

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

In the matter of an application for Winding up under section 255(c) and (f) of the Companies Act 17 of 1982.

AND

In the matter of Imperial Medical Stores Limited of No. 103, Main Street, Colombo 11.

CALA / 69/2006

CA/REV/278/2006

DC Colombo Case No. 5107/SPL

1. Ms. Daisy Pieris [incorrectly stated as being of No. 18 Barnes Place, Colombo 07] of No. 6 Vidyala Place, Colombo 10.

ORIGINAL PETITIONER.

AND

2. Ms. Daisy Pieris [incorrectly stated as being of No. 18 Barnes Place, Colombo 07] of No. 6 Vidyala Place, Colombo 10.

CONTRIBUTORY PETITIONER

Vs.

1. H.A. Pieris [incorrectly stated as being of No. 18 Barnes Place, Colombo 07] of No. 81/7 - Rosmead Place, Colombo 7
2. Gamini Pieris [incorrectly stated as being of No. 18 Barnes Place, Colombo 07] of No. 14 Trelawney Place, Colombo 4

CONTRIBUTORY-RESPONDENTS

1. Anthony Nirmal Fernando.
2. Mohamed Riyaz Mihuular .
3. Timothy John Surendraaraj

Joint liquidators being partners of KPMG Ford Rhodes Thornton & Co., No. 32A , Sir Mohamed Macan Mawatha, Colombo 02.

LIQUIDATOR -- RESPONDENTS.

AND NOW BETWEEN

Ms. Daisy Pieris [incorrectly stated as being of No. 18 Barnes Place, Colombo 07] of No. 6 Vidyala Place, Colombo 10.

CONTRIBUTORY PETITIONER -PETITIONER

Vs.

1. H.A. Pieris [incorrectly stated as being of No. 18 Barnes Place, Colombo 07] of No. 81/7 Rosmead Place Colombo 7
2. Camini Pieris [incorrectly stated as being of No. 18 Barnes Place, Colombo 07] of No. 14 Trelawney Place, Colombo 4

CONTRIBUTORY — RESPONDENTS-RESPONDENTS

1. Anthony Nirmal Fernando.
2. Mohamed Riyaz Mihuular
3. Timothy John Surendraaraj

Joint liquidators being partners of KPMG Ford Rhodes Thornton & Co.of , No. 32A , Sir Mohamed Macan Mawatha, Colombo 02.

LIQUIDATOR-RESPONDENTS-RESPONDENTS

Ram Brothers (Pvt.) Limited, of No. 140, Main Street Colombo 11.

INTERVENIENT-PETITIONER-RESPONDENT.

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Harsha Amarasekara PC with Koshila Perera and Neomal Pelpita for the Contributory - Petitioner-Petitioner.

Erangi Vitharana Pathirana with Prabash Senasinghe for the Substituted 01st Contributory -Respondent- Respondent.

N.R. Sivendran with Vinojini Selvaraja for the Liquidator-Respondents-Respondents

Written Submissions: By the Contributory - Petitioner-Petitioner on 07-06-2007, 19-06-2012, 11-03-2013 & 22.10.2013
By the Contributory -Respondent- Respondent on 07-06-2007
By the Liquidator -Respondent- Respondent on 07-06-2007, 22.06.2012 & 05.04.2018
By the Intervenant-Petitioner – Respondent on 22-05-2007 and 15-11-2012

Argued on: 02-04-2018, 15-02-2019, 15-02-2021 & 01-03-2021

Judgment on: **01-04-2021**

N. Bandula Karunarathna J.

This Leave to Appeal Application preferred by the Contributory - Petitioner-Petitioner (hereinafter referred to as the Contributory - Petitioner) against the order dated 01.02.2006 by the Learned Additional District Judge of Colombo.

By the said Order the Learned District Judge had confirmed that the sale of the property by the Liquidators-Respondents-Respondents (hereinafter referred to as the Liquidators) to the Intervenant-Petitioner-Respondent, was in order.

