
**UDENI KADAWATHA AUCTIONS (PVT.) LTD. AND ANOTHER
VS.
JAYATHILAKE AND OTHERS**

COURT OF APPEAL.
SOMAWANSA, J. (P/CA).
WIMALACHANDRA, J.
CALA 188/2004.(LG)
DC GAMPAHA 3808/SPL.
FEBRUARY 17, 2006.

Companies Act, No. 17 of 1982 - Section 255, section 257(1) - Company Winding up Rules 7, 7(2), 7(3),- Procedure to be followed - Court of Appeal Appellate Procedure Rules of 1990-Applicability to leave to appeal applications-Rule 3(1) (a) - Civil Procedure Code-Section 757- Constitution Articles. 140, 141.

The petitioner-respondent filed an application in terms of section 257(1) of the Companies Act for the liquidation of the Petitioner Company. The respondent-petitioners objected to the maintainability of the said action on the ground of non compliance with Winding up Rules. The District Court removed the said application from the Roll in terms of Rule 7(3) on the basis of non compliance with Winding up Rules. Subsequently the petitioner-respondents tendered an amended petition and affidavit. The respondent-petitioners objected to same. The District Judge overruled the objection and restored the application to the roll. On leave being sought, it was contended by the petitioner respondent that,

- (i) the petitioners have failed to annex certified copies of the petition and documents - Rule 3(1) of CA Rules 1990 ;
- (ii) there is no provision to amend the petition under the Companies Winding up Rules ;
- (iii) a Company could be wound up only for the reasons set out in section 255 and that the present application is based on the allegation that a dispute has arisen-which is not a ground to wind up a Company ;
- (iv) the advertisement published was not in accordance with Rule 7(2) ;
- (v) there is non compliance of imperative Rule 9 which requires a certifying affidavit to be filed within four days after the petitioner is Presented.

HELD :

- (1) Rules of Court of Appeal (Appellate Procedure) Rules of 1990 do not apply to leave to appeal applications, as leave to appeal applications are governed by procedure laid down in section 757 of the Civil Procedure Code.
- (2) Removal from the roll enunciated in Rule 7(3) of the Companies Winding up Rules does not have the effect of dismissal. There is no provision whatsoever prohibiting the amendment of the petition under the Winding up Rules.
- (3) On the objection that the present application is based on the allegation that a dispute has arisen and it is not a ground for winding up it is a matter that has to be gone into at the inquiry in the application for winding up. In any event, the order canvassed is not an order for winding up but was only an order fixing for inquiry, the objection is premature.
- (4) On the objection that, the advertisement does not give sufficient information about the winding up application. Rule 7 does not specially say that, notice should be given to the petitioner as well as to his Attorney but only says notice should be given to the petitioner or his Proctor ; the advertisement contains the petitioner's name and address as well as his registered Attorney-at-law's name and address though it does not say that, notice could be served on the Attorney-at-Law also—there is no prejudice caused to any one.
- (5) The verifying affidavit required under Rule 9 has to be filed only on the rectified application being accepted. This is a step to be complied with, after the impugned order was made—this objection is premature.

APPLICATION for leave to appeal from an order of the District Court of Gampaha.

Cases referred to :

1. *K. A. Dayaratne Perera vs. K. A. Thilakaratne Perera* - CALA 224/2004 - D. C. Mt. Lavinia. 63/91 - CAM 21.10.2005
2. *Brown & Co. Ltd., vs. Ratnayake* - 1994 - 3 SLR 91.

Ikram Mohamed PC with Waruna Mallawarachchi for 1st and 3rd respondent-petitioners.

P. L. Gunawardane with Sarath Weerakone for petitioners-respondents.

February 17th, 2006.

ANDREW SOMAWANSA, J.(P/CA)

This is an application for leave to appeal from the order of the Additional District Judge of Gampaha dated 18.05.2004 over-ruling the preliminary objection taken by the 1st and 3rd respondents-petitioners and if leave is granted to set aside the aforesaid order dated 18.05.2004 and dismiss the instant application of the petitioner-respondent for winding up of the 1st respondent-petitioner Company.

Leave to appeal has been granted and both parties having agreed to resolve the main matter by way of written submissions have tendered their written submissions.

The relevant facts are, the petitioner-respondent filed an application in terms of section 257(1) of the Companies Act No. 17 of 1982 for the liquidation of the 1st respondent-petitioner Company on the grounds set out in the petition. Upon notice being served the respondents-petitioners filed objections to the maintainability of the said action for non-compliance of winding up Rules in that no verifying affidavit was filed and no advertisement was published. The learned Additional District Judge having considered the objections by his order dated 25.06.2003 removed the said application from the roll in terms of Rule 7(3) of the Companies Winding up Rules of 1939 on the basis of non compliance with winding up rules. Subsequently the petitioner-respondent tendered an amended petition and affidavit along with draft of notification for approval by the Registrar of Court and moved for permission to support it. In the meantime, the 1st and 3rd respondents-petitioners filed a statement of objection to the said second application of the petitioner-respondent. Of consent, both parties agreed to conclude the inquiry by written submissions. The learned Additional District Judge having considered the written submissions tendered by both parties made the aforesaid order dated 18.05.2004 over-ruling the objection taken by the 1st and 3rd respondents-petitioners and restoring the application to the roll. It is from this order that the 1st and 3rd respondents-petitioners have preferred this leave to appeal application.

