Re Windsor Holdings Pte Ltd
[2001] SGHC 22

Case Number : CWU 303/2000

Decision Date : 13 February 2001

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Hri Kumar and Ajay Advani (Drew & Napier) for the banks; Lim Joo Toon (instructed) (Thomas Tham & Co) for the company; Lee Cheow Han (Deputy Official Receiver) for the official receiver

Parties : —

Companies – Winding up – Company unable to pay debts – Whether appropriate case for winding up

: This was a petition by the Overseas Chinese Banking Corp (`the petitioners`) to wind up Windsor Nursing Holdings Pte Ltd (`the company`). The directors of the company were Loo Choon Beng and Chay Kwok Kee. They hold 57% of the shares in the company. Loo`s wife Yue Ngan Ying holds 16.7%. The petitioners petitioned for the winding up of the company on the ground that it was unable to pay its debts. The debt owed by the company arose from two facilities granted by the petitioners, which for convenience I shall refer to as the 1995 facility and the 1997 facility.

The 1995 facility was granted in March of that year and comprised an overdraft of $2m and a term loan of $1.5m. The loan was secured by the personal guarantees of Loo Choon Beng and Chay Kwok Kee. The 1995 facility was not disputed by Mr Lim, counsel for the company, as being properly made. The 1997 facility, however, was challenged. This facility was granted by the petitioners on 15 November 1997. It comprised an overdraft of $1.5m and a term loan of $500,000. The overdraft facility was activated on 4 December 1997 and the term loan was disbursed on 5 December 1997.

The petitioners terminated the overdraft facility on 28 April 2000 and demanded payment of $3,520,367.73, and on 10 May it declared an event of default in respect of the term loan and demanded payment of all moneys due and owing to them by the company as at 9 May 2000. The total due was $4,616,784.49. No payment was made. The relevant chronology of events is as follows. On 22 May 2000, the company`s solicitors (`Daisy Yeo & Co`) wrote to the petitioners` solicitors asking for indulgence; and the petitioners granted a 45-day extension of time for payment by letter dated 26 May 2000. Having received no response by 15 September 2000, the petitioners issued a statutory demand for $4,534,489.87 being the amount outstanding as at that date. On 5 October 2000, two days before the expiry of the time stipulated under the statutory demand, the company`s solicitors wrote to the petitioners` solicitors stating that the company had obtained an `in principle` approval for a new loan and asked for the redemption statement. When asked for documentary evidence of the new loan the company did not respond. On 10 October 2000 this petition was filed.

On the same day, the company through a new set of solicitors (`Loo & Chong`) wrote to the petitioners` solicitors stating that a loan has been agreed in principle with the RHB Bank. Once again, the petitioners asked for proof and received no response from the company. On 3 November 2000, Thomas Tham & Co, the company`s third set of solicitors, wrote to the petitioners` solicitors stating that they had obtained financing from two banks. The petitioners again asked for proof, and again the request elicited no response. The petition was heard on 30 January 2001. The company made three more attempts to persuade the petitioners that it had obtained fresh financing. One attempt was made on the eve of this hearing. No substantive proof was produced and the hearing proceeded. At the end of submissions I directed the company to file an affidavit setting out the details of the loan

by Madam Tan to Loo and the manner in which judgment was obtained against him. The hearing was adjourned to 12 February 2001. An affidavit from Madam Tan was duly filed. When hearing resumed on 12 February 2001 Mr Thomas Tham appeared for the company and informed me that he had just filed an affidavit on behalf of the company stating that the company had obtained `in-principle` approval from Sing Investments Finance Pte Ltd to re-finance the company. Mr Kumar submitted that the offer from Sing Investments was subjected to the same ifs and buts. In my view this latest affidavit, filed without leave, was too little too late.