When this Leave to Appeal Application was taken up for argument, the main basis on which the Contributory Petitioner endeavoured to challenge the said Order of the Learned District Judge before this Court is on the basis of;

- (a) allegation of manipulation by the Liquidators;
- (b) allegation of fraudulent conduct by the Liquidators;
- (c) allegation of misconduct and improper conduct by the Liquidators;

In order to see whether the aforesaid contentions are substantiated or not and whether the said contentions can be raised before this Court, we have to look at the relevant application made by the Contributory Petitioner in the District Court.

The Petitioner says that acting upon advice she has filed this Leave to Appeal Application, which is an independent and distinct application which must not be confused with the application filed by the 1st Contributory Respondent.

The two applications namely the Leave to Appeal application filed by this Petitioner and the Revision application (CA/REV/278/2006) filed by the said 1st Contributory Respondent have, for convenience of parties, been taken up together.

The Petitioner states that the Petitioners application for Leave must be dealt with on its own merits, independently of the 1st Contributory Respondent's application in Revision and the Final Appeal. The defects or impediments of one application should not be construed as constituting part and parcel of the other. The Petitions Leave to appeal application cannot be prejudiced by the fact that the 1st Contributory who has, acting on independent advice, filed a Revision application and a Final Appeal.

The Contributory Petitioner in April 1998 made an application to the District Court of Colombo to wind up the affairs of Imperial Medical Stores Limited, under and in terms of section 255 (c) and (f) of the Companies Act 17 of 1982.

The 1st Contributory Respondent filed objections to the application to wind up the company. Subsequent to an inquiry into the application to wind up the said company the District Court, by Order dated 10/09/1998 sanctioned the winding up on the said company. This was an application made by a Contributory. It is not an application made by a Creditor. In fact, the company sought to be wound up did not owe any monies to any entity.

The Contributory Petitioner states that her Attorney-at-Law informed the Liquidator not to sell the property by way of Public Offer, but to do so only by Public Auction, and further not to sell the same to Ram Brothers (Pvt) Ltd, namely the Intervenant Petitioner. Despite the said instructions the Liquidator by letter dated 10/05/2004 informed the Contributory Petitioner's Attorneys at Law that he would be taking all steps to sell the property by public offer.

At this point, the liquidators should have taken note of the fact that the duty is owed (in the absence of any creditors) to the Contributories. The Petitioner on or about 31/03/2005 made an application to the District Court of Colombo seeking an order to prevent the sale of the said property and further an Order of Court directing the Liquidator Petitioner to act in terms of Article 56 of the Memorandum and Articles of the said Company and distribute the assets of the company amongst the shareholders thereof.

Articles 56;

"If the company shall be wound up, whether voluntarily or otherwise the liquidators may with the sanction of an extra ordinary resolution divide among the contributories in specie or kind any part of the assets of the company, and may with the like sanction vest any part of the assets of the company in trustees upon trust for the benefit of the contributories or any of them as the liquidators, with the sanction, shall think fit."

The Petitioner says that Intervenant Petitioner namely Ram Brothers (Pvt) Limited, made an application to intervene in the said proceedings on the basis that they were the highest bidders at the public tender, and on or about 15/03/2005, had deposited the purchase price of the said principal assets of the company.

The Contributory Petitioner being aggrieved with the order dated 01/02/2006 of the learned District Judge of Colombo, filed a Petition on 17/02/2006 seeking the leave to appeal from the said Order of the Learned District Judge of Colombo. The 1st Contributory Respondent on or about 07/04/2006 filed a separate Revision Application (CA/REV/278/2006) to the Court of

Appeal seeking inter alia to set aside the Order of the Learned District Judge of Colombo dated 01/02/2006. The Petitioner has been named as a Respondent in the said Revision application.

The Interventient- Petitioner filed objections to the 1st Contributory Respondents Revision Application on or about 28/07/2006. The Petitioner in this Application did not file any objections thereto. Due to the fact that the same parties were involved in both the Leave to Appeal application filed by this Petitioner, namely CALA/ 69 / 2006 and in the Revision Application filed by the 1st Contributory Respondent namely CA /REV/278/06 for the convenience of this Court and the parties, the two cases were fixed to be taken up together. Parties agreed that one Judgment can be delivered considering all facts and law and the documents.

