

**DALAM MAHKAMAH RAYUAN DI MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO. W-02-113-2008**

**Dalam perkara Seksyen
218(1)(e) dan 218(2)(a) Akta
Syarikat 1965**

Dan

**Dalam perkara Kaedah-
Kaedah Penggulangan
Syarikat 1972**

Dan

**Dalam perkara Kaedah-
Kaedah Mahkamah Tinggi
1980**

Dan

**Dalam perkara WAJA
DESTINASI (M) SDN BHD (NO.
SYARIKAT 260592-M)**

ANTARA

**SINARLIM SDN. BHD.
(No. Syarikat 11215-W)**

.. PERAYU

DAN

**WAJA DESTINASI (M) SDN. BHD.
(No. Syarikat 260592-M)**

.. RESPONDEN

**(Dalam Mahkamah Tinggi Malaya Di Kuala Lumpur
(Bahagian Dagang)**

Petisyen Penggulangan Syarikat No. D8-28-570-2007)

**Dalam perkara Seksyen
218(1)(e) dan 218(2)(a) Akta
Syarikat 1965**

Dan

**Dalam perkara Kaedah-
Kaedah Penggulangan
Syarikat 1972**

Dan

**Dalam perkara Kaedah-
Kaedah Mahkamah Tinggi
1980**

Dan

**Dalam perkara WAJA
DESTINASI (M) SDN BHD (NO.
SYARIKAT 260592-M)**

ANTARA

SINARLIM SDN. BHD.

(No. Syarikat 11215-W)

.. PEMPETISYEN

DAN

WAJA DESTINASI (M) SDN. BHD.

(No. Syarikat 260592-M)

.. RESPONDEN

**CORAM: LOW HOP BING, JCA
 SULONG MATJERAIE, JCA
 RAMLY ALI, JCA**

RAMLY ALI, JCA

(DELIVERING JUDGMENT OF THE COURT)

1. This is an appeal against the decision of the learned judge of the Kuala Lumpur High Court (KL – D8) dated 17.1.2008 in setting aside the winding up order earlier made by the Ipoh High Court on 21.6.2007 vide the Ipoh High Court Companies (Winding-Up) Petition No. 28-1-2007 (Ipoh Winding-Up) against the Respondent.

Factual Background

2. The Appellant is a sub-contractor for the Respondent who was the main contractor for the Flood Mitigation Works carried out for the benefit of the Department of Irrigation and Drainage Malaysia, at Kampung Gajah, Teluk Intan, Perak Darul Ridzuan.

3. It is not in dispute that the Respondent owed the Appellant a sum of RM479,825.52. The Appellant then issued a statutory notice pursuant to **section 218 (1)(e) of the Companies Act 1965** and served it on the Respondent on 5.10.2006. The Respondent did not pay the debt even after expiry of the 21 days.

4. On 5.1.2007, the Appellant filed a winding up Petition No. 28-1-2007 at the Ipoh High Court and the Petition was fixed for hearing on 21.6.2007. The said Petition was duly served on the Respondent on 23.2.2007. The Ipoh High Court then issued a Registrars' Certificate of Due Compliance pursuant to **Rule 32(1)(d) of the Companies (Winding Up) Rules 1972** on 30.5.2007.

5. On the date of hearing of the Petition on 21.6.2007 the Respondent failed to turn up even though the Petition was duly served on it. The Ipoh High Court then proceeded to hear the submissions on merits by the Appellant's Counsel

and after the Official Receiver from the Insolvency Department, Ipoh Office confirmed that the papers are in order, the learned judge then ordered that the Respondent be wound up.

6. The Ipoh High Court was also informed on the hearing date that an official search with the Registrar of Companies does not disclose existence of any winding up order on the Respondent company and there is also no other winding up notice in the Ipoh Official Receiver's records on the date of hearing.
7. After the winding up order was granted by the Ipoh High Court, the Official Receiver then requested that the matter be transferred to the jurisdiction of Kuala Lumpur High Court as the Respondent has its registered address in Kuala Lumpur. This case was subsequently transferred to the Kuala Lumpur High Court (Commercial Division) and registered as the Companies (Winding-Up) Petition No. D8-28-570-2007 (KL- D8).

