NG ENG HUAT & 2 ORS v. PIN EU ENTERPRISE SDN BHD
HIGH COURT, PULAU PINANG
ABDUL HAMID MOHAMED J
PENGGULUNGAN SYARIKAT NO. 28-24-93
6 APRIL 1994
[1994] 1 LNS 99

Winding up — Whether just and equitable — Petitioners' allegations credibly denied — Allegations must be proved by oral evidence or cross-examination of deponents of affidavits — Petitioner must come to court with clean hands

The petitioners, who instituted the winding up petition against the respondent company, held 42.85% shares in the respondent company. The remaining shares were held by SEG and LHT. The allegations by the petitioners were disputed by SEG and LHT.

Abdul Hamid b Hj Mohamed J:

This petition for winding-up was filed by three petitioners, namely, Ng Eng Huat, Choo Ah Mooi and Lee Yan Hin. They together had 42.85% shareholding in the company. The remaining 57.15% were held by Soon Ewe Ghee and Lee Hack Teik.

According to the petitioners, they were induced by Soon Ewe Ghee and Lee Hack Teik to purchase the company on 6 June 1991, for RM 1,500 and subsequently to contribute to the shareholding of the company. They alleged that Soon Ewe Ghee and Lee Hack Teik had obtained a licence from a Japanese Company to sell a health product called Tsukarezu Furozu via direct sales; that the profit margin was very high and that they had obtained the approval of the Health Ministry to sell the product.

Further, the petitioners alleged that Soon Ewe Ghee and Lee Hack Teik represented to them that they (the petitioners) would be placed on the board of directors and would not be replaced so long as the company was in existence. Acting on those representations the company was purchased. The three petitioners were made directors together with the two. Soon Ewe Ghee became the executive director and Lee Hack Teik became the managing director.

However, according to the petitioners at an AGM on 27 February 1993, they were outvoted and removed from the board of directors. After they were removed they discovered that the sale of the product was in contravention of the Poisons Act as no approval of the Ministry of Health had been obtained.

The petitioners also said that Soon Ewe Ghee himself had, at the board meeting on 4 February 1993, "resolved " to wind up the company and to put up a motion for that purpose at the AGM to be held on 27 February 1993. However, at the AGM Soon Ewe Ghee refused to consider the proposal.

Further the petitioners said that Soon Ewe Ghee had elected his wife (Chuah Soo Choo) to the board of directors on 27 February 1993, despite the petitioners' protests. They alleged that the motive of the appointment was to enable the funds and assets of the company to be siphoned off.

It was also alleged by the petitioners that Soon Ewe Ghee and Lee Hack Teik had fraudulently informed the company bankers that the fixed deposit slip of RM60,390 was lost and withdrew the said sum without the knowledge and consent of the petitioners. The amount had not been refunded.

The petitioners said that Soon Ewe Ghee and Lee Hack Teik had conducted the affairs of the company for their personal interests and to the detriment of the company and the petitioners. The petitioners also alleged that Soon Ewe Ghee and Lee Hack Teik had breached their fiduciary, duty to the company by misappropriating and siphoning off funds of the company thereby enriching themselves in the process at the expense of the company and the petitioners. The petitioners therefore prayed that the company be wound up.

Excluding the affidavit verifying the petition, the petitioners filed three affidavits - encls. 3, 15 and 18. Soon Ewe Ghee and Lee Hack Teik filed four affidavits - encls. 12, 14, 16 and 17.

Let me briefly summarise the contents of the affidavits of Soon Ewe Ghee and Lee Hack Teik. They denied inducing the petitioners that they had obtained a licence from a Japanese company to sell the product. They denied that they represented to the petitioners that the petitioners would not be removed as directors so long as the company was in existence. They alleged that the petitioners were removed because they (the petitioners) tried to siphon out the company funds without the proper sanction of the board of directors. Copies of three cheque butts were exhibited. They also alleged that the three petitioners passed a resolution to enable themselves to sign cheques of the company dated 14 December 1992, and presented the same to the bank contrary to the memorandum and articles of association of the company. However, upon objection by Soon Ewe Ghee and Lee Hack Teik the bank did not make payment on the cheques.

Soon Ewe Ghee and Lee Hack Teik also said that the petitioners took an active part in the running of the company. Therefore it was inequitable for the petitioners to accuse them that they had breached the law, especially the Poisons Act. They also said that they had obtained the permission of the Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna for the company to operate direct sale of the product. The letter dated 29 May 1993, was exhibited. They further said that they opposed the petition because the company under the chairmanship of the first-named petitioner had failed to come up with the financial statement for the year ending 31 May 1992, and also failed to lodge the income tax returns. Regarding the fixed deposit receipt they said they could not locate it. That was why they reported that it was lost.

Regarding the proposed voluntary winding-up of the company Soon Ewe Ghee replied that his own proposal to wind up the company was not agreed to by Lee Hack Teik. Further it was not proceeded with at the AGM because there was no special resolution as required by the memorandum and articles of association of this company.

It was also pertinent to note that 12 days after the board meeting of 4 December 1992, at which the petitioners agreed to wind up the company (Exh. "A " of encl. 12) the petitioners

applied for letter of credit to further order the said product from Japan (Exh. "B " of encl. 12).

I have narrated these facts (I confess that they may not be exhaustive) to show how disputed the facts are. There are allegations and denials and counter-allegations and counter-denials. All are in affidavits. No oral evidence was adduced.

In this regard I must be guided by the decision of the Privy Council in*Tay Bok Choon V. Tahansan Sdn. Bhd. [1987] CLJ 24* PC, in particular at p. 436:

In civil proceedings the trial Judge has no power to dictate to a litigant what evidence he should tender. In winding up proceedings the trial Judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him unless some opposing party has applied for the attendance for cross-examination of the deponent and that application has been granted and the deponent does not attend. The Court cannot give a direction about evidence unless one of the litigants desires such direction to be made. Of course a Judge may indicate to a petitioner that unless he calls oral evidence or applies to cross-examine the deponents of the opposition so as to prove a disputed fact, his petition is likely to fail. The Judge may equally indicate to a respondent that unless he calls oral evidence or applies to cross-examine the petitioner deponents for the purposes of disproving an allegation made by the petitioner, then the petitioner is likely to succeed. At the end of the day the Judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent affidavits, then in the absence of oral evidence or cross-examination, the Judge must ignore the disputed allegations. The Judge must then decide the fate of the petition by consideration of the disputed facts.

So, if the Court were to disregard the disputed facts in this case, there is really nothing left on which the Court could decide in favour of the petitioner.

Indeed in the course of the argument I did indicate the difficultly this Court would be faced with. But learned Counsel for the petitioners appeared to be of the view that it would not be necessary for the petitioners to prove their allegations. It was sufficient merely to show that both parties had lost mutual trust and understanding in each other. Allegations, counter-allegations and affidavit evidence, he argued, had shown that that was the case. Therefore, it would be "just and equitable " to wind up the company. He relied heavily on the fact that the company was a small private company, the company which was in substance a partnership. He referred the Court to the House of Lord case of Ebrahimi v. Westbourne Galleries Ltd. & amp; Ors. [1973] AC 360, the Privy Council case of Loch & amp; Anor. v. John Blackwood Limited [1924] AC 783 and passages from Palmer Company Law.

I agree with him as far as the principles of law are concerned. Even learned Counsel for the respondent company did not disagree. I agree too that this is a small private company which in substance is a partnership.

But is it not incumbent on the petitioners petitioning for the winding-up alleging that they were misrepresented, that those who are now in control of the company had siphoned off the company assets, enriched themselves, excluded them from participation in the business, carrying on the business in contravention of law and so on, to prove that the allegation on which they were relying to wind up the company on "just and equitable " grounds were true, where, as in this case, all those allegations were credibly denied? I am of the view they must.

Otherwise we would have a situation whereby one group which is as much or even more at fault than the other, coming to Court with all kinds of allegations against the other group. They need not prove these allegations. But the moment the other group denies their allegations and make counter-allegations, then the first group would say:

Never mind who is speaking the truth. Never mind who is really or more at fault. There is a loss of mutual trust. Therefore the petition to wind up the company must be allowed.

With respect, I do not think that that is the law.

Ebrahimi case says very clearly at p. 387G:

A petitioner who relies on the "just and equitable " clause must come to Court with clean hands.

How is the Court to decide whether a party comes to Court with clean hands or not if parties do not have to prove their allegations in affidavit evidence and credibly denied?

On the evidence before me, disregarding the disputed affidavit evidence there is insufficient evidence for me to make finding whether or not the petitioners had come to this Court with clean hands. On the other hand, if all the allegations by both sides are true (of which I make no decision), it only shows that both sides do not come to Court with clean hands.

Let me reemphasize that the main ground on which I decided to dismiss the petition was that, as the facts on which the petitioners based the ground for winding up were only contained in affidavit evidence which were credibly denied and on the authority of*Tay Bok Choon V. Tahansan Sdn. Bhd. [1987] CLJ 24* , a Privy Council decision, they must be disregarded, there was no evidence left for the Court to make a definite finding whether it would be just and equitable that the company be wound up. A party wishing to ask the Court to make such an order on such ground must satisfy the Court that their allegations of facts which form the basis of their petition are true. Where affidavit evidence is greatly in dispute, where no oral evidence is adduced, or cross-examination of the deponents of the affidavits is done the Court is not in a position to decide the truth of the allegations. That being so the Court is not in a position to make a finding whether it would be just and equitable to wind up the company, just as it is not possible for the Court to decide whether the petitioners had come to Court with clean hands or not.

On these grounds I dismissed the petition with costs.