Re Jeyaretnam Joshua Benjamin
[2000] SGHC 87

Case Number : B 3129/1999, 3130/1999

Decision Date : 16 May 2000

Tribunal/Court : High Court

Coram : Tay Yong Kwang JC

Counsel Name(s) : Lynette Sathiasingam (Leo Fernando) for the debtor; Davinder Singh SC and Hri Kumar (Drew & Napier) for the petitioning creditors; Sarjit Singh and Sunari Kateni (Official Assignee)

Parties : —

Insolvency Law – Bankruptcy – Petition – Whether dishonesty involved in presentation of petition

Insolvency Law – Bankruptcy – Petition – Time for assessing debtor's inability to pay – Whether presumption of inability to pay properly invoked

Insolvency Law – Bankruptcy – Petition – Statutory minimum debt of $10,000 – Time for applying requirement – s 61(1)(a) Bankruptcy Act (Cap 20, 1996 Ed)

: This is an appeal by the debtor in Bankruptcy 3130/99 against the decision of the learned Assistant Registrar Dawn Tan Ly-Ru given on 5 May 2000 ordering that the debtor be adjudged a bankrupt. Both Bankruptcy 3129/99 and Bankruptcy 3130/99 were heard together and upon the bankruptcy order being made in Bankruptcy 3130/99, leave to withdraw Bankruptcy 3129/99 was granted. Both petitions were essentially the same and arose out of High Court Suit 2308/95.

Bankruptcy 3130/99

The petition filed by R Kalamohan on 1 October 1999 stated:

> *1 The conditions and grounds specified in ss 60 and 61 of the Bankruptcy Act (1996 Ed) have been satisfied as:*
>
> *(a) the debtor is domiciled in Singapore and/or has within the period of one year immediately preceding the date of the presentation of this petition, been ordinarily resident in Singapore; and*
>
> *(b) the amount of the debt is not less than $10,000, is for a liquidated sum payable to the petitioner immediately and the debtor is unable to pay the debt.*
>
> *2 The debtor is justly and truly indebted to me in the aggregate sum of $31,504.10, full particulars of which are set out in the annexure to this petition.*
>
> *3 The abovementioned debt is for a liquidated sum payable immediately and the debtor appears to be unable to pay it.*
>
> *4 On Wednesday, the 8th day of September, 1999, at 2.30pm a statutory demand was served upon the debtor by way of substituted service, in respect of the abovementioned debt. Twenty-one days have elapsed since the service of the demand and to the best of my knowledge and belief, the demand has neither been complied with nor set aside in accordance with the Bankruptