

**ARJUN & SONS TIMBER MILLS LTD**

v.

**BABASIGA TIMBER TOWN LIMITED**

[HIGH COURT, 1994 (Pathik J), 11 November]

Civil Jurisdiction

A

*Company law-disputed petition for winding up-disputed debt-whether petition properly served.*

B

Upon hearing a disputed petition for winding up the High Court re-examined the applicable law and practice.

Cases cited:

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*Bateman Television Limited (in Liquidation) and Another v Coleridge Finance Company Limited* [1971] NZLR 929

*Cornhill Insurance PLC v Improvement Services Ltd and Others* [1986] 1 WLR 114

*Globe New Patent Iron and Steel Company* (1875) LR 20 Eq. 337

*Mann v Goldstein* [1968] 1 WLR 1091; [1968] 2 All ER 769

*Offshore Oil N.L. v Investment Corporation of Fiji Limited* (Civ App. 29/84 FCA)

*Re Tweeds Garages Ltd* [1962] (1) Ch 406; [1962] 1 All ER 121

D

Petition to wind up limited company.

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*V. Kapadia* for the Petitioning Creditor

*M.B. Patel* for the Company

**Pathik J:**

This is a Petition by Arjun & Sons Timber Mills Ltd (hereafter referred to as the 'Creditor') to wind up Babasiga Timber Town Limited (hereafter called the "Company") pursuant to the provisions of section 220 of the Companies Act (Cap. 247) (hereafter referred to as the "Act").

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The creditor has filed a Memorandum of Due Compliance under Rule 28(1) of the Companies (Winding Up) Rules, 1983.

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The Petition to wind up is opposed by the Company and through one of its directors Rajesh Singh it has filed an Affidavit in Opposition, to which Kamlesh Kumar Manager for the Creditor has filed an Affidavit in Reply.

On 20 October 1994 Court heard the Petition when both counsel made oral submissions.

The matters raised by the Company are:

- A (a) that, as stated in paragraph 4 of Singh's affidavit, "our company denies owing the alleged sum or any sum at all and further say that it purchased a Mity Mike Machine from the Petitioner in March, 1993 for the sum of \$27000.00. That the said Machine was not in working condition and we inform the same to the Petitioner who did the repair work twice but could not repair the same."
- B (b) that the company did not receive any notice and that a copy of the Petition was received by mail.
- C (c) that the "matter is in dispute and there is also a pending matter in respect of the same with Department of Fair Trading and Consumer Affairs".
- (d) that the company is solvent in that it is in a healthy financial condition.

D In response to Singh's affidavit, Kumar says inter alia 'that the said Sawmill Machine was purchased by the Company on an "as is where is basis"' and that no 'no condition, warranty or representation was made by the Petitioner as to the working condition' of the machine. He further stated that no one undertook to do any repairs to it after it was sold to the Company; that the Winding Up Notice was duly served on the Company; that there is no dispute regarding the machine and that there is "no matter pending at any Government agency regarding the sale"; that it is believed that the Company is "not operating anymore"; that the cheque for \$7000 was given by the said Singh and that it was returned from the Bank with answer that the account had been closed; that there is no dispute regarding the debt.

F The question for Court's determination is whether there is a substantial dispute as to the debt alleged after considering the matters raised in opposition by Mr. Patel to prevent the making of a winding up order against the Company.

G The Petition is presented under s220 of the Act which provides, inter alia, that "a company may be wound up by the Court, if - (e) the Company is unable to pay its debts; (f) the Court is of opinion that it is just and equitable that the company should be wound up; ....."

The term "inability to pay debts" is defined by s221 of the Act as follows:

"221. A company shall be deemed to be unable to pay its debts -

- (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding \$100 then due has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has, for 3 weeks thereafter, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;"

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Mr. Kapadia for the Creditor/Petitioner has argued that the sum of \$7000 indebtedness on which the Petition is based has not been paid by the Company despite demand having been served in respect thereof and hence the Petition.

