Show Theatres Pte Ltd (in liquidation) v Shaw Theatres Pte Ltd and Another [2002] SGCA 42

Case Number : CA 37/2002

Decision Date : 05 October 2002

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J; Yong Pung How CJ

Counsel Name(s) : Lee Eng Beng and Lynette Lee (Rajah & Tann) for the appellants; Tan Kok Quan SC, Tang Khin Wai and Dawn Chew (Tan Kok Quan Partnership) for the respondents

Parties : Show Theatres Pte Ltd (in liquidation) — Shaw Theatres Pte Ltd; Another

Companies – Winding up – Unfair preference – Repayment by company in liquidation to another company – Whether payments were made to 'person connected' with company in liquidation and hence constituting unfair preference – Interpretation of 'associate' – ss 99, 100 & 101 Bankruptcy Act (Cap 20, 2000 Ed) – regs 2, 3, 4 & 5 Companies (Application of Bankruptcy Act Provisions) Regulations (Cap 50, Rg 3, 1996 Ed)

Words and Phrases – 'Associate' – s 101(4) Bankruptcy Act (Cap 20, 2000 Ed) – reg 2 Companies (Application of Bankruptcy Act Provisions) Regulations (Cap 50, Rg 3, 1996 Ed)

Words and Phrases – 'Individual' – ss 101(4) & 101(6) Bankruptcy Act (Cap 20, 2000 Ed)

Words and Phrases – 'Person connected with a company' – reg 2 Companies (Application of Bankruptcy Act Provisions) Regulations (Cap 50, Rg 3, 1996 Ed)

Judgment

GROUNDS OF DECISION

1 This appeal raised the question as to the meaning of the term "associate" in the context of determining whether payments made by a company under liquidation to another company were payments made to a "person connected" with the company, thus rendering the payments made an unfair preference over other creditors of the company. The point involved construing certain provisions in the Bankruptcy Act, which are made to apply to the winding up or judicial management of a company.

2 The court below held that the payments made by the appellants, Show Theatres, to the two respondents (hereinafter referred to separately as "Shaw Pte" and "Eng Wah Pte" respectively) were not payments made to "persons connected" with the appellants and as those payments were made more than six months before Show Theatres were placed under liquidation, the liquidator of Show Theatres (the liquidator) was not entitled to recover the payment from the two respondents.

3 On 13 September 2002, we heard the appeal lodged by the liquidator and held that Shaw Pte and Eng Wah Pte were "persons connected" with Show Theatres. As the payments were made to the former within two years prior to the liquidation of Show Theatre, the payments were presumed to constitute unfair preference. Therefore, the liquidator was entitled to recover the same from Shaw Pte and Eng Wah Pte. We now give our reasons.

The facts

4 The facts giving rise to the action were these. Show Theatres were incorporated by Shaw Pte and Eng Wah Pte in 1993, with the former holding 75% of its shares and the latter, 25%. Shaw Pte was represented on the board of directors by Mr Shaw Vee Chung Harold and Mr Shaw Vee King (the two Shaws) and Eng Wah Pte by Mr Goh Keng Beng. The two Shaws and Goh Keng Beng were also directors of Shaw Pte and Eng Wah Pte respectively.

5 Sometime in 1997, Show Theatres called on their shareholders to provide funds by way of loans to the company which were required

for their business needs. One of the purposes was in relation to the purchase of shares in Chinatown Point and, for that, Show Theatres needed a sum of $500,000. This sum was furnished by Shaw Pte and Eng Wah Pte in the proportion of their shareholdings in Show Theatres, i.e., $375,000 and $125,000 respectively.

6 Some two years later, on 6 August 1999, the two sums were repaid by Show Theatres to the two respondents. It was common ground that at the time of the repayments, Show Theatres were insolvent. The repayments were made more than six months, but less than two years, before the presentation of the winding up petition.

7 On 24 October 2000, a creditor of Show Theatres presented a petition for the company to be wound up. The winding-up order was granted on 17 November 2000. The liquidator, after reviewing the records and accounts of the company, thought that the two repayments constituted unfair preference and thus applied to court to have the two sums restored to the company.

8 In the court below, the respondents raised three arguments to resist the liquidator's application. First, that the two sums were, in fact, moneys held by Show Theatres on a trust, of the nature enunciated in *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567, for both the respondents. Second, that the rules laid down in the Companies (Applications of Bankruptcy Act Provisions) Regulations [CABAR] were not valid as the Minister had no such power to make them. Third, as the respondents were not "persons connected" with Show Theatres and as the repayments were not made to them during the period of six months before the winding up of the company, the presumption of unfair preference did not arise and the payments were in order.

The issue

9 Before us, there was really only one issue. Were Shaw Pte and Eng Wah Pte "persons connected with" Show Theatres when the repayments were made to them? The answer to this question in turn depends on the meaning to be given to the term "associate" in the definition of a "person connected with a company" laid down in CABAR. The two other issues taken in the court below were, quite rightly, not seriously pursued before us. They were adequately dealt with by the court below.

Relevant provisions

10 Section 329(1) of the Companies Act (Cap 50) provides that –

> Subject to this Act and such modifications as may be prescribed, any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy be void or voidable under section 98, 99 or 103 of the Bankruptcy Act 1995 (read with sections 100, 101 and 102 thereof) shall in the event of the company being wound up be void or voidable in like manner. (Emphasis added).

11 Section 99(1) and (2) of the Bankruptcy Act provides that where an individual is adjudged a bankrupt and he has, at the "relevant time", given an unfair preference to any person, the Official Assignee may apply to court for an order to remedy the situation. "Relevant time" is defined in s 100(1)(b) as meaning, in relation to the situation where an unfair preference is given to a person who is an "associate" of the individual, a period of two years, ending with the day on which the individual is adjudged a bankrupt. The desire to prefer is presumed where the payment is made to an associate of the bankrupt (s 99(4) & (5) of the Bankruptcy Act).

12 Section 101 defines who is an associate. The following subsections are germane to the matter at hand:-

> (4) A person is an associate of an individual whom he employs or by whom he is employed and for this purpose, any director or other officer of a company shall be treated as employed by that company.
>
> (6) A company is an associate of an individual if that individual has control of it or if that individual and persons who are his associates together have control of it.
>
> (9) For the purposes of this section an individual shall be taken to have control of a company, if –

(a) the directors of the company or of another company which has control of it (or any of them) are accustomed to act in accordance with his directors or instructions; or

(b) he is entitled to exercise, or control the exercise of, one-third or more of the voting power at any general meeting of the company or of another company which has control of it.

and where 2 or more persons together satisfy paragraph (a) or (b) they shall be taken to have control of the company.

13 However, as recognised in s 329(1) of the Companies Act, these provisions of the Bankruptcy Act have to be applied to a company in liquidation, or placed under judicial management, with the necessary modifications. This is prescribed in CABAR, the regulations made by the Minister pursuant to the powers conferred upon him under s 329(1). Regulation 3 provides that ss 98-103 shall be read subject to –

"(a) the modifications set out in regulations 4 to 9; and

(b) such textual and other modifications as may be necessary for their application to a company being placed under judicial management or being wound up …"

14 Regulation 4 provides that any reference to an associate of a person or an individual who has been adjudged a bankrupt in, inter alia, ss 99 and 100 (except s 101) of the Bankruptcy Act "shall be read as a reference to a person connected with a company … against which a winding-up order has been made." It seems to us that s 101 is expressly excluded by regulation 4 because regulation 2 already defines an "associate" to mean "an associate of a person or company as determined in accordance with s 101 of the Bankruptcy Act, as modified by regulation 5".

15 A "person connected with a company" is defined in regulation 2 to mean a person who is –

(a) a director or shadow director of the company or an associate of such a director or shadow director; or

(b) an associate of the company.

16 For completeness, we shall now set out regulation 5, although the extended meanings of "associate" prescribed in that regulation are not really germane to the issue under consideration.

Associate of a company

5. In addition to the provisions of section 101 of the Bankruptcy Act by which the question whether a person is an associate of another person is to be determined, a company shall be regarded as an associate of another company if –

(a) the same person has control of both companies, or a person has control of one company and persons who are his associates, or he and persons who are his associates, have control of the other company; or

(b) a group of 2 or more persons has control of each company, and such groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate.

Proper construction

17 The problem is one of construction and it seems to us that much of the difficulty arose because provisions meant to be applicable to the bankruptcy of an individual are made to apply to the winding up or judicial management of companies. Although regulation 3 states that those provisions of the Bankruptcy Act should be applied to a company under liquidation subject to regulations 4 to 9 and "such textual and other modifications" as may be necessary, the difficulty appears to be in determining what should be the appropriate "textual and other modifications" to be made to s 101 in relation to a company under liquidation.

18 Regulation 4 clearly spells out that as far as ss 99 and 100 of the Bankruptcy Act are concerned, references therein to an associate of a bankrupt individual shall be read, in relation to a company under liquidation or judicial management, to refer to "a person connected with a company". Under regulation 2, a "person connected with a company" is, inter alia, "an associate of a director of the company." Who is an "associate" is defined in s 101, as modified by regulation 5. By virtue of section 101(4), as far as the three directors of Show Theatres were concerned, they would, as they were directors of Shaw Pte and Eng Wah Pte, be treated as employed by the latter two companies. Thus, the two Shaws were associates of Shaw Pte and vice versa. The same would be the position as between Eng Wah Pte and Goh Keng Beng. Following from that, taking the case of Eng Wah Pte, the latter would be an associate of Goh Keng Beng, who was a director of Show Theatre. Accordingly, Eng Wah Pte was a person connected with Show Theatres. The same was the position between Shaw Pte and Show Theatres. The effect of this construction is that where two companies have a common director or common directors, one company will be treated as connected with the other.

19 In the court below, the judge could not reach the same conclusion as we did because he considered that the opening phrase of s 101(4), "A person is an associate of an individual" should be modified to read "A person is an associate of the company under liquidation". By so construing s 101(4), he held that the two Shaws were associates of Show Theatres only. Section 101(4) would not operate to deem the two Shaws as associates of Shaw Theatre or vice versa. This, in turn, meant that Shaw Pte could not be a person connected with Show Theatres. The same position applied as between Eng Wah Pte and Show Theatres.

20 As we see it, the expression "an individual" in s 101(4) should not be read to refer only to the company under liquidation. This would not be consistent with the second limb of s 101(4) where it is provided that "any director … of a company should be treated as employed by that company" and "that company" must be referring to "a company". It is clear that the provisions of s 101(4) are of general application, otherwise they would not have used the article a. We are fortified in this view by the opening words of regulation 5 which read "in addition to the provisions of s 101 … by which the question whether a *person* is an associate of another *person* is to be determined", repeating the words of s 101(1) "any question whether a *person* is an associate of another *person*". It must be borne in mind that under the Interpretation Act a "person" is defined to include "any company, or association or body of persons …" In other words, s 101(4) should apply to any situation which calls for a determination of the relationship between two entities. It should not be confined to apply only to the situation of a person being an associate of the company under liquidation. On this construction, Shaw Pte would be an associate of the two Shaws and as the two Shaws were also directors of Show Theatres, Shaw Pte would be a person connected with Show Theatres.

Policy considerations

21 We were mindful that this ruling could have some repercussions in view of the corporate practice in Singapore, where it is a common phenomenon to see a person sitting on the boards of several companies. We do not, however, see anything seriously objectionable in the construction we have given. All it means is that whenever two companies have a common director or common directors, they are to be treated as "connected with" each other. In this regard, it is vitally important to bear in mind the clear objective behind ss 98 to 101. What is prescribed in those sections is a scheme for the protection of creditors generally. It underscores the need for transparency. Because of the connection due to common directorship, a payment to a "connected" company made within the period of two years prior to the liquidation of the company is presumed to be made in unfair preference and it is for the "connected" company to rebut that presumption. It is right, and not unfair, to assume that a director exercises influence within the company.

