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[2013] 8 MLJ 761

Re Lee Buck Gee; ex parte CIMB Bank Bhd

HIGH COURT (KUALA LUMPUR)
MOHAMAD ARIFF J
BANKRUPTCY NO D-29-3441 OF 2011
15 February 2012

Bankruptcy -- Bankruptcy Act -- Effective date -- Whether bankruptcy occurred at the date of SAR's decision -- Whether it occured seven days from date bankruptcy notice served on judgment debtor -- Bankruptcy Act 1967 s 3(1)(i) -- Bankruptcy Rules 1969 r 95

Bankruptcy -- Notice -- Setting aside -- Appeal against -- Whether bankruptcy notice ambiguous and defective -- Whether judgment creditor possessed requisite locus standi -- Whether judgment creditor failed to obtain leave of court to commence bankruptcy proceedings -- Whether third party settling judgment debtor's debt -- Bankruptcy Rules 1969 r 92

The judgment debtor was appealing against the decision of the senior assistant registrar ('SAR') who had dismissed the judgment debtor's application to set aside the bankruptcy notice on the following grounds, namely: (a) the judgment creditor did not possess the requisite locus standi; (b) the judgment creditor had failed to obtain the leave of court to commence the bankruptcy proceedings; and (c) a third party (Intan Permata Properties Sdn Bhd) was settling the judgment debtor's debt. The second appeal by the judgment creditor was related to the effective date the bankruptcy act occurred. The SAR decided that the act of bankruptcy occurred at the date of her decision, namely 23 November 2011, instead of seven days from the date the bankruptcy notice was served on the judgment debtor pursuant to s 3(1)(i) of the Bankruptcy Act 1967 ('the Act').

Held, dismissing the judgment debtor's application to set aside bankruptcy notice; allowing the judgment creditor's appeal with costs:

(1) The evidence was clear that the present judgment creditor had stepped into the shoes of the original judgment creditor under vesting orders of the court. Given the existence of the vesting orders on the evidence, it could be reasonably said the judgment debtor was mislead or embarrassed by the service of the bankruptcy notice, since the names of the original judgment creditor (United Merchant Finance Bhd) and the present judgment creditor (CIMB Bank Bhd) were expressly mentioned (see para 4).

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(2) The bankruptcy notice was clear as to the relevant judgment and to whom it was to be satisfied presently. The particulars given in the *'Permintaan Mengeluarkan Notis Kebankrapan'* were clear; the requirements of r 92 of the Bankruptcy Rules 1969 ('the Rules') have been satisfied, and the registrar would have suitably vetted the particulars before sealing and issuing the bankruptcy notice. There could not have been any ambiguity in the name of the judgment debtor and the name of the current judgment creditor who was now vested with this legal position pursuant to the aforesaid vesting orders. It will be stretching credulity to suggest the judgment debtor has been prejudiced or embarrassed in some way on these facts, unless the court is persuaded to adopt a position of blind adherence to extreme technicality (see paras

4-5).

(3) The sum paid by the third party had been suitably deducted from the judgment debt and this was seen in the calculation presented in the bankruptcy notice. There was however no evidence presented by the judgment debtor that this third party had undertaken to pay the judgment debt as a matter of express legal obligation accepted by the judgment creditor. The evidence did not suggest the third party had entered into such 'outside agreement' to settle the indebtedness. The act of bankruptcy will therefore require to be decided in accordance with the strict provisions of the Act, to be exact s 3(1) thereof (see para 7).

(4) On the facts, the judgment debtor did not file an affidavit in opposition under r 95 of the Rules. Instead, he had filed a summons in chambers to set aside the bankruptcy notice on the grounds earlier mentioned. This being the case, the act of bankruptcy must be taken as occurring seven days after the service of the bankruptcy notice which was 15 September 2011. In these circumstances it would be wrong to take the date of the decision by the learned SAR as the date of the act of bankruptcy (see paras 9 & 12).