When the two cases were taken up for argument on 04/04/2007, the counsel for the Interventient Respondent informed court that he had filed objections to the 1st Contributory Respondents Revisions Application, and that he wanted the preliminary objections set out in paragraphs 1, 2, 3,4, and 5, of his statement of Objections in case CA/ 278/2006 to be taken up as preliminary objections in CALA/ 69 / 2006.

The application made to the District Court by the Contributory Petitioner is by Petition dated 31st March 2005. A copy of which is marked as N with this Leave to Appeal Application. An Affidavit and documents marked P1 and P2 were annexed to the said Petition.

On perusal of the Petition dated 31st March 2005 filed by the Contributory Petitioner which contains only twelve paragraphs;

- (a) there is no allegation of manipulation by the Liquidators;
- (b) there is no allegation of fraud by the Liquidators;
- (c) there is no allegation of malpractice and improper conduct by the Liquidators;

An allegation of manipulation or fraud or malpractice is a serious allegation which should be set out in the pleadings and which should be dealt with and supported by an Affidavit. It should be brought to the specific attention of Court and the other party. In the said Petition of the Contributory Petitioner there is no allegation or accusation or even the slightest suggestion of manipulation or fraud or malpractice or lack of transparency by the Liquidators.

The basis of the aforesaid application of the Contributory Petitioner as evident from the said Petition, dated 31st March 2005 is the mere desire of the Contributory Petitioner to have the said property of "Imperial Medical Stores Limited" divided among the three contributories. In the circumstances, the Learned District Judge when he delivered the Order on 1st February 2006 had not and could not have been dealt with the said matters, now sought to be raised in the Court of Appeal by the Contributory Petitioner.

It is my view that the Order of the Learned Trial Judge cannot be challenged on the basis of the aforesaid matters in as much, as the said matters that are now sought to be raised were not matters that were placed before or put in issue, before the Learned Trial judge. Also, it is important to note that as conceded by the Counsel for the Contributory Petitioner and as borne out by the Journal Entries in the District Court, there was a lapse on the part of the Contributory Petitioner, by not objecting to and making an appropriate application or taking steps when the

Report of the Liquidators marked as J was submitted to the District Court. The question arises whether these matters can be taken up for the first time in a Leave to Appeal Application. The said Order of the Learned District Judge dated 1st February 2006 cannot be set aside on any of the matters that were sought to be raised by the Contributory Petitioner in this Leave to Appeal Application on 24th April 2012.

The Learned President Counsel, for the Contributory Petitioner conceded the fact that none of the matters now urged for the contributory Petitioner were urged before the District Court. In the absence of any allegations of manipulation or fraud or malpractice raised or put in issue by the Contributory Petitioner in the District Court or dealt by the Learned District Judge, these matters cannot be raised for the first time in the Court of Appeal.

The allegation of manipulation or fraud or malpractice is involving a question of fact which should have been agitated and established by evidence in the original Courts and obtained an Order in respect of the same. The Contributory Petitioner did not agitate these matters nor even refer to them in the original Court and thus, the Contributory Petitioner is not entitled to raise the said matters for the first time in this Leave to Appeal Application.

The judgment of the Supreme Court in Setha VS. Weerakoon 49 NLR 225 is important at this moment. In this case the Plaintiff Appellant sought to raise a new point in appeal which was not covered by the issues framed at the trial, nor raised or argued at the trial, the point being that the doctrine of Lis pendens applies to the case. Dias J. cited the decided cases on this point and held;

"The law on this question is well settled by a decision of the House of Lords and a series of decisions of the Supreme Court. In the case of The Tasmania (1890) 15 App. Cases 223 Lord Herschel said "It appears to me that under these circumstances, Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it is satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and, next, that no satisfactory explanation could have been offered by those whose conduct is impugned, if an opportunity for explanation had been afforded them when in the witness box Therefore, it is not open to a party to put forward a ground for the first time in appeal, unless it might have been Put forward in the Court below under someone or other of the issues framed; and when such a ground, that is to say, a ground that might have been put forward in the Court below, is put forward for the first time in appeal, the cautions indicated in the case of The Tasmania (supra) may well be observed.... (emphasis added)

