Finebuild Systems Pte Ltd v Transbilt Engineering Pte Ltd (in liquidation) [2005] SGHC 17

Case Number : OS 954/2004

Decision Date : 27 January 2005

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : A Rajandran (A Rajandran, Joseph and Nayar) for plaintiff; Gong Chin Nam (T M Hoon and Co) for defendant

Parties : Finebuild Systems Pte Ltd — Transbilt Engineering Pte Ltd (in liquidation)

Insolvency Law – Winding up – Garnishee order not made absolute when debtor company wound up – Whether creditor entitled to retain benefit of attachment order – Whether court should exercise discretion to set aside rights of liquidator – Section 334 Companies Act (Cap 50, 1994 Rev Ed)

27 January 2005

Judith Prakash J:

Introduction

1 The applicant, Finebuild Systems Pte Ltd ("Finebuild"), took out garnishee proceedings in order to enforce a judgment it had obtained against the respondent, Transbilt Engineering Pte Ltd ("the company"). An attachment order was made and the garnishee was ordered to show cause on 1 June 2004. On 31 May 2004, the company went into creditors' voluntary liquidation. Consequently, Finebuild applied by way of this originating summons for leave to proceed with its garnishee proceedings notwithstanding the liquidation of the company. I allowed Finebuild's application. The company has appealed.

Background

2 Both Finebuild and the company carried on business in the construction industry. In 2003, Finebuild commenced action in the District Court to recover moneys owing to it by the company. On 7 October 2003, Finebuild obtained a judgment against the company for a principal amount of $82,876.73, costs of $3,500 and certain interest. A week later, the company applied to the High Court for leave to convene a creditors' meeting to consider a proposal for a scheme of arrangement under s 210 of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act"). The application was dismissed by the High Court when objections to the scheme were raised by some of the creditors. Thereafter, the company did nothing to put its affairs in order or to make payment of the judgment debt due to Finebuild.

3 On 4 May 2004, Finebuild obtained an attachment order and served it on the proposed garnishee, namely Kim Seng Heng Engineering Construction (Pte) Ltd ("the garnishee"). The show cause action was fixed for hearing on 1 June 2004. On 31 May 2004, the garnishee notified Finebuild that it was indebted to the company in the sum of $84,000 and it sent a copy of this letter to the company as well. That same day the company went into liquidation. Two directors of the company, one Mr Chia Weu Mok and one Mr Yang Chunsheng, made and filed a statutory declaration stating that the company was unable to continue its business by reason of its liabilities and that meetings of the company and of its creditors had been summoned for 10 June 2004. The directors also appointed one Mr Goh Ngiap Suan as the provisional liquidator of the company.

4 The creditors' meeting was duly held on 10 June 2004. It was chaired by Mr Yang. At the meeting, the creditors passed a resolution confirming Mr Goh's appointment as liquidator and also elected a committee of inspection to oversee the liquidation. Mr Yang and Mr Chia as well as Mr Ang Poh Hwee, a director of Finebuild, were elected as members of the committee. Mr Yang told the meeting that the company had realisable assets of $1,299,301.38 and total liabilities of $7,649,677.57. Mr Yang expected that the assets would be realised for about $1,138,121.32. Mr Yang also told the meeting that he himself was a creditor of the company and that he had injected funds into the company as cash flow for its various projects. It was pointed out at the meeting that Mr Yang was the major creditor of the company as the books showed that the amount due to him was $6,015,461.97. The liquidator, Mr Goh, informed the meeting that the decision to place the company in creditors' voluntary winding up was made in order to stop the finalisation of the garnishee order.

The arguments

5 At the hearing, counsel for the company pointed out that there was no dispute that the company was insolvent. He drew my attention to one of the primary principles of insolvency law, *ie*, that ordinary creditors should be paid out of the remaining assets of the insolvent company in proportion to their debt. Under the provisions of the Act, no one creditor was allowed to gain an undue advantage over the other creditors of the company. Once liquidation had started, any existing proceedings against the company could not be proceeded with except by leave of court (s 299 of the Act). As the garnishee order had not been made absolute at the time the company went into liquidation, Finebuild was not entitled to retain the benefit of the attachment order (s 334(1) of the Act). Counsel also referred to the holding in *Pritchard v Westminster Bank Ltd* [1969] 1 WLR 547, that a garnishee order, as it has the effect of giving one creditor preference over all other creditors of a bankrupt debtor, ought not to be made absolute after the commencement of bankruptcy. In this case, as at the date of winding up, the company had, according to the list of creditors filed by the liquidator, a total of 109 creditors and a total indebtedness of $7,568,733.02. Most of these creditors were owed less than $20,000.

6 Counsel for Finebuild recognised that under ss 334(1) and 334(2) of the Act, the *prima facie* position is that a creditor who has attached a debt owing to a company cannot retain the benefit of this attachment if the company is subsequently wound up, unless he has received the debt prior to the commencement of that winding up. He relied, however, on the further proviso in sub-para (c) of s 334(1) that:

> [T]he rights conferred by this subsection on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court thinks fit.

He submitted that this was a proper case for the court to exercise its discretion under that proviso and set aside the rights conferred on the liquidator, so as to permit Finebuild to retain the benefit of its garnishee order.

7 Counsel pointed out that Finebuild had started its action in June 2003 and obtained judgment in October 2003. Thereafter, it had tried to garnish moneys owing to the company but had had to withdraw these applications when it was established that one potential garnishee did not in fact owe moneys to the company and the other potential garnishee disputed its liability to the company. Finebuild had then (in January 2004) issued a Writ of Seizure and Sale against the assets of the company. Execution was levied in April 2004 against certain office equipment and furniture found at the company's place of business. One week later, a Notice of Claim was filed by a related company,

A Pacific Construction & Development (S) Pte Ltd, and the seizure was withdrawn thereafter.

8 Counsel submitted that the company had appointed a provisional liquidator simply to defeat the claim of Finebuild. The company was aware that an order absolute would have been made on 1 June 2004 if it had not gone into creditors' voluntary liquidation. Between October 2003 and 31 May 2004, the company had done nothing whatsoever to deal with its creditors and to benefit them. The main creditor of the company, Mr Yang, was also a director of the company and he had given inconsistent accounts of the debt which he claimed was due to him. On the one hand, he had claimed that the money was advanced by him to the company, but on the other, during the creditors' meeting, he had stated that the source of his loans to the company was a corporation in China which wished to do business in Singapore.

9 It was further submitted that if the company had had genuine intentions to deal fairly with its creditors, it would have taken proper steps during the period between October 2003 and May 2004. During that period, the company had received moneys in respect of its receivables but those funds had not been placed in any special account for the benefit of its creditors. Further, it had not taken steps to enforce claims against persons who owed it money. In October 2003, the company's net current assets were worth more than $2.5m but by the date of the creditors' meeting, this figure had been reduced to $1.13m.

10 Counsel submitted that the court had a wide discretion and had been given the jurisdiction to do what was right and fair in the circumstances of the case. For this proposition, he relied on *Re Grosvenor Metal Co Ltd* [1949] 2 All ER 948. In that case, the insolvent company which I shall refer to as GM Co, was indebted to another company, BI Ltd. On 23 November 1948, BI Ltd obtained judgment against GM Co, and two days later, a Writ of Seizure and Sale was issued. Owing to representations made by GM Co, BI Ltd was induced to delay execution and on 17 January 1949, when an order for the compulsory winding up of GM Co was made, the execution had not been completed. BI Ltd then applied under s 325(1)(c) of the UK Companies Act 1948 (c 38) to have the rights of the liquidator set aside in their favour. It was found as a fact that the representation of GM Co that induced BI Ltd to delay execution had not been in any way dishonest or improper. Vaisey J held that under the subsection, the court had jurisdiction to make the order asked for as the jurisdiction was not limited to cases in which there had been dishonesty or trickery on the part of the debtor company. In the course of his judgment he commented at 949–950:

> I think that prior to the passing of the Companies Act, 1948, nothing short of a trick or some actual dishonesty would justify interference by the court. It is suggested that this new para. (c) of the proviso does no more than declare the law as it existed before the passing of the Act of 1948 and that I ought to proceed on the footing, as I should have proceeded before the Act of 1948 came into operation, that, in view of the decision in *Armorduct Manufacturing Co., Ltd. V. General Incandescent Co., Ltd.* (1), nothing short of trickery would justify my interference, but when I look at the words of para. (c) it appears to me that I am given a wider jurisdiction. In my view, it enables me to defeat the rights conferred on the liquidator either wholly or partially because of the words "to such extent." It enables me also to impose terms. For instance, I think I could say that the execution creditor should have the benefit of fifty per cent. of the judgment or that he should have the benefit of the judgment subject to any terms I might think fit to impose. Therefore, I hold that under this proviso I have a wider discretion than I should have had before that proviso became part of the statute law.
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> I am not going through the facts of this case. I do not think anybody could say there was any trickery here, but I hold as a fact that the applicants, Bebb Industries, Ltd., were

> persuaded, or induced, or requested, to stay their hands in the matter of this execution. While I acquit the officers of Grosvenor Metal Co., Ltd., of any kind of dishonesty or impropriety, I think that, but for their requests and the pressure they put on the applicants, this execution would have been completed before the commencement of the winding-up. I think that the rights of the liquidator must be set aside in favour of the applicants, and I so decide.

I note here that the wording of s 325(1) of the UK Companies Act 1948, and in particular sub-para (c) of that section, is *in pari materia* with the wording of s 334(1)(c) of the Act.

11 I should also mention that in response to the submissions made on behalf of Finebuild, counsel for the company replied that the reasons given for setting aside the rights of the liquidator were insufficient to displace the overriding rule of equal treatment among creditors in an insolvency. Finebuild's claim that Mr Yang had had an ulterior motive for putting the company into liquidation was not a relevant matter. Whether Mr Yang had a valid claim or not was an issue to be adjudicated by the liquidator in the liquidation of the company and it was that adjudication that would determine whether or not Mr Yang was the chief beneficiary of the funds owing by the garnishee to the company.

My decision

12 In making my decision, I was guided by the opinion of Vaisey J that the jurisdiction of the court to set aside the rights of the liquidator does not depend on the existence of dishonesty or trickery on the part of the company in liquidation. The jurisdiction is to be exercised "to such extent … as the court thinks fit". This means that the court has to do justice in all the circumstances of the case. I was aware that there was a difference between the fact situation that existed in *Re Grosvenor Metal Co Ltd* and the fact situation before me. In the present case, the company had not actively induced Finebuild to withhold completion of its attachment. In fact, the company had been completely passive from the time the scheme of arrangement was rejected in late 2003 up till the end of May 2004 when it learnt of the imminent hearing of the show-cause action. I was, however, influenced by the fact that the company had apparently done nothing to set its affairs in order or provide for its creditors during that period. Further, moneys that had come into the company's coffers from its debtors had not been put aside for the benefit of its creditors, notwithstanding that the company was no longer actively carrying on business. From October 2003, the company had been defunct for all intents and purposes. It was also odd that even items in the company's premises such as office equipment, machinery and stocks turned out to be owned by a related company.

13 Additionally, I was aware that Mr Yang was by far the biggest creditor of the company, apart from being a director and a shareholder. His account of how he became such a large creditor varied from time to time and it was not clear whether he himself had lent money to the company or whether he had been categorised as a creditor in respect of moneys that had come from a potential investor, and which thus should have been more properly classified as payment for equity in the company instead of as advances emanating from Mr Yang. Considering that Mr Yang was the initiator of the winding up proceedings, one of the persons who had chosen the liquidator and also on the committee of inspection, and that it had been admitted that the liquidation had been started in order to stymie the garnishee proceedings, I was uneasy about the situation. There appeared to me to have been some degree of manipulation involved in the way in which the liquidation proceedings had been dealt with. I also noted that if the claim made by Mr Yang was not a valid claim, the company's realisable assets would not fall far short of the total amount due to the other unsecured creditors. In that case, allowing Finebuild to keep the benefit of its garnishee proceedings would not be unduly detrimental to

the other unsecured creditors. On the other hand, if Mr Yang's claim was admitted to proof by the liquidator, it would constitute about 78% of the company's total indebtedness (using the figures in the creditors' list prepared by the liquidator). Therefore only about 22% of the amount garnished would have been available for distribution amongst the other creditors and that would have meant a pittance for each of them. I therefore made an order in terms of the application.

14 Having given further consideration to this issue since the company obtained leave to appeal out of time, I am now not quite so certain that the court's discretion ought to have been exercised in favour of Finebuild. Apart from Finebuild and Mr Yang, the company had 107 other creditors whose interests would be affected by the order that I had made, although the debts owing to most of those persons were small. The principle of equal division amongst creditors in an insolvency is a very well-established one that is only set aside in exceptional circumstances. Whilst I did (and do) have concerns about how this principle would operate in this case, bearing in mind Mr Yang's position and claim, those concerns could perhaps have been addressed in another way. For example, an application could have been made for a different liquidator to be appointed or for the official receiver to take over the liquidation, so that creditors like Finebuild, who were not happy with Mr Yang's active role in the liquidation, would have the reassurance that a completely independent mind was scrutinising the situation. In saying this, I am not casting any aspersions on the present liquidator, Mr Goh. I merely point out that in the circumstances of this case, it is important that the liquidator be seen to be independent of the directors of the company. Whilst in *Re Grosvenor Metal Co Ltd*, the insolvent company had actively tried to delay execution so that liquidation proceedings could commence, no such thing had happened here. Instead of having a sinister cast as alleged by Finebuild, the events of 31 May 2004 could equally well be looked at as necessary steps taken to preserve the company's assets for the benefit of all its creditors.