



**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE WILAYAH PERSEKUTUAN
[COMPANIES WINDING UP PETITION NO. WA-28NCC-1342-
12/2019]**

BETWEEN

**ZAINUDDIN BAHARUDDIN
(I/C No.: 600908-10-6497)**

... PETITIONER

AND

**PELOPOR DINAMIK SDN BHD
(Company No.: 314189-V)**

... RESPONDENT

AND

**JAMES THEOPHILIUS FREDERICKS
(I/C No.: 480706-05-5069)**

... CONTRIBUTORY

JUDGMENT

Introductory

- [1] Before this court, the Petitioner, one Zainuddin Bin Baharuddin (Petitioner), who is a shareholder and director of the Respondent company, had filed a winding up petition (Petition) against Pelopor Dinamik Sdn Bhd, the Respondent herein (Respondent) pursuant to sections 465(1) (e) and 466(1) of the Companies Act 2016 (CA 2016).

- [2] The Respondent company is a company incorporated in Malaysia and has amongst its objects the ‘holding and letting of properties.’
- [3] The Petitioner had obtained a judgment in default against the Respondent on 1.11.2019 at the Kuala Lumpur High Court vide Summons No. WA-22NCVC-191-04/2018 wherein the Petitioner was the Plaintiff in a counterclaim and the Respondent the 2nd Defendant therein, for the sum of RM288,000 as directors fee, interest on the said sum at the rate of 5% per annum from 5.6.2018 to 25.6.2019 and further interest on the said sum at the rate of 5% per annum from 26.6.2019 to the date of full settlement and costs of RM1,000 (Judgment).
- [4] Thereafter the Petitioner had on 20.11.2019 served a Statutory Notice on even date, on the Respondent at the Respondent’s registered address demanding *inter alia* the Judgment sum together with interest and costs thereto totalling RM310,027. A period of 21 days from the date of service of the said Statutory Notice had elapsed and the Respondent had continued to fail, refuse and/or neglect to pay the said sum demanded.
- [5] A winding up petition was then filed by the Petitioner against the Respondent on 20.12.2019 and the Respondent thereafter through one Lim Julian, had filed its Affidavit In Opposition on 10.2.2020 (AIO) at enclosure 12 hereof. In essence the said AIO averred *inter alia* that:-
- i. the Respondent was not in a position to currently pay the directors fees at this juncture;
 - ii. the Respondent admitted the existence of the Judgment;

- iii. that there was a dispute between the shareholders and one of the other shareholders by the name of James Theophilus Fredericks (James Fredericks) who had allegedly siphoned out monies from the Respondent amounting to RM2,000,000;
- iv. there is a loss of mutual trust and confidence among the shareholders and directors wherein various court actions had been initiated between the parties involving the said Lim Julian, James Fredericks and the Petitioner;
- v. the said Petition was an abuse of court process;
- vi. the Respondent was ready to settle the alleged debt after its organization and management restructuring.

[6] James Fredericks had in these proceedings also filed an application to oppose the Petition on 6.2.2020.

Hearing of the Petition

[7] During the course of these proceedings, various interlocutory applications were filed by the respective parties for which this court had made or dismissed the necessary orders as the case maybe. Accordingly on 11.3.2020 the Court had after disposing of enclosures 39 (for a stay of the Petition) and 36 (an application for dispensation of the gazette and advertisement for the Petition) on the same day, proceeded to hear the Petition per se i.e. enclosure 1 hereto.

[8] At the hearing of the Petition before me, the respective counsels had made their oral submissions and had also relied on the respective Written Submissions filed by them in respect of Enclosure 1 herein. However at the start of the hearing for

enclosure 1, the counsel for James Fredericks, one of the Contributory's herein (Contributory) had challenged the right of the Respondent's solicitors for their authority to act for the Respondent company, to which the Respondent's counsel Mr RK Sharma replied that the same issue was raised by the said Contributory's counsel in another proceedings before another High Court and that no prior notice was given to him with regards the issue.

- [9] It was further argued by Mr RK Sharma, that it has come to his client's knowledge that monies have been siphoned out and that their position was that a proper forensic audit be done by the Liquidator, which can only be done if the company is wound up and therefore they take the position that they really cannot object to the Petition.
- [10] The Counsel for the Contributory, Mr Leonard Raj, had argued that the Judgment was illegal as it was based on a cause of action which related back to the year 1994 and this therefore allows the court to go behind the Judgment. It was further contended by Mr Raj that the Judgment was illegal and surreptitious of section 6 of the Limitation Act 1953 and that the Petition was being used to circumvent their application for a discovery against the Respondent vide Originating Summons No. 24NCC-585-10/2019.

Courts Findings

- [11] I had on the 11.3.2020 at the hearing of this Petition, made an *ex tempore* judgment after hearing the parties respective counsels and henceforth are my full grounds in respect of my Order to wind up the Respondent company.

[12] Section 466(1)(a) of the Companies Act 2016 provides as follows:

“Definition of inability to pay debts.

(1) A company shall be deemed to be unable to pay its debts if:

(a) the company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice of demand, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and the company has for twenty-one days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;

[13] Based on the facts of the matter before this Court, it is clear that a Statutory Notice had been issued and served on the Respondent on 20.11.2019. It is also clear from the Affidavits filed by both parties, that the Respondent has not denied receiving the said Statutory Notice or that the Respondent had made any payment to the Petitioner within 21 days after the said Statutory Notice was served on them. It is also a fact that the Respondent had not denied the Judgment obtained against them and in fact had expressly admitted to the same in its AIO. Thus, it is an undeniable fact that the debt has not been disputed and that the said debt is still at the date of the hearing of the Petition still due and owing. Non payment of the Statutory Demand has also triggered the presumption of the Respondent being unable to pay its debt (see *Eastool Industries Sdn Bhd v. Getfirms Electronics Sdn Bhd* [2001] 6 CLJ 151).

- [14] In any event, it is settled law based on the Supreme Court case of *Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ Rep 343, that this Court is bound by the Judgment. See also *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2010] 3 MLRA 263; [2011] 1 CLJ 947 where the Court of Appeal had stated:

“A valid and enforceable judgment of court as in the present case, (unless set aside or stayed) cannot be considered a disputed debt. The law is settled on this point (emphasis mine).’ Accordingly once a Court has already made a valid and enforceable judgment, this judgment confirms the existence of the debt, and cannot be disputed, unless the judgment is otherwise stayed or set aside.”

- [15] The Contributory had attempted to argue and persuade this Court that the Petition should be dismissed on the issue of limitation on the cause of action which led to the Judgment being obtained i.e. the claim by the Petitioner that the unpaid directors fees due to him was time barred and the argument by the Respondent which follows thereto is that the Judgment is therefore grounded on the issue of illegality for which I have in the Application for the Setting Aside of the Petition filed by the Contributory in Post Winding Up Application No. WA-28PW-160-03/2020, earlier held that the said contention does not come within the realm of ‘fraud’ or ‘collusion’ and therefore this Court has no power to go behind the said Judgment. See *Gulf Business Constructions (M) Sdn Bhd v. Israaq Holding Sdn Bhd* [2010] 8 CLJ 775 where in that case a petitioner obtained a court order against a respondent for the release and refund of a certain amount of trust money. Premised upon the court order the petitioner served a notice under section 218(1)(e) Companies Act on the respondent. The Court of Appeal held: *“It is legally*

impossible for the respondent to challenge the validity of the court order dated 3 June 2005 in the winding-up proceedings”

[16] I would also rely on and humbly quote the case of *Sri Jeluda Sdn Bhd v. Pentalink Sdn Bhd* [2008] 4 CLJ 359 where the Court of Appeal held “*A judgment remains a regular and enforceable until it is set aside by the court.*” and another Court of Appeal case being *Gulf Business Construction (M) Sdn Bhd v. Ishraq Holding Sdn Bhd* [2010] 8 CLJ 775; “*There was no appeal against the court order dated 3 June 2005. Thus, for all intents and purposes that court order must be construed as final, conclusive and binding. It was legally impossible for the respondent to challenge the validity of that court order in the winding up proceedings.*” per Abdul Malik Ishak JCA.

