IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Winding Up Action No: HBE 59 of 2020

IN THE MATTER of **HONEY DEW FARMS COMPANY PTE LIMITED** a limited liability company having its registered office situated at Shekinah Law, Suite 1B FHL Properties Ltd Building, 41 Gladstone Road, Suva, Fiji.

AND

IN THE MATTER of the **COMPANIES ACT 2015**

Counsel : **Applicant:** **Ms. J. Raman**
: **Respondent:** **Ms. K. Saumaki**

Date of Hearing : **17.2.2023(9.30am)**
Date of Judgment : **17.2.2023 (2pm)**

Catch Words

Section 553 of Companies Act 2015, Stay of an order of court to wind up, Discretion of the court.

Cases Referred

In the Matter of Millennium Plaint Company Fiji Limited (unreported) decided on 10.12.2021

Practice Note (Winding Up Order: Rescission) (No2)(1971) 1 WLR 4. (Not applied)

JUDGMENT

INTRODUCTION

1. Plaintiff Official Receiver (OR) had filed this application in terms of Section 553(1) of Companies Act 2015 to stay the winding up of Honey Dew Farms Company (the Company). One of the creditors who had initially filed proof of debt with the official

receiver (AEPL), and had withdrawn its proof of debt, is opposing this application. The main argument for AEPL is that OR must submit assets and liabilities of the Company in terms of Section 553 of Companies Act 2015 and failure to do so was fatal for this application. AEPL relied on a decision of Master in Winding Up Cause No 8 of 2018 *In the Matter of Millennium Plaint Company Fiji Limited* (unreported) decided on 10.12.2021. Section 553(1) of Companies Act 2015, impose no mandatory obligation on the part of an applicant, to file assets and liabilities of the Company. The factors that are relevant to prove 'to the satisfaction of court' in order to stay an order for winding up can vary. Section 553(2) of Companies Act 2015, grants the Court power to direct an applicant seeking stay of an order for winding up to submit a report of any relevant . So the contention this application should be dismissed for failure to submit assets and liabilities is without a merit. The discretion to grant or to refuse stay of an order for winding up is with the court. Before exercising this court 'may' in its own opinion request a report about any relevant fact, but it is wrong to dismiss this application without the court first considering the facts submitted with the affidavit in support and or directing OR to submit a report, on any relevant fact.

FACTS

2. The Winding Up of the Company was made on 16.2.2021. The Company was in the business of plastic recycling in the island of Denarau which is highly dependent on tourism. It had got severely affected due to the closure of border during pandemic.

3. There were six creditors initially who appear before OR and submitted proof of debt, but subsequently all of them had withdrawn such proof of debt statements.

4. Four of the creditors were fully settled and remaining two including AEPL entered in to payment agreements with the Company.

5. Application for stay of winding up was made by OR on 10.11.2022

6. Out of the six creditors only AEPL objected to this application of OR to stay.

ANALYSIS

7. This is an application made by OR in terms of Section 553 of Companies Act 2015 which reads:

> "*General Powers of Court in case of Winding up by Court power to stay winding up'*
>
> **553.**— (1) The Court may, at any time after an order for winding up, on the application either of the liquidator or the Official Receiver or any creditor

or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit.

(2) On any application under this section, the Court may, before making an order, require the Official Receiver to furnish to the Court a report with respect to any fact or matter which are in his or her opinion relevant to the application.

(3) A copy of every order made under this section must be forwarded by the Company, or otherwise as may be prescribed by regulations made under this Act, to the Registrar, using the Prescribed Form, for registration."

8. According to Section 553(1) of Companies Act 2015, following persons can make an application seeking stay of winding up action:

a. Liquidator.
b. OR-Official Receiver.
c. Any creditor.
d. Any contributory.

9. Accordingly (OR) has locus *standi* to file this application as much as any creditor or contributory of the Company.

7. The Applicant (OR) had sought to stay the order made on 16.2.2021. There is an affidavit in support filed.

8. OR must satisfy the court that all proceedings should be stayed. For that OR had filed an affidavit in support. The affidavit in support states in detail how many debtors had submitted proof of debt and the amount of debt they claimed in the proof of debt statements submitted.

9. The affidavit in support also included the evidence of settlement of four out of six creditors fully by the Company (in receivership) and withdrawal of proof of debt statements by remaining two debtors, including AEPL who was a supporting creditor.

10. There is no evidence that the Company had violated terms of said agreements entered between two outstanding creditors of the Company including AEPL.

11. In the circumstances, in my mind OR had satisfied the requirements under Section 553(1) of Companies Act 2015, to seek stay of winding up.

12. There is no mandatory requirement for an Applicant under Section 553(1) of Companies Act, 2015 to submit assets and liabilities of the Company, though such disclosure may be desirable depending on circumstances of the case, to assist the court.

13. In any event, it would be wrong to dismiss an application for stay of winding up only because it lacked such a report on assets and liabilities, when the court is empowered to seek such other relevant information before making a decision regarding stay of an order for winding up.

14. In this instance AEPL had before OR had withdrawn its proof of debt upon an agreement it had entered with the Company. Its total debt at that was $94,156.55 and this had reduced to $65,126.00. These are facts stated by AEPL in their affidavit in opposition.

15. According to AEPL, there is an outstanding debt. That is correct but by the same token debt had reduced by approximately one third and there is no allegation of the Company violating the agreement entered with them to voluntarily to settle the debt.

16. Counsel for OR stated that the Company have significant debt to FRCA but again they have also come to an arrangement with the Company and had withdrawn its statement of proof of debt.

17. It is not a requirement for a Company in receivership to settle all its debts, to stay winding up, although that may be the ideal situation to stay a winding up order. This can happen when a company is downsizing or restructuring or asset rich company decides to strip some of its assets to settle the debt fully. But in many instances debts of a Company cannot be settled by disposal of assets due to such assets being securities to loans obtained.

18. A court can take in to consideration of affidavit evidence available on the action in order to exercise its discretion in terms of Section 553(1) of Companies Act 2015.

19. Considering the circumstances of this case where liquidity of a company got affected to external factors such as pandemic, change of circumstances is a major factor to be considered. So it will be futile to list the factors that a court needs to consider in the exercise of its discretion in terms of section 553(1) of Companies Act 2015. This is the reason for granting the court to allow seek additional relevant facts, by way of a report in terms of Section 553(2) of Companies Act 2015.

20. The reason for the failure of the Company being unable to settle its debt, can be numerous from internal factors such as financial mismanagement to external factors such as recession in economy and or pandemic etc. So the remedies to settle its debt also depends on both internal as well as external factors. The determinant factor for the court to lift an order for winding up, is the ability of the Company to do business without incurring additional defaults.

21. In my mind first court should look at the bona fides of the application for stay of the winding up. This is the acid test for any application seeking stay of winding up order once it is made. The threshold for such a stay is high but should not be saddled with too much technicalities.

22. There is no hard and fast rule that such an application needs to make as soon as winding up order is made. No such requirement is needed and what is more important is overall benefit to all stake holders of the Company.

23. Later the application is made, it gives the company in receivership to show its bona fide regarding settlement of its debtors and compliance of payment schedule.

24. In this instance where four out of six creditors who were fully settled and they had withdrawn their proof of debt before OR. These debtors were owed comparatively less amounts compared with AEPL and FRCA who had also voluntarily arrived to debt settlement agreements and had also withdrawn their respective proof of debt statements.

25. Having withdrawn all the proof of debt statements by the creditors who appeared before OR, it would be unreasonable for OR not to seek a stay of winding up order, unless there are some special reasons for not making such an application. In this case winding up order was made more than two years ago and severe effect of border closure and its impact on the economic activities in and around the area where the Company's business activities revolve is a factor OR can take in to consideration and a court cannot ignore such factors in the exercise of its discretion under Section 553(1) of Companies Act 2015.

26. If the court is not satisfied it can always request OR or liquidator to submit any independent report regarding a relevant fact, but without exercising judicial mind as to the facts submitted , it cannot be rejected only because such an application was made late and or it had not contained all the assets and liabilities of the Company.

27. When the court is given a wide discretion such as Section 553 of Companies Act 2015, it cannot be narrowed down, or adding gloss over it, through artificial requirements without a good reason.

28. AEPL relied on decision of Master in *In the Matter of Millennium Plaint Company Fiji Limited* (unreported) decided on 10.12.2021, at paragraph 20 held,

> 'For this reason it is required that an application for stay a winding up order should promptly be made with the supporting affidavit detailing assets and liabilities of the company. In case of belated application, the affidavit should establish the exceptional circumstances justifying the application. (Practice Note (Winding Up Order: Rescission) (No2)(1971) 1 WLR 4.'