The Supreme Court held as follows at page, 231: -

"I am of the opinion that the point sought to be raised on appeal for the first time is not a pure question of law, but is a mixed question of law and fact. It is uncovered by any of the issues framed, and the defendant respondent has no opportunity of adequately meeting this contention in Appeal. I am, therefore of the opinion that this is not a matter which can be raised for the first time in appeal." (emphasis added)

in Thalwatte vs Somasundaram 1997(2) SLR 109 G.P.S.De Silva CJ at page 111 held as follows:-

"Besides the question of appropriation of payments by way of rent does not arise in the present case for the reason that the case was not presented before the District Court on that basis. Neither the pleadings nor the issues nor even the written submissions reflect the question of appropriation of payments. A new contention of this kind cannot be raised for the first, time in Appeal since it involves questions of mixed fact and law. A party cannot be permitted to present in appeal a case materially different from the case, presented before the trial court.

The question as to whether a matter that has not been raised as an issue at the trial could be considered in appeal was examined in detail in Gunawardena v Deraniyagala and others. (S.C. Application) No.44/2006 S.C. Minutes of 03.06.2010, where attention was paid to several decided cases.

After a careful examination of the aforementioned decisions, it was clearly decided in Gunawardena v Deraniyagala and others (supra), that according to our procedure a new ground, cannot be considered for the first time in appeal, if the said point has not been raised at the trial under the issues so framed. Accordingly, the Appellate Court could consider a point raised for the first time in appeal, if the following, requirements are fulfilled.

- a) the question raised for the first time in appeal, is a pure question of law and is not a mixed question of law and fact;
- b) the question raised for the first time in appeal is an issue put forward in the Court below under one of the issues raised;
- c) the Court which hears the appeal has all the material before it to decide the question.

"On an examination of all these decisions it is abundantly clear that according to our procedure, it is not open to a party to put forward a ground for the first time in appeal, if the said point has not been raised at the trial under the issues so framed. The appellate Court may consider a point raised for the first time in appeal, where the point might have been put forward in the Court below under one of the issues raised and where the Court has all the material before it that is requested to decide the question".

"Accordingly, the Court of Appeal has correctly retained from considering an issue that was raised for the first time in appeal which was at most, a question of mixed law and fact. For the reasons aforesaid, the judgment of the Court of Appeal is affirmed. This appeal is accordingly dismissed".

It was revealed that the Company, "Imperial Medical Stores Limited" was ordered to be wound-up by the District Court. The Liquidators Respondents, who are the Partners of KPMG Ford Rhodes Thornton & Co., have been appointed as Liquidators of the Company on 10th September 1998. After that date the Directors of the Company have no rights and are not entitled to act as Directors and they ceased to be Directors of the Company. Thus, they could not and cannot enter into any agreements or negotiations or no resolutions in respect of the Company.

There were three shareholders in the said Company and they were also the Directors of the Company. According to the available information, all the three Directors of the Company did not get on with each other well and they were, having different views in regard to the Company. An application was made to Wind-up the Company under the supervision of Court and the Winding-up Order was made. The Liquidators took steps to sell the property and informed Court regarding all the steps that were taken and sought the permission of Court to, advertise the sale of the property.

The Court permitted advertisements to be placed with regard to the sale of the property. Then, public advertisements were placed in the newspapers in all three languages and public offers were called. The public offers were received by the Liquidators.

The Liquidators informed Court, of the offers that were received. It was evident that they sought the permission of Court to sell and transfer property to the highest bidder, namely Ram Brothers (Pvt) Limited.

According to the available documents, the highest offer made by Ram Brothers (Pvt) Limited was accepted by the Liquidators, having obtained the sanction of Court for the sale of the said property to the Interventient-Petitioner. Thereafter having accepted the full payment for the said sale, the property has in fact and in law, virtually had sold on the 15th March 2005.

Section 278(3) of the Companies Act, No.17 or 1982, reads as follows;

“278. (3) The liquidator may make an application to court in the prescribed manner for directions in relation to any particular matter arising under the winding up.”

