Transbilt Engineering Pte Ltd (in liquidation) v Finebuild Systems Pte Ltd [2005] SGCA 33

Case Number : CA 115/2004

Decision Date : 11 July 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Choo Han Teck J; Yong Pung How CJ

Counsel Name(s) : Nandakumar Renganathan and Gong Chin Nam (T M Hoon and Co) for the appellant; A Rajandran (A Rajandran Joseph and Nayar) for the respondent

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

Insolvency Law – Winding up – Debtor company wound up before creditor company's garnishee order nisi made absolute – Whether creditor entitled to retain benefit of garnishee order – Whether court should exercise discretion to set aside rights of liquidator to allow continuation of garnishee proceedings – Section 334(1)(c) Companies Act (Cap 50, 1994 Rev Ed)

11 July 2005

Choo Han Teck J (delivering the judgment of the court):

1 The appellant and the respondent were companies in the construction and engineering business. The respondent obtained judgment against the appellant in the District Court and on 4 May 2004 obtained an attachment order *nisi* by way of garnishee proceedings against the garnishee for $84,000. The garnishee was ordered to show cause why the order should not be made absolute, and the show cause was scheduled to take place on 1 June 2004. On 31 May 2004, the garnishee notified the respondent that it was indebted to the appellant in the sum of $84,000. On the same day the appellant commenced a voluntary winding up by reason of its inability to pay its debts, and a provisional liquidator was also appointed on the same day. A meeting of its creditors was scheduled to take place on 10 June 2004, and consequently, the show cause proceedings were adjourned to 13 July 2004. On 10 June 2004, the meeting endorsed and passed the requisite resolution for winding up the appellant. By virtue of s 291(6)(*a*) of the Companies Act, (Cap 50, 1994 Rev Ed) ("the Act"), winding-up proceedings were deemed to have commenced on 31 May 2004, the day the provisional liquidator was appointed. The respondent, a creditor, was also notified of the creditors' meeting on 31 May 2004. There was no dispute that that was the date of the commencement of the winding-up proceedings.

2 At the show cause hearing on 13 July 2004, the District Court granted leave to the respondent to apply to the High Court for relief under s 334 of the Act. The show cause hearing was consequently adjourned. The respondent then applied to the High Court on 26 August 2004 and obtained an order setting aside the liquidator's rights. The application was made under s 334(1)(*c*), which reads as follows:

> Where a creditor has issued execution against the goods or land of a company or has attached any debt due to the company and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator unless he has completed the execution or attachment before the date of the commencement of the winding up, but the 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.

The only issue before us was whether the undisputed facts found by the High Court justified an order setting aside the liquidator's rights. The principal provision in s 334(1) of the Act was intended to

provide a clear path for a liquidator to perform his tasks, and to that end, it expressly provides that any inchoate execution and attachment will be nullified in that the executing creditor may not reap the benefit of the execution or attachment. It means also that no steps may be taken to complete the inchoate execution or attachment proceedings, otherwise the provision will be substantially weakened and itself nullified. This provision is also necessary to prevent any disorganised or unfair rush by creditors to put assets of the company beyond the liquidator's control and thus alienate them from a fair distribution to all creditors. It will be in this context that the discretionary power under sub-s (1)(*c*) has to be considered.

3 There can be no quarrel with the view of Vaisey J in *Re Grosvenor Metal Co, Ltd* [1949] 2 All ER 948 at 950 that the English equivalent of s 334(1)(*c*) does not require the creditor applicant to prove fraud or trickery, and indeed none was found by the court in that case – nor in the present case before us. What moved Vaisey J was the inequity of permitting the company to deprive the applicant there of a larger share of its assets because the execution was stalled by representations expressly made by the company. There is no similar inequity in this case. There seemed to be only one major and significant factor that underpinned the exercise of the lower court's discretion in the present case. That was the claim by one of the company's directors, Yang Chun Seng, that he had a substantial claim of $6,015,461.97 which, if admitted to proof by the liquidator, would form about 78% of the company's gross liabilities of $7,649,677.57. The lower court had been of the view that if Yang's claim were invalid, the company's realisable assets of $1,299,301.38 would not fall far short of the amount due to the other unsecured creditors. Thus, even if the garnishee order of $84,000 were made absolute, the payouts to each unsecured creditor would not be significantly reduced. On the other hand, if Yang's claim were valid, then according to the *pari passu* principle of distribution, the other unsecured creditors would only be able to share in 22% of the company's assets, after Yang had obtained his share of 78%. In these circumstances, each unsecured creditor would get pittance whether or not the garnishee order was made absolute. On this view, it would mean that the difference between granting and not granting the order, so far as the other creditors' financial positions were concerned, would be very small indeed. We are of the view, however, that the merits of the proofs of debt, apportionment, and the value of each creditor's share are not factors to be regarded as a point of principle. They may be relevant as peripheral and additional considerations once a substantial ground such as that found in *Re Grosvenor Metal Co, Ltd* is established.

4 Counsel for the respondent submitted that the respondent should not be regarded as any other general creditor because it had an execution order *nisi*. This is not correct in principle since all creditors are placed on the same footing with no preferential treatment or distinction between them at the onset of liquidation. An incomplete execution or attachment is not an exception. On the contrary, it is the rule as set out in s 334(1). *In re Redman (Builders) Ltd* [1964] 1 WLR 541 is another case in which an execution creditor who had not completed his execution at the commencement of winding up was treated as a creditor like any other. We would like to deal quickly with the point made by the appellant's counsel that s 334(1)(*c*) does not avail the respondent because it applied only to cases in which the garnishee had been made absolute. We need only say, that were that the case, we would have to strain to find a useful application for s 334(1) itself. We do not think that we can do that.

5 Lastly, for the sake of completeness, we should address the connected, yet separate issue of whether an order *nisi* ought to be made absolute after commencement of winding up proceedings. The show cause proceedings is a separate proceedings and the court would be obliged to complete the proceedings, but for the reasons above, the intervention of the winding up process has the effect of rendering all creditors in an equal position as a way of providing a fair distribution of the company's assets. Fairness in this regard (of treating all creditors equally) applies to all creditors and is not emphatic in respect of a select group of creditors. It is also a fairness to be applied in all cases and

therefore the possibility of individual or specific instances of unfairness would have been taken into account in the formulation of the general principle. It should be departed only in exceptional circumstances, and where the law provides a basis for doing so. We are aware that the English Court of Appeal in *Burston Finance Ltd v Godfrey* [1976] 1 WLR 719 ("the *Burston* case") favoured the proposition that a bankruptcy adjudication (and similarly thus, a company liquidation) after an order *nisi*, in itself, is not a sufficient cause for refusing to make the order absolute. The House of Lords in *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192 ("*Roberts Petroleum*") rejected this view even though the Court of Appeal below endorsed its decision in the *Burston* case. Lord Brightman's leading opinion in *Roberts Petroleum* gave reasons which we too agree and adopt, for his conclusion that a company's liquidation was a sufficient cause for refusing to make the garnishee order absolute. First, he held that "it may help to avert an unseemly scramble by creditors to achieve priority at the last moment", and second, "it establishes a clear working rule, and avoids the uncertainties of an inquiry whether a scheme of arrangement has been 'set on foot and has a reasonable prospect of succeeding'" (at 576). Thus, in respect of a show cause hearing, the order *nisi* ought to be discharged and not made absolute if the court is of the view that the company is in liquidation or irretrievably on the road to liquidation.

Appeal allowed.