29. In UK in 1971 there was an increase number of applications seeking stay of winding up, before they are 'drawn up'. For that purpose Practice Note (Supra) made, (Per Megarry J)

> 'owing to the great increase in the number of such orders it often happens that some time elapses before the order can be drawn up. The making of the order, however , affects all creditors of the company, and gives the official Receiver authority to act forthwith; and **in the circumstances the inherent power of the court to revoke or vary an order at any time before it is perfected is one that out to be exercised with great caution.** Accordingly, although the matter is one for the discretion of the court in each case, application to rescind a winding up order will not normally be entertained by the court unless it is made within three to four days of the order, and is supported by an affidavit of assets and liabilities. If an application is made later than this, the affidavit should also establish the exception' (emphasis is mine)

30. From the above quote, it is clear that Megarry J was not considering stay of winding up in terms of Section analogous to 553(1) of Companies Act 2015, but a totally different scenario where discretion of the court to vary an order before it is drawn up and sealed. So Megarry J in UK Practice Note (supra) had not discussed Section 256 of UK Companies Act 1948[1], analogous provision to Section 553 of Companies Act 2015. Hence UK decision should not be misapplied, to curtail the wide discretion granted to court. It was meant for a different situation and should be applied only for analogous situation.

31. What is required to exercise wide discretion of the court is to approach the application and its bona fides in holistic, manner including all internal as well as external factors and the conduct of the Company since the order for winding up made.

32. In my mind a report of all assets and liabilities of a company will not show its potential to collect revenue and pay off all its outstanding debts, as heavily leverage companies are much solvent due to steady cash flow and other factors.

[1] https://www.legislation.gov.uk/ukpga/1948/38/section/256/enacted(17.2,2023)

33. If the court is not satisfied to lift the winding up order permanently, it may lift it for a period and request a report during such time period.

34. In this case as all the debtors who submitted statements to prove their debts had withdrawn them. Another factor is change of external economic activities, which has an impact on recycling business in an area dependent on tourism. This is holistic consideration in the exercise of discretion in terms of section 553(1) of Companies Act 2015.

35. The discretion given to court is wide and if the court is satisfied upon the material submitted that winding up should be stayed it can be allowed with reasons stated. I do not see any reason to narrow the discretion granted to court in terms of Section 553 of Companies Act 2015, but it needs to be exercised with caution and not to allow abuse of it by frivolous applications.

36. In this instance there were six creditors who submitted proof of debt statements to OR when public notice was given regarding the order for winding up. Out of that four debtors were fully paid and they had withdrawn their respective proof of debt statements.

37. As regards to unsettle debtors, arrangements were made to settle their debt and they had accordingly withdrawn their proof of debt statements. So , when OR made this application seeking stay of winding up there were no proof of debt by any creditor to wind up the Company.

38. The discretion given to the court should be exercised reasonably and not in arbitrary manner. This is an application made by OR the liquidator appointed for the winding up of the Company. As all the six debtors who appeared before OR had withdrawn their proof of debt statements, there was no basis for OR to seek continuation of winding up of the Company. Accordingly, OR had made this application seeking stay of winding up. In the circumstances it would be unfair and unreasonable not to exercise the discretion grated stay of winding up.

39. The contention that OR should submit a report of Assets and Liabilities of the Company, cannot be accepted for reason stated earlier. Even if such a report is submitted it will only show assets and liabilities at a particular time and not its ability to pay the debts, but if such a report is needed the court may request such a report before a decision is taken to stay winding up.

40. In this action the order for winding up was made on 16.2.2021. The court can take judicial notice of the closure of borders due to pandemic and its impact on the Company considering that its area of business.

41. There is no hard and fast rule as to the time taken to make an application for stay of winding up should be made. So it is wrong to say such application should be made promptly, when the legislation had not made any restriction as to the time period of making such an application in terms of Section 553(1) of Companies Act 2015.

CONCLUSION

42. Applicant who is OR is an independent and disinterested body to the Company had made this application seeking stay of winding up after two years from court making an order to wind up. The bona fides of the applicant and the Company can be established by independence of OR to the application, and also conduct of the Company. AEPL had withdrawn its proof of debt statement before OR upon entering in to an agreement to settle its debt with the Company and its debt had reduced by nearly one third, since order for winding up was made. There were no allegation of default or violation of said debt repayment schedule with AEPL or the other creditor. There is no reason to request report of all assets and liabilities of the Company considering circumstances of this case. This is not a mandatory requirement and if the court desires it can order such a report in terms of Section 553(2) of Companies Act 2015. I am not inclined to reject this application in the exercise of wide discretion granted to the court in terms of Section 553(1) of Companies Act 2015. Accordingly, the winding up order made by the court is stayed permanently. No order for costs, considering circumstances of the case.

FINAL ORDERS

a. Winding up order made in this action on 16.2.2019 is stayed, permanently.
b. No order as to the costs.

Dated at Suva this 17th day of February, 2023.

HIGH COURT OF FIJI
SUVA

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Justice Deepthi Amaratunga
High Court, Suva