[17] The Contributory had also argued *inter alia* that:-

- a) there was a failure by the Petitioner to comply with the Companies (Winding Up) Rules 1972, as the Affidavit Verifying the Petition was sworn without exhibiting the Petition;
- b) the debt was *bona fide* disputed;
- c) the allegation of siphoning of monies should not be taken into account in the Petition;
- d) the Respondent was a solvent company;
- e) the Petition was filed for a collateral purpose with an ulterior motive to shut down the company.

[18] As to the Contributory’s contention that there was a failure by the Petitioner to comply with the Companies (Winding Up) Rules 1972, as the Affidavit Verifying the Petition was sworn

without exhibiting the Petition, this Court holds that the same is a mere irregularity which can be cured and that no injustice has been caused to the Respondent as a result thereof. Authority for this can be found in *Delta Drive Sdn Bhd v. Hong Leong Finance* [2007] 4 CLJ 435 where the Court of Appeal had held in a case involving the premature swearing or affirming of the affidavit verifying petition was a mere irregularity and curable as no injustice has been caused to the company.

[19] I also hold that the debt was not *bona fide* disputed for the reasons I have put forth with regards the Judgment per se and for the simple reason that the Respondent had clearly and unequivocally accepted that a Judgment had been obtained against it as per the AIO aforementioned.

[20] I further hold that there has been no evidence brought before this Court that the Respondent is solvent. See the Court of Appeal case of *Lafarge Concrete Sdn Bhd v. Gold Trend Builders Sdn Bhd* [2012] 6 MLJ 817 where the Court held that:

“the ability of a company to meet current demands upon it goes to the solvency or otherwise of a company. In Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd [1980] 1 LNS 44; [1980] 2 MLJ 53, the Privy Council opined that the following observations in Buckley on the Companies Act, 13th edn., at p. 460, dealing with “commercial insolvency, that is, of the company being unable to meet current demands upon it”, were impeccable: In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable;

but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.”

[21] Thus, this Court finds that the Respondent is insolvent as it is unable to meet its current demand *vis a vis* the Judgment herein and which the Respondent in its AIO had admitted to the same.

[22] As to the alleged collateral purpose which the Contributory has made with regards the filing of the Petition, I find no such evidence of the same and that the Contributory’s contention is misguided to say the least more so based on the reasons I have mentioned in coming to my decision herein to wind up the Respondent company.

[23] Wherefore I hereby allow the Petition with costs of RM15,000 to be paid by the Contributory to the Petitioner.

Dated : 22 JULY 2020

(NADZARIN WOK NORDIN)
Judicial Commissioner
Kuala Lumpur High Court

COUNSEL:

For the petitioner - Harvinder Singh; M/s Harvinder Singh & Co

For the respondent - RK Sharma & Billi Chua; M/s Lily Chua & Associates

For the respondent - Leonard Raj, Tan Sze Lee & James Theophilus Fredericks; M/s Tan Swee Im, Siva & Partners

For the contributory - Ahmad Ezmeel; M/s Ezameel & Co



Case(s) referred to:

Eastool Industries Sdn Bhd v. Getfirms Electronics Sdn Bhd [2001] 6 CLJ 151

Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ Rep 343

Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2010] 3 MLRA 263; [2011] 1 CLJ 947

Gulf Business Constructions (M) Sdn Bhd v. Israq Holding Sdn Bhd [2010] 8 CLJ 775

Sri Jeluda Sdn Bhd v. Pentalink Sdn Bhd [2008] 4 CLJ 359

Delta Drive Sdn Bhd v. Hong Leong Finance [2007] 4 CLJ 435

Lafarge Concrete Sdn Bhd v. Gold Trend Builders Sdn Bhd [2012] 6 MLJ 817

Legislation referred to:

Companies Act 2016, ss. 218(1)(e), 465(1) (e), 466(1)(a)

Limitation Act 1953, s. 6