
**ANITEX WASHING PLANTS (PVT) LTD
VS
G. D. S. CHEMICALS (PVT) LTD AND ANOTHER**

COURT OF APPEAL.
SOMAWANSA, J. (P/CA) AND
BASNAYAKE, J.
CALA 4/2004 (LG).
D. C. PANADURA - Winding up Application No. 2890/Spl.
MARCH 7, 2005.

Companies Act, No. 17 of 1982 - Winding up - Debts owed - Action instituted by a creditor for winding up - Prescription Ordinance, section 8 - Does the Prescription Ordinance apply?

Winding up proceedings were filed against the respondent petitioner as the respondent petitioner was not able to pay the respondent company a certain debt. Preliminary objection was taken that the petitioner respondent's claim was time-barred. The trial judge overruled the objection on the ground that the application to wind up a company was for non-payment of debts and not an action to recover a debt; thus the Prescription Ordinance will not apply. The respondent petitioner sought leave to appeal.

HELD:

- (i) The petitioner respondent sought a winding up order, and also sought recovery of his money. A creditor - petitioner does not petition for the satisfaction of seeking the demise of his company debtor but rather in the hope of recovering part at any rate of his debt. Thus the petitioner is seeking to recover a sum.
- (ii) No liability could be attached to a prescribed debt. The provisions of the Prescription Ordinance do apply.

PER ERIC BASNAYAKE J. :

It is a startling proposition to suggest that in a due course of administration in a voluntary winding up the liquidator is entitled to pay statute barred creditors.

APPLICATION for leave to appeal from an order of the District Court of Panadura, with leave being granted.

Cases referred to :

1. Re. Karnes Property Co. Ltd.
2. In re. Fleadwood and District Electric Light and Power Syndicate - (1915) 1 Ch. 486
3. In re Art Reproduction Co. Ltd - 1952 Ch. 89

Shamil Perera with Lahiru Abeyasekara for respondent petitioner.
M. Inthikab M. Idroos with Charuni Gunawardena for respondent.

Cur.adv. vult.

September 14, 2005.

ERIC BASNAYAKE, J.

In this case winding up proceedings were filed in the District Court of Panadura on 09.07.2003 against the respondent - petitioner (petitioner) in terms of the Companies Act, No. 17 of 1982, and the Winding up Rules 1939 as the petitioner was not able to pay the petitioner - respondent (respondent) a debt amounting to a sum of Rs.234,774.37. The said sum is made up of the goods sold and delivered as per the details given below:

<i>Date</i>	<i>Amount</i>
20.12.1999	10,674.37
30.12.1999	86,737.50
05.10.2000	50,625.00
13.01.2000	25,312.50
03.02.2000	61,425.00
Total	234,774.37

When this case was taken up for inquiry in the District Court on 15.09.2004, a preliminary objection was taken that the respondent's claim was time barred and therefore the court has no jurisdiction to entertain the petition. The learned District Judge overruled the said objection on the ground that this being an application to wind up a company for non payment of dues and not an action to recover a debt, the provisions of the Prescription Ordinance has no application.

The petitioner filed this case seeking leave to appeal against the order of the learned District Judge of Panadura, dated 19.01.2004. On 15.09.2004, leave was granted on the following question namely :-

"Whether the Respondent Company is entitled to seek a winding up of the Petitioner Company on the basis of a prescribed debt of the Petitioner Company". Written submissions have been tendered by both parties to resolve this question. The learned counsel for the respondent submits that this is an application filed in terms of the Companies Act, No. 17 of 1982 and not an action as defined by the Civil Procedure Code. The Companies Act refers to an application and not an action. An action has to be either in regular or summary form. An action is defined as proceedings for the prevention or redress of a wrong, and a cause of action is a wrong for the prevention and redress of which an action may be brought."

The learned counsel submits that on the contrary the petitioner has only prayed for a winding up order on a company. Section 8 of the Prescription Ordinance states that "No action shall be maintainable for or in respect of any goods sold and delivered.... unless the same shall be brought within one year after the debt shall have become due". The learned counsel submits that he did not plead a cause of action nor prayed for the recovery of any debt in the prayer and hence the Prescription Ordinance has no application.

The facts in *Re Karnos Property Co Ltd.*⁽¹⁾ cited by the learned counsel for the petitioner is I think to the point. In this case a local authority served a statutory demand on a company for non-payment of rates. The company paid part of the sum due, the balance remaining unpaid representing rates due more than six years before the issue of the petition. The issue before the court was whether the claim for the unpaid rates was time barred under the Limitation Act 1939 and therefore that no debt was due from the company that could constitute the basis for a winding up order.

Mervyn Davies J. having referred to section 2(1) read with section 31(1) of the Limitation Act 1939 said "looking at those enactments it is plain that a petition in the Companies Court is an action within section 2(1). One then asks whether it is an action to recover any sum. One may say that a petition is an action seeking not to recover a sum but to secure the winding up of a company. Certainly the petitioner seeks a winding up order, but as well as the petitioner (who is a creditor) also seeks recovery

of his money or such parts of it as may become his by virtue of a dividend. A creditor petitioner does not petition for the satisfaction of seeking the demise of his company debtor but rather in the hope of recovering part at any rate of his debt by way of dividend. A petition therefore, in my view, seeks to recover a sum”.

Again in the case of *In re. Fleetwood and District Electric Light and Power Syndicate* the Court held that it was improper to pay statutory barred creditors when objected to by the shareholders. In this case the question was whether a liquidator having surplus assets available for distribution was at liberty to pay statute barred creditors. Astbury J said “it seems a startling proposition to suggest that in a due course of administration in a voluntary winding up the liquidator is entitled to pay statute barred creditors”.

In the case of *In re. Art Reproduction Co. Ltd*, Wynn Parry J after holding that in a voluntary winding up of a solvent company, statute barred debts cannot be paid unless the contributories consent said “It was contended on behalf of the applicant that, even if both parts of the claim were statute barred, nevertheless there is jurisdiction to authorize the liquidator to pay the claims; and that in the circumstances of this case, the court ought to exercise that jurisdiction. Both the liquidator and the registrar, it is clear, had considerable sympathy for the applicant ; and I do not differ from either of them ; but the question being one of jurisdiction, in the first place, the matter has to be considered strictly”.

The learned counsel for the respondent submits that the above cases have no relevance due to the reason that section 31 (1) of the Limitation Act applies to all the proceedings in a court of law whereas there is no such provision in the Prescription Ordinance. I am not in agreement with the above submission. Considering the above authorities it is clear that no liability could be attached to a prescribed debt and therefore that the petitioner should succeed in this application. Hence I set aside the order of the learned District Judge dated 19.01.2004 and dismiss the petition for winding up with costs fixed at Rs. 10,000.

SOMAWANSA J. - I agree

Appeal allowed.

Winding up application dismissed