On the evidence before me I am satisfied and I do so find that there has been a service of the demand under the said section 221 and that service by registered post at the postal address of the Company was a proper and sufficient service. The Creditor is entitled to adopt this mode of service by section 391(1) of the Act which provides that "a document may be served on a company by sending it by post to the registered postal address of the company in Fiji, or by leaving it at the registered office of the company". Similarly, I find that the Petition although served by mail, was properly served and in accordance with the provisions of the said section 391(1).

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I therefore find that Mr. Patel's argument that there has not been a proper service of a demand and the Petition, and that an affidavit of service of demand should have been filed, are devoid of merits.

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Mr. Patel's argument that because the Creditor tried to repair the machine waives the 'as is where is' condition is also without merit. The Creditor however denies that any repair was ever done to the machine after it was sold. Also without merit is his further argument that since the offer to purchase was for 30 days, the deal taking place after that date is a fresh deal and therefore affects the validity of 'as is where is' condition.

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On the evidence it is clear that the sale of the machine was on "as is where is condition" as stated on the Invoice dated 3 March 1993 (Annexure "B" of Kumar's affidavit) and as per Creditor's letter dated 21 January 1993 addressed to the Company. The Invoice states possession was given on 8 March 1993. There is no evidence, even implied, of waiver of the above condition of sale. Further, it is not in dispute that the machine was purchased for \$27000 and that the sum of \$7000 was paid by way of deposit. The evidence reveals that this sum of \$7000 was paid by cheque No. 066921 dated 10 March 1993 and made in favour of "Arjun & Son" the creditor (although the proper registered name was not written on the cheque).

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A It cannot be said that this sum was not paid and in the manner aforesaid nor can it be said that it was not for the purchase of the machine. It is this cheque which was dishonoured by the Bank with the answer "A/C closed".

In these circumstances there is no evidence that this sum has been paid to the Creditor despite the said demand. That is why the Creditor is saying that it is still owed the said sum of money. I fail to understand Singh's assertion in his affidavit that the "company denies owing the alleged sum or any sum at all".

B The Company does not say that it has paid it, instead it has raised the points I have referred to hereabove, it also states through its counsel that the cheque was that of "JERATICS FURNITURE" and "no idea who it is; even if it is Rajesh Singh - no consideration passing from Petitioner to owner of cheque - no notice of dishonour given, cheque is not payable to Petitioner but to Arjun & Sons - so cheque cannot be relied upon". These arguments have no basis whatever and are completely devoid of merits. No amount of hair splitting in this regard by Mr. Patel will be of any avail to the Company.

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All this clearly demonstrates that the Company is clutching at straws. It should be evident to Mr. Patel that the sum of \$7000 that was paid by the said Singh by cheque towards the purchase price (and it is not denied that it is not the same Singh who paid and who swore the affidavit on behalf of the Company) and which said cheque was later dishonoured and until this day this sum has not been paid to the Creditor.

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The Company says that the debt alleged is disputed. To be able to succeed in a case of this nature, the Company has to prove that the dispute is on 'substantial grounds' (Re Lympne Investments Ltd [1972] 2 All ER 385). In Offshore Oil N.L. v Investment Corporation of Fiji Limited (Civ App. 29/84 F.C.A. at p.15 of cyclostyled judgment) Barker J.A. said :

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"The law is clear that there is a discretion a Court seized of a winding-up petition, to decline to hear the petition where the debt is contested on substantial grounds."

F On the evidence before me I find that there is no bona fide dispute bearing in mind what I have found and as stated hereabove. The allegation of Petitioner coming to repair the machine and alleged waiver of "as is where is condition" have no bearing on the matter and that they do not in way raise any dispute as to the \$7000.

G In Bateman Television Limited (in liquidation) and Another v Coleridge Finance Company Limited [1971] NZLR 92 it was held:

"3. The general rule is that an order for winding up will not be made on disputed debt but a Judge has discretion to make a winding up order on disputed

debts which is not reviewable unless exercised on a wrong principle or the Judge included or omitted consideration of a relevant fact or was wholly wrong”.