Penghutang penghakiman merayu terhadap keputusan penolong kanan pendaftar ('PKP') yang telah menolak permohonannya untuk mengetepikan notis kebankrapan atas alasan berikut, iaitu: (a) pemiutang penghakiman tidak mempunyai *locus standi* yang sepatutnya; (b) pemiutang penghakiman telah gagal mendapatkan kebenaran mahkamah untuk memulakan prosiding kebankrapan; dan (c) pihak ketiga (Intan Permata Properties Sdn Bhd) telah menyelesaikan hutang penghutang penghakiman. Rayuan kedua oleh pemiutang penghakiman adalah berkenaan tarikh kuatkuasa tindakan kebankrapan. PKP memutuskan bahawa tindakan kebankrapan berlaku pada tarikh keputusannya, iaitu 23 November 2011, dan bukannya tujuh hari dari tarikh notis kebankrapan telah disampaikan kepada penghutang penghakiman menurut s 3(1)(i)Akta Kebankrapan 1967 ('Akta').

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Diputuskan, menolak permohonan penghutang penghakiman untuk mengetepikan notis kebankrapan; membenarkan rayuan pemiutang penghakiman dengan kos:

(1) Keterangan-keterangan adalah jelas bahawa pemiutang penghakiman telah mengambil alih peranan pemiutang penghakiman asal di bawah perintah-perintah letakhak oleh mahkamah. Melihatkan pada kewujudan keterangan-keterangan perintah-perintah letakhak pada keterangan, secara munasabahnya, tidak boleh dikatakan bahawa penghutang penghakiman tersalah arah atau dimalukan dengan penyampaian notis kebankrapan, kerana nama-nama pemiutang penghakiman yang asal (United Merchant Finance Bhd) dan pemiutang penghakiman kini (CIMB Bank Bhd) telah disebutkan secara nyata (lihat perenggan 4).

(2) Notis kebankrapan adalah jelas mengenai penghakiman yang relevan tersebut dan kepada siapa ia harus kini dipenuhi. Butir-butir yang diberikan dalam 'Permintaan Mengeluarkan Notis Kebankrapan' adalah jelas; keperluan k 92 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah-Kaedah') telah dipenuhi, dan pendaftar sepatutnya telah menyemak butir-butir sebelum menutup dan mengeluarkan notis kebankrapan. Tidak boleh berlaku sebarang kekaburan mengenai nama penghutang penghakiman dan nama pemiutang penghakiman kini yang telah diletakhakkan dengan kedudukan undang-undang ini menurut perintah letakhak tersebut. Ia akan menambah kepercayaan dalam menunjukkan bahawa penghutang penghakiman telah diprejudis atau dimalukan dalam beberapa keadaan menurut fakta, melainkan jika mahkamah terpengaruh dengan memilih untuk mematuhi kelampauan teknikal secara membuta (lihat perenggan 4-5).

(3) Jumlah wang yang dibayar oleh pihak ketiga telah, dengan sesuainya, dipotong daripada hutang penghakiman dan ini dapat dilihat dalam pengiraan yang dibentangkan dalam notis kebankrapan. Walau bagaimanapun tiada keterangan yang dikemukakan oleh penghutang penghakiman bahawa pihak ketiga telah mengakujanji untuk membayar hutang penghakiman sebagai kewajipan nyata undang-undang yang diterima oleh pemiutang penghakiman. Keterangan tidak menunjukkan bahawa pihak ketiga telah

memeterai 'perjanjian di luar' untuk menyelesaikan hutang. Tindakan kebankrapan perlu diputuskan menurut peruntukan-peruntukan ketat Akta, khasnya s 3(1) (lihat perenggan 7).

(4) Berdasarkan fakta, penghutang penghakiman tidak memfailkan afidavit menentang di bawah k 95 Kaedah-Kaedah. Sebaliknya, dia telah memfailkan saman dalam kamar untuk mengetepikan notis kebankrapan atas alasan yang telah dinyatakan. Oleh itu, tindakan kebankrapan mesti dikira telah bermula tujuh hari selepas penyampaian

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notis kebankrapan iaitu pada 15 September 2011. Dalam keadaan ini, adalah salah untuk memutuskan bahawa tarikh keputusan PKP adalah tarikh tindakan kebankrapan (lihat perenggan 9 & 12).

