

**COLOMBO ENGINEERING ENTERPRISES (PVT) LTD.
AND OTHERS
v.
HATTON NATIONAL BANK LTD.**

COURT OF APPEAL
ISMAIL, J. (P/CA)
TILAKAWARDANE, J.
CALA NO. 197/98
D.C. COLOMBO NO. 4767/SPL
SEPTEMBER 23, 1998

Companies Act, 17 of 1982 – S. 255 (e) – Companies Winding-up Rules 95 – 15 (1), 15 (2) – Winding up Procedure – for an Order for winding-up – Can evidence be led – Civil Procedure Code S. 183 (A).

The District Court held that in making a winding-up Order court is only bound to consider the affidavit testimony and the oral submissions of parties.

Held:

Per Tilakawardane, J.

"Whilst expeditious procedure was no doubt intended by the legislature, courts must also be conscious that the winding-up of a company is a drastic remedy which may have far reaching consequences, financial and commercial and also consequences not only affecting the company but also those concerned with it . . ."

1. District Court in the exercise of its powers is vested with a discretion either to allow or disallow *viva voce* testimony.

The District Judge has erred in so much as he has concluded that the winding-up order must be determined on affidavit evidence alone, and consequently he had no discretionary powers to entertain *viva voce* testimony.

APPLICATION for leave to appeal.

Cases referred to:

1. *Re Travel and Holiday Clubs Ltd.* – 1967 (2) ALL ER 602.
2. *In Re Emma Silva Mining Company* – 1875 Chan A. 1994.
3. *A. B. C. Computer and Engineering Co., Ltd.* – 1862 ALL ER 68.

4. *Re Lympne Investments Ltd.* 1972 Ch. Div – 385.
5. *In Re Davis Investment (East Ham) Ltd.* – 1961 ALL ER.

Shibly Aziz PC with Prassana Jayawardane and Ms. N. Buhary for the company sought to be wound-up petitioner.

S. Sivarasa PC with N. R. Sivendran and Arul Selvaratnam for petitioner-respondent.

S. Parathalingam, PC with Nihal Fernando and Chandimal Mendis for the creditor-respondent.

Cur. adv. vult.

December 11, 1998.

SHIRANEE TILAKAWARDANE, J.

At the hearing of this application, parties agreed that as the matter had been argued exhaustively, that this court would determine the Leave to Appeal as well as conclude the final determination of this matter in one and the same order. It was agreed that the record need not be called.

According to the facts disclosed in this case the respondent Bank had sought a compulsory winding-up order in terms of section 255 (e) of the Companies Act, No. 17 of 1982, in the circumstances that the petitioner company was unable to pay its debts.

Both parties to this application conceded that a sum of Rs. 9,452,835.53 was outstanding as payment from the company to the Bank. Learned President's counsel for the petitioner company submitted that the debt was admitted and that they acknowledged and admitted the liability to pay the said amount. However, the date on which the repayment of this amount due was disputed by the petitioner company.

A verifying affidavit dated 11. 11. 96, together with the relevant documents was filed by the Creditor Bank in terms of rule 9, and an affidavit in opposition by the petitioner who was the company sought to be wound-up, was filed of 19. 11. 96 in terms of rule 15 (1) of the Companies Winding Up Rules 1939. Affidavit in reply in terms of the aforesaid rule 15 (2) was filed on the 05. 12. 1996.

On 18. 6. 98, when the matter was fixed for submissions, an application was made by the petitioner company to be given the opportunity to cross-examine the deponents of the affidavits of the respondent Bank and to elicit the evidence of witnesses to be called on behalf of the petitioner company. The Bank objected to this opportunity being afforded, on the basis, that the procedure for an order for winding-up was on affidavit evidence alone.

After hearing their submissions, the District Judge delivered the order dated 13. 08. 98 refusing the application of the petitioners, and held, that in making of a winding-up order the court is only bound to consider the affidavit testimony and the oral submission of parties. For this reason he has refused the above application of the petitioner.

Counsel for the petitioner company submitted that the courts had a discretionary jurisdiction to allow such an application, and should have exercised it in their favour, specially in the circumstances that there was a doubt as to whether the monies were due immediately.

Counsel for the respondent Bank has contended that there is no provision under the Companies Act to allow for such evidence to be led, and that legislature intended that the inquiry envisaged was one that would be concluded expeditiously on affidavit evidence only.

English law, has recognized that the District Judge has a discretionary jurisdiction to allow evidence to be led under circumstances where it was considered necessary, where the verifying affidavit was challenged on material grounds.

Pennyquick, J. in the case of *Re Travel and Holiday Clubs Ltd.*⁽¹⁾ considered this, and on the question of whether the evidence filed (by way of affidavit) was not sufficient to support the charges contained in the petition, it was held that : "The court would not in the exercise of its discretionary jurisdiction, be satisfied with *prima facie* evidence but would require the petitioner to substantiate his case more fully; that in such cases it would require, where practicable, the evidence of witnesses with direct knowledge of the matters on which they were testifying, and on which they could be cross-examined, and which conformed to the ordinary rules of evidence".