By way of a preliminary objection, counsel for the petitioner-respondent submits that the 1st and 3rd respondents-petitioners have failed to annex certified copies of the petition and the documents P1 to P8 (a-f) and therefore

the petition of the 1st and 3rd respondents-petitioners should be dismissed *in limine* for want of compliance with section 3(1)(a) of the Supreme Court(it should be Court of Appeal) Appellate Procedure Rules of 1990. I am not at all impressed with this argument.

In *K. A. Dayaratne Perera vs. K. A. Thilakaratne Perera* ⁽¹⁾

I have given reasons as to why rules of Court of the Appeal(Appellate Procedure) Rules of 1990 do not apply to an application for leave to appeal. Applications for leave to appeal are governed by procedure as laid down in the Civil Procedure Code section 757 onwards. In any event, even in terms of Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rule 1990 only documents material to the application need be filed and no more. In *Brown & Co. Ltd. vs. Ratnayake* ⁽²⁾

“Rule 46 is applicable to writ applications also. An application (for writ) under Articles 140 and 141 of the Constitution has to be accompanied by a duly certified copy of the proceedings in the Court of first instance, tribunal or other institution if the copy is material to the case but not otherwise.”

Another objection taken by the 1st and 3rd respondents-petitioners is that there is no provision whatsoever to amend the petition under the Companies Winding up Rules and or the rules do not permit an amended petition being filed and that in any event no amended petition can be filed without permission of Court. In the circumstances, he submits that the amended petition filed cannot and should not be accepted and should necessarily be rejected. Here again, I am not impressed with the objection taken and submission made by counsel for the 1st and 3rd respondents-petitioners for the reason that removal from the roll enunciated in Rule 7(3) of the Companies Winding up Rules does not have the effect of dismissal.

In any event, there is no provision whatsoever prohibiting the amendment of the petition under the Companies Winding up rules. Furthermore, by order dated 25.06.2003 the original petition filed by the petitioners-respondents was only removed from the roll in terms of section 7(3) of the Companies Winding up Rules of 1939 but not dismissed and I am yet to

come across any positive rule of law preventing the amendment of a petition that has been taken off the roll in terms of Rule 7(3) or in supporting such amended petition having complied with the mandatory requirements of the provisions in the Companies winding up rules. I see no merit in the argument of counsel for the 1st and 3rd respondents-petitioners.

Another matter that is raised by the 1st and 3rd respondents-petitioners is that in terms of section 255 of the Companies Act No. 17 of 1982 a company could be wound up only for the reasons set out therein and it is submitted by counsel for the 1st and 3rd respondents-petitioners that the present application is based on the allegation that a dispute has arisen between the petitioner-respondent and the 2nd respondent-petitioner and that this is not a ground to wind up a company. Section 255 has set out six instances in which a company may be wound up by court and it is the contention of the petitioner-respondent that this application falls within the situation set out as per paragraph 'f' Court can give an order for winding up if the "Court is of opinion that it is just and equitable". However this is a matter that has to be gone into at the inquiry into the application for winding up. In any event the order canvassed is not an order for winding up but was only an order fixing for inquiry the application for winding up and the aforesaid objection appears to be premature.

Another objection taken by counsel for the 1st and 3rd respondents-petitioners is that the advertisement published marked B was not in compliance with the provisions in Rule 7(2) of the Companies Winding up Rules as the advertisement states that such a notice be given to the petitioner and the need for same to be given to the Proctor/Attorney is not spelt out therein. In the circumstances, it is submitted by the counsel that the application should be dismissed in limine for non-compliance of Rule 7. The said Rule 7 reads as follows :

Rule 7 "The advertisement shall state the day on which the advertisement was presented and the name and address of the petitioner and of his proctor and shall contain at the foot thereof stating that any person who intends to appear on the hearing of the petition, either to oppose or support must send notice of his intention to the petitioner or to his proctor within

the time and manner prescribed by Rule 14 and an advertisement of a petition for the winding up of a company which does not contain such a notice shall be deemed irregular."

On an examination of the advertisement marked B it is to be seen that it gives sufficient information about the petitioner-respondent's application and adequate opportunity to any interested party to lodge their objections either with the petitioner-respondent or his Attorney-at-law. Rule 7 does not specifically say that notice should be given to the petitioner as well as his Attorney but only says notice should be given either to the petitioner or his Proctor and the advertisement marked B contains the petitioner's name and address as well as his registered Attorney-at-Law's name and address though it does not say that notice could be served on the Attorney-at-Law also. I am unable to agree that anyone would be prejudiced by the aforesaid advertisement marked B.

Another objection taken by counsel for the 1st and 3rd respondents-petitioners is that of non-compliance with imperative Rule No. 09 which requires a certifying affidavit to be filed within 4 days after the petition is presented verifying the same. Here again, the order of the learned Additional District Judge accepting the rectified application and restoring it to the roll has been made on 18.05.2004. It is from this order that the 1st and 2nd respondents-petitioners have preferred this appeal. In any event, the verifying affidavit required under Rule 9 of the liquidation Rules have to be filed only on the rectified application being accepted. Therefore this again is a step that has to be complied with after the impugned order was made and not a matter that needs to be considered at this stage. This again is an objection that could be taken up at the winding up inquiry and accordingly this objection too is premature.

For the foregoing reasons, the appeal of the 1st and 2nd respondents-petitioners is without any merit and I see no basis to interfere with the order of the learned Additional District Judge. Accordingly the appeal will stand dismissed with costs fixed at Rs. 15,000/-

WIMALACHANDRA, J. — *I agree.*

Application dismissed.