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I have in this case applied the rule that should be applied in an opposed winding up petition and have analyzed the evidence before me as outlined hereabove before coming to the conclusion to which I have come.

This Petition is brought on the ground that the Company is unable to pay its debts. I find that such is the situation here. The creditor has to prove a negative, that negative being that the Company cannot pay its debts. A situation similar to the one before me arose In re Globe New Patent Iron and Steel Company (1875) LR 20 Eq. 337 in which the headnote reads:

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“A company bought goods, giving in part payment its acceptance, which was dishonoured on presentation, and continued unpaid: and the vendor presented a petition for winding up the company:-

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Held, that the dishonour of the bill was proof to the satisfaction of the Court under sect. 80, sub-sect. 4 of the Companies Act, 1862, that the company was unable to pay its debts, although the Petitioner had not served a demand requiring payment under sub-sect. 1.”

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No question of statutory demand arose in Globe (supra) but the Companies Act Cap. 247 has provided for certain situations where deemed inability to pay debts arises. Even if the Company can show that it is able to pay its debts, it will do no good whatsoever. If the situation exists, it is deemed unable to pay its debts whether or not that is, in fact, correct. It was so held in Cornhill Insurance Plc v Improvement Services Ltd and Others [1986] 1 WLR 114 as follows:-

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“Held, refusing the application, that where a company was under an undisputed obligation to pay a specific sum and failed to do so, it could be inferred that it was unable to do so; that, accordingly, the defendants could properly swear to their belief in the plaintiff company’s insolvency and present a petition for its winding up.”

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In re Tweeds Garages Ltd [1962] 1 Ch 407 at 408 where the company admitted the existence of a debt to the petitioner but disputed the amount of the debt alleged in the petition, it was held:

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“that the only qualification required of the Petitioner was that it was a creditor; and that, where there was no doubt (and there was none here) that the petitioner was a creditor

A for a sum which would otherwise entitle it to a winding-up Order, a dispute as to the precise sum owed was not a sufficient answer to the petition”.

B Similarly, bearing in mind that in the case before me there is no dispute that there was a sale of the machine for \$27000 and having found that there is no substantial dispute as to the \$7000 the Creditor is entitled to present the petition. The Company is not saying that the alleged defect would cost the full \$7000 to fix the machine. However, even if one were to accept that part of the \$7000 would be needed to repair, even so in the circumstances of this case the Creditor would be entitled to present a petition to wind-up the Company.

C In the case before me having found that the creditor's debt is clearly established in that there is no dispute on substantial grounds, the correct test in approaching these matters is as Harman J said in Cornhill (supra) quoting from Ungoad - Thomas J in Mann v Goldstein [1968] 1 WLR 1091 at 1096 where he said:-

D “When the creditor's debt is clearly established it seems to me to follow that this court would not, in general at any rate, interfere even though the company would appear to be solvent, for the creditor would as such be entitled to present a petition and the debtor would have his own remedy in paying the undisputed debt which he should pay. So, to persist in non-payment of the debt in such circumstances would itself either suggest inability to pay or that the application was an application that the court should give the debtor relief which it itself could provide, but would not provide, by paying the debt.”

E In this case it appears to me that although the Company says it is solvent it has chosen not to pay the debt, and the following words of Harman J in Cornhill (supra) apply to this case also:

F “In my view in such circumstances the creditor was entitled to (a) threaten to and (b) in fact if it chose to present a winding up petition,....”

G To conclude, for the aforesaid reasons, this petition must succeed. There is no bona fide dispute on substantial grounds permitting the court to restrain presentation of the petition. Here I find that the dispute alleged has been based on very trivial and insubstantial and flimsy grounds.

Therefore, in all the circumstances of this case I make an order to wind up the Company. The Company is ordered to pay the costs of this action which is to be taxed unless agreed upon.

*(Order for Winding Up.)*