CITY AUDIO SDN BHD v. PENGANGAKUTAN KARGO UDARA MAS SDN BHD
HIGH COURT, PENANG
ABDUL HAMID MOHAMED J
KEMANSUHAN SYARIKAT NO. 28-29-91
28 DECEMBER 1993
[1993] 1 LNS 19

Unreported

Counsel:

For the plaintiff - J.A. Yeoh, Daphne Choy; M/s. Shearn, Delamore & Co.

For the respondent - V. Arivanandhan; M/s. Wong-Chooi & Mohd. Nor

Abdul Hamid bin Hj Mohamed J:

This petition for winding up was filed on 16 September 1991. The petition said that the respondent company was indebted to the petitioner in the sum of RM524,242.56 "in respect of damages for loss of goods." The ground for the application was that the respondent company was unable to pay its debts.

The petition was served on 19 October 1991.

On 29 October 1991, the respondent company filed its notice of intention to appear on petition.

On 11 December 1991, the petitioner filed a summons-in-chambers for an order that all the requirements under r. 32(1) of the Companies Winding Up Rules 1972 had been complied with. The Senior Assistant Registrar gave the order prayed for on 18 December 1991.

The petition was adjourned a number of times for various reasons including to enable all the applications in chambers in the related civil suit be heard first.

Finally it came up for hearing on 24 June 1993. On that day, learned Counsel for the petitioner was present. Learned Counsel for the respondent was absent. One Miss Banu, an advocate and solicitor, informed the Court that learned solicitor for the respondent was taken ill. Learned Counsel for the petitioner objected to further postponement. He drew the Court's attention to the fact that r. 32 had been complied with as early as 18 December 1991, that the application for extension of time to appeal against the summary judgment given by the Senior Assistant Registrar had been dismissed and that there was no order for stay of execution

pending appeal.

As the case had been pending for about two years and the reason given for the absence of the learned Counsel for the respondent appeared to me to be something which had happened on previous occasions (especially taking into account the related civil action), I made the winding up order and other related orders.

To cut the story short, subsequently, there was a change of solicitors for the respondent. The new solicitors filed a notice of motion praying for the following orders:

(i) that the Order of the Court dated 24 June 1993, for the winding-up of Pengangkutan Kargo Udara Mas Sdn. Bhd., the respondent abovenamed be dissolved forthwith;

(ii) that in the alternative the Order of Court dated 24 June 1993, for the winding-up of pengangkutan Kargo Udara Mas Sdn. Bhd. the respondent abovenamed be stayed pending the hearing of the respondents' Notice of Appeal to the Supreme Court against the decision of the High Court in refusing the respondents' summons-in-chambers for, amongst other things, an extension of time to file a Notice of appeal against the order of the Senior Assistant Registrar dated 5 May 1990;

(iii) that there be such consequential orders or directions as may be necessary;

(iv) that the costs of this application be provided for.

I heard the application on 16 November 1993 and made the following orders:

(i) that the winding-up order of 24 June 1993, be set aside forthwith.

(ii) that the costs of the motion herein be paid by the respondents to the petitioners.

(iii) that the sum of RM524,242.56 now deposited with the Official Receiver be paid out to Messrs Shearn Delamore & amp; Co., solicitors for the respondents, on their undertaking to deposit the said sum of RM524,242.56 in a joint bank account in the names of Messrs Shearn Delamore & amp; Co. and Messrs Wong-Chooi & amp; Mohd. Nor until the final determination of the proceedings herein.

The petitioner appealed.

The first question to be determined is whether this Court has the jurisdiction to set aside the order made on 24 June 1993. Learned Counsel for the respondent argued that the order was made in default, that the merits had not been argued and therefore this Court had power to set it aside.

On the other hand, learned Counsel for the petitioners argued that since the order had been perfected, the only remedy that the respondent had was to appeal.

Learned Counsel for the petitioner drew my attention to the provisions of s. 243 of the Companies Act 1965 which provides for power to stay a winding up order. He submitted that the Court had no power to set aside a winding-up order. He also drew my attention to certain passages in Palmer's Company Law at pp. 1389 and 1390 (unfortunately the edition was not

given):

The Court has inherent power to rectify or rescind an order before it is drawn up The Court can correct an order even after it has been drawn up if it does not express its intention. Apart from this an order cannot be rescinded after it has been drawn up even if it was obtained by mistake or is bad on the face of it. The Court has no jurisdiction to rehear a case after the order had been perfected. Any further proceedings to discharge or vary or challenge the order must be by way of appeal - or on the application to stay proceedings under s. 147 of the Act.

He also referred me to a note from the Law of Company Liquidation by Mcpherson 3rd Edn., at p. 443 which was to the same effect.

However what is not clear is whether the principles so stated apply to an order made in default, or, as in this case, made in the absence of the respondent or its solicitors without hearing the arguments of the parties. Even the cases referred to by learned Counsel for the respondent do not help as they are not winding-up cases.

However learned Counsel for the petitioner drew my attention to a decision of James Foong J in BP Paks Sdn. Bhd. v. Sheng Hung Industrial Co. Sdn. Bhd. [1921] 3 CLJ 1573. In that case a winding up petition was filed and duly served on the applicant company. Receivers of the company gave notice of intention to appear at the hearing of the petition. The hearing was adjorned a few times, the last adjournment being on 2 September 1987, at the request of both parties. The judgment went on to say:

On 2 September 1987, the applicants apparently withdrew their objections and a winding-up order was made against the company.

There was also an order which was later amended requiring receivers and managers to personally pay the costs of the petitioners. The petitioners applied to set aside that part of the order regarding costs. The learned Judge considered the provisions of O. 20 r. 11 of the Rules of the High Court 1980 (RHC) but found that it was not a case falling under that rule as it was not a case of correcting a clerical mistake, error or omission. Then the learned Judge went on to consider the provisions of O. 35 r. 2 of the RHC. (The judgment contains reference to O. 32 r. 2 and O. 32 r. 11, which I think, with respect, is a mistake). However, the learned Judge found that the facts and the circumstances of the case did not provide any reasonable justification acceptable to the Court in granting a setting aside order.

This case too does not assist this Court in the present case. But it does show one thing, that is, if the facts and the circumstances justifies it, appears that resort may be made to O. 35 r. 2 of the RHC to set aside part of a winding up order.

Section 243 provides power for the Court to stay a winding up order on the application of a liquidator, creditor or contributory. But I do not think that section can be read to say that it prohibits an application to set aside a winding up order on the application of the company. In Sri Hariamas Dvpt Sdn. Bhd. v. MBf Finance Bhd. [1991] 3 CLJ 2078 SC, Hashim Yeop A Sani CJ (Malaya) delivering judgment of the Court said:

After a winding up order is made generally speaking no one but the liquidator can act on behalf of the company. But it is quite clear that the company has a right to be heard to say

that the winding-up order is wrong and to appeal against the order.

If the company can appeal (of course s. 253(2) of the Companies Act provides for it) then in all fairness, it appears to me, that the company should also be able to apply to set aside an order made in the absence of its solicitors or representatives.

I am therefore of the view that this Court has the power to hear an application to set aside the order made on 24 June 1993.

Then there was the question of delay in making the application. Order 35 r. 2(2) of the RHC requires the application to be made within 7 days after the trial. This application was made about four months after the order was made. Record shows that there was a change of solicitors. Indeed it was the new solicitors who made this application. I am of the view that whereas delay in making an application is a factor to be considered, I do not think it is fatal. It is merely an irregularity for which the petitioner may be compensated with costs, which I did in this case.

Learned Counsel for the petitioner further submitted that the respondent had no locus standi to make the application and the general manager of the respondent bad no authority to depose an affidavit in support of the application. I have actually touched on these issues and wish only to say that, in my view, as the company may make this application, it follows that the servant or agent of the company may depose an affidavit in support of it.

Let me now consider the grounds of the application. Learned Counsel for the respondent referred to para. 5 of the petition which reads:

5. The company is indebted to your petitioner in the sum of RM524,242.56 in respect of damages for loss of goods.

The notice of demand states the same amount. However the judgment given by the Senior Assistant Registrar on 5 May 1990, was as follows:

(a) that the defendant do pay the plaintiff RM390,000 for loss of 600 sets of video cassette recorders and

(b) that the defendant do pay the plaintiff or the Customs Authority RM134,242.56 as import duty or sales tax.

It is clear that the amount stated in the notice of demand and the petition is the total of the two sums. Nowhere did the petitioner depose that the sum of RM134,242.56 had been paid by the petitioner to the Customs Department. In the circumstances, it does appear that the sum actually owed to the petitioner is less than the sum demanded. Where the amount stated in the notice is in excess of the debt due, the failure on the part of the company to pay the sum claimed does not mean that the company is unable to pay its debts - Re Pertisahaan Jenwall Sdn. Bhd. [1990] 2 MLJ 178, See also Re Yap Kim Kee & amp; Sons Sdn. Bhd. [1990]2 MLJ 108.

It was also argued by learned Counsel for the respondent that on the face of it, the petition was irregular because the notice of demand was not annexed, and no reference was made to the judgment. The debt was still" disputed" and" technically" there was an appeal pending

(against the judgment in the civil suit no. 23-450-186), he said.

In my judgment, nothing much turns on this ground. As regards the appeal against the judgment entered against the respondent, I do not intend to delve into that file which is even more messy than this file and determine whether or not" technically" there is an appeal pending. Suffice for me to say that the fact that there is an appeal pending, if any, is not a bar to the filing of a winding-up proceeding. As regards the failure to enclose a copy of the judgment and the notice of demand, I was not shown, neither am I aware or any authority which requires them to be enclosed. Practice too seems to differ, some do and some do not. However, had they been enclosed, it would have been obvious that the debt due was not as simple as stated in the petition and the notice of demand.

It should be noted that all that the respondent wanted was to have the order dated 24 June 1993, set aside so that the respondent be given a chance to be heard. To show their good faith, the respondent had offered to have the amount stated in the petition which was paid by the company to the Official Receiver subsequent to the order to be paid into Court pending the hearing of the petition on merits.

On the above-stated reasons I allowed the application to set aside the order dated 24 June 1993. However, as I was of the view that it was through no fault of the petitioner that it has to contest this application, I gave the petitioner costs of this application. As regards the amount of RM524,242.56 now with the Official Receiver, by consent, I ordered it to be placed in a joint account in the name of the solicitors for both parties until the determination of the petition. This is to avoid delay in payment out and until then to enable it to earn some interest.