Bombay Talkies (S) Pte Ltd *v* United Overseas Bank Limited [2015] SGCA 66

Case Number	: Civil Appeal No 69 of 2015
Decision Date	: 27 November 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: Madan Assomull (Assomull & Partners) for the appellant; and Chew Ming Hsien Rebecca and Yeo Jianhao Mitchell (Rajah & Tann Singapore LLP) for the respondent.
Parties	: BOMBAY TALKIES (S) PTE LTD — UNITED OVERSEAS BANK LIMITED

Companies - Winding Up

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2015] SGHC 142.]

27 November 2015

Sundaresh Menon CJ (delivering the judgment of the court *ex tempore*):

1 A winding-up order was made against the appellant company. The order was made on the basis of the appellant's deemed insolvency, a statutory demand for payment having been made without being honoured. The underlying debt is not disputed; the only dispute as to quantum concerns the computation of additional charges and costs which have accrued since the issuance of the statutory demand.

2 In this appeal, the appellant challenges the winding up order that was made below by a High Court judge ("the Judge") whose decision is published as *United Overseas Bank Ltd v Bombay Talkies (S) Pte Ltd* [2015] SGHC 142. The main argument canvassed by the appellant's counsel, Mr Madan Assomull, centred on whether the debt had been compounded to the reasonable satisfaction of the respondent by dint of an arrangement that was entered into between the parties for monthly instalments to be paid to the respondent ("the Repayment Agreement").

3 The statutory demand was issued on 21 February 2014 and served on the appellant on 24 February 2014. The Repayment Agreement was set out in a letter from the respondent's solicitors to the appellant's solicitors dated 30 April 2014.

4 The salient parts of the Repayment Agreement provide as follows:

> 3. Having regard to the foregoing, for the avoidance of doubt and without prejudice to any of our clients' rights, our clients [*ie*, the respondent] are prepared to withhold for the time being winding up and/or bankruptcy proceedings and/or execution proceedings under the Consent Judgment [in Originating Summons No 221 of 2014] subject to the following terms:
>
> …
>
> (f) Your clients shall make monthly repayments of the sum of S$33,000 from March 2014 to August 2014 to our clients, the cheques for the first such payment was received on 14

March 2014, and thereafter, payments shall be received by our clients on the last working day of each month;

(g) Our clients shall be entitled in their sole discretion to apply the monthly payments of S$33,000 received from March 2014 to August 2014 towards the repayment and satisfaction of any of the amounts due and owing by your clients to our clients;

(h) Your clients are to submit by no later than 31 August 2014 a fresh repayment proposal in respect of the balance outstanding amount as at 31 August 2014 (including all accrued and accruing interest, costs and expenses incurred on a full indemnity basis) for our client's consideration; and

…

4. In the event of any failure on the part of your clients to comply with any of the terms as set out in paragraph 3 above, our clients shall proceed to enforce their rights against your clients, including but not limited to enforcing their rights under the Consent Judgment and instituting winding up and/or bankruptcy actions against your clients without further reference to you or your clients.

5 Section 254(2)(*a*) of the Companies Act (Cap 50, 2006 Rev Ed) provides as follows:

Definition of inability to pay debts

(2) A company shall be deemed to be unable to pay its debts if —

(*a*) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding $10,000 then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor …

6 It follows that the debtor may do any of the following in response to a statutory demand:

(a) pay the sum demanded;

(b) secure the sum demanded to the reasonable satisfaction of the creditor; or

(c) compound the sum demanded to the reasonable satisfaction of the creditor.

7 There is no dispute that the debt in this case was neither paid nor secured to the reasonable satisfaction of the debtor. The only question is whether it was in fact compounded. Mr Assomull contends that the respondent's agreement to allow the appellant to pay monthly instalments amounted to its compounding the debt. As a starting point, we accept that where a debt has in fact been compounded to the reasonable satisfaction of the creditor, a winding up petition cannot be presented in reliance on the statutory demand that was based on the debt which has since been compounded. The question before us therefore turns on what it means to compound a debt.

8 In our judgment, to compound a debt connotes the acceptance of an alternative obligation in lieu or in satisfaction of the debt in question. To put it another way, a debt is compounded when it is discharged or rendered unenforceable pursuant to an agreement between the debtor and the creditor.

In such circumstances, it will frequently be the case that a new obligation is created and this will be the consideration for the discharge of the original debt; but that is a separate matter which will have to be separately pursued by the creditor in the event of a breach.

9 Thus, in *Good v Cheesman* (1831) 109 ER 1165, it was observed that where the creditors had entered into a composition with the debtor, the "consequence of such engagement [was that each creditor's] demand will not be enforced" and there was "in fact, a new agreement, substituted for the original contract with the debtor" (at 1167). If the debt which is purportedly the subject of a composition remains valid and enforceable and an action can continue to be brought upon it, there will in fact have been no composition.

10 The definition of "compound" might have been stated in wider terms in some cases. Notably, there is an Australian authority cited in the grounds of decision below (at [25]): *Commonwealth Bank of Australia v Parform Pty Ltd* (1995) 13 ACLC 1309 ("*Parform*"). The debtor in that case argued that a letter from its solicitors to the creditor's solicitors to pay a part of the debt forthwith and the balance within the next 30 days amounted to a compounding of the debt, even though, on the facts, the proposal was rejected by the creditor. This contention was not accepted by the court on the ground that the creditor was reasonably entitled to reject the proposal. But the court went on to define compounding in the following terms (at [4]): "To 'compound' for a debt is to accept an arrangement for payment of the amount of the debt or of a different amount".

11 Relying on this definition of "compounding", Mr Assomull argues that *any* agreement to accept an alternative payment arrangement would entail that the debt had been compounded. In this regard, he contends that the respondent in this case had agreed to accept an alternative scheme for payment as set out in paragraphs 3(f)–(h) of the Repayment Agreement which has been referenced at [4] above and therefore had compounded the debt.

12 In our judgment, this is much too wide a construction to be placed on the effect of the decision of the court in *Parform*. At the outset, it has to be noted that this was not the central concern in the case. As noted above, the primary issue was whether it was open to the creditor to reject the debtor's proposal. But insofar as some observation was made on the meaning of "compounding" in our judgment, the true effect of this, which is consistent with what we have said at [8] above, is that a debt will be considered to have been compounded where the original obligation is discharged. Only then can it be said that "an arrangement for payment" has in fact been accepted. Where this is accompanied by the parties entering into a fresh agreement, it is the fresh obligation, not the original obligation, which may be enforced. In *Parform*, if the creditor had accepted the proposal, the debt which had fallen due would have been extinguished in consideration of an agreement to make an immediate payment of a certain sum followed by a further payment that would not fall due until 30 days later. If this was not subsequently complied with, and in particular if the sum due 30 days later was not paid, the creditor would have a right of action in respect of that sum but this would be a fresh right and it would not be a right in respect of the original debt.

13 On a true construction of the repayment terms in this case, which are set out above at [4], we are amply satisfied that the debt had not been compounded. In saying this, we refer first to paragraph 3 of the Repayment Agreement which makes it clear that the repayment terms were agreed *without prejudice* to any of the creditor's rights. In our judgment, this makes it explicit that although the creditor was prepared to withhold winding up or bankruptcy or execution proceedings for the time being, subject to certain terms, this was on terms that its rights in respect of the original obligation owed by the appellant were not to be disturbed. This conclusion is then fortified by paragraph 4 of the Repayment Agreement in which the parties explicitly provided that the creditor would be entitled to proceed to enforce its rights against the debtor in the event of any failure on the part of the

debtor to comply with any of the terms set out in paragraph 3. In short, the latter makes it abundantly clear that the original obligation had not been discharged, and absent such a discharge, it is wrong to speak of it as having been compounded.

14 In our judgment, the effect of paragraphs 3 and 4 of the Repayment Agreement was to make it clear that the creditor was not compounding the debt but was granting the debtor an indulgence and this was on express terms that its rights would not be compromised. On the view we have formed of what constitutes "compounding", this was the very antithesis of it.

15 Mr Assomull relies on the decision of the Supreme Court of South Australia in *Kema Plastics Pty Ltd v Mulford Plastics Pty Ltd* (1981) 5 ACLR 607 ("*Kema Plastics*") to suggest that an agreement to accept payment by instalments will necessarily amount to a compounding of the debt. In our judgment, that decision simply does not stand for so broad a proposition. Indeed, *Kema Plastics* is useful to illustrate the point that the question of whether a debt has been compromised or compounded will depend on what exactly has in fact been agreed. In *Kema Plastics*, the alleged agreement included a term that having accepted the proposed payment terms, *the notice of demand would be treated as withdrawn or as being of no effect*. This in effect amounted to an allegation that the parties had agreed that the original obligation had been discharged and a new one entered into in its place. If this were true, then there would be no difficulty finding that the debt had been compounded. But there is no such agreement here. To the contrary, the express terms of the agreement here were such as to make it clear that the instalment proposal was accepted *without prejudice* to the creditor's rights and that if the instalment plan was breached, the creditor would have the right to proceed with the winding up action without further reference to the debtor.

16 We make a further observation. The view that we have taken today will have the salutary effect of encouraging creditors who have included the necessary protective language in their agreements to afford debtors the opportunity to pay by instalments so that deserving debtors may avoid having to be wound up.

17 For these reasons, we dismiss the appeal and order the appellant to pay to the respondent costs fixed at $20,000 inclusive of disbursements. We also make the usual consequential order for the payment out of the security for costs.