Re Bentimi Pte Ltd; In the Matter of Part X of the Companies Act, Chapter 50 (1994 Revised Edition) v In the Matter of Bentimi Pte Ltd
[2003] SGHC 92

Case Number : CWU 72/2002

Decision Date : 15 April 2003

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Anna Quah (Ang & Partners) for the petitioner; Loo Dip Seng (Ang & Partners) for the petitioner; Gurdaib Singh (Gurdaib Cheong & Partners) for the company.

Parties : In the Matter of Part X of the Companies Act, Chapter 50 (1994 Revised Edition) — In the Matter of Bentimi Pte Ltd

Companies – Winding up – Creditor relying on document to prove debt – Company alleging document is forged – Whether there is a bona fide dispute.

Companies – Winding up – Creditor alleging that company carried on business improperly – Whether just and equitable to wind up company.

1 The petitioner is a factoring company incorporated in the UK. The respondent is a Singapore company incorporated in 1992 as an import and export company, but it avers that it had been dormant since 1998. This petition was brought to wind up the respondent on the grounds that it is insolvent and unable to pay its debts, and alternatively, that it is just and equitable to do so.

2 The petitioners purchased debts purportedly incurred by the respondent to a company called RBG Resources PLC. The debts arose from the purchase of antimony ingots and nickel cathodes from RBG. The amount owing was over S$2m under a total of nine invoices. However, the petitioner had sold five of them back to RBG and are now claiming payment under the remaining four. The total amount owing under these four (No. 310259, 310641, 310770 and 310870) is S$1,135,007.54.

3 On 25 March 2002 RBG on the advice of its auditors, whom the petitioners had consulted, sent a telefax to the respondent stating that it was in connection with RBG's internal audit. The telefax requested the respondent to confirm the nine invoices, unpaid as of 14 March 2002. The telefax was endorsed with a stamp of 'Bentimi Pte Ltd' (the respondent company) with a signature purportedly by one 'Niranjan Desai'. The respondent aver that the signature was a forgery although it does not dispute that the telefax from the auditor was sent to a telefax number belonging to the respondent. The reply was sent from the same number.

4 The respondent company appears to have four directors at the material time. Three of them were members of a family. Desai Niranjan Resiklal, his wife, Desai Freny Niranjan, and their son Desai Viren Niranjan. The fourth was a director who was in Dubai. The respondent denies any knowledge of transactions with RBG. The directors affirmed in their affidavits that they did not purchase any goods from RBG.

5 On the strength of the verification telefaxed (on 28 March 2002) purportedly by 'Niranjan Desai' on behalf of the respondent, the petitioner served two statutory demands (on 10 and 17 June 2002 respectively) on the respondent. The two demands were in respect of the four aforesaid invoices. No payment was made and three weeks later the petitioner filed this petition to wind-up the respondent.

6 The respondent produced its telephone bills which did not show any record of telefaxes being sent to RBG. But Miss Quah, counsel for the petitioner, argued that by sending the telefax back to RBG the inference must be that the respondent admitted the debt. The case of *Gobind Lalwani v*

Basco Enterprises Pte Ltd [1999] 3 SLR 354 and *Capital Realty Pte Ltd v Chip Thye Enterprises Pte Ltd* [2000] 4 SLR 548 were cited in support.

7 I think that there can be little doubt that a signed audit confirmation constitutes a strong *prima facie* evidence of a debt – as was so held in the *Capital Land* and *Gobind* cases. But the issues arose in a trial in that case and the person who signed it testified in court and his evidence was tested (and not accepted) by the trial judge. In the present case, the petitioner are desirous of winding-up a company on a disputed debt on the basis of this signed verification, which is not the audit confirmation to its own auditors, but an enquiry from the purported creditor. This difference may not ultimately be significant, but the fact remains that the verification is being challenged and there appears to me sufficient incongruities in the petitioner's case to suggest that this is not a matter that ought to be decided on the strength of one document. There was no explanation from RBG as to how they came to make the contracts with the respondent, and in particular, to explain how they were prepared to deliver over $2m worth of metal with no security of payment.

8 I agree entirely with the decision in *Yogambikai Nagarajah v Indian Overseas Bank* [1997] 1 SLR 258, 269 reaffirming the judicial view that the burden of proof is on the party alleging forgery. But let it not be forgotten that that statement was made in the context of a trial. So, while I agree that in applying the principle that the court must be convinced on proof furnished by the respondent that the signature on the verification form was forged, I think that the company must, nonetheless, be given the appropriate opportunity to prove its case. Miss Quah relied on the stock authorities such as *Re Claybridge Shipping Co SA* [1997] 1 BCLC 572, 574 and *Re Collinda Pty Ltd* [1991] 6 ACSR 123, 126-127 for the proposition that the court must be satisfied that the defence is *bona fide*. In the *Collinda* case the court stated that unlike a summary judgment case where the defendant need only raise issues to be tried, 'in a winding-up petition, it is incumbent upon the company, *once the burden has shifted*, to establish as clear and persuasive grounds that there is a *bona fide* dispute based on substantial grounds'. In the present case, if the respondent had made a bare denial that the signature was theirs then I would agree that their resistance must fail. However, as I have elaborated, there is a real question as to whether there was a rogue director in the company, and whether RBG (who could not, and had not) accounted for the circumstances why they sold so much metal to the respondent with no precaution to secure payment. In all such cases the petitioner must first prove a clear debt before proceeding to convince the court, as it must, that the respondent company is unable to pay it. In this instance, the issues raised before me in this petition are best resolved in a writ action where the procedures for interrogatory, discovery, and cross-examination can be invoked. I am of the view that there is a *bona fide* dispute that ought to go to trial.

9 A petition to wind-up a company under s 254(1)(c) of the Companies Act must be supported by clear and undisputed evidence of a debt and proof that the company is unable to pay that debt. In this case, I am not convinced that the debt is owing. In the circumstances, the petitioner must prove its debt by a judgment of court after it has proved its case at trial.

10 In support of its alternative case, the petitioner says that the directors of the respondent company had not carried on the business of the company in a proper manner and so the company ought to be wound up on the just and equitable ground. Miss Quah argued that the company was not only set up without carrying on any business but it allowed itself to be used as a front. On these assertions, counsel submitted that a full-scale investigation into the company's affairs is warranted. Counsel relied on the judgment of Swinfen Eady J in *Re The Peruvian Amazon Co (Ltd)* (1913) TLR xxix page 384 in support; but in the *Peruvian Amazon Co*'s case, the company was already in voluntary winding-up and the petitioners preferred a compulsory winding-up order so as to conduct a fuller investigation. Furthermore, the petition's case based on the just and equitable ground is dependent on facts which I would have to infer. Whether the respondent had been so reckless in the conduct of its business such as to lead to the petitioner's loss is a matter that requires a specific pleading with

particulars and strictly proved in evidence. I am not satisfied that the material before me justifies the inferences that Miss Quah would like me to make. This argument may have some merit had it been made by a shareholder, but it was made as an allegation by a creditor in the face of a denial by the respondent; and I am of the view that that denial cannot be dismissed out of hand without trial.

For the reasons above the petition is dismissed with costs