This Section empowers a Liquidator to apply to Court, to seek directions in relation to a matter arising, in a winding-up. The Liquidators in this case have sought directions from Court for placing an advertisement for the sale of the property.

Having accepted the offers made, the Liquidators thereafter had submitted all the offers to Court and sought permission for the sale of the property to Ram Brothers (Pvt) Limited, being the highest bidder, and the Court has granted permission for the sale.

Section 277 (2) (a) of the Companies Act, No.17 of 1982 reads as follows;

277 (2) The Liquidator in a winding up by the court Shall have power;

(a) to sell the movable and immovable property and things in action of the company by public auction or private contract, with power to, transfer the whole thereof to any person or company, or to sell, the same in parcels;

Thus, the Liquidators acting under the powers given by the Companies Act No. 17 of 1982, must have sold the property after the Court granted approval for the sale of the premises in issue on 15th March 2005 to Ram Brothers (Pvt) Limited and the consideration for the said sale had already passed from Ram Brothers (Pvt) Limited to the Liquidators.

Learned Counsel for the Petitioner argued that in terms of Article 56 a resolution can be passed for the property to be divided. The Winding-up Order of the Company was made on 10th September 1998 and the Liquidators have been appointed as lawful Liquidators. Once a Winding-

up Order is made, the Directors cease to be in control of the Company and it is the Liquidators who are in control of the activities of the Company. The law is very clear that, once the Winding-up Order is made, no resolution of any kind of the Company can be validly passed by the Shareholders. The Company comes under the direct supervision of Court through, the Liquidators. In the present case, there is no resolution exists in terms of Article 56. Thus, the argument of the Learned Counsel for the Petitioner cannot be maintained.

The Petitioner is guilty of laches and has acquiesced in that the Petitioner having been aware that the Liquidators sought permission to advertise for sale the said property in the year 2004 and did not object. This property was in fact advertised by the Liquidators in the newspapers of 13th August 2004 and the Petitioner did not object to such advertisement. Having seen the advertisement in the newspapers, the Petitioner did not make an application to Court, not to grant permission to sell the said property. Thereafter, the Liquidators reported to Court of the offer made by parties and sought sanction to sell the said property to Ram Brothers (Pvt) Limited. The Court On 26th January 2005 approved the sale to Ram Brothers (Pvt) Limited, on which date the Petitioner was in Court and did not object to that application.

The Petitioner having had full knowledge of all the transactions that were taking place, in respect of the Company, has been grossly guilty of laches and undue delay and in any event, is not entitled to any reliefs.

It was revealed that the formal Deed of Transfer has not been Signed by the Liquidators, due to the present litigation and the sale of the property has taken place on 15th March 2005 and Ram Brothers (Pvt) Limited had become the lawful owner of the said property.

In "Application to Windup companies" by Derek French at page 154 and 155, reference has been made to a judgement, which is identical on point with this case reads as follows: -

"In Mookapillai vs Sri Saringgit Sdn (1981) 2 MLJ 114, the company had been ordered to be wound up on a contributory's petition alleging oppression of the minority. About 18 months after the winding-up order was made, all the members realised that the break-up, of the very valuable assets of the company was a financial disaster for them, and they asked for a stay of proceedings and for reversal of the liquidator's sales, which had nearly all been completed. The Court refused to interfere with the liquidator's sales because this would be a breach of commercial morality and refused to order a stay of proceedings because the liquidation was almost complete;"

On 26th January 2005, the Court in the presence of all parties gave permission to the Liquidators to proceed with the sale of the property to Ram Brothers (Pvt) Limited. There were no objections by any person on 26th January 2005, when permission was granted by Court for the sale of the property to Ram Brothers (Pvt) Limited. No party appealed against the said Order dated 26th January 2005.

It was revealed that Ram Brothers (Pvt) Limited, on 15th March 2005 handed over the Bank Draft in favour of the Liquidators and thus, the sale of the said property to Ram Brothers (Pvt) Limited had been completed. Thereafter on 31st March 2005 the Contributory-Petitioner made an application to stay the sale of the disputed property.

The following pleadings are the matters which were considered by the Learned District judge for the determination of the said application: -

- (a) Petition of the Shareholder-Petitioner dated 31st March 2005 (marked as N with the Petition of the Petitioner).
- (b) Statement of Objections of the Liquidators dated 14th July 2005 (marked as 2Q with the Petition of the Petitioner)
- (c) The Affidavit and documents marked X1 to X4 filed by the Liquidators objecting to the said application of the Shareholder-Petitioner.
- (d) The Petition and Affidavit dated 19th July 2005 of Ram Brothers (Pvt) Limited (marked as O with the Petition of The Petitioner) together with the documents marked X1 to X7 filed thereto.

It was not disputed that public offers were called for the sale of the property and the same had been advertised in the newspapers. The public offers received were notified to Court by the Liquidators through their Report dated 01st November 2004. Liquidators had requested for the sale of the property to the highest bidder namely, Ram Brothers (Pvt) Limited, who was the Intervening-Petitioner. Time was given for the consideration of the said Report until 26th January 2005. On that day all parties were present and represented by Learned Counsel in Court and the District Court granted the permission to sell the said property.

It is significant to note that at the time the matter came up, for consideration of the highest offer made by Ram Brothers (Pvt) Limited, there were no objections by any party to the proposed sale. The Contributory Petitioner was a party to the action and was represented in Court.

Thus, the Contributory Petitioner having consented to and having conceded the sale of the property to Ram Brothers (Pvt) Limited has no right to challenge thereafter the said sale.

No party appealed against the said Order of 26th January 2005, which is a valid and binding Order and which has not been set aside. It was argued by the Liquidators that it cannot be set aside now in these proceedings. It is the correct legal position at the moment.

The sale of the property by the Liquidators to Ram Brothers (Pvt) Limited consequent to the approval given by the District Court on 26th January 2005, is valid and binding according to law and cannot be disturbed. This court of the view that no reason to interfere with the Order of the Learned District Judge dated 01st February 2006 which is correct and valid in law.

The Order of the Learned District Judge of Colombo dated 1st February 2006, relates to the said application made by the Contributory-Petitioner on 31st March 2005. The Learned District Judge held that the sale was a valid sale.

Thus, it is clear that the sale of the disputed property having been approved by Court on 26th January, 2005 and no party having appealed against the said Order granting permission on that day, for the sale of the property and as all the matters have been concluded there are no other steps to be taken in this application.

The Learned District Judge having considered all the aforesaid matters by Order dated 01st February 2006, refused the application of the Contributory Petitioner.

The Order of the District Court of Colombo dated 26-01-2005, permitting the Liquidators to sell the said assets to the highest bidder, in my view is a consent order, and no grounds have been urged by the Contributory Petitioner to show that the consent of the contributories have been invalidly obtained or that they laboured under some misapprehension, when consenting to the order for sale. They had nearly a year to mull over the matter, and it is thereafter that the consent was given for sale of the said property.

As the Liquidators were acting on the basis of a consent order of Court, there was no further obligation on the Liquidators to summon a meeting of the contributories to obtain the sanction of the contributories in terms of Article 56 of the Articles of Association of the Company.

The Contributory Petitioner has not urged any legal grounds upon which the Court could after having ordered a sale of the said property on the basis of consent, issue an order staying its own original consent order for the sale of the said property.

By its Order dated 01-02-2006 (marked T) the District Court of Colombo correctly dismissed the application for stay of sale with costs, permitted the Intervient-Petitioner-Respondent's application for intervention, and ordered the sale of the said property to the purchaser as soon as possible.

The sale of the said property to the Intervient Petitioner is now ineffective, and hence now there is no pending transfer to be stayed. It would therefore, be futile and otiose to even consider granting the reliefs prayed for in the petition dated 31-03-2005 marked "N" filed in the District Court of Colombo, and in the petition dated 17th February, 2006 filed in the Court of Appeal.

For the above reasons, we decide to affirm the said Order of the District Court of Colombo dated 01-02-2006, and dismiss with costs both the Leave to Appeal Application bearing number CALA/69/2006 and Revision Application bearing No. CA/Rev/278/2006.

Both Applications are dismissed with cost.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal