayan for the Plaintiff
Ms. Hari Kishan A. for Official Receiver (Defendant- In liquidation)

Dates of Hearing: 21.09. 2023

Date of Judgment: 22.11.2024

Catch words

Sections 531, 543 (2) (a) of Companies – company in liquidation- powers of liquidator- jurisdiction –leave of court- - Nunc pro tunc -Order 7 rule 3 of High Court Rules- transfer of land – public auction and private contract of liquidator-

JUDGMENT

INTRODUCTION

[1] Plaintiff had filed this action purportedly, in terms of Section 543(2) (a) of Companies Act 2015, by way of originating summons. It deals with powers of official receiver, as liquidator. Plaintiff is seeking the court to direct official

receiver to sign and execute to transfer of CT 32802 in favour of Plaintiff and second order in the originating summons is ancillary to said transfer relating Capital Gains Tax. Said provision allowed liquidator to “Sell ” properties through private contracts or through public auction in order to recover money from the assets of the company in liquidation.

- [2] I used the word purportedly because no action could be filed by an individual against a company that is in liquidation in terms of Section 543(2)(a) of Companies Act 2015 and this court is not conferred with jurisdiction in terms of said provision to grant orders sought by Plaintiff. So this application is dismissed *in limine*.
- [3] There is no room under Section 543(2)(a) of Companies Act 2015, for liquidator to dispose or transfer properties of the entity in liquidation without a sale through public auction or through private contract for consideration.

JURISDICTION AND CAUSE OF ACTION IN ORIGINATING SUMMONS

- [4] Plaintiff had entered in to sale and purchase agreement with Defendant prior to liquidation, and had varied it subsequently. In terms of varied sale and purchase agreement. Plaintiff had failed to execute transfer of this property in terms of said sale and purchase agreement. Plaintiff is unable to explain why such transfer was not executed, whereas rest of the transfers contained in the same sale and purchase agreement were transferred. Plaintiff is seeking an order of this court to direct liquidator to execute said transfer in terms of Section 543(2)(a) of Companies Act.
- [5] Defendant is a company in liquidation pursuant to order for winding up handed down on 31.10.2011. So any proceedings commenced against Defendant in liquidation required leave of the court nearly after eleven years from winding up order of the court.
- [6] Plaintiff's originating summons must be struck off *in limine* in terms of Section 531 of Companies Act 2015.

'Actions stayed on winding up order

531. When a winding up order has been made or an interim 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.’(emphasis added)

- [7] Plaintiff had failed to seek leave of the court, and it is undisputed that Defendant is in liquidation pursuant to winding up order of the court on 11.10.2011. So this action was filed without fulfillment of condition precedent, hence struck off. Such leave is required for a purpose and this is to prevent unmeritorious actions such as this action. Plaintiff had avoided this provision as it had also failed to state “*a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy*” in terms of Order 7 rule 3 of High Court Rules 1988. So no cause of action pleaded in the originating summons.
- [8] Without prejudice to above, Plaintiff in the originating summons sought following orders
- “That official Receiver acting on behalf of the Defendant sign and exercise the following documents to complete transfer of Certificate of Title No 32802 in favour of the Plaintiff pursuant to section 543(2)(a) of..... ‘
- [9] Above order is misconceived in law and also on facts. Section 543(2) (a) empowers liquidator to **sell properties of Defendant in liquidation** by public auction or through contract. There is no such public auction or contract entered by official receiver to execute a transfer of land belonging to Defendant
- [10] Section 543 of Companies Act 2015 does not confer jurisdiction to this court to make orders sought by Plaintiff even if leave is granted. So it will be futile for this court to grant leave *nonc pro tunc*. In such an instance leave will not be granted by court as leave is required to filter actions which has no merits.
- [11] Section 543 (1) of the Companies Act also indicates who can institute action and or defend actions and this needs to be read along with Section 531 of Companies Act 2015 .Section 543 of Companies Act 2015 reads;

“Powers of liquidator

543.—(1) Subject to this section, the liquidator in a winding up by the Court must have power, with the sanction either of the Court or of the committee of inspection—

(a) to bring or defend any action or other legal proceeding in the name and on behalf of the Company;

(b) to carry on the business of the Company, so far as may be necessary for the beneficial winding up of the Company;

(c) to appoint a barrister and solicitor to assist the liquidator in the performance of his or her duties;

(d) to pay any class of creditors in full;

(e) to make any compromise, or arrangement with creditors, or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the Company, or whereby the Company may be rendered liable;

(f) to compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the Company and contributory or alleged contributory or other debtor or person apprehending liability to the Company, and all questions in any way relating to or affecting the assets or the winding up of the Company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim and give a complete discharge.

(2) Subject to this section, the liquidator in a winding up by the Court must have power—

(a) to sell the real and personal Property and things in action of the Company by public auction or private contract, with power to transfer the whole Property to any person or Company or to sell the same in parcels;

(b) to do all acts and to execute, in the name and on behalf of the Company, all deeds, receipts and other documents;

(c) to prove, rank and claim in the bankruptcy, Insolvency or sequestration of any contributory for any balance against his or her estate, and to receive dividends in the bankruptcy, Insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or Insolvent, and rateably with the other separate creditors;

(d) to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the Company, with the same effect with respect to the liability of the Company as if the bill or note had been drawn, accepted, made or endorsed by or on behalf of the Company in the course of its business;

(e) to raise, on the security of the assets of the Company, any money requisite;

(f) to take out, in his or her official name, letters of administration for any deceased contributory, and to do, in his or her official name, any other act necessary for obtaining payment of any money due from a contributory or his or her estate which cannot be conveniently done in the name of the Company and, in all such cases, the money due must, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator, provided that nothing in this paragraph must be deemed to affect the rights, duties and privileges of the Public Trustee;

(g) to appoint an agent to do any business which the liquidator is unable to do;

(h) to do all such other things as may be necessary for winding up the Affairs of the Company and distributing its assets.

(3)The exercise by a liquidator in a winding up by the Court of the powers conferred by this section must be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

(4) Except with the approval of the Court, the committee of inspection or a resolution of the majority of creditors, a liquidator must not enter into an agreement on the Company's behalf (for example, but without limitation, a lease or a Charge) if—

(a) without limiting paragraph (b), the term of the agreement may end; or

(b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance;

(c) more than 3 months after the agreement is entered into, even if the term may end, or the obligations may be discharged, within those 3 months.” (emphasis added)

[12] There is no provision allowing a party to seek court order in terms of orders sought in originating summons by Plaintiff in terms of Section 543(2) of Companies Act 2015

[13] Section 543(1) (c) of Companies Act 2015 allows the liquidator “to appoint a barrister and solicitor to assist the liquidator in the performance of his or her duties”. This cannot be expanded to delegate the power granted exclusively to liquidator for institution of an action on behalf of the Company in liquidation. In this action Plaintiff submitted some emails of the office of official receiver. This does not allow Plaintiff to circumvent express legal provisions.

[14] The above provision of law allows a liquidator to obtain assistance from any solicitor to perform in order to perform the duties of the liquidator, but the legislature did not grant power to institute an action on behalf of a company in liquidation.

[15] In UK House of Lords decision Inland Revenue Commissioners v Hinchy, [1960] 1 All ER 505 at 512 held,

“...But we can only take the intention of Parliament from the words which they have used in the Act and, therefore, the question is whether these words are capable of a more limited construction. If

not, then we must apply them as they stand, however unreasonable or unjust the consequences and however strongly we may suspect that this was not the real intention of Parliament.”(emphasis added)

[16] Official Receiver is granted power to execute transfer of titles, in terms of Section 543(2)(b), pursuant to ‘public auctions’ or ‘private contracts’ in a “sale” of property of the company in liquidation. This is a power of liquidator to recover money for payment of outstanding creditors. This cannot be abused or used for purpose other than sale of assets of company in liquidation.

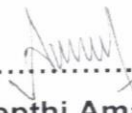
[17] There is no such sale by official receiver hence this provision cannot be applied by Plaintiff who allegedly entered in to sale and purchase agreement with Defendant prior to liquidation cannot seek said provision for the orders sought in the originating summons.

[18] So Plaintiffs originating summons struck off. Cost of this action is summarily assessed at \$1,000 to be paid within 21 days.

FINAL ORDERS:

- a. Originating summons struck off.
- b. Cost is summarily assessed at \$1,000 to be paid within 21 days.





Deepthi Amaratunga
Judge

At Suva this 22nd November, 2024.

Solicitors

R Patel lawyers
AG's Chambers