

IN THE HIGH COURT OF FIJI
AT SUVA
COMPANIES JURISDICTION

Companies Action No. 67 of 2011

IN THE MATTER of
FRONTIER HAPPY LIVING
LIMITED

AND

IN THE MATTER of the
Companies Act, Sections 264
and 324

BETWEEN : **SUZUKI KOGORO** of 5 G Jalan Tanjung Tokong, 10470 Penang,
Malaysia, Businessman.

Applicant

AND : **JIA SHIYONG** of 22 Salato Road, Namadi Heights, Suva, Director and
PEI TE SHI of 115 Kaunitoni Street, Vatuwaqa, Suva, Director.

1st Respondent

AND : **FENG PEILIAN** of 32 Spring Street, Toorak, Suva.

2nd Respondent

COUNSEL : **Mr Nand M. of Nands Law for the Applicant**
Mr Niubalavu P. of M.A. Khan Esq for the Respondents

DATE OF JUDGMENT: 2nd May 2014

JUDGMENT

Facts

1. A winding up application was presented against the above company by one Suzuki Rogoro on 8 September 2011.

2. The Learned Master made an Order on 28 October 2011 which states:
 - *“FRONTIER HAPPY LIVING LIMITED, a limited company having its registered office at 32 Spring Street, Toorak, Suva be wound up under the Companies Act Cap 247.*

 - *That the Official Receiver attached to the court be constituted provisional liquidator of the company.*

 - *Costs of \$500 to the Petitioner.”*

3. Subsequent to the said order, Notice of Motion dated 25 June 2012 and the Affidavits in Support sworn on 25 June 2011 sworn by Jai Prakash Narayan, Power of Attorney holder for the Petitioner were filed on 27 June 2012. The Petitioner claimed the following reliefs:
 - (a) *An Order under Section 264 of the Companies Act for the 1st and 2nd Respondents to appear before this Court to give information concerning the dealings, affairs or property of the Company and produce any books and papers in his custody or power relating to the Company;*

 - (b) *An Order under Section 264 of the Companies Act that if the 1st and 2nd Respondents after being tendered a reasonable sum for their expenses, refuse to come before this Court at the time appointed, not having a lawful impediment (made known to the Court at the time of its sitting and allowed by it) the 1st and 2nd Respondents be arrested and brought before the Court for examination;*

 - (c) *A Declaration under Section 324 (1) of the Companies Act that the 1st Respondents as Directors of the said Company were knowingly a party to the carrying on of the business of the said Company with intend to defraud*

creditors of the said Company and for other fraudulent purposes, and that they are responsible without any limitation of liability for the Company's debt to the Applicant, amounting to \$124,608.43 and interest thereon at the rate of 13.5% per annum computed from 7th January 2010 till payment in full;

- (d) If necessary, an account of the debts of the said Company;*
- (e) Payment to the Applicant by the 1st Respondent of the said sum of \$124,608.43 and interest as aforesaid;*
- (f) An Order that the 1st Respondent do pay to the Applicant its costs of and incident to this application;*
- (g) Such further or other relief as shall to this Honorable Court seems just.*

The said application was made pursuant to Sections 264 and 324 of the Companies Act and under Rule 60 of the Winding Up Rules.

4. When the matter came up before this court on 17th July 2012, 1st Respondent did not appear in court and the 2nd Respondent appeared and 21 days granted to file the Affidavit in Response and the Affidavit in Response was filed on 15 August 2012 and Affidavit in Reply was filed by the Petitioner through his Attorney Jai Prakash Narayan on 31st August 2012.
5. On 12th September 2012, when the matter came up before this court, order was made granting the following reliefs claimed in the Notice of Motion dated 25th June 2012. The Order stated:
 - (1) The 1st and 2nd Respondents to give information concerning the dealings, affairs or property of the Company and produce any books and papers in his custody or power relating to the Company.*
 - (2) If the 1st and 2nd Respondents after being tendered a reasonable sum for their expenses, refuse to come before this Court at the time appointed, not having a lawful impediment (made known to the Court at the time of its sitting and allowed by it) the 1st and 2nd Respondents be arrested and brought before the Court for examination.*

(3) *Matter adjourned to 4th October 2012.*

6. The matter was taken up for inquiry on 17th October 2012 and Ms Feng Peilian, 2nd Respondents Jia Shiyong and Pei Te Shi were present. Mr Nand counsel for the Petitioner called the second Respondent to give evidence. The 2nd Respondent stated that she signed the Affidavit on 15th August 2012.

6.1 **Evidence of the 2nd Respondent**

She was the Manager of the company since 2010. She signed the Affidavit on 15/8/2012. Rent paid to the landlord was \$2500 per annum + vat. She signed the cheques and she was the sole signatory. Shown the Statements of the Bank Account marked as *Annexure "E"* to the Affidavit sworn by her rent payments are \$3067.00, last statement of the bank shows the payment of \$3067.00 paid on 6/9/2011 and stated that payment was not for the month of September there was 2 months rent in arrears. She stated she didn't know whether any advance payment was made and notice was received by her demanding the arrears. From January 2011 to August 2011, landlord verbally demanded the arrears of rental. The witness stated letter marked "*H*" dated 15th September 2011 received by her terminating the contract. Winding-Up Petition was served on her on 16/9/2011. She was aware the Petitioner Suzuki funded the business. She requested Suzuki to invest some more money. She approached by some other people and she had given the landlord's telephone number and landlord negotiated and entered into a new agreement with them. She is managing the new venture since 8th October 2011. She informed the Directors of Frontier Happy Living Limited in September about the Winding-Up case when she received the notice.

- 6.2 There were certain improvements done to the premises by the new company. She resigned from the previous company on 28th of August 2011 and letter of resignation was given to Jia Shiyong one of the Directors. She admitted that she had not stated that she resigned from the company in her Affidavit.

Replying to the Respondents' counsel, the 2nd Respondent was shown *Annexure "G"* and the witness stated that the Petitioner Suzuki is a party to the agreement because he wanted to do business in Fiji, *Annexure "G"* is dated 13th July 2012. There was no rent payment made from July to November 2011. She had arranged the staff to work in the company under a work permit. Staffs were brought down from China and she was responsible for the staff. Some of the items of the company are there and some items are not there. Applicant had spent the monies demanded from the

company on various expenses and purchases. Items available are detailed in paragraph 27 of her Affidavit.

7. **Evidence of Pei Teshi – 2nd named Respondent**

The witness stated he is a businessman and aware of Frontier Happy Living Company. Shown *Annexure “B”* to the Affidavit in Support by Jai Prakash Narayan and admitted the said document. Authority being given to the Petitioner to inspect the company documents by the Annexure “B”. The company was not in operation from August 2011. The company closed in October. Rent was in arrears since July. He is not aware the exact amount. *Annexure “E”* to the Affidavit of Ms Peng was shown and the witness stated that he cannot say the return cheque of \$3067.00 was for rent. *Annexure “JPN2”* annexed to the Affidavit of Jai Prakash Narayan dated 30th August 2012 was shown and the witness admitted the items were bought by the Petitioner. Items were left at the premises since rent was not paid. All the monies in the company were invested by the Petitioner and the witness was not involved with the business. Remaining items in the premises belongs to the company.

In replying to the counsel for the Respondents, witness sated the balance of the Bank Account as at September was \$436.20. Tenancy Agreement was signed terminated on 18th September 2011. He doesn't have any involvement with the company which operates now from the premises.

In replying to Mr Nand the witness stated certain item in the premises can be removed and he didn't handover the business to any other company.

8. **Findings and Determination**

8.1 The Petitioner claimed the company is indebted to him in the sum of \$124,606.33. It is observed the resolution marked “B” annexed to the affidavit of the petitioner signed by the Directors of Frontier Happy Living Ltd was for funding of the importation of equipments fixtures and fittings renovation of the business premises and establishment of business. The Petitioner was given the power to inspect the company accounts and monthly profit and loss and balance sheet was to be tendered.

8.2 There was no evidence before this court that apart from \$124,606.33 invested by the Petitioner any other monies were invested in the company. I believe the evidence of Feng Peilian and Pei Te Shi and that the evidence establish the Petitioner himself

operating the company and the Directors have just lent the names to incorporate the company in Fiji. As stated and revealed in the evidence the alleged debt is in fact an investment which was expended for importing certain items from China (9350.58USD) which was far less than the debt. It was also revealed in the evidence certain expenses of the Petitioner were also included in the debt. This court after considering evidence cannot find any reason for the Petitioner who being a foreigner, to grant a loan to local Fijians (*no previous business relationships established in the case*) without interest. The only conclusion this court can arrive at is that the monies alleged to be a loan, was in fact an investment. When someone invests monies in a company, it carries a risk. There was no evidence to establish that there was any fraud perpetrated by the Respondents and their position was that for the items remaining at the premises are purchased by the Petitioner and they don't claim ownership to such items. Accordingly, there is no case to establish before this court to make a declaration under Section 324 (1) of the Companies Act as claimed in the Notice of Motion dated 25th June 2012 and the Petitioner fails.

- 8.3 I am satisfied the affairs of the company had properly detailed in the Affidavit of the 2nd Respondent.
9. For completeness of this Judgment, this court also made the following observations on the Commercial Tenancy Agreement marked "A" annexed to the Affidavit of the 2nd Respondent. The parties to the Agreement were Naseys Safeway Limited (*Landlord/Owner*), Frontier Relaxing Time and Suzuki Kogoro, the Petitioner. This agreement dated 13th July 2010 was admitted by the Petitioner in paragraph 25 of the Petitioner's Affidavit. It is interesting to observe that the Petitioner is the Joint Lessee/Tenant of the premises with Frontier Relaxing Time and it is evident that Frontier Happy Living Limited was not a party to this agreement neither the Petitioner had not given any explanation in this regard, as to how the Frontier Happy Living Limited came in to the shoes of Frontier Relaxing Time. It is also noted on behalf of Frontier Relaxing Time (*business registration pursuant to CAP 249*), one 'Navitalai Nabuca' had signed on the agreement marked "G". Although, this was not raised as an issue by the parties, my conclusion is Frontier Happy Time Limited was not a party to the agreement marked "G". This once again proves that Frontier Happy Living Limited was a company fully invested by the Petitioner, who signed the agreement marked "G". The other matters brought before this court are not relevant to the Notice of Motion filed in the case.

10. However, it was submitted and I am satisfied the items stated in paragraph 25 of the 2nd Respondent's Affidavit were purchased by the Petitioner by investing his monies and he is entitled for the proceeds if the Landlord had consented to release as submitted by the Respondents' counsel. I direct the Provisional Liquidator to take steps for disposal and all expenses for realization of the assets by the liquidator to be reimbursed. The 2nd Respondent is directed to assist the liquidator in this regard.

11. Accordingly, I make the following Orders:

(1) *Declaration in terms of paragraph (c) of the Notice of Motion refused/dismitted and other reliefs claimed under (d), (e) and (f) are refused/dismitted.*

(2) *No order as to costs.*

Delivered at Suva this 2nd day of May 2014.



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C. KOTIGALAGE
JUDGE

