

**SHAW WALLACE AND HEDGES LTD**  
**v**  
**NIRMAL FERNANDO AND OTHERS**

COURT OF APPEAL  
AMARATUNGA, J. AND  
BALAPATABENDI, J.  
C.A. 1097/2001  
D.C. NEGOMBO 2397/Spl  
NOVEMBER 12, 2002

*Companies Act, sections 57(2), 264 and 270 – Application to wind up company – Order made – Liquidator appointed – Claim made by alleged creditor to liquidator – Who is a creditor for the purpose of liquidation? – Civil Procedure Code, section 5 – Who is a judgment creditor – Ex parte decree provisional in nature – Is it a decree capable of execution?*

A company “B” issued certain fully paid redeemable preference shares of that company to the judgment creditor petitioner “S” company. When the company failed to redeem the said shares the “S” company-petitioner instituted action in the District Court and claimed a certain sum with interest.

In this action *ex parte* decree had been entered.

K.J. Company made an application to wind up company “B”. the District Court made order to wind up the said company and have a Liquidator appointed. The Liquidator thereafter called upon all creditors of “B” company to submit their claims. When the “S” petitioner company submitted its claim for a certain sum due to it in terms of the District Court judgment, the Liquidator informed the petitioner “S” company, that the petitioner “S” company cannot be treated as a creditor for the purpose of the liquidation.

The petitioner contends that the Liquidator ought to have treated the petitioner as a creditor of “B” company.

**Held:**

- (i) The Judgment and decree obtained by the petitioner was an *ex parte* decree which is of a provisional nature.
- (ii) The B company has filed papers to vacate the *ex parte* order and the inquiry into that is still pending. Therefore it necessarily follows that the *ex parte* decree has not become a decree capable of execution and accordingly the petitioner company is not a judgment creditor.

- iii) *Ex parte* judgment by the very provisional nature given to it by the provisions of the Civil Procedure Code is not a final judgment between the parties, and so long as it remains a provisional judgment, a person in whose favour it has been given is not a person who has become a creditor by virtue of a judgment.
- iv) A holder of redeemable preference shares remain even if the date fixed for redemption has passed, a holder of redeemable preferential shares and therefore a contributor until his rights are crystallised into a valid decree.

**APPLICATION** in revision against the order of the District Court of Negombo.

*Gomin Dayasiri with M.E. Wickremasinghe* for judgment creditor-petitioner

*K. Kanag-Iswaran P.C., with Suresh Perera and Dilshani Wijewardana* for liquidator-respondent

*Prasanna Jayawardena* for creditor intervenient-petitioner-respondent.

*Cur.adv.vult*

30 May, 2003

**GAMINI AMARATUNGA, J.**

This is an application to revise the order of the learned District Judge of Negombo refusing the petitioner's application for a direction to the liquidator-respondent that the petitioner is a judgment creditor of a company to be wound up. 01

The detailed facts relevant to the present application are as follows. In 1986, a company named Bonaventure Textiles (Lanka) Limited has issued 30,000 fully paid redeemable preference shares of that company to the petitioner Shaw Wallace and Hedges Limited. When the company has failed to redeem the said redeemable preference shares on the due date the petitioner has instituted action No. 8328/M in the District Court of Negombo claiming Rs. 60 million with interest at 30% and costs. In this action *ex parte* decree had been entered on 2/12/1996 for Rs. 60 million with interest at 30%. 10

On 5th February 1997, Kay Jay Agencies Limited has made an application to the District Court of Negombo, bearing No.2397 spl to wind up the company named Bonaventure Limited. The

District Court has made order to wind up the said company and in terms of section 270 of the companies Act has appointed the Liquidator respondent company to conduct the winding up proceedings. Thereafter in terms of winding up rules the Liquidator has called upon all creditors of Bonaventure Ltd to submit their claims. By its letter dated 11th September 1997, the petitioner has submitted its claim to the Liquidator for a sum of Rs. 85,766,000.00 due to it in terms of the judgment in D.C. Negombo case No. 8328 Spl. In response to this claim the Liquidator by his letter dated 31/05/2000 has informed the petitioner that the petitioner "cannot be treated as a creditor for the purposes of this liquidation". 20

Upon receiving this communication from the Liquidator the petitioner has filed an application in the District Court of Negombo seeking *inter alia* directions to the liquidator to treat the petitioner as a creditor of the said Bonaventure Limited and to pay the petitioner the amount decreed in its favour in D.C. Negombo case No 8328 M. After both the petitioner and the Liquidator filed written submissions the learned District Judge has made order dated 22/06/2001 refusing the petitioner's application. This revision application is to have that order revised. The petitioner has also filed an application for leave to appeal against the said order. 30

In his short order the conclusion given by the learned District Judge for refusing the application of the petitioner was that under the provisions of the Companies Act a holder of preference shares has no right to obtain money for those shares on the judgment obtained by him. He has further stated that a holder of preference shares cannot circumvent the provisions of the Companies Act by virtue of an ex parte decree obtained by him. However the learned Judge has not referred to specific provisions of the Companies Act relevant to his conclusion and the legal principles relevant and applicable to the interpretation of those provisions. Therefore the conclusion of the learned Judge is not supported by reasons. 40

However it appears to me that there is a much more fundamental matter which goes to the very root of the petitioner's application made to the District Court. The petitioner's application to the District Court, marked P1 and produced with this revision application has been made on the basis that the petitioner is a judgment creditor of Bonaventure Limited. The judgment and decree obtained 50

by the petitioner in District Court Negombo case No. 8328/M was an *ex parte* decree which is of a provisional nature. The person against whom an *ex parte* decree has been entered is entitled to make an application to the Court which entered the decree within 14 days of the service of the *ex parte* decree on him to purge his default and to have the decree set aside. If such an application is made within the period of 14 days and if the Court, after inquiry, is satisfied that the defendant had reasonable grounds for his default the Court has to set aside the judgment and decree and permit the defendant to proceed with his defence from the stage of the default. 60

On the other hand if the defendant on whom an *ex parte* decree has been served fails to make an application within 14 days to have it set aside the *ex parte* decree becomes a decree capable of execution. Even if an application has been made within 14 days, if such application is dismissed by Court then again the *ex parte* decree becomes a decree capable of execution. In terms of section 5 of the Civil Procedure Code a judgment creditor means any person in whose favour a decree or order capable of execution has been made. The learned President's Counsel for the liquidator in his written submissions dated 25/06/2002 has submitted that the holder of an *ex parte* decree is not a judgment creditor and accordingly the petitioner cannot claim the status of a judgment creditor. 70

Whether the Bonaventure Limited has filed an application within time to have the *ex parte* decree set aside and if so what was the outcome of that application is very relevant in considering whether the *ex parte* decree has become a decree capable of execution making the petitioner a judgment creditor. The application made by the petitioner to the District Court and the revision application and the accompanying affidavit are conspicuously silent on this aspect. In the written submissions filed on behalf of the Liquidator dated 25/06/2002 it is specifically stated that Bonaventure Limited has filed papers to vacate the *ex parte* order and the inquiry into that application is still pending in the District Court of Negombo. There is no denial of this position in the written submissions filed by the petitioner dated 2/12/2002. Instead it has been stated in the said written submissions that the Liquidator having appeared in Court within 14 days from the receipt of judgment P1 (*ex parte* judgment) has made an application under section 264 80 90

of the Companies Act to stay further proceedings in that matter and the proceedings have been accordingly stayed.

On this basis the petitioner has submitted that in view of this the *ex parte* judgment and decree still stand valid and accordingly the petitioner is a judgment debtor. However if the inquiry to set aside the *ex parte* judgment and decree is still pending, then it necessarily follows that the *ex parte* decree has not become a decree 100 capable of execution and accordingly the petitioner is not a judgment creditor. If the petitioner was dissatisfied with the decision of the District Court to stay the inquiry the petitioner should have obtained permission from Court to proceed with the inquiry. Therefore it is quite clear that the petitioner is not a judgment creditor within the meaning of the law.

The next question is whether the petitioner is a creditor? In order to show the petitioner is a creditor the petitioner has cited the following passage from Pennington's Company Law (5th Edition) page 843. 110

"A creditor is a person who could enforce his claim against the company by an action of debt and a person cannot petition as a creditor when he merely has a right of action against the company for unliquidated damages for breach of contract, tort or for the restitution of money or property to him in equity. But if such person obtains judgment against the company for an ascertained sum of money, the judgment itself creates a debt and he is then able to petition."

This passage, in my opinion refers to a final judgment by which the rights of the parties have been determined. But an *ex parte* judgment, by the very provisional nature given to it by the provisions of the Civil Procedure Code is not a final judgment between the parties and so long as it remains a provisional judgment a person in whose favour it has been given is not a person who has become a creditor by virtue of a judgment. Therefore a holder of redeemable preferential shares remains, even if the date fixed for redemption has passed, a holder of redeemable preferential shares, and therefore a contributor until his rights are crystalized into a valid decree. 120

If the petitioner, not being a judgment creditor or a creditor, remains the holder of redeemable preferential shares what are his rights with regard to his redeemable preferential shares? Section 57(2) of the Companies Act states that "The redemption of preference shares under the provisions of this section may be effected subject to such terms and in such manner as may be provided by the articles of the company." The share certificate issued by Bonaventure Limited to the petitioner company has been produced along with the Liquidator's written submissions marked "A". It states that 30,000 redeemable preference shares issued to the petitioner are issued subject to the Memorandum and Articles of Association of the company. Articles 5(B)(1)(b) of the Articles of the company which sets out the rights available in respect of preference shares states as follows:

"On a liquidation or return of capital (otherwise than on redemption in accordance with the provisions of paragraph (2) below) the assets of the company available for distribution among the members shall be applied in repaying to the holders of the Preference Shares the amount paid up thereon together with a premium of Rs. 1990/- per Preference Share in priority to any payment to the holders of any other class of shares in the capital of the company."

This Article clearly sets out Preference Shareholder's rights when the assets available for distribution among members on a winding up are considered. If a preference shareholder obtains a judgment on the basis that he is the holder of redeemable preference shares not redeemed on the due date and on that account claims that he is entitled to recover the value of his preference shares as a debt due from the company then he is in the position of a creditor of the company and would be in a position better than that of a preference share holder on liquidation. This would enable him to circumvent the provisions of the Articles of the company subject to which the preference shares have been issued to him and it would in turn be contrary to section 57(2) of the Companies Act quoted above. If a preference shareholder is allowed to circumvent the Articles of Association subject to which he has obtained his shares by resorting to the process described above it would enable

him to circumvent the provisions of the companies Act in an indirect way. He is not entitled to do this.

I have earlier referred to the conclusion given by the learned District Judge for refusing the application of the petitioner. I have also stated that the learned Judge has not given his reasons. For the reasons stated above in this judgment I have come to the same conclusion. In the circumstances I do not see any reasons to interfere with the learned District Judge's order dated 22/06/2001. I accordingly dismiss this revision application with costs in a sum of Rs. 20,000/- payable to the Liquidator-respondent. In view of this judgment I also refuse leave to appeal and dismiss the leave to appeal application bearing No. CALA Application 249/2001. 170

**BALAPATABENDI, J.** - I agree.

*Application dismissed.*