COMMERCIAL BANK OF CEYLON LTD.

vs.

GUNARATNE AND OTHERS

COURT OF APPEAL.
WIMALACHANDRA, J.
CALA 250/98 (LG).
DC COLOMBO 19806/MR.
MAY 25, 2005.
JUNE 01, 2005.

Companies Act, No. 17 of 1982, Section 259, section 261, section 347, section 353, section 353 (3), - Winding up proceedings-. When could the Court make an order under section 353(3) ? - Civil Procedure Code - Exparte order - Improperly obtained.

Plaintiff respondent G instituted action against the defendant M Company to recover a certain sum of money. Exparte judgment was obtained. The properties seised by the fiscal and belonging to M were sought to be sold by public auction. The petitioner-Commercial Bank - made an application under section 343 of the Civil Procedure Code read with section 259 of the Companies Act to stay the execution of the sale. After inquiry the Court on 08.10.1998 permitted the sale subject to certain conditions imposed on the liquidator who was added as a respondent. An application to wind up the Company was made on 17.02.1998.

HELD:

(1) The winding up order was made on 18.05.1999 and the liquidator appointed on 26.10.1999. At the time the impugned order was made neither had a provisional liquidator been appointed nor winding up order made. The order dated 08.10.1998 giving directions to the liquidator who was not even appointed at that time is clearly wrong. Court can make an order under section 353 (3) when a provisional liquidator has been appointed or when a winding up order has been made.

(2) The said order is also contrary to section 347 of the Companies Act. It also defeats the provisons of section 261.

(3) The plaintiff-respondent obtained the exparte judgment entirely on the basis of a letter of acknowledgement of the debt written by a Director of the Company sought to be wound up. There is a possibility that the

Director had come forward to give such a letter of acknowledgement of debt and kept away from Court, allowing the plaintiff to obtain judgment exparte.

Per Wimalachandra. J.

"It is my view that where an exparte decree appears to be improperly obtained, the Court must investigate and call for independent proof of the debt due to the company, the Court has power to go behind the judgment to determine whether the judgment was properly obtained."

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

Case referred to :

Vanguard Insurance Co. Ltd. vs. Ruhunu Transit Co. Ltd. 65 NLR 60

Varuna Senadheera with Shivan Cooray for petitioner-petitioner.

Padma Bandara with S. B. Dissanayake for plaintiff-respondent-respondent.

Chanaka de Silva for added respondents.

Cur. adv. vult.

October 14, 2005.

WIMALACHANDRA, J.

This is an application for leave to appeal from an order of the learned Additional District Judge of Colombo dated 08.10.1998.

Briefly, the facts as stated in the petition are as follows :

The plaintiff-respondent-respondent (plaintiff) instituted action No. 19806/MR in District Court of Colombo to recover a sum of Rs. 1,417,355.17 from the defendant-respondent-respondent (defendant). The matter proceeded to trial ex-parte against the defendant as the defendant failed to appear in Court on the summons returnable date. At the ex-parte trial the plaintiff produced a letter acknowledging the said debt, signed by a Director of the defendant-company. The plaintiff obtained an ex-parte judgment against the defendant and the ex-parte decree was served on the defendant. There

being no application to set aside the decree, the plaintiff filed papers for the execution of the same. In executing the said decree, the Fiscal seized properties belonging to the defendant. Thereafter, the properties seized by the Fiscal were sought to be sold by public auction on 3rd and 4th April, 1998 for the recovery of the amount in the decree. On 1st April 1998 the petitioner-petitioner (the petitioner) made an application under section 343 of the Civil Procedure Code to be read with section 259 of the Companies Act, to stay the execution of the sale. This application was supported by the petitioner without notice to the plaintiff and an order was obtained to stay the sale. The plaintiff filed objections to the application made by the petitioner and the matter was then fixed for inquiry. At the inquiry, both parties agreed to tender written submissions and the learned judge made order on 08.10.1998 permitting the sale subject to certain conditions namely– :

(a) after deducting the costs of the sale, the proceeds be deposited in Court to the credit of the above-mentioned case No. 19806/MR and the sum so deposited to be held to the credit of the liquidator in the winding up application.

(b) the liquidator to use part of the said money so deposited to pay the debt due to the plaintiff in terms of the judgment in case No. 19806/ MR

(c) if there is an unreasonable delay to conclude the said winding up application No. 5066/Spl and make the payment of the money due to the plaintiff in case No. 19806/MR, the plaintiff be entitled to make an application to Court to withdraw the money due to the plaintiff and in such an event, after payment of the money due to the plaintiff, the balance to be held to the credit of the liquidator in the said winding up application No. 5066/Spl.

It is from this order the petitioner has filed this application for leave to appeal. The Court granted leave on 08.10.1998, and the order was made on 18.05.1999 in the said winding up application No. 5066/Spl to wind up the defendant company and a liquidator was appointed on 26.10.1999. On 17.11.2000 the said liquidator in case No. 5068/Spl sought permission of this Court to intervene in this case pending in the Court of Appeal. The Court of Appeal by its order dated 30.08.2001 added the said liquidator as the added-respondent.