Notes

For cases on setting aside, see 1(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3217-3263.

Cases referred to

Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 2 MLJ 298; [1993] 3 CLJ 324, SC (folld)

Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd [1992] 2 MLJ 344, SC (not folld)

Legislation referred to

Bankruptcy Act 1967 s 3(1), (1)(i)

Bankruptcy Rules 1969 rr 18, 92, 95, Form No 7

Mohd Alizal bin Abdul Razak (Ben Lee, Alizal & Co) for the judgment debtor.

Loh Chu Bian (Himahlini Ramalingam and Yeoh Jit Wei (PDK) with him) (Lee Hishamumuddin Allen & Gledhill) for the judgment creditor.

Mohamad Ariff J:

[1] There are two appeals before this court.

[2] In the appeal from the decision of the SAR by the judgment debtor (encl 19), the subject matter of the appeal is the decision of the SAR dismissing the judgment debtor's application to set aside the bankruptcy notice on three grounds, namely:

(a) the judgment creditor does not possess the requisite locus standi;
(b) the judgment creditor has failed to obtain the leave of court to commence the bankruptcy proceedings; and
(c) a third party (Intan Permata Properties Sdn Bhd) is settling the judgment debtor's debt.

[3] The second appeal by the judgment creditor (encl 20) relates to the date taken as the act of bankruptcy by the SAR. The SAR decided that the act of bankruptcy was to be taken as occurring at the date of her decision, namely 23 November 2011, instead of seven days from the date the bankruptcy notice was served on the judgment debtor pursuant to s 3(1)(i) of the Bankruptcy Act 1967, which reads:

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A debtor commits an act of bankruptcy in each of the following cases:

...

(i) If a creditor has obtained final judgment or final order against him and execution thereon not having been stayed has served on him in the Federation or by leave of court elsewhere, a Bankruptcy Notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the said judgment or order with interest quantified up to the date of issue of the Bankruptcy Notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:

Provided that for the purpose of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order ...

ENCLOSURE 19

[4] As regards the first appeal, the evidence is clear that the present judgment creditor has stepped into the shoes of the original judgment creditor under vesting orders of the court. See paras 4-8 of the 'Permintaan Mengeluarkan Notis Kebankrapan'. Given the existence of the vesting orders on the evidence, it cannot be reasonably said the judgment debtor was mislead or embarrassed by the service of the bankruptcy notice, since the names of the original judgment creditor (United Merchant Finance Bhd) and the present judgment creditor (CIMB Bank Bhd) are expressly mentioned. The bankruptcy notice is clear as to the relevant judgment and to whom it is to be satisfied presently. The particulars given in the 'Permintaan Mengeluarkan Notis Kebankrapan' are clear; the requirements of r 92 of the Bankruptcy Rules 1969

92 Issue of notice:

When applying for the issue of a bankruptcy notice, the creditor shall-

(a) produce to the Registrar an office copy of the judgment or order on which the notice is founded;
(b) file the notice, together with a request for issue;
(c) lodge sufficient number of copies of the bankruptcy notice to be sealed and issued for service.

have been satisfied, and the registrar would have suitably vetted the particulars before sealing and issuing the bankruptcy notice. There could not have been any ambiguity in the name of the judgment debtor and the name of the current judgment creditor who is now vested with this legal position pursuant to the aforesaid vesting orders.

[5] It will be stretching credulity to suggest the judgment debtor has been prejudiced or embarrassed in some way on these facts, unless the court is persuaded to adopt a position of blind adherence to extreme technicality.

[6] On the issue of leave of court, again the evidence is also clear. See exh JC2 to the affidavit in reply of the judgment creditor, which is the relevant order of the court dated 22 October 2010. I need only reproduce the terms of the order of court to show that this issue raised is without merit:

PERINTAH ...

