

KOTALAWELA

v.

LANKA TYRELANDS COMPANY (PVT) LTD AND OTHERS

COURT OF APPEAL
WEERASURIYA, J.
DISSANAYAKE, J.
C.A. 886/92(P)
D.C. HOMAGAMA 1454/SPL
MAY 10, 2000
JUNE 9, 2000

Companies Act No 17 of 1982 - Winding up - Procedure - Winding up Rules 1939 - Subsidiary Legislation Vol. II Rules 8, 9 No. 43 of 1982 Stamp Duty Act S.71 - Rules framed thereunder.

The Petitioner- Appellant sought to wind up the 1st Respondent - Respondent - Company on the ground that the said Company is unable to pay its debts.

The Petitioner tendered to Court, the Petition, documents in support and the affidavit of verification.

The Respondent contended that -

1. the Petition was not served on the 1st Respondent Company;
2. the affidavit of verification was not served on the 1st Respondent company;
3. the affidavit of verification was not duly stamped;

The District Court held with the Respondent. On Appeal -

Held :

- (i) In terms of Rules 8 and 9 of the winding up Rules, there is no requirement that verifying affidavit should be served on the 1st Respondent Company;
- (ii) If the verifying affidavit contains a 'class' stamp, there is no requirement to affix Rs. 1/- stamp on the verifying affidavit.
- (iii) The Fiscal has reported that the Petition was served on the Company.

APPEAL from the Judgment of the District Court of Homagama.

Nihal Fernando with Ms. Nilani Somadasa, for Petitioner Appellant.

R. K. W. Gunasekera with C. V. Vivekanandan, for 1st Respondent - Respondent company.

Cur. adv. vult.

September 15, 2000.

WEERASURIYA, J.

The petitioner - appellant instituted action in the District Court of Homagama, seeking to wind up the 1st respondent - respondent company in terms of the Companies Act No. 17 of 1982 on the ground that the said company is unable to pay its debts and it is just and equitable that in the circumstances that the said company should be wound up.

The petition relating to the winding up application together with the documents X1-X12 was filed in the District Court on 17. 09. 1991. The affidavit of verification was affirmed by the petitioner - appellant on 19th September which was tendered to Court on the same day when the application was supported and the Court fixed the inquiry for 10.12.1991. Upon proof of service of the petition and the documents on 24. 09. 1991 as evidenced by the report of the fiscal, on 04. 10. 1991 the 1st respondent-respondent (company) filed its proxy and moved for time to file objections.

Thereafter, when this matter came up for inquiry, 1st respondent-respondent (company) raised the following preliminary objections as to the maintainability of the action.

- (a) That the petition was not served on the 1st respondent - respondent company;
- (b) that the affidavit of verification was not served on the 1st respondent-respondent;
and
- (c) That the affidavit of verification was not duly stamped.

Learned District Judge, by her order dated 06. 10. 1992, upheld the preliminary objections and dismissed the application. It is from the aforesaid order that this appeal has been lodged.

At the hearing of this appeal, learned Counsel appearing for the petitioner-appellant contended that learned District Judge had erred in law in holding-

- (a) that the affidavit of verification has to be served on the company; and
- (b) that the said affidavit has not been duly stamped.

The procedure relating to winding up applications are set out in the Companies Winding up Rules 1939 Subsidiary Legislation Vol. II. Rule 9 thereof states that verifying affidavit should be filed within 4 days after the petition is presented. Rule 8 which requires the petition to be served on the company makes no provision for the service of verifying affidavit on the company. Therefore, there is no requirement that verifying affidavit should be served on the 1st respondent-company.

It is to be observed that the fiscal has made explicit reference in his report to the serving of petition and documents X1-X12 on the 1st respondent-company.

The Companies Act and the Rules framed thereunder make no reference to the requirement of stamping of affidavits filed in winding up proceedings. Nevertheless, Section 71 of the Stamp Duty Act No. 43 of 1982 (as amended) in its interpretation of documents includes affidavits as chargeable with stamp duty in legal proceedings. Rules framed under Stamps Duty Act were published in Gazette Extraordinary of the Democratic Socialist Republic of Sri Lanka bearing No. 224/3 dated 20. 12. 1982. It is to be observed that item No. 2 thereof states that affidavit or affirmation not otherwise provided for in part 11 of the Schedule should bear a stamp of Rs. 1/-.

Item No. 2 of part 11 of the aforesaid schedule provides that documents filed in civil proceedings in District Court shall contain for every Rs. 1000/- or part thereof stamps to the value of Rs. 3/- subject to a maximum duty of Rs. 1000/= on each document chargeable with duty. In the circumstances, there is no requirement to affix Rs. 1/= stamp on the verifying affidavit, when it contains a 'class' stamp. It is to be noted that the verifying affidavit in this case contains a 'class' stamp of Rs. 50/=.

In the circumstances, it seems to me that the learned District Judge has erred in dismissing the winding up application of the petitioner- appellant.

Therefore, the order of the District Judge dated 06. 10. 1992 is set aside and this appeal is allowed with costs.

DISSANAYAKE, J. - I agree.

Appeal allowed.