1962 **Present: Sansoni, J., and G. P. A. Silva, J.**

VANGUARD INSURANCE CO. LTD., Appellant, *and* RUHUNU TRANSIT CO. LTD., Respondent

S. C. 42/60—D. C. Matara, 1149/M

Company Law—Action filed against a Company for recovery of money—Subsequent proceedings taken by the Company for voluntary liquidation—Power of Court to stay proceedings pending action—Companies Ordinance, ss. 166, 216–220, 243.

Shortly after action was filed by plaintiff against the defendant Company for the recovery of a certain sum of money the defendant went into voluntary liquidation, and the liquidator was added as a defendant. The defendants then prayed that the action be stayed and the plaintiff be directed to prove his claim in the winding-up. They also denied liability and submitted an affidavit to show that they had sufficient assets to meet the claims of all creditors.

Held, that even if the case was such that the liquidator could appropriately refer to Court the question of staying the action by virtue of the provisions of section 243, read with section 166, of the Companies Ordinance, the exercise by Court of the power to stay proceedings would not be just and beneficial to the parties concerned.

APPEAL from a judgment of the District Court, Matara.

C. Ranganathan, with *S. C. Crossette-Thambiah*, for Plaintiff-Appellant.

K. Shinya, with *U. C. B. Ratnayake*, for Defendant-Respondent and Added Defendant-Respondent.

Cur. adv. vult.

July 9, 1962. G. P. A. SILVA, J.—

The Plaintiff in this case, the Vanguard Insurance Co. Ltd., filed action on 18th December, 1957 in the District Court of Matara against The Ruhunu Transit Co. Ltd., for the recovery of Rs. 41,294·11 being the amount due to the Plaintiff on account of insurance premia in respect of certain buses belonging to the Defendant company which buses had been insured with the Plaintiff. Very shortly after this action was filed, the Defendant went into voluntary liquidation and the liquidator, Noel de Costa of Carter de Costa & Co., was added as a Defendant to the action. Thereafter, the Defendant and the Added-Defendant filed answer on 27th June, 1958 praying inter alia that the action be stayed. They also pleaded that, according to the Defendant's books of accounts, credit was due from the Plaintiff to the Defendant on account of premia returnable to and claims settled by the Defendant and that after these amounts had been set off against moneys due to the Plaintiff the net sum owing from the Defendant to the Plaintiff was Rs. 23,646·05 as at 31st December, 1957. The Defendant further stated that the assets of the Defendant

company were compulsorily acquired by the Ceylon Transport Board on 1.1.1958 but that, though compensation was payable in terms of the Motor Transport Act No. 48 of 1957 such compensation had not been paid and that such assets as were in the hands of the Added-Defendant were insufficient to pay the Plaintiff's claim even if such payment were permitted in law. The Defendants, therefore, prayed that the Plaintiff's action be dismissed in respect of any sum in excess of Rs. 24,646·05 and also that the action be stayed and the Plaintiff directed to prove his claim in the winding up.

The Added-Defendant also filed together with the answer a petition supported by an affidavit praying that the action be stayed and that the Plaintiff be directed to prove his claim in the winding up, pleading, among other things, that the action was an attempt on the part of Plaintiff to obtain an undue preference or an advantage over the other creditors of the Defendant, that the Plaintiff's proper remedy was to prove its claim in the voluntary winding up and that, even if the Plaintiff obtained judgment and decree against the Defendant it cannot in fact or in law levy execution of such decree against the Defendant. The application made by the Added-Defendant was taken up for inquiry by the learned District Judge in the first instance and he made order that the proceedings be stayed as prayed for and directed the Plaintiff to prove its claim in the winding up. The present appeal is from the order of the District Judge.

In arriving at a decision in this matter it is important to remember that the amount in dispute regarding which the Defendant made only a general averment was as much as Rs. 17,648·06 made up of a number of items in which not only the quantum but even the liability was clearly in issue. While the Plaintiff filed with the plaint the full account particulars which made up the claim for Rs. 42,294·11 alleged in the plaint as being due to the Plaintiff, the Defendants filed no such account in support of their averment in the answer that only Rs. 24,646·04 was due. It is most unlikely in the circumstances that the liquidator will be able to adjudicate between the parties and to decide on the amount due without a reference to Court.

Section 166 of the Companies Ordinance deals with the power of a Court to stay or restrain proceedings against a company after the presentation of a winding up petition and before a winding up order has been made. This section enables a company or any creditor to apply to the court in which an action or proceeding is pending to stay proceedings therein at any time after the presentation of a winding up petition and before a winding up order has been made and the Court is empowered on such application to stay or restrain proceedings on such terms as it thinks fit.

But section 161 and subsequent sections show that the proceedings contemplated by section 166 relate to cases where winding up is by Court and action can be taken to stay or restrain proceedings only after the

presentation of a winding up petition to Court in terms of section 164. In the present case no petition for winding up by Court having been presented and the Defendant company having only initiated action for a voluntary liquidation or winding up, the provisions of section 166 would not directly apply. The provisions applicable in such a case are to be found in sections 216 to 220 of the Ordinance. While these sections do not contain any express provision empowering a Court to stay any action or proceeding brought against the company, section 243 permits a liquidator or a creditor to apply to Court for determination of any question arising in the winding up and thereupon the Court can exercise the same powers as it might exercise in the case of a winding up by Court.

Mr. Renganathan for the Plaintiff-Appellant has argued that in regard to a voluntary winding up there is no prohibition in law for an action to proceed. He further submitted that even if by virtue of the provisions of section 243 the liquidator in the case of a voluntary winding up may apply to Court to determine any question arising in the winding up of a company as in the case of a winding up by Court, the Court will not stay proceedings when creditors can be paid in full and when the liability itself is disputed. He relied on the affidavit of the Added-Defendant to show that the creditors could be paid in full.

Mr. Shinya for the Defendant-Respondent has contended on the other hand that no Court will allow an action to proceed where one creditor will thereby obtain an advantage over another creditor and has cited a passage from Buckley on the Companies Acts (11th Edition) page 393 where it is stated that the scope of the Act is to bring all claims within the winding up and to prevent persons from enforcing the demands by action. He further argued that, where there was a voluntary winding up, all creditors have to be paid *pari passu* and the Court will interfere by injunction to restrain one creditor from seizing an undue share of the assets of the company for its own benefit, and that, when a creditor commenced action after a resolution to wind up voluntarily the Court restrained the action.

It seems to me that the passage in Buckley referred to would properly apply firstly, where an action commenced after the resolution to wind up voluntarily, secondly, where the creditors are to be paid *pari passu*, the assets being clearly insufficient to meet the claims of all creditors, and, thirdly where a creditor who institutes an action will gain an advantage over the other creditors. In this case the action was commenced before the resolution to wind up. On the affidavit of the Added-Defendant, the liquidator, the total value of the assets of the Defendant company far exceeded the sum of its liabilities. The Plaintiff creditor will not, by being allowed to pursue the action and by obtaining a judgment as to the amount due, gain an advantage over the other creditors. No prejudice whatsoever can be caused to any other creditors by a continuation of this action and by an adjudication as to the actual amount due to the Plaintiff. For, even if the assets were insufficient to meet

the liabilities and all the creditors were to be paid *pari passu*, it would always be possible for the Added-Defendant to apply to Court for stay of execution of the decree until he was prepared to distribute the assets *pari passu* amongst the creditors at the final winding up.

On the other hand an order to stay this action must necessarily cause prejudice to the Plaintiff. The nature and extent of the amount dispute between the parties is such that a reference to Court by the liquidator at the time of the distribution of the assets will indeed be inevitable. A reference to Court at that stage is bound to delay the payment of his dues to the Plaintiff who will have to await the decision of Court before receiving such payment. In this view of the matter I feel that even if this was a case in which the liquidator could appropriately have referred to Court the question of staying the action by virtue of the provisions of section 243 read with section 166 of the Companies Ordinance, the exercise by Court of the power to stay proceedings would not be just and beneficial to the parties concerned.

For these reasons I allow the appeal and direct that the action filed by the Plaintiff-Appellant which was stayed be proceeded with. The Plaintiff-Appellant will have the costs of this appeal.

SANSONI, J.—I agree.

Appeal allowed.