

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

K.G. Jothipala,
No. 200/1,
Aluthgama,
Bogamuwa,
Yakkala.

Petitioner-Petitioner
(now deceased)

Kodithuwakku Arachchilage
Sugala Priyangani,
No. 200/1, Aluthgama,
Bogamuwa,
Yakkala.

Substituted Petitioner-Appellant

CASE NO: CALA/509/2005

DC COLOMBO CASE NO: 5066/SPL

Vs.

Commercial Bank of Ceylon
Limited,
No. 21,
Bristol Street,
Colombo 1.

And Joint Liquidators
Respondent-Respondents

Before: A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Ikram Mohommad, P.C., with Jagath
Wickramanayake, P.C., for the Substituted
Petitioner-Appellant.
Hiran De Alwis with Medani Navoda for the
Creditor-Bank.
N.R. Sivendran with S. Somaratne for the
Liquidators.

Argued on: 24.09.2019

Decided on: 16.10.2019

Mahinda Samayawardhena, J.

The Company named Magpek Exports Limited has been wound up by the District Court, I assume, on the application of a creditor on the basis that the Company is unable to pay its debts.¹ In the process, a liquidator has been appointed *inter alia* to sell the remaining assets of the Company and settle the dues of the creditors. The Commercial Bank is a secured creditor to which the property in question belonging to the Company seems to have been mortgaged in order to obtain loan facilities.

The liquidator has published only one newspaper advertisement to sell by public tender instead of public auction, the land and premises, factory building complex, wood working and general machinery, office furniture/appliances etc. belonging to the Company.

¹ I have to assume facts as the petitioner who filed this leave to appeal application has not filed all the necessary documents, but has filed selected documents strictly relevant to his limited application.

The deceased Petitioner (K.G. Jothipala) who is neither a creditor nor a contributory was said to be the highest bidder for rupees thirty million at the time of closing the tender.

After such closure, the said Bank has made a bid to buy the said property for rupees thirty one million.

Thereafter the liquidator without notice to any party has referred the matter to the District Court seeking instructions, and the Court by bench order dated 15.10.2004 has directed to award the tender to the Petitioner.

The liquidator has thereafter by letter dated 29.10.2004 awarded the tender to the Petitioner.

Before the Petitioner accepting the said award and settling the Bid Price, the Bank has made an application to the District Court by Petition dated 01.11.2004 to suspend the said order to sell the property for rupees thirty million, and to order the property to be sold by public auction. One of the reasons given by the Bank to make that application is that the liquidator himself valued the said property in the year 2000 for rupees hundred million. This application has been supported on 03.11.2004 and the Court has suspended the sale.

The Petitioner has objected to the application of the Bank to again sell the property by public auction. His position had been that in accordance with the earlier order of the Court, the property shall be sold to him as the highest lawful bidder.

Thereafter the liquidator has agreed to hold a public auction to sell the property as a result of a settlement reached with the Bank to which the Petitioner was not a party.

Despite objections of the Petitioner, the District Judge has made a fresh order dated 07.12.2005 directing the liquidator to sell the property by public auction.

It is against this last order, the Petitioner has filed this appeal with leave obtained.

Both parties allege the liquidator acted in collusion with the opposite party in this transaction, which the liquidator denies.

The liquidator in a winding up by Court is an officer of Court. He takes charge of the Company assets as a trustee for the creditors. If I may refer to the new Companies Act, No. 7 of 2007, under section 292(1) and (2), the liquidator has so many powers including selling of movable and immovable properties of the Company. However, sub section (3) thereof says that:

The exercise by the liquidator in a winding up by the court of the powers conferred by the provisions of this section, shall be subject to the control of the court and any creditor or contributory may make an application to the court for the exercise or proposed exercise of any of those powers.

Section 293 also explains how the liquidator's powers are controlled by Court.

Section 293(3) states that:

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.

Section 293(5) makes provisions for the Court, upon an application of an aggrieved party, to confirm, reverse or modify

any act or decision made by the liquidator “as it thinks just.” The said section runs as follows:

Where any person is aggrieved by any act or decision of the liquidator, that person may appeal to the court against such act or decision, and the court may confirm, reverse, or modify the act or decision complained of and make such order as it thinks just.

When the liquidator makes *ex parte* applications to Court seeking instructions with direct or indirect suggestions, Court tends to make orders relying upon what the liquidator submits to Court. But any creditor or contributory can, as I stated earlier, under section 292(3) make an application to Court suggesting how the liquidator shall be guided to exercise his powers in the best interest of the creditors and contributories.

According to the Petitioner, even if the Court later realized that the liquidator has acted *mala fide* in realizing the assets of the Company, the Court cannot rescind the earlier orders made at the instance of the liquidator, which are not in the best interest of the creditors. I am unable to agree with that in view of the nature of the proceedings had before the District Court. Company winding up procedure is a special procedure, of which, in my view, one of the objectives is to protect the creditors of the Company under liquidation. That is exactly what has been done by the District Court in this case when it made the impugned order. The Court has rescinded the earlier order to sell the property by tender and instead ordered to sell the same by public auction to get the maximum price for the assets. That order, in my view, is flawless.

In this view of the matter, it is not necessary for me to consider the threshold objection of the Bank regarding standing of the Petitioner to file this leave to appeal application.

I dismiss the appeal without costs.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Court of Appeal