The right to cross-examine in these proceedings was also recognized in the case. In *Re Emma Silva Mining Company*⁽²⁾ where it was held that : "The petitioner had a right to the production of the Companies books, papers on the cross-examination of the secretary for the purpose of testing the evidence, but for no other purpose".

Recognizing the right to cross-examine witnesses and lead evidence, in the case of *A B C Coupler and Engineering Co., Ltd.*⁽³⁾ Buckley, J. held that, "where the learned Judge decided that where grave charges were levelled against individuals the court would not in the exercise of its discretionary jurisdiction be satisfied with *prima facie* evidence but require the petitioner to substantiate his case more fully; that in such cases it would require where practicable the evidence of witnesses with direct knowledge of the matters to which they were testifying and on which they could be cross-examined and which conformed to the ordinary rules of admissibility".

Whilst no doubt the verifying affidavit is always a necessary document, in all cases it may not always be sufficient to verify the the petition. In such cases the Judge clearly has a discretion to allow the testimony of witnesses and their cross-examination. It may appear to be contradictory to the statutory provisions which provide that affidavits should in ordinary circumstances be sufficient *prima facie* evidence of the statements of the petition, but where the verifying affidavit is not sufficient, then and only then must opportunity be afforded for the adducing of evidence and/or cross-examination of the deponent witnesses.

Whilst expeditious procedure was no doubt intended by the legislature, courts must also be conscious that the winding-up of a company is a drastic remedy which may have far-reaching consequences, financial, and commercial and also consequences not only affecting the company but also those concerned with it, and the courts should act only after having a careful consideration of the statuting affidavits and where they are insufficient material matters allow *viva voce* evidence.

It has been specifically, held that where the company is *wound -up on a debt* that has been incurred by the company it is also important to ascertain on the affidavits whether the debt is disputed on substantial and material grounds. In the case of *Re*

*Lympne Investments Limited*⁴⁾ Meggary, J. in a case where the dispute was "not trivial" or "insubstantial" held that where the debt was disputed on *substantial grounds* and where it was *not* a debt where *payment had been neglected* that the evidence should be led as to whether the debt was due.

The point is that was made that in a winding-up on a debt incurred by the company the courts must carefully peruse the sufficiency of the verifying affidavit and the other material placed before the court before allowing an order for winding-up. (In *Re Davis Investment (East Ham) Ltd*⁵⁾).

Counsel for the petitioner company has submitted that the courts should not even have entertained this application for a winding-up on a single debt. However, though as winding-up procedure is not a means of debt collecting nor a means for bringing improper pressure on a company, nevertheless it has been held that a winding-up order could be made even for a single debt.

It was also submitted by the counsel for the respondent Bank that in the absence of a statutory provision permitting cross-examination and the leading of evidence the District Judge should not permit the same. However, counsel for the petitioner correctly pointed out that there was no statutory bar to the leading of evidence. The several cases referred to above bear out that evidence has been permitted to be led. These case authority also establish that winding-up orders are not solely made upon the affidavits.

Furthermore section 183 (A) of the Civil Procedure Code reads as follows:

Where any person is required under the provisions of this code, or under any other law for the time being in force, to make an affidavit, then—

- (a) where the action is brought by or against the Attorney-General, any officer of the State, and
- (b) where the action is brought by or against a corporation, board, public body or company, any secretary, director or other principal officer of such corporation, board, public body or company; and

- (c) where any party to the action is absent from Sri Lanka, his attorney duly authorized to bring, conduct or defend the action, as the case may be; and
- (d) where any party to the action or where there is more than one party to the action such of the parties as are Sri Lanka, or when such attorney of the parties as is just above-mentioned, is or are unable, for want of personal knowledge or bodily or mental infirmity, to make the required affidavit, any recognized agent of such party.

may make an affidavit in respect of these matters, instead of the party to the action:

Provided that in each of the foregoing cases the person who makes the affidavit instead of the party to the action, must be a person having personal knowledge of the facts of the cause of action, and must in his affidavit swear or affirm that he deposes from his own personal knowledge of the matter therein contained and shall be *liable to be examined as to the subject-matter thereof* at the *discretion of the Judge*, as the party to the action would have been, if the affidavit had been made by such party.

In this circumstance the District Court in the exercise of its powers is vested with a discretion either to allow or disallow *viva voce* testimony.

The District Judge in his order referred to above has erred in so much as he has concluded that the winding-up order must be determined on affidavit evidence alone and consequently he had no discretionary powers to entertain *viva voce* testimony.

Accordingly leave to appeal is allowed. The order of the District Judge dated 13. 08. 98 is set aside and the matter is sent back, to the learned District Judge to hold a fresh inquiry as to whether he should or should not exercise his discretion in favour of the petitioner company.

We make no order for costs.

ISMAIL, J. (P/CA) – I agree.

Appeal allowed.