22 Therefore, it is wholly justified to require a "connected" company to show that the payment received was not an instance of unfair preference. If it could be shown that the payment was made for proper commercial considerations, the presumption would be rebutted: see *Re Fairway Magazines Ltd* [1993] BCLC 643 at 649 per Mummery J. There is really no overriding policy or commercial consideration which militates against this construction. Indeed, in the interest of maintaining good business practices and to protect all persons who, in good faith,

have dealings with the company, there should be closer scrutiny and stricter rules governing transactions between related companies.

Additional point

23 The same conclusion could also be reached by applying the definition of a "person connected with a company" in regulation 2 of CABAR, read together with ss (6) and (9) of s 101. This argument was, however, not raised by the appellants in the court below and the appellants accordingly asked for leave to raise it pursuant to O 57 r 9A(4) of the Rules of Court. As this was a point of law, and no further evidence was needed to make the submission, there was no reason why leave should not be granted : see *Cheong Kim Hock v Lin Securities (Pte)* [1992] 2 SLR 349.

24 As will be recalled, another definition of a "person connected with a company" is "an associate of the company". Section 101(6) provides that "a company is an associate of an individual if that individual has control of it." Section 101(9)(b) amplifies the concept of control by providing that an individual shall be taken to have control of a company if, inter alia, "he is entitled to exercise, or control the exercise of, one third or more of the voting power at any general meeting of the company." The subsection further provides that "where two or more persons together satisfy that condition, they shall be taken to have control of the company." (hereinafter referred to as the proviso to s 101[9]).

25 The respondents argued that the word "individual" in s 101(6) should, like the same word in s 101(4), be read, in the context of the present case, to mean "the company in liquidation". In our opinion, such a reading would be in error and would undermine the very objective implicit in ss 98-101 of the Bankruptcy Act as this illustration will show:-

> Illustration
>
> Suppose Company A has control over Company B. Knowing that Company B is already insolvent, Company A decides to cause Company B to return a loan given by Company A to Company B. On the respondents' interpretation, Company A and Company B would only be deemed associates if Company B (the insolvent company) has control over Company A and not the other way round.

26 In our opinion, the construction contended for by the respondents would give rise to an anomalous result, and with respect, an absurd result, as that is precisely the kind of transaction which the law should seek to restrain. Like the construction we gave to s 101(4), the words "an individual" in s 101(6) should simply be read as "another company".

27 Following from this interpretation, Shaw Pte and Eng Wah Pte were, therefore, "associates" of Show Theatres, as the former collectively exercised complete control of Show Theatres. It could not be disputed that Shaw Pte and Eng Wah Pte acted in concert in getting Show Theatres to repay them the two sums.

28 In this connection, the respondents submitted that they were separate legal entities and that it was necessary for the appellants to prove that each of the respondents individually was an "associate" of Show Theatres. In our opinion, this submission overlooks the proviso to s 101(9). If two companies, X and Y, both receive repayments from the insolvent company, and between them they exercised 1/3 or more of the voting power of the latter company, then by virtue of the proviso they are deemed to be associates of the latter. And if X and Y were to hold 100% of the voting power in the insolvent company the proviso should apply to the situation with even greater force. All the more so where it was clear that the two companies (like Shaw Pte and Eng Wah Pte here) had acted in concert in getting their loans repaid by the insolvent company. This would be wholly in line with the scheme to render void payments made in unfair preference.

29 Accordingly, this would be a further basis to hold that Shaw Pte and Eng Wah Pte were companies "connected with" Show Theatres.

Position in UK

30 In passing, we would mention that the conclusion we reached herein is consistent with the position prevailing in the United Kingdom, although we should add that the UK legislation (Insolvency Act 1986) is clearer, as it does not suffer from the drafting complexity arising from importing and adapting rules governing individual bankruptcy into the regime of corporate insolvency. The UK Insolvency Act 1986 is a

piece of consolidating legislation, bringing within one umbrella enactments of both company insolvency and individual bankruptcy, with separate parts in the Act dealing with each aspect and a common part applying to both company insolvency and individual bankruptcy. The definition of a "person connected with a company" in CABAR is in all material respects the same as that provided for in the English 1986 Act. As we see it, the intention implicit in s 329(1) and the regulations in CABAR was to follow the scheme of things applicable in the UK.

Sgd:

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