The petitioner has instituted several actions in the Commercial High Court of the Western Province, bearing No. 124/97(1) for the recovery of approximately Rs. 50.2 million together with interest and No. 126/97(1) for the recovery of approximately Rs. 90 million together with interest, against the defendant. The petitioner obtained an ex-parte decree against the defendant [vide 'X2(a)' and 'X3(a),] and the ex-parte decree was duly served on the defendant in terms of the provisions of the Civil Procedure Code. The defendant however failed to make an application to vacate the said ex-parte decree. In the meantime an application was filed No. 17.02.1998 in the District Court of Colombo by one W. A. L. D. Felix Perera of Q/2/A, Bambalapitiya Flats, Colombo 04 under the provisions of the Companies Act, No. 17 of 1982 to wind up the defendant-company. The said winding up application bearing No. 5066/Spl is marked 'X4'. The petitioner states that in view of this winding up application, it refrained from taking steps to execute the aforesaid ex-parte decree as it would have become void in terms of the Companies Act.

The Court can make an order under section 353(3) when a provisional liquidator has been appointed or when a winding up order has been made. Admittedly, at the time the impugned order was made neither had a provisional liquidator been appointed nor a winding up order made. It is to be noted that the winding up order had been made on 18.05.1999 and the liquidator was appointed on 26.10.1999.

In the circumstances, the order of the learned District Judge dated 08.10.1998 giving directions presumed to be made under section 353(3) of the Companies Act, to the liquidator in the winding up application No. 5066/Spl who was not even appointed at that time is clearly wrong. Moreover, the learned judge did not have jurisdiction or the power to make any order under section 353 of the Companies Act, because by then there was no winding up order. In terms of section 353 of the Companies Act No. 17 of 1982, it is imperative that a provisional liquidator should have been appointed by Court in order to apply section 353 of the Companies Act. The aforesaid order made by the learned Judge is also contrary to section 347 of the Companies Act which deals with preferential payments.

It appears that the impugned order made by the learned Judge frustrates and defeats the purposes of section 261 of the Companies Act and deprives the petitioner and other creditors of the defendant-company of their rights under the law. In making the said order the learned Judge has failed to consider the principles laid down by the Supreme Court in *Vanguard*

Insurance Co. Ltd Vs. Ruhunu Transit Co. Ltd. at p 62. Justice G. P. A. Silva, delivering the judgment said

> **".....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 creditors at the final winding up".**

In the circumstances, it appears that the learned Judge has failed to consider the principle of law stated in the **Vanguard Case** *(supra)* in making the impugned order permitting the auction sale of the seized machinery and other immovable properties, permitting the plaintiff to make an application to withdraw the sum due to him and giving direction to the liquidator to use a part of the sale proceeds so deposited to the credit of the case No. 19806/MR filed by the plaintiff to pay the debt due to the plaintiff in terms of the judgment in the said case.

It is to be observed that the plaintiff obtained an ex-parte judgment in case bearing No. 19806/MR entirely on the basis of the letter of acknowledgement of the debt written by a director of the Company sought to be wound up. There is possibility that the director of the Company had come forward to give such a letter of acknowledgement of debt and then kept away from Court allowing the plaintiff to obtain a judgment producing ex-parte evidence. In the circumstances, it is my view that where an ex-parte decree appears to be improperly obtained, the Court must investigate and call for independent proof of the debt due to the Company. The Court has power to go behind the judgment to determine whether the judgment was properly obtained. In these circumstances, the Court has the discretion to stay the execution of the judgment unless there are exceptional reasons for the Court to allow the execution. In this case I am of the strong view that there are no exceptional reasons for the Court to allow the execution of the judgment obtained by the plaintiff whilst the winding up application is pending.

Though a judgment is always *prima-facie* proof of a debt, nevertheless where there are circumstances casting doubts on the claim, the Court has the power to call for independent proof. There are some logical reasons for this. If a judgment were conclusive, a director of a company which is to be wound up might allow any number of judgments to be obtained by

default against the company by his friends or relations without any debt being due to them at all.

In my opinion the order of the learned Additional District Judge is contrary to law and it will deprive the petitioner and other creditors of the defendant a just and fair distribution of the assets of the defendant. The impugned order would permit the plaintiff to proceed with the auction sale of the properties seized by the fiscal and thereafter recover the debt due to the plaintiff in preference to the petitioner who is a judgment-creditor, and the other creditors of the defendant-company.

For these reasons I am of the view that the said order of the learned Additional District Judge dated 08.10.1998 is contrary to law and to the principle of *pari passu* recognized by law. Accordingly, I allow the appeal and set aside the order of the learned Additional District Judge dated 08.10.1998. The learned Judge is directed to proceed with the winding up application according to law. The appellant is entitled to the costs of this appeal.

Appeal allowed.

District Court directed to proceed with the winding up application according to Law.