Ong Kian Hoy *v* Liquidator of HSS Engineering Pte Ltd
[2014] SGHC 242

Case Number : Originating Summons No 1011 of 2013

Decision Date : 19 November 2014

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : A P Thirumurthy (Murthy & Co) for the plaintiff; Ang Siok Hoon (Rajah & Tann LLP) for the defendant.

Parties : Ong Kian Hoy — Liquidator of HSS Engineering Pte Ltd

Insolvency law – Winding up – Liquidator – Proof of debt

19 November 2014

Judith Prakash J:

Introduction

1 This matter arises out of a proof of debt filed by the plaintiff in respect of debts owing to him by HSS Engineering Pte Ltd ("the Company"), a company in liquidation. The defendant, who is the liquidator of the Company ("the liquidator"), rejected the proof of debt and the plaintiff then sought to have this rejection set aside or varied. I heard the plaintiff's application and reversed the rejection of the proof of debt to the extent of sums amounting to $38,981.37 and $6,000. I refused, however, to allow the plaintiff's claims for two other sums, *viz*, $656,373 and $450,000 or to give the plaintiff the full amount of certain legal costs he incurred. The plaintiff has appealed against my decision.

2 In respect of the sum of $656,373, there is no doubt that the plaintiff had made shareholder's loans to the Company totalling that sum. However, in 2008, the plaintiff waived the debt. The issue that arose was whether when the Company was wound up the plaintiff was entitled to withdraw that waiver and re-claim the amount in the winding up.

3 As for the sum of $450,000, this arises under a deed of settlement entered into between the plaintiff and other shareholders of the Company. Under the deed, this amount was payable to the plaintiff on completion of the sale of the Company's property. The issue here was whether the amount was payable to him regardless of whether the sale of the property took place pursuant to the deed of settlement or was effected by the liquidator.

4 In respect of the legal costs, I allowed the plaintiff $6,000 instead of $42,000 as claimed. The plaintiff now appeals for full reimbursement.

5 I give my reasons below.

Background

6 In 2001, the plaintiff and his brother, Mr Ong Kian Sim, acquired the Company and became its directors and shareholders, the plaintiff being appointed managing director. As the holder of 40% of the Company's issued share capital, he was also its majority shareholder.

7 Between 2001 and 2013 when the Company was wound up, the plaintiff managed its operations. At some point the Company acquired a piece of land at Kranji Link ("the Property") from the Jurong Town Corporation on which it then constructed a factory building. The Property is now the Company's main asset. The plaintiff said that he did his best to keep to Company afloat and on many occasions used his own money to pay for the Company's operations and settle its debts.

8 In 2008, two companies, namely, Starluck Development Pte Ltd ("Starluck Development") and HNO Pte Ltd, each took a 30% stake in the Company. In 2012, a company related to Starluck Development, Starluck Construction Pte Ltd ("Starluck Construction"), applied for the Company to be wound up vide CWU 170/2012 ("CWU 170"). A compulsory winding up order was made on 1 March 2013 and the defendant was appointed liquidator of the Company.

9 The plaintiff has filed three proofs of debt in the Company's liquidation. The first proof of debt was dated 25 March 2013 and was for debts aggregating $2,107,849. On 3 October 2013, the liquidator rejected four of the claims itemised in the proof as follows:

(a) A sum of $38,981.37 which was part of the plaintiff's personal loans to the Company aggregating $461,476;

(b) Personal loans totalling $656,373;

(c) Compensation for loss of use of the Property in the sum of $450,000; and

(d) Legal fees allegedly incurred by the plaintiff in the sum of $40,000.

The amounts rejected by the liquidator totalled $1,185,354.37. Therefore, the proof of debt had been partially allowed in the sum of $922,494.63. The reasons for the rejection were that either the plaintiff had not provided sufficient documentation in support of his claims or that the claims were baseless.

10 On 22 October 2013, the plaintiff filed this application for the setting aside or reversal or varying of the Notice of Rejection dated 3 October 2013. The plaintiff subsequently submitted further documents to the liquidator supporting his claim for return of a loan in the sum of $38,981.37. The liquidator found these documents satisfactory and admitted the sum of $38,981.37.

11 At the hearing before me, the liquidator had no objection to the reversal of the Notice of Rejection to the extent of $38,981.37 since this amount was now supported by documentary evidence. I heard the parties' arguments and decided that the plaintiff should be entitled to an additional sum of $6,000 in respect of his costs incurred while opposing CWU 170. I therefore varied the Notice of Rejection in respect of the two sums mentioned above. I did not accept the plaintiff's other claims which I will deal with below.

The claim for $656,373

12 As I have stated, the plaintiff made various personal loans to the Company while it was in business in order to keep the Company in business. In the Company's balance sheet, as of 31 December 2008, the Company was shown as owing the plaintiff $414,966.92 and a further sum of $98,809.13 which was entered as being owed to a director. The plaintiff had advanced other sums to the Company and, on 26 May 2010, the Company's accountants wrote to him to ask him to confirm that as at 31 December 2008 the Company's indebtedness to him was $656,373. The plaintiff duly confirmed that this was the balance in his favour. The auditors sent him another letter, shortly

thereafter, asking him to confirm that the amount of $656,373 that was owing to him had been waived and forgiven by him, and that he had no further claim against the Company for this sum after 31 December 2010. The defendant duly signed this confirmation as well. As a result, when the Company's accounts for the year ended 31 December 2010 were prepared, they showed that the amount due to the plaintiff as at that date was only $447,494.53 and that the amount due to him of $656,373 had been waived and written back into the accounts.

13 It is also relevant that the 2010 audited accounts were approved by all the directors of the Company (including the plaintiff) and subsequently at the annual general meeting of the Company on 27 December 2011.

14 The plaintiff argued that although it was alleged that this sum had been written off and forgiven by him, it was still due and owing to him. The plaintiff admitted that in 2010 he had agreed that this debt should be forgiven and written off. He disputed, however, that his "earlier kind act to write off and waive this debt" should result in his claim for $656,373 in his proof of debt being rejected by the liquidator. He explained that he had been persuaded in 2010 to waive this debt because the Company did not have funds to pay him and the accounts of the Company had to be in credit to enable the Company to borrow money from the bank for the further development of its business. There was no consideration given by the Company to the plaintiff for the waiver of the debt.

15 The plaintiff said that with a clean slate of accounts, the Company could borrow funds and do further business. That would be of great benefit to him as managing director and majority shareholder of the Company. It was only in those circumstances that he agreed to waive the debt. It was most unfair, now that the Company had been wound up and would receive funds from the sale of its assets, that he should be denied the right to recover the debt. There was an expectation that the Property would be sold for between $6.5m and $7m. This amount would be sufficient to allow all the creditors of the Company, including the plaintiff, to recover more than 90% of the Company's indebtedness to them. In such circumstances, it was unfair to reject the plaintiff's claim.

16 I could not accept this argument. The plaintiff had admitted that he had waived the debt and allowed it to be written off so that the Company's accounts would present a better picture when the Company approached its bankers for a loan. The plaintiff recognised that it would be in his interest, as a shareholder, if the Company was able to get more funds and carry on its business. The plaintiff confirmed and acknowledged, on at least three occasions, that he would have no further claims against the Company in respect of the sum of $656,373. Accordingly, that amount was written off as a debt and the accounts did indeed present a better financial position for the Company than they had when the debt was still owing.

17 There were no documents showing that the debt of $656,373 was subsequently revived and acknowledged by the Company as being due to the plaintiff. Indeed, it was not the plaintiff's position that the debt was revived. He simply considered it unfair that he should not be able to recover it from moneys received from the sale of the Property. The plaintiff had allowed the Company's accounts to be re-written without the debt and had agreed to the waiver for that very purpose. He had agreed to the production of documents which he knew would be seen by third parties and would show the Company's financial position as it stood after the indebtedness to him had been written off. Thus, even if he had not received any consideration for the waiver (albeit he had agreed that funding on the basis of the revised accounts would benefit him), having agreed to the affairs of the Company being represented in a particular manner, he would surely be estopped from going back on his waiver. I was satisfied that the plaintiff no longer had any claim to recover $656,373 from the Company and that this amount had to be deducted from his proof of debt. In my judgment, it had been properly rejected.