ATAS PERMOHONAN CIMB BANK BERHAD MAKA

ADALAH DIPERINTAHKAN bahawa --

(1) CIMB Bank Berhad dijadikan Plaintif di dalam tindakan ini bagi menggantikan United Merchant Finance Berhad di bawah Aturan 15 Kaedah 7(2) Kaedah-Kaedah Mahkamah Tinggi 1980;

(2) Prosiding-prosiding untuk melaksanakan Penghakiman bertarikh 18 November 1999 diteruskan dalam nama CIMB Bank Berhad;

(3) CIMB Bank Berhad *diberi kebenaran di bawah Aturan 46 Kaedah 2 Kaedah-Kaedah Mahkamah inaai 1980 untuk memulakan pros/ding pelaksanaan terhadap Na Chen Oon ... dan Lee Buck Gee ... iaitu Defendan Ke-3 dan Ke-4 yang dinamakan di atas berdasarkan Penghakiman bertarikh 18 November 1999 ...*

[7] On the third issue, the sum paid by the third party has been suitably deducted from the judgment debt and this is seen in the calculation presented in the bankruptcy notice. There is however no evidence presented by the judgment debtor that this third party has undertaken to pay the judgment debt as a matter of express legal obligation accepted by the judgment creditor. The reliance by the judgment debtor on the Supreme Court decision in *Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd* [1992] 2 MLJ 344 is unsupported on the evidence in this present case. Although the Supreme Court in *Datuk Mohd Sari* opined that no act of bankruptcy would be committed where a judgment debt was 'controlled by an outside agreement', this is not the fact-situation here. The evidence does not suggest the third party has entered into such 'outside agreement' to settle the indebtedness. The act of bankruptcy will therefore require to be decided in accordance with the strict provisions of the Act, to be exact s 3(1) thereof.

[8] Based on the evidence as disclosed in the affidavits, I am dismissing the appeal by the judgment debtor in encl 19.

ENCLOSURE 20

[9] As for the appeal by the judgment creditor (encl 20), this is allowed, since the ground raised by the judgment debtor falls outside the purview of r 95 of the Bankruptcy Rules 1969,

95 Application to set aside.

(1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.

(2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act for bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

namely the filing of an affidavit to answer the bankruptcy notice on the ground the judgment debtor has a set off, counterclaim or a cross-claim which exceeds the amount of the claim. On the facts, the judgment debtor did not file an affidavit in opposition under r 95. Instead he has filed a summons in chambers to set aside the bankruptcy notice on the grounds earlier mentioned. This being the case, the act of bankruptcy must be taken as occurring seven days after the service of the bankruptcy notice which is 15 September 2011. The Supreme Court decision of *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298; [1993] 3 CLJ 324, has been cited by counsel for the judgment creditor, and I agree the principles analysed therein apply.

[10] The Supreme Court in *Datuk Lim Kheng Kim* held that the affidavit filed to set aside a bankruptcy notice under r 95 had to be related to the grounds under s 3(1)(i) of the Act (to follow the form and substance of Form No 7 of the Bankruptcy Rules). If the affidavit did not disclose that the judgment debtor had a counterclaim, set-off or cross-claim, it could not be accepted as an affidavit to set aside filed under r 95, in which event the proper mode of procedure would be for the judgment debtor to file a notice of motion under r 18 of the Rules. Under the present r 18 (as

amended), the procedure is by summons in chambers supported by affidavit.

> 18 Applications to be made by summons in chambers.
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> (1) Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit.
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> (2) Notwithstanding sub-rule (1), where applicable, all applications filed by
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> *8 MLJ 761 at 768*
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> way of motion before the commencement of these Rules may be heard by the Registrar as if they were applications made under such Rules.

[11] It is also a fact that the judgment debtor in this proceeding to set aside the bankruptcy notice has done so by summons in chambers supported by affidavit. See encl 13 in this regard.

[12] In these circumstances it will be wrong to take as the date of act of bankruptcy the date of the decision by the learned SAR. The appeal by the judgment creditor is therefore allowed.

COSTS

[13] I am also ordering that costs of RM1,000 shall be paid by the judgment debtor to the judgment creditor as costs for both appeals.

Judgment debtor's application to set aside bankruptcy notice dismissed; judgment creditor's appeal allowed with costs.

Reported by Ashgar Ali Ali Mohamed