

Re Hong Huat Development Co (Pte) Ltd
[2000] SGHC 215

Case Number : CWU 204/1999
Decision Date : 27 October 2000
Tribunal/Court : High Court
Coram : Choo Han Teck JC
Counsel Name(s) : Sharon Tay Mui Leng (Donaldson & Burkinshaw) for the petitioner; Lawrence Teh (Rodyk & Davidson) for the respondent.
Parties : —

*Civil Procedure – Costs – Petition to wind up company on basis of unsatisfied judgment debt
– Judgment reversed in part on appeal – Petition withdrawn – Whether petitioner should bear costs*

: The dispute before me concerned only the question of costs. The petitioner was the claimant in an arbitration proceedings against the respondent. The arbitrator published his award in favour of the petitioner on 24 December 1998. Under the award, the respondent was held liable to pay the petitioner the sum of \$351,642.06 being the balance contract sum, and a further sum of \$615,133.42 being damages for breach of contracts and some other heads of award. The respondent was also liable for the arbitrator's fees, interests, and costs. On 30 March 1999 the respondent paid the sum of \$315,642.06 leaving the other sum as well as interest and costs under the award unpaid.

A statutory demand was served on the respondent on 7 April 1999. The respondent filed an application for leave to appeal against the arbitration award and also an application for a stay of execution. The applications were dismissed on 20 May 1999. The respondent did not pay. On 27 May 1999 the petitioner filed this petition to wind up the respondent on the ground that it was unable to pay its debts. Meanwhile the respondent appealed against the dismissal of its two applications. At the same time, the respondent obtained an order of court staying the winding up proceedings pending the appeal before the Court of Appeal. The respondent's appeal was allowed by the Court of Appeal on 21 March 2000. Leave was thus granted to the respondent to appeal against the arbitration award. That appeal was heard before Judicial Commissioner Woo Bih Lee. On 6 July 2000 Judicial Commissioner Woo Bih Lee delivered his judgment largely in favour of the respondent and set aside \$555,937.88 out of the sum of \$615,133.42 awarded by the arbitrator, thus leaving a sum of \$46,212.60 to be paid. On 26 July 2000 a further order for the respondent to pay another sum of \$12,982.94 was made. The total sum due to the petitioner after 26 July 2000 was \$59,195.51. The petitioner was granted leave to appeal against the decision of Judicial Commissioner Woo Bih Lee. The respondent paid the sum of \$59,195.51 on 7 August 2000.

On 23 October 2000 the petitioner applied for leave to withdraw this petition. The respondent had no objection save that the issue of costs be argued. I granted leave to withdraw the petition and heard arguments on costs. Both sides claimed costs. Miss Tay for the petitioner submitted that the petition was properly brought in the first instance because the respondent refused to pay the arbitration debt. She argued that the mere fact that there was an appeal is no reason for a stay of execution. She maintained that an arbitration award must be recognised until set aside. The respondent, she argued, was not entitled to look at events beyond 27 May 1999, in other words, the fact that the respondent was largely proved right in disputing the alleged debt was immaterial.

Mr Teh submitted on behalf of the respondent that the subsequent events were important. He argued that winding up proceedings are not execution proceedings in the sense that the former rests on the insolvency of the company whereas the latter concerns any refusal or failure to pay a judgment debt and does not depend on the solvency or otherwise of the judgment debtor. Mr Teh conceded that

ordinarily, a petitioner may pursue an undisputed debt even with venom and will not be faulted for doing so, the situation is different when the debt is disputed. In this regard, counsel relied on the only authority on point, namely, **Re Anglo-Bavarian Steel Ball Co Ltd [1899] WN 80**. It was very briefly reported that a winding up petition was presented on the basis of a judgment debt. The judgment was reversed before the petition was heard. The report stated as follows: `Cozens-Hardy J said that the judgment, having been reversed, must be taken to have been wrong, and that the petition must be dismissed with costs.` This short judgment did not seem to occasion any injustice in that case. There are two parts to the judgment. First, the petition was dismissed on the ground that the basis for its presentation was gone. There can be no quarrel with that finding. Secondly, costs were awarded against the petitioner. The logical inference is that the petitioner who must have known that the basis was gone and, therefore ought to bear the costs. The second part of that decision was a discretionary part, and in my view, nothing in that case suggests that the court was wrong to impose costs against the petitioner there. The question arises, however, was whether costs would have been ordered against the petitioner if he had withdrawn the petition as soon as the judgment was reversed.

In the present case, the petitioner asked for leave to withdraw the petition after the respondent had paid the moneys due to it although the petitioner is appealing against the decision of Judicial Commissioner Woo Bih Lee. It was not disputed that on 28 July 2000, two days after JC Woo Bih Lee`s final orders, the petitioner`s solicitors wrote to the respondent`s solicitors offering to withdraw the petition upon the respondent paying the balance due after JC Woo Bih Lee`s decision. When the petition was presented there was a judgment debt. This debt was subsequently reduced substantially but not entirely. I agree that a winding up petition is based on the insolvency of the company, but a persistent reluctance to pay on an obvious debt may not unreasonably give rise to the impression that the company was unable to pay. A judgment under appeal does not mean that the debt is any less obvious because, until it is reversed, the judgment is good. In **Cornhill Insurance plc v Improvement Services Ltd [1986] 1 WLR 114**, 118 Harman J quoted Vaisey J`s words in another case as follows: `Rich men and rich companies who did not pay their debts had only themselves to blame if it were thought that they could not pay them`. Thus the petitioner was, in my view, entitled to present the winding up petition just as much as the respondent was entitled to seek an order of court for a stay. Sargant J in **Re Amalgamated Properties of Rhodesia (1913) Ltd [1917] 2 Ch 115** was opposed to the notion that it was wrong to present a winding up petition on a judgment debt just because there is a pending appeal. He ruled however, that there be a short stay of the petition until the respondent company could produce satisfactory security for the debt. Thereafter, the petition would be dismissed with costs to the petitioner. I agree entirely with this approach. The proper course for a judgment debtor in the respondent`s circumstances is to offer to pay the judgment into court or to a stakeholder pending appeal, unless, of course, the respondent obtains an order for a stay of execution.

Accordingly, I would order that costs be payable by the respondent up to 25 June 1999 (which was when a stay order of the winding up petition was made with the ancillary order that the respondent provide adequate security). Each party is to bear his own costs thereafter.

Outcome:

Order accordingly.