MARIL-RIONEBEL (M) SDN BHD & ANOR v. PERDANA MERCHANT BANKERS BHD & OTHER APPEALS
COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM, JCA; ABDUL HAMID MOHAMAD, JCA; MOHD NOOR AHMAD, J
CIVIL APPEAL NOS: W-02-808-2000, W-02-809-2000, W-02-784-2000, W-02-783-2000, W-02-481-1999
11 APRIL 2001
[2001] 3 CLJ 248

***CIVIL PROCEDURE**: Appeal - Parties - Procedure - Proper party to make application for stay pending appeal - Whether proper of appellant to bring several appeals in respect of one suit - Stay of Winding-up petition pending outcome of other suits - Bona fides of appellant*

***CIVIL PROCEDURE**: Execution - Winding up - Whether presentation of Winding-up petition a form of execution*

***CIVIL PROCEDURE**: Amendment - Petition - Winding-up - Exercise of court's discretion*

***CIVIL PROCEDURE**: Irregularity - Winding-up petition - Affidavit of truth sworn before petition - Whether curable*

***CIVIL PROCEDURE**: Res judicata - Cross-examination - Winding-up petition - Application to cross-examine deponent on matter already decided at appellate level - Whether an abuse of process*

***COMPANY LAW**: Winding-up - Petition - Whether more than one petition may be presented - Whether petition a form of execution - Companies (Winding-up) Rules 1972, r. 33*

The respondent had obtained a winding-up order ('the order') against the first appellant ('the appellant'). Due to the effect of a judgment of the Court of Appeal in another matter, the second appellant, Anafartalar Caddesi Sdn Bhd, a contributory of the first appellant, applied for a stay of execution of the order to the Court of Appeal. The court permitted the second appellant to be added as a co-appellant and stayed execution of the order.

The appellant had taken several steps by way of different applications to resist the winding-up petition in the High Court. The main appeals were against the High Court's decisions: (i) to grant the order although there was another petition by another creditor; (ii) to refuse to stay the winding-up petition although there were two suits filed by the appellant impeaching the judgment on which the petition was based; (iii) to grant an amendment to the respondent's petition; (iv) to refuse to strike out the petition although the affidavit of truth was sworn before the petition; and (v) to refuse to order cross-examination of the deponent of the respondent's affidavits.

Held:

Per Abdul Hamid Mohamad JCA

> **[1]** The unhealthy trend among respondents in winding-up petitions is to make all kinds of interlocutory application which would stall the hearing of the petition proper. It was therefore timely that the court has come out strongly against such practice.

*[**Bahasa Malaysia** Translation Of Headnotes]*

Penentang telah mendapatkan perintah pergulungan syarikat ('selepas ini perintah tersebut') terhadap perayu pertama ('perayu'). Kesan daripada keputusan Mahkamah Rayuan dalam satu kes lain, perayu kedua, Anafartalar Caddesi Sdn Bhd, sertaan daripada perayu pertama, memohon perintah untuk pergantungan pelaksanaan daripada Mahkamah Rayuan. Mahkamah membenarkan perayu kedua dimasukkan sebagai perayu sertaan dan perintah untuk pergantungan pelaksanaan.

Perayu telah mengambil beberapa langkah melalui permohonan yang berbeza-beza bagi menentang petisyen pergulungan syarikat di Mahkamah Tinggi. Rayuan utama adalah terhadap keputusan-keputusan Mahkamah Tinggi iaitu: (i) membenarkan perintah walaupun terdapat petisyen daripada penghutang lain; (ii) tidak membenarkan pergantunggan pelaksanaan petisyen pergulungan syarikat walaupun terdapat dua tindakan yang difailkan oleh perayu mencabar keputusan dimana petisyen itu disandarkan; (iii) membenarkan pindaan terhadap petisyen penentang; (iv) tidak membenarkan petisyen itu dibatalkan walaupun kebenaran affidavit diangkat sumpah sebelum petisyen; dan (v) tidak membenarkan perintah untuk menyoal balas pembuat affidavit bagi pihak penentang.

Diputuskan:

Oleh Hamid Mohamad HMR

> **[1]** Satu kecenderungan yang tidak sihat dikalangan penentang-penentang dalam kes petisyen pergulungan syarikat adalah dengan memasukkan berbagai permohonan interlocutori yang menghalang kelancaran pendengaran sesuatu petisyen. Oleh yang demikian sudah tiba masanya mahkamah menentang secara tegas amalan ini.

[Rayuan-rayuan ditolak; permohonan pergantungan pelaksanaan sementara menunggu kebenaran untuk rayuan di Mahkamah Agung ditolak.]

Case(s) referred to:

Antara Elektrik Sdn Bhd v. Bell & Order Bhd [2000] 1 LNS 196; [2000] 6 MLJ 385 ***(refd)***

Asia Commercial Finance (M) Bhd v. Lum Choon Realty Sdn Bhd (Companies Winding-up No: 28-60-92) ***(refd)***

Buildcon-Cimaco Concrete Sdn Bhd v. Filotek Sdn Bhd [1999] 4 CLJ 135 ***(refd)***

Hendry v. De Cruz [1948] 1 LNS 39; [1949] MLJ Supp 25 ***(refd)***

Hunter v. Chief Constable of West Midlands & Anor [1981] 3 All ER 727 ***(foll)***

In re Kredin Sdn Bhd (Companies Winding Up No: 28-55-89)(ovrd) ***(ovrd)***

Ladli Parshad Jaiswal v. Karnal Distillery Co Ltd [1954] 24 Comp Cas 77 ***(foll)***

Lai Yoke Ngau & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 ***(foll)***

Miliangos v. George Frank (Textiles) Ltd [1975] 1 All ER 1076 ***(foll)***

Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 317 (Rep), [1991] 1 CLJ 260; [1991] 1 MLJ 95 ***(foll)***

Nicholls v. Nicholls [1997] 147 NLJ 61 ***(foll)***

Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 ***(foll)***

Re Norton Iron Co [1877] 47 LJ Ch 9 ***(refd)***

Re Overseas Aviation Engineering (GB) Ltd [1962] 3 All ER 12 ***(refd)***

SP Setia Bhd v. Gasing Heights Sdn Bhd [2001] 6 CLJ 55 ***(refd)***

Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1991] 3 CLJ 2078; [1991] 1 CLJ 436 (Rep) ***(foll)***

Stonegate Securities Ltd v. Gregory [1980] 1 All ER 241 ***(foll)***

Sun Microsystems Malaysia Sdn Bhd v. KS Eminent Systems Sdn Bhd [2000] 4 CLJ 72 ***(refd)***

Taylors Industrial Flooring Ltd v. M & H Plant Hire (Manchester) Ltd [1990] BCLC 216 ***(foll)***

Teck Yow Brothers Hand-Bag Trading Co v. Maharani Supermarket Sdn Bhd [1989] 1 CLJ 258; [1989] 2 CLJ 555 (Rep) ***(foll)***

Young v. Bristol Aeroplane Co Ltd [1944] 1 KB 718 ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 4, 218, 219(2), 224, 253(2)

Courts of Judicature Act 1964, ss. 43, 44(1), 67(1)

Companies (Winding-up) Rules 1972, rr. 32, 33

Rules of the High Court 1980, O. 18 r. 19

Counsel:

For the appellant - Cecil Abraham (T Gunaseelan with him); M/s Jayaraman Ong & Co

For the respondent - Lambert Rasa-Ratnam (Sean Yeow with him); M/s Lee Hishamuddin

Reported by Anne Khoo

JUDGMENT

Abdul Hamid Mohamad JCA:

I have had the advantage of reading the judgment of my learned brother Gopal Sri Ram JCA. I agree entirely with his views. However, I only wish to add a few words to further emphasise my unhappiness (and his too) about the way winding-up petitions are often conducted. Indeed what I am saying here is no more than what I have earlier said on at least four occasions when I was sitting in the High Court. Reference can be made to *Buildcon-Cimaco Concrete Sdn Bhd v. Filotek Sdn Bhd[1999] 4 CLJ 135*, *Antara Elektrik Sdn Bhd v. Bell & Order Bhd[2000] 1 LNS 196*; [2000] 6 MLJ 385, *Sun Microsystems Malaysia Sdn Bhd v. KS Eminent Systems Sdn Bhd[2000] 4 CLJ 72*and recently *SP Setia Bhd v. Gasing Heights Sdn Bhd[2001] 6 CLJ 55*.

As pointed out by my learned brother Gopal Sri Ram JCA, the unhealthy trend is, upon being served with a petition, instead of defending the petition proper at the hearing of the petition, the respondent makes all kinds of interlocutory applications. That would invariably stall the hearing of the petition proper. If the application is dismissed, the respondent would appeal to the Court of Appeal or may even try to go further, further delaying the hearing of the petition. I have come across cases where even an order made by the senior assistant registrar under r. 32 of the Companies (Winding-up) Rules 1972was appealed against and when the appeal was dismissed, the respondent further appealed to the Supreme Court - see *Asia Commercial Finance (M) Berhad v. Lum Choon Realty Sdn. Bhd* (Penang High Court Companies Winding-up No: 28-60-92). Of course, having filed the notice of appeal, the respondent then filed a notice of motion to stay all proceedings pending the disposal of the appeal by the then Supreme Court. When the notice of motion was dismissed, another appeal was filed. The effect is that the hearing and disposal of the petition is delayed.

One of the most abused procedure adopted in winding up proceedings is the application to strike out the petition under O. 18 r. 19 of the RHC 1980and/or the inherent jurisdiction of the court.

In *Buildcon-Cimaco Concrete Sdn Bhd v. Filotek Sdn Bhd[1999] 4 CLJ 135*I pointed out the

undesirability of applying such procedure to a winding up petition:

> Besides, the Companies (Winding-up) Rules 1972 provides its own scheme of procedure for a s. 218 winding-up petition which is more simplified and geared for speedy disposal. RHC 1980, for example, provides for appearance (conditional and unconditional), discoveries, interrogatories, judgment in default of pleading, summary judgment (O. 14), striking out of pleadings (O. 18 r. 19), summons for directions and setting down for trial. Hearing date is only given after the directions made in the summons for directions are complied with and the case has been set down for trial. Perhaps because of these requirements which take some time to be complied since the filing of a writ, that procedures for judgment in default of pleading, summary judgment and the striking out of the writs and pleadings are provided, for quick disposal in clear-cut cases.
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> The scheme under the Companies (Winding-up) Rules 1972 is different. When the petition is issued out of court, a hearing date is given straight away. Whatever has to be done, eg, service, advertisement, compliance with r. 32, will have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes up before it. If everything is done as scheduled, the petition is heard on the date first fixed for hearing. That is what the rules envisage. In the circumstances, there is no necessity for provisions for judgment in default, summary judgment or striking out the pleading or trial on issues. I am of the view that that is the reason why the Companies (Winding-up) Rules 1972 do not provide for such procedures. They are not necessary.
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> Furthermore, more often than not, resort to O. 18 r. 19 of RHC 1980in a winding-up proceedings results in the delay in the hearing of the petition. The application is usually filed one or two weeks before the date fixed for the hearing of the petition. Application is made for it to be heard first, supposedly, to save the court's time.
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> In reality, it delays the hearing of the petition. Whenever there is such an application, inevitably, the hearing of the petition is delayed. Not only will the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s).

These views were reiterated in *Antara Elektrik Sdn Bhd v. Bell & Order Bhd[2000] 1 LNS 196*; [2000] 6 MLJ 385 this time in Malay.

In *Sun Microsystems Malaysia Sdn Bhd v. KS Eminent Systems Sdn Bhd[2000] 4 CLJ 72*, I stressed the difference between the procedure in respect of a writ action under the RHC 1980 and a winding-up petition under the Companies (Winding-up) Rules 1972:

> It is important to note that the procedure in a winding-up proceeding as provided by the Companies (Winding-Up) Rules 1972 is different from the procedure in a writ action as provided by the Rules of a High Court 1980 (RHC 1980). In a winding up proceeding, the procedure is simple and brief. That is what it is meant to be. When a petition is filed, the senior assistant

registrar gives a hearing date straightaway before the petition is issued. The petitioner is expected to do everything he or it has to do in terms of complying with the procedural requirements eg, serving, gazetting and advertising, before the hearing date. The petition is to be heard on the date fixed for hearing.

On the other hand, in a writ action upon filing no date (be it for hearing or for mention) is given by the senior assistant registrar. He merely signs the writ and issues it. The writ itself clearly says:

> We command you that within eight days after the service of this writ on you, inclusive of the day of such service, **you do cause an appearance to be entered for you** at the suit of... And take notice, that in default of you so doing the plaintiff may proceed therein to judgment and execution. (emphasis added.)

The trial date is a long way off. Indeed, there may not be none at all.

It is important that the procedure applicable in a writ action should not be incorporated into a winding-up proceeding. It is not meant to be. Appearance is required (and provided for) in a writ action so that the plaintiff will know whether to take a judgment in default or not. If an appearance is filed, followed by defence, then at the close of the pleadings, the plaintiff should apply for directions and ask for the case to be set down for trial. In other words, he asks for a trial date. That is not necessary in a winding-up petition because the hearing date has been given even before the petition is issued. That is why there is no provision for appearance, defence, summons for directions, setting down for trial etc. in a winding up proceeding.

Finally, the same view was reiterated in *SP Setia Berhad* (Kuala Lumpur High Court Winding-up Petition No: D8-28-173-2000).

Having written on it four times and in two languages, it is timely that my learned brother Gopal Sri Ram JCA and this court come out strongly against such practice, which, at the very least is delaying the hearing and disposal of winding-up petitions, which is unfair to the petitioners and clogging the court docket.