Reverting to the arguments at the hearing on 1 February 2001, Mr Lim submitted that the petition ought to be dismissed. Counsel proceeded on two grounds. First, he submitted that the petitioner is the mortgagee of a piece of real property belonging to the company. That property is valued above $6m. Therefore, he argued, the petitioners ought to exhaust that security before proceeding with this petition. The property is known as 2-4 Jalan Ulu Siglap. It is used as a nursing home operated by Winsor Nursing Home Pte Ltd. This company is not a related company to the company but it has several familiar names as its shareholders. They include Chay Kwok Kee, Yue Ngan Ying, and Ng Siok Sim (an officer and cheque signatory of the company). The company produced a valuation report by Colliers Jardine dated 8 June 2000 in which the valuers conclude that the property was worth $6.7m (assuming vacant possession and free from encumbrances). The property is presently leased to Windsor Nursing Home Pte Ltd for $24,000 a month but no details as to the other terms of the lease were produced. The valuers were also of the opinion that a forced-sale of the property may fetch $5.7m. If that is an accurate valuation then it is more than the debt owed by the company. In such circumstances, it will ordinarily be a very strong factor which may weigh against the grant of a winding-up order. However, the circumstances of this case militate against this. The lease to Windsor Nursing Home may not make vacant possession come cheaply. Furthermore, the company was unable to persuade anyone to give it fresh financing since this valuation was done in June 2000. If, therefore, the petitioners were to realise this security the debt may still not be fully paid and they may have to return to court with another petition.

The second ground relied upon by Mr Lim was that the 1997 facility was illegal. He argued that the loan was not for the benefit of the company but was granted `in connection with the loan to Top Test`. The reference to Top Test was set out in affidavits filed on behalf of the company, in particular, the affidavits of Yeo Tiong Cheok dated 9 and 23 November 2000. Mr Yeo repeated the allegation of fraud by the petitioners throughout his affidavits. The allegations of fraud were elaborated to some extent as to why the petitioners granted the 1997 facility, but a recitation of detail is not evidence of proof. On the evidence of these depositions alone I have no difficulty in disregarding the allegations.

Mr Yeo himself came into the case as a representative of Madam Tan Poh Lean who obtained all of the shares of Loo Choon Beng in the company by reason of a default judgment. She stated that she loaned $500,000 to Loo in August or September 1999. The loan was unsecured and, two months after she was advised by her son, she obtained an acknowledgement of debt from Loo for that sum. Loo then pledged his shares in the company to her as collateral. In the midst of fending off the petitioners` demand, Madam Tan sued (through the company`s solicitors, Daisy Yeo & Co) Loo and obtained a default judgment (through new solicitors Judy Loke & Cheong) against Loo. The judgment obtained on 29 September 2000 was a peculiar one. There was no order for the payment of the said $500,000 loan whatsoever. Instead, the order was for a declaration that Madam Tan was the beneficial owner of the shares in the company; and secondly, that the company issue new share certificates to Madam Tan or her nominee. The action itself was commenced three days before the extension of time given by the petitioners to the company (to raise fresh financing) expired. There was no evidence of what the value of those shares were. If the shares were worth less than $500,000 why did Madam Tan not obtain judgment for that sum? If they were worth more, why did

Loo allow default judgment to be obtained? The mode of operation in this case was reminiscent of a similar exercise taken by the relevant party in **London & Provincial (S) Pte Ltd v BS San Development Pte Ltd** (Unreported) . My attention was drawn to the stark similarity only because Suit 1483/98 was tried before me and most of the performers there appeared in this petition now before me. They include Chay Kwok Kee, Tan Geok Ser, and Network Entertainment Group. The company called Top Test also featured in that case. The mode of operation is set out in the judgment of the court in Suit 1483/98.

It may not be fair to tarnish the credibility of witnesses or deponents in a trial or proceeding by reference to findings and impressions formed of them in another proceeding and I will not do so here, save to note the similarity of the way the default judgments were obtained and no more. By itself, the default judgment obtained by Madam Tan does not appear bona fide. However, if there is evidence of conduct that requires investigation then the court ought to consider whether that investigation is outside the scope of the proceedings before it or are sufficiently within its discretion to take cognizance. In this case, much of the allegations of fraud and illegal conduct was raised by the company, but the depositions raised on its behalf merits investigation, not only of the lenders (of which there was much smoke but no fire in Yeo`s affidavits) but also of the company and its officers. Furthermore, it is apparent from the chronology and undisputed facts that the company was unable to raise fresh financing in spite of the huge cry that the petitioners have in hand security worth $5.7m at the very least. Vaisey J`s famous words cited by Harman J in **Cornhill Insurance v Improvement Services** [1986] 1 WLR 114 at p 118 are apt in present circumstances: `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`. A winding-up order seems to me to be the most appropriate order in this case.

In these circumstances, I am of the view that the petitioners should be entitled to their petition. I therefore grant an order in terms of prayers 10(a), (b) and (c) of the amended petition. I will also direct that the liquidators submit an interim report to this court within four (4) weeks of their appointment.

Outcome:

Petition granted.