

**Re [Winding-up] Ailee Development Corporation (in liquidation) and the
Companies Act 1972**

(2010) SLR 18

Kieran SHAH for the appellant
Francis CHAN SAM for the respondent
Bernard GEORGES *Samicus curiae* for the creditors and contributories

Judgment delivered on 10 December 2010

Before MacGregor P, Hodoul, Domah JJ

This is an appeal against one of the orders made by the then Ag Chief Justice Perera in a winding-up application in which he made a number of orders among which one in the following terms:

the Registrar of Lands shall register the transfer of property Title T 147 together with the buildings and appurtenances free of all encumbrances, save the right of way Consequently, all restrictions, inhibitions and charges entered in the Register of Lands are hereby removed ...

Some counsel make simple issues complex and some complex simple issues. We had the benefit of counsel of standing in this matter intent upon the latter preoccupation. They reduced the controversies to one central issue. What finally this Court is now being called upon to decide, as per document dated 30 November 2010 filed before us on the day of hearing, is:

whether the Supreme Court was the right to order the removal of the charges registered against Title T147.

The following may be stated to be the common ground among the parties as at 29 November 2010 (vide documents filed by liquidator and counsel pending hearing). Following the order made by the Ag Chief Justice, the liquidator has already sold Title 147 to European Hotels & Resorts Limited for the sum of R480,000,000. That happened on 4 September 2008. The buyer has taken possession of the property and builders have already moved on and taken over the site. Demolition works have started. So have rebuilding works. As for the proceeds, they are still lying with the liquidator awaiting a ruling from the Supreme Court for the purpose of disbursement. It would appear that this process is being stalled because the creditors and the contributories have not been too happy as to the manner in which the liquidator proceeded with the application leading to the sale ordered by the Court.

The Attorney-General, Mr Govinden, appearing for the State, indicated his stand on the overall dispute. His position is that the distribution as per the law is getting stalled on account of the fact that the creditors and contributories are recalcitrant in using the avenue and the opportunity afforded to them under the law including the Companies Act, more particularly section 223. He added that the procedure adopted has been in accordance with the law and the wide powers given by the liquidator and

the Court in a winding-up.

Mr F Chan Sam for the liquidator submitted that it is important to consider that with which we are involved: it is a winding-up order. Since that is the case, the powers of the court are wide. The court may make any order it may deem fit. However, he emphasized the point that the rights of the creditors and the contributories are, thereafter, vested in the assets realized and they should now, more profitably, be engaged in that direction.

Admittedly, in the light of the events which have supervened since the orders made on 28 September 2008 and the reality on the ground, a number of issues raised in the procedure for sale may be relevant for another forum.

As far as this appeal is concerned, counsel for the appellant, Mr K Shah SC, argued that we may with benefit resolve the issue of law where the court may be said to have clearly erred when it decided that: "the special law contained in the Companies Act would override the general law in the Land Registration Act."

That, in our considered view, is a far-reaching pronouncement. If that remains in our jurisprudence, the consequences may be chaotic. The Ag Chief Justice so stated when he was interpreting section 278(5)(d) of the Companies Act 1972 and section 45(1) of the Land Registration Act 1965 in the context of a winding-up application. He saw himself in a situation where he had to overcome the hurdle of removing the encumbrances and charges which had been registered under the Land Registration Act on the property Title 147 before he could exercise his power under the Companies Act to effect the sale in that application of a special nature under our law. He took the view that the two sections were conflicting and the only way he could have proceeded was to state that section 278(5)(d) of the Companies Act 1972 overrides section 45(1) of the Land Registration Act 1965. However, our reading is, as rightly submitted by counsel for applicant, different.

Section 278(5)(d) of the Companies Act 1972 provides:

a security shall be deemed to be realized if any of the assets subject to it are sold or are ordered by a court to be sold, or if a receiver is appointed in respect of any of those assets, or if the person entitled to the security takes possession of any of those assets.

Section 45(1) of the Land Registration Act 1965 provides:

a charge shall be discharged by an order of the Court or by an instrument in the prescribed form, or, in the case of a legal charge by an order of the Court, or upon the application in writing of the Officer or person referred to in section 43.

Another section to which the Ag Chief Justice referred to was section 20(e) of the Land Registration Act 1965 which provides:

The registration of a person as the proprietor of a charge shall vest in that person all the rights, powers and remedies of a mortgagee or of a person entitled to a privilege, as the case may be, under the law of

mortgages and privileges; and it is hereby provided that, notwithstanding anything to the contrary contained in any other written law, the land or lease comprised in the registered charge shall be security for all sums recoverable under such charge in priority to all claims under the mortgage or privilege which is not registered under this Act.

Mr Shah's argument is that the Supreme Court was never called upon, in the first place, to decide which law gained priority over which so that the pronouncement of the Supreme Court on the matter was *ultra petita*. He cited *Tex Charlie v Marguerite Francoise* SCA 12 of 1994, LC 72. He further argued that, in any event, the interpretation was incorrect, inasmuch as there is no conflict between the two regimes envisaged by the two laws under consideration.

He referred to section 278 of the Companies Act which deals with matters of priority with regard to income tax, wages, workmen's compensation etc whereas the provisions of the Land Registration Act deal with, inter alia, security on immovable property. Each has its own field of operation.

Mr B Georges, holding a watching brief for the other creditors and contributories, argued that the Court had no power to wipe the slate of encumbrances clean. The stroke of one judicial pen had swept all the rights of the parties concerned. He cited *Halsbury* paragraph 1042 which repeats the rule obtaining in section 232 of the Companies Act:

An order for winding up operates in favour of all the creditors and contributories as if made on the joint petition of a creditor and of a contributory.

He referred to the case of *Re Greenhavens Motors Ltd Mayers v BG Funding Ltd*[1999] EWCA Civ 3046. His argument was that the order as made violated the principle that dealings in the assets of a company may only be possible with the agreement and consent of the creditors and the contributories.

We have given due consideration to the submissions of all four counsel. We have to say that while a number of arguments presented to us are important for our present consideration, a number of them are valuable for other fora. Our analysis has shown that the devil in the order made by the Ag Chief Justice lay not in the order as made but in the laws as interpreted. The Judge simply overstated it when he decided that the above-stated provisions of the Companies Act overrode the above-stated provisions of the Land Registration Act. To that extent we agree with the submission of counsel for the applicant. That cannot be, inasmuch as the two laws under scrutiny deal with two different concepts in law: one with security and one with realization.

Section 41(3) of the Land Registration Act (Cap 107) reads:

A charge shall not operate as a transfer but shall have effect as a security only.

We agree with what Mr B Georges submitted that the Judge could not wipe the slate clean with respect to the accrued rights of the creditors and contributories in the assets recovered.

Mr Chan Sam has put it equally correctly. The parties have never lost their rights which may be traced in the assets. What the order did was simply to break the deadlock, enable the sale, recover whatever proceeds could in the circumstances be obtained and enter the parties on to the next logical stage.

In fact, the judgment is quite clear on this aspect of the order made:

the Registrar of Lands shall register the transfer of property Title T 147 together with the buildings and appurtenances free of all encumbrances, save the right of wayConsequently, all restrictions, inhibitions and charges entered in the Registrar of Lands are hereby removed ... *subject to the rights of the chargees and other creditors who have registered inhibitions and restrictions being repaid when distributing proceeds in accordance with the provisions of the Companies Act for proof and ranking of claims.* [emphasis ours]

Our interpretation of the order made by the court is that the property in question was sold unencumbered only for the purposes of effecting the sale. However, all the rights reserved by the encumbrances have remained intact and have been transferred and have as a matter of course vested in the proceeds. Accordingly, parties are to pursue their rights in the proceeds in the hands of the liquidator. The creditors and the contributories are to use the avenue given to them under the Companies Act to claim from the realized assets in accordance with the encumbrances and the law.

If anything needs to be added for the purposes of clearing any doubt on the interpretation that the impugned provision in the Companies Act cannot override the impugned provisions of the Land Registration Act, we need not go to any canon of interpretation.

The answer is found in section 20(e) itself when it states:

The registration of a person as the proprietor of a charge shall vest in that person all the rights, powers and remedies of a mortgagee or of a person entitled to a privilege, as the case may be, under the law of mortgages and privileges; and it is hereby provided that, *notwithstanding anything to the contrary contained in any other written law*, the land or lease comprised in the registered charge shall be security for all sums recoverable under such charge in priority to all claims under the mortgage or privilege which is not registered under this Act.

The answer, therefore, to the question asked of us is found in the emphasised part above. In other words, notwithstanding anything to the contrary contained in any other written law, the land or lease comprised in the registered charge continue to be security for all sums recoverable under such charge in priority to all claims under the

mortgage or privilege which is not registered under this Act.

In the light of the above, our answer to whether the Supreme Court was empowered to order the removal of the charges registered against Title T147, is in the positive inasmuch as it was for the limited purpose of effecting the sale to realize the assets; but, we hasten to add that such removal did not have the effect of abrogating the rights of those who had registered their charges. The rights thereunder have been transferred to the assets that have been realized in the process.

Since the applicants have succeeded partly in this appeal, we make no order as to costs.

Record: Court of Appeal (Civil No 17 of 2008)