8. On 5.7.2007, the Respondent filed a Notice of Appeal to the Court of Appeal vide Court of Appeal Civil Appeal No. A-02-674-2007 through Messrs. Shamsuddin & Co. against the winding up order made by the Ipoh High Court.

The Proceedings in the Kuala Lumpur High Court

9. In the Kuala Lumpur High Court, the Respondent filed a Notice of Motion dated 20.7.2007 (Enclosure 18) for a stay order against the Ipoh Winding Up Order dated 21.6.2007. On 24.10.2007, the date of hearing of the Respondent's Notice of Motion for a stay order, a different officer from the Insolvency Department, Kuala Lumpur office, informed the Court that there was an earlier winding up Petition vide Kuala Lumpur High Court Companies (Winding Up) Petition No. D2-28-372-2005 (D2 Petition).
10. After hearing oral submissions, on the same day on 24.10.2007, the learned judge of the Kuala Lumpur High

Court (KL – D8) dismissed the Respondent’s Motion for stay. Instead the learned judge on his own volition concluded that once there is in existence a winding up Petition in D2 Court, it is impossible to have another winding up proceeding against the same company in the Ipoh High Court. Therefore the learned judge concluded that leave is required to file the Ipoh Winding Up Petition under **Section 226(3) of the Companies Act 1965**. Since no leave was given in the Ipoh High Court for the Petition therein the learned judge then set aside the Ipoh High Court winding up order.

11. On the same day (24.10.2007) the learned judge also directed the Official Receiver to file a written report within one (1) month from 24.10.2007 to confirm whether there was an earlier winding up order granted on 2.2.2007 by the D2 Court against the Respondent.

12. Since the Official Receiver failed to observe the directions given by the learned judge on 24.10.2007, the Appellant then filed a Summons In Chambers dated 10.12.2007 (Enclosure

- 39) for further direction and order from the High Court as the Appellant discovered that there was actually a stay order of the D2 winding-up order granted by the D2 Court on 15.6.2007 which was never disclosed to the learned judge on 24.10.2007.
13. During hearing of the Appellant's said Summons In Chambers dated (Enclosure 39) on 17.1.2008 before the Kuala Lumpur High Court (KL – D8), the Appellant's Solicitors submitted that the effect of an order for stay of the D2 winding-up order is a total discontinuance or termination of the winding up proceedings. The learned judge however disagreed and dismissed Enclosure 39 with costs and at the same time on his own volition set aside the Ipoh Winding Up Order. Hence the present appeal to this Court.
14. In a nutshell, the Court summarises that following chronology of events:

- (a) Petition in the Companies (Winding Up) Petition No. D2-28-372-2005 was filed on 26.5.2005 in Kuala Lumpur High Court (KL – D2), however this Petition was not indicated in the Registrar of Companies search dated 11.7.2005;
- (b) the said Petition was allowed by the KL - D2 Court on 2.2.2007 but stayed due to mutual consent pursuant to **Section 243(1) of the Companies Act 1965** by Order dated 15.6.2007, because the debt in question was settled;
- (c) in the meantime another petition was filed on 5.1.2007 at the Ipoh High Court and as at that material time there was no indication of any winding up order made against the Respondent based on the earlier D2 Petition;
- (d) the Petition was allowed by the Ipoh High Court on 21.6.2007 after a stay order of the winding-up was granted on 15.6.2007 by the KL – D2 High Court because the debt in the D2 Petition was settled; and

- (e) after the Ipoh winding up order was made the file of the case was transferred to Kuala Lumpur High Court (KL – D8) on request made by the Official Receiver as the Respondent's registered office was in Kuala Lumpur.

Issues to be determined

15. The issues to be determined by this Court are as follows:
- (a) on jurisdictional issue, whether the learned judge of the KL – D8 Court has the jurisdiction to set aside the winding up order earlier made and perfected by the Ipoh High Court; and
 - (b) on merit, whether the learned judge of the KL – D8 Court was right when he set aside the winding up order earlier made by the Ipoh High Court.

16. In determining the second issue above, the following subsidiary issues need to be dealt with:
- (a) whether the Ipoh Winding-Up Petition can validly be filed at the date when the D2 Winding Up Petition in the KL – D2 High Court had earlier been filed but no winding up order been made yet;
 - (b) whether the Ipoh Winding Up Order can be granted by the Ipoh High Court after the D2 Winding Up Order in the KL – D2 High Court had been stayed.
17. On the jurisdictional issue, this Court is of the view that the learned judge of the KL – D8 Court clearly has no jurisdiction to set aside or rescind a winding up order earlier made and perfected by another High Court, in this case the Ipoh High Court on 21.6.2007. The KL – D8 Court had already been *functus officio* and the matter is *res judicata*. Even if the decision of the Ipoh High Court in granting the winding up order is wrong, it should have been dealt with by the Court of

Appeal (on appeal by the Respondent), but not to be set aside or rescinded by another High Court of concurrent jurisdiction.

18. The above principle was stressed by the Court of Appeal in **Vijayalakshimi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors [1995] 1 MLJ 830.**

19. The **Companies Act 1965 or the Companies (Winding-Up) Rules 1972** make no express provision enabling the High Court to set aside or rescind a winding-up order after it had been made and perfected. The scheme of the Act is such that an aggrieved party may under **section 253** of the Act appeal against a winding-up order, or apply to stay to proceedings under **section 243** of the Act altogether or for a limited time, under terms and conditions which the Court thinks fit. (see: **Perdana Merchant Bankers Bhd. v. Maril Rionebel (M) Sdn Bhd [1996] 4 MLJ 343**; and **Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1991] 3 MLJ 325**).

20. In this respect, the Court is in agreement with the learned author Derek French in his book “**Applications To Wind Up Companies**” – 2nd Edition, at page 289 paragraph 4.4.3 when he says:

“A winding-up order is a final order. In subsequent proceedings in the winding-up, the Court will not consider whether the order was properly made; that can be considered only on an appeal against the order”.

The same principle was adopted and applied in **Re Michael P. Georges Co. Ltd [1948] OR 78; Re Reliance Properties Ltd [1951] 2 All ER 327; Re Overend, Gurney and Co. Ltd, ex parte Oakes and Peek (No. 2) [1876] 36 LJ Ch. 413; Re London Marine Insurance Association [1896] LR Eq. 176, Re Cosmopolitan Life Association [1893] 15 on PR 185; and Re Mid East Trading Ltd [1998] 1 All ER 577.**

21. On this issue alone, the appeal should be allowed and the order of the learned judge of the KL- D8 Court dated 7.1.2008 be set aside.
22. The next issue is whether the Ipoh Winding-Up Petition can validly be filed at the date when the D2 Winding-Up Petition in the KL – D2 High Court had earlier been filed but no winding-up order been made yet.
23. In the present case, the D2 Winding-Up Petition was filed on 26.5.2005 and the winding-up order was made by the KL – D2 High Court on 2.2.2007; while the Ipoh Winding-Up Petition was filed in Court on 5.1.2007. In other words, when the Ipoh Winding-Up Petition was filed in Court, there is no winding-up order in existence against the Respondent in any Court. The KL – D2 Winding-Up Order was only made about one month after the Ipoh Winding-Up Petition was filed.
24. The learned judge of the KL – D8 was of the view that there cannot be more than one winding-up petition to be filed

against the Respondent at any one time and held that the Ipoh High Court Petition was wrongly filed.

25. With respect, this Court cannot agree with the learned judge on this point. It is a settled legal principle that in law there is nothing against the filing of more than one winding-up petition against the same company at any one time. There is no leave required for the filing of the second and subsequent winding-up petitions if the company has not been wound up yet. However, the Court must stress that at no time a company which has been wound-up can subsequently be wound-up again.

26. This matter concerning the position of several petitions for the winding up of the same company was considered in re **European Banking Company: Ex parte Baylis [1866] LR 2 Eq 521** where Sir RT Kindersley VC, observed:

“However desirable it is to avoid a number of petitions being presented for the winding-up of a company, I am not aware of

any rule having been established with a view to limit the number of them. But still every one of these petitions ought to be looked at separately upon its own merits as if it were the only petition presented.”

27. The above proposition was adopted and followed by Dulat J. in **Ladli Prasad Jaiswal v. Karnal Distillery Co. Ld [1954] Comp. Cas 77**, where he held:

“It is not shown that this view has been departed from in the English Courts. There is thus no authority for concluding that the appellant’s petition for the winding-up of this company is not maintainable because a previous petition by him of a similar kind is pending and has not yet been decided.”

28. The above principle was accepted and followed by the Court of Appeal in **Maril-Rionebel (M) Sdn. Bhd & Anor v. Perdana Merchant Bankers Bhd. (and 4 Other Appeals) [2001] 3 AMR 2893**, where it was held by Gopal Sri Ram JCA *inter alia* that:

*“I require no clearer authority for the proposition that more than one winding-up petition may be presented against a company. Of course, the provision of **Rule 33** is available to a petitioning creditor. And if he does not take advantage of the rule to have him substituted for a lethargic petitioner, he may find himself out of pocket for his costs. But on no account is his petition bad in law. Nor is it an abuse of the Court’s process.”*

29. The above authorities clearly support the findings of this Court that the Ipoh High Court Winding-Up Petition filed on 5.1.2007 is valid in law, even though at the time of filing there was another winding-up petition earlier filed and pending in the KL – D2 High Court. No leave is required for such filing under **section 226(3) of the Companies Act 1963**.

30. The Court will now deal with the last issue i.e. whether the Ipoh Winding-Up Order can be granted by the Ipoh High Court on 21.6.2007 after the D2 Winding-Up Order in the

KL – D2 High Court had been stayed on 15.6.2007 under **section 243 (1) of the Companies Act 1965**. In other words: what is the legal effect of a stay order on a winding-up order?

31. In this case, the D2 Winding-Up Order was made by the KL-D2 High Court on 2.2.2007 and later on 15.6.2007 was stayed by the same Court due to mutual consent of the parties pursuant to **section 243(1) of the Companies Act 1965** because the debt in question was fully settled. The Ipoh Winding-Up Petition was filed on 5.1.2007 and a winding-up order was granted on 21.6.2007 (six days after the D2 Winding-Up Order in the KL- D2 Court was stayed).
32. The learned counsel for the Appellant submitted that the stay order granted by the KL - D2 Court on 15.6.2007 had the effect of total discontinuance or termination of the D2 Winding-Up proceedings, as if there was no winding-up order against the Respondent at all, and therefore on 21.6.2007 the learned judge in the Ipoh High Court was at liberty and

correct in granting a Winding-Up Order against the Respondent.

33. In the present case, the KL - D2 Winding Up Order was stayed wholly by consent, the debt was fully settled the KL -D2 Petition has now outlived its purpose. It has the effect of being totally discontinued or terminated. In law, the effect of such a stay order was clearly narrated by NH Chan JCA in the case of **Vijayalakshmi Devi d/o Nadchatiram v. Jegadevan s/o Nadchatiram & Ors [1995] 1 MLJ 830 (at page 833)** as follows:

“The effect of an order to stay proceedings under the winding-up order altogether after a winding-up order has been made is a total discontinuance or termination of the winding-up proceedings. In 2 Jowitt’s Dictionary of English Law (2nd Ed) under ‘Stay’ at pp 1701 – 1702, after stating that the term ‘stay of proceedings’ can mean a total discontinuance of an action, it says this: ‘... but in strictness it is only accurate when a decree or judgment has been given, for in such a case the suit or action cannot be dismissed, because the

Court has adjudicated on it, and therefore all that can be done is to stay proceedings under the decree or judgment .. the stay operation of an order means that the order which has been stayed would not be operative from the date of the passing of the stay order.”

34. The same principle was laid down in the case of **Krextil Holdings Pty Ltd v Widdows [1974] VR 689**, in that the order of a stay of the winding-up, if expressed in unlimited terms (as in the present case), would put an end to the winding-up process and the Respondent company can thereupon resume the conduct of its business and affairs as if no winding-up existed at all. If proceedings in the winding-up are stayed by order of the Court, any duty of the Official Receiver to send report ceases. (see: **Halsbury’s Law of England (4th Ed. Reissue) para 1528**).
35. Now, the question is: can the Ipoh High Court make a winding-up order against the Respondent after the KL – D2 Winding-Up Order was stayed wholly?

36. The above authorities are clear indicators that the answer to the above question is in the affirmative. The Court of Appeal's decisions in **Vijayalakshmi Devi d/o Nadchatiram v Dr. Mahadevan s/o Nadchatiram (supra)** and **Maril-Rionebel (M) Sdn. Bhd. (supra)** are very clear on this issue and are binding on the High Court. The learned High Court judge (KL – D8) should have followed those decisions.

Conclusion

37. The above consideration leads the Court to only one conclusion i.e. the decision of the Kuala Lumpur High Court (KL – D8) on 17.1.2008 ought to be reversed because the learned judge has failed to appreciate the legal effect of the stay order in the D2 Petition granted by the KL – D2 Court, which totally terminated the winding-up order against the Respondent. Consequently the Ipoh High Court Winding-Up Order on 21.6.2007 was correctly granted and valid in law.

38. In the circumstances, this Court unanimously allowed the appeal with costs of RM1000.00 to the Appellant and deposit to be refunded to the Appellant. The decision of the learned judge of the Kuala Lumpur High Court (KL – D8) is set aside and the decision of the learned judge of the Ipoh High Court is restored, so that the record will show that the Respondent is wound-up as of 21.6.2007.

Dated this 5th day of May 2009

**RAMLY ALI
JUDGE
COURT OF APPEAL, MALAYSIA**

Solicitors:

- 1. Leong Kok Keong (with Mohamd Khairil Abidin)
Tetuan Kean Chye & Sivalingam .. for the Appellant**

2. Shamsul Zakri Zakaria

Peguamcara Jabatan Insolvensi Malaysia .. for the Respondent

Cases Referred to:

- 1. Vijayalakshimi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors [1995] 1 MLJ 830**
- 2. Perdana Merchant Bankers Bhd. v. Maril Rionebel (M) Sdn Bhd [1996] 4 MLJ 343**
- 3. Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1991] 3 MLJ 325**
- 4. Re Michael P. Georges Co. Ltd [1948] OR 78**
- 5. Re Reliance Properties Ltd [1951] 2 All ER 327**
- 6. Re Overend, Gurney and Co. Ltd, ex parte Oakes and Peek (No. 2) [1876] 36 LJ Ch. 413**
- 7. Re London Marine Insurance Association [1896] LR Eq. 176**
- 8. Re Cosmopolitan Life Association [1893] 15 on PR 185**
- 9. Re Mid East Trading Ltd [1998] 1 All ER 577**

10. **European Banking Company: Ex parte Baylis [1866] LR 2 Eq 521**
11. **Ladli Prasad Jaiswal v. Karnal Distillery Co. Ld [1954] Comp. Cas 7**
12. **Maril-Rionebel (M) Sdn. Bhd & Anor v. Perdana Merchant Bankers Bhd. (and 4 Other Appeals) [2001] 3 AMR 2893**
13. **Krextile Holdings Pty Ltd v Widdows [1974] VR 689**

Legislation Referred to:

1. **Companies Act 1965: section 218(e), section 226(3) & section 243(1)**
2. **Companies (Winding Up) Rules 1972: Rules 1 Order 32(1)**

Other References:

1. **Applications To Wind Up Companies – 2nd Edition, at page 289 paragraph 4.4.3**
2. **Halsbury's Law of England (4th Ed. Reissue)**