Lu Yuan Sheng v Hitachi Credit Singapore Pte Ltd
[2004] SGHC 118

Case Number : Bankruptcy 143/2004

Decision Date : 04 June 2004

Tribunal/Court : High Court

Coram : Vincent Leow AR

Counsel Name(s) : Teo Guan Teck (Guan Teck & Lim) for the petitioning creditor; Solomon Richard (Solomon Richard & Co) for the judgment debtor

Parties : Lu Yuan Sheng — Hitachi Credit Singapore Pte Ltd

4 June 2004

Assistant Registrar, Vincent Leow

1 In 2001, Lu Yuan Sheng ("the debtor"), a businessman operating as a sole proprietor, entered into a lease agreement for a photocopier with Hitachi Credit Singapore Pte Ltd ("the creditor"), a finance company. He defaulted in making his monthly payments and the creditor brought an action against him in the Subordinate Courts. A judgment was entered against him pursuant to an Order 14 application in November 2003 (against which no appeal was lodged). He failed to make payment and the creditor sought to issue a statutory demand against him.

2 On 11 November 2003, the solicitor's service clerk ("Ricky"), went to the debtor's business address (as provided by the debtor in an affidavit in the earlier action in the Subordinate Courts) and upon arrival, was informed by a female Chinese that she did not know the debtor and that the debtor was never there. The next day, Mr Teo, the solicitor for the creditor, went to the same address and found out that the business address was actually occupied by a company which provided secretarial and mail forwarding services to the debtor's business.

3 On 13 November 2003, Mr Teo wrote to the debtor's solicitors informing them of his two unsuccessful attempts at personal service of the statutory demand on their client and informed them that he intended to leave a copy of the statutory demand at their client's business address and his last known residential address (it was not disputed that this was and still is the debtor's residential address) and he further enclosed a copy of the statutory demand for the solicitors to forward to their client. On 14 November 2003, Ricky went to the residential address of the debtor, but could not locate the unit number. On his second visit on 17 November 2003, he found the unit and as the debtor was not in, he posted the statutory demand on the front door. Additionally, Ricky also went to the debtor's business address on the same day, but did not effect the posting as it was a secretarial office.

4 A bankruptcy petition was duly filed after the requisite 21 days necessary to raise the presumption of insolvency under s 62(a)(ii) of the Bankruptcy Act had passed. At the bankruptcy hearing, Mr Soloman, counsel for the debtor, sought to set aside the statutory demand. He raised two points. First, he disputed the sum claimed in the statutory demand and second, he contended that service was bad.

Disputing the sum set out in the statutory demand

5 I had little hesitation in dismissing this point since the sum claimed was based upon a judgment debt. Any attack on the merits of that decision must be by way of an appeal and not via an application to set aside the statutory demand.

Ineffective service – lack of knowledge

6 I then turned to consider Mr Solomon's second point. He started his arguments by contending that the substituted service was bad because the debtor was hospitalised for dengue fever on 15 November 2003 and only discharged on 17 November 2003. Further, the debtor did not immediately return home, but instead stayed with a close friend. Additionally, he did not inform his solicitor, who was thus unable to contact him. As such, the debtor was completely unaware of the statutory demand until after the bankruptcy petition was served.

7 In considering this point, I noted that the effect of substituted service is that it is equivalent for all purposes to actual service: see *Watt v Barnett* (1878) 3 QBD 363 and *Harrisons Trading (Peninsular) Sdn Bhd v Juta Perkara Sdn Bhd and others* [1997] 2 SLR 496. As such, the underlying principle behind substituted service is one of imputed or constructive notice. This can only be achieved if substituted service provides the most effective substitute for personal service: see *Deverall v Grant Advertising* [1955] CH. 111 and *Sockalingam Chettiar v Somasundaram Chettiar* [1941] MLJ 103. The primary concern is thus a consideration of how the matter can in all reasonable probability, if not certainty, be best brought to the personal attention of the person in question: see *Porter v Freudenberg* [1915] 1 KB 857, *Teo Ah Bin v Tan Kheng Guan* [1981] 2 MLJ 146 and *Malayan United Finance Bhd v Sun Chong Construction Sdn Bhd and others* [1995] 4 MLJ 749. As such, while it is hoped that substituted service would serve to bring the statutory demand to the notice of the debtor, actual knowledge is not necessary: *Re Yeap Chee Fun; ex p Pernas Trading Sdn Bhd* [2000] 5 MLJ 510. Given this, I saw no merit in counsel's contention that the debtor had no actual knowledge of the statutory demand.

Ineffective service – taking of all reasonable steps

8 However, the fact that actual knowledge is irrelevant means that substituted service is something that the Court should not treat lightly as it leads to imputed knowledge. The test to be met is set out in r 96 of the Bankruptcy Rules which reads:

> (1) The creditor shall take all reasonable steps to bring the statutory demand to the debtor's attention.
>
> (2) The creditor shall make reasonable attempts to effect personal service of the statutory demand.
>
> (3) Where the creditor is not able to effect personal service, the demand may be served by such other means as would be most effective in bringing the demand to the notice of the debtor.
>
> …
>
> (6) A creditor shall not resort to substituted service of a statutory demand on a debtor unless —
>
> > (a) the creditor has taken all such steps which would suffice to justify the court making an order for substituted service of a bankruptcy petition; and
> >
> > (b) the mode of substituted service would have been such that the court would have ordered in the circumstances.

9 The test is thus whether the creditor has taken "all such steps which would suffice to justify the court making an order for substituted service of a bankruptcy petition". The Supreme Court Practice Directions offers some practical guidance as to what constitutes 'all such steps'. In particular, paragraph 10 provides that 2 attempts at personal service should be made and that the attempts should be made at the residence of the party to be served, if known; otherwise or if the claim relates to that party's business or work, the attempts should be made at the party's place of business or work.

10 In this case, it was clear that the Practice Directions had not been complied with as the attempts at personal service were made at the business address while the substituted service was made at the residential address. My view is that if the creditor felt that the posting of the notice at the residential address would in all reasonable probability have been effective to bring the statutory demand to the notice of the debtor, then surely it must have been reasonable to attempt personal service at that address. To hold otherwise, would render the requirement for two attempts at personal service meaningless as creditors can attempt personal service at one place and then post the statutory demand at another.

11 Two questions flow from my conclusion. First, whether this breach means that the creditor has failed the test encapsulated in r 96 of the Bankruptcy Rules. Second, if the answer to the first is in the affirmative, then whether the statutory demand should be set aside.

Effect of breaching the Practice Directions

12 Practice Directions are administrative directions that are framed to regulate the procedures of the Court and to offer guidelines to practitioners in the course of litigation. Although they do not have the force of law, they should nevertheless be adhered to so that there are consistent and systematic procedures. After all, rules are made to be observed and complied with, not flouted or wantonly ignored: per Abdoolcader J in *Ng Yit Seng and another v Syarikat Jiwa Mentakab Sdn Bhd and others* [1981] 2 MLJ 194. This does not mean that the Court must blindly follow the Practice Directions. As in all guidelines, they must be applied mutantis mutandis to the facts of each case.

13 Looking at Paragraph 10 of the Practice Directions, the evil that it seeks to address is to prevent a plaintiff from abusing the process of substituted service, by the entering of default judgment in the absence of appearance against a defendant who has no knowledge nor reasonable chance of coming to that knowledge of the writ lodged against him. Hence, in the absence of good reason, a failure to comply with this Practice Direction will generally result in the dismissal of the application for substituted service.

14 With these considerations in mind, if this had been an application for substituted service of the bankruptcy petition, I would have refused the application and insisted that the solicitor attempt personal service at the residential address. As such, the test set out in r 96 of the Bankruptcy Rules has clearly not been met. This being so, I turn to the next question – whether the statutory demand should be set aside.

Whether to set aside the statutory demand

15 Rajendran J has in *Wong Kwei Cheong v ABN-AMRO Bank NV* [2002] 3 SLR 594 clearly stated that the proper service of a statutory demand is a matter of fundamental importance in the operation of the Bankruptcy Act. This must be so because service of the statutory demand gives rise to the presumption of insolvency under s 62 of the Bankruptcy Act: see *Pac Asian Services Pte Ltd v European Asian Bank AG* [1987] SLR 1 a case on the winding-up regime. This is further emphasised by

r 96 of the Bankruptcy Rules which provides that the 'creditor **shall** not resort to substituted service' unless the requisite steps have been taken.

16 Additionally, since the substituted service of the statutory demand is done unilaterally by the petitioning creditor (as opposed to under an order of Court), the Court should apply a high standard in determining whether service was effective: see *Regional Collection Services v Heald* [2000] BPIR 661 (English Court of Appeal). Lastly, the procedural defect in failing to take the necessary steps is not a matter that can be cured given the clear wording of the s 62 of the Bankruptcy Act read with r 96 of the Bankruptcy Rules which clearly puts the onus on the creditor to ensure that all reasonable steps have been taken to effect service.

Conclusion

17 Given the above, I was of the opinion that the service of the statutory demand should be set aside. Consequentially, given the wording of s 61(1)(c) of the Bankruptcy Act, I also dismissed the creditor's bankruptcy petition as it could not be shown that the debtor was unable to pay the debt at the time that the petition was presented. I also made certain orders as to costs.