The claim for compensation of $450,000

18 On 25 April 2012, a Deed of Settlement ("the Deed") was entered into between the shareholders of the Company, the Company and Starluck Construction. The purpose of the Deed was to record the terms on which Suit 902 of 2011 ("Suit 902") could be settled. Suit 902 had been instituted by Starluck Construction against the Company to recover $3,616,240.99 which Starluck Construction alleged that the Company owed it in respect of the construction works undertaken on the Property. In the Deed, the shareholders agreed to dispose of all their shares in the Company for a consideration of not less than $8.8m and that upon receipt of this sum they would pay $2,681,368.48 to Starluck Construction which would then discontinue Suit 902. The Deed further provided by cl 5(c) that, upon the completion of the sale of the shares, the shareholders would pay the plaintiff $450,000 as compensation for the loss of his use of part of the Property out of which a sum of $135,000 would be retained and donated to a charity to be nominated by one of the shareholders.

19 In the event the shareholders were unable to find a purchaser for their shares. No payment was made to Starluck Construction which subsequently obtained judgment against the Company in Suit 902. Thereafter, Starluck Construction petitioned for the winding up of the Company.

20 The plaintiff included the sum of $450,000 in his proof of debt on the basis that he was entitled to receive it as he was being deprived of the use of part of the Property. The plaintiff conceded that the Deed was not completed and the Property was not sold pursuant to the Deed. He argued, however, that this amount should still be paid to him as all the shareholders of the Company and the Company itself had agreed that the compensation was payable to him when there was a sale of the Property. It did not matter whether the sale came about through the Deed or by reason of the liquidation. In both cases, the plaintiff would have lost the use of the Property. He should be compensated as earlier agreed to by all parties.

21 I did not accept the plaintiff's argument. This issue arose from the Deed and depended on the true interpretation of cl 5(c). The liquidator submitted that the plain meaning of cl 5(c) was that the compensation to be paid to the plaintiff was to be paid from the proceeds of sale of the shares in the Company. In the circumstances, the obligation to compensate the plaintiff, if any, would be owed by the other shareholders of the Company and not by the Company itself. The Company did not own its shares and would not be a recipient of the proceeds of sale of its shares. I agreed. It was clear to me from cl 5(c) and the Deed as a whole, that it was the shareholders who undertook to dispose of all their shares in the Company in order to raise funds. Thus, cl 5 which dealt with the completion of the sale and purchase of shares and the manner in which the proceeds of sale should be applied was a clause which bound the shareholders, not the Company. It was the shareholders, not the Company, who would be entitled to receive the proceeds of the sale of the shares and it was the shareholders who would have to agree that what would otherwise be received by them should be used to pay to Starluck Construction (cl 5(b)), the plaintiff (cl 5(c)) and to pay all other debts and liabilities of the Company (cl 5(d)) and only thereafter distributed amongst the shareholders proportionately to their shareholdings (cl 5(e)). The Company did not and could not assume any liability to pay the plaintiff the sum of $450,000. I also noted that in any case the plaintiff would have received only $315,000 if the sale of shares had gone through.

22 I also accepted the liquidator's argument that the plaintiff was deprived of his use of the Property because the Company was in liquidation and the Property had to be sold. He was not being deprived of it pursuant to the Deed, *ie*, pursuant to the sale of the Company's shares. In the circumstances, the obligation under the Deed to compensate the plaintiff had not been triggered. In the circumstances, there was no basis for the Company to compensate the plaintiff for the loss of use of the Property. The liquidator was correct to reject the plaintiff's claim for compensation of

$450,000.

The claim for legal fees of $42,000

23 In the proof of debt, the plaintiff claimed the sum of $40,000 as legal fees. The first component of this was the sum of $20,000 that he paid as security for costs when he lodged the Company's appeal in CA No 31 of 2013 ("CA 31") against winding up order in CWU 170. The second component was the sum of $20,000 which he paid to his lawyers Murthy & Co for the cost of representing the Company in CA 31.

24 CA 31 was subsequently withdrawn and Starluck Construction, the respondent, was awarded costs of $12,000. As a result, the costs actually incurred by the plaintiff amounted to the $20,000 he paid his lawyer and the $12,000 that was paid to Starluck Construction from the security.

25 When the plaintiff filed his first two affidavits in support of the application for reversal of the rejection of the proof of debt, he sought to have the sum of $42,000 admitted instead. This comprised $12,000 paid to Starluck Construction, $10,000 paid to Murthy & Co for acting for the Company in CWU 170 and $20,000 paid to Murthy & Co as legal costs for CA 31.

26 On 30 July 2014, the plaintiff's solicitor, Mr A P Thirumurthy, filed an affidavit. He exhibited two bills of costs from his firm. The first was dated 29 July 2014 and was a bill for $10,000 costs and $285.60 for disbursements for his firm's charges to act for the plaintiff and the Company in CWU 170. The second bill was also dated 29 July 2014 and was a bill for $20,000 costs and $4,609.20 for disbursements in respect of his firm's charges to act for the plaintiff and the Company in CA 31. Mr Thirumurthy's affidavit was filed to support the plaintiff's revised claim for $42,000 as legal costs.

27 I deal first with the sums of $20,000 and $12,000 which the plaintiff incurred in respect of CA 31. The liquidator submitted that these sums could not be claimed because the plaintiff had pursued CA 31 without the authorisation and/or sanction of the other directors and shareholders of the Company.

28 In *In Re Wilson and Sons Ltd* [1972] 1 WLR 791 ("*Wilson*"), the company appealed against the winding up order made against it and the issue arose as to who should be the party to provide security for the costs of the appeal. The English Court of Appeal held that the costs of the appeal ought to be borne directly by those promoting the appeal and not the company itself. The court noted that in the earlier case of *In Re Consolidated South Rand Mines Deep Ltd* [1909] WN 606, the view had been stated that a company in winding up had a right to appeal but should only be allowed to do so upon the terms of finding security from a source outside the company's assets, namely, from the directors or shareholders who were at the back of the appeal. The rationale was that if the appeal failed, the company should have their costs from the persons who really promoted the appeal. This approach was followed in *Wilson* where the court held that security for the costs of the appeal had to be secured from those concerned with promoting the appeal. This would mean that the company would not have to use its assets to pay the legal costs for the appeal if it failed. In a later Hong Kong case, *In the matter of S Y Engineering Company Limited*, Civil Appeal No 1986 of 2001, the court observed that it would not be just that any costs occasioned by an unsuccessful appeal from a winding up order should be thrown upon the assets of the company to the prejudice of the creditors.

29 On the law, therefore, the plaintiff has no basis to claim the costs of CA 31 from the Company. The facts were also against him. He did not file the appeal on the basis that the debt was disputed. He did not dispute the debt owed by the Company to Starluck Construction. Instead, the plaintiff's

motive as appeared from his own affidavit was to try to save the Company from being wound up. He was hoping that in the interim, pending the hearing of CA 31, he could persuade the other shareholders to join him to raise money to pay off Starluck Construction. Unfortunately, the other shareholders did not offer any assistance and he was unable to find anyone else willing to furnish funds to save the Company. In the end, he had to give instructions for CA 31 to be withdrawn. Although it is understandable that the plaintiff desired to save the Company, that does not mean that he was entitled to bill the Company for his efforts to save it or to treat the money that he expended on CA 31 as being a loan from him to the Company which he could recover from it in its liquidation. The plaintiff chose to file the appeal and he must bear the costs of so doing. I found no merit in his claim to be able to recover these costs from the Company.

30 The final sum claimed by the plaintiff as costs was the sum of $10,000 that he paid Murthy & Co to act for the Company in CWU 170. According to the bill rendered by Murthy & Co, the fee charged covered four attendances in the High Court, drafting one affidavit to be affirmed by the plaintiff and perusing the three documents filed in CWU 170 and two orders of court. The affidavit filed by the plaintiff had 12 pages of text and about 40 pages of exhibits. The court attendances were brief and no substantial legal arguments were made with any of them. All in all, it appeared to me that $10,000 was excessive and that a more reasonable fee for acting for the Company would be $6,000 inclusive of disbursements. I therefore allowed the plaintiff to claim this sum.

Conclusion

31 For the reasons given above, I allowed the plaintiff's application in part only. I also ordered the plaintiff to pay the defendant's costs fixed at $3,000 plus filing fees. I was informed that there had been at least five adjournments since the filing of the plaintiff's application. The plaintiff had substantially failed in the application and therefore had to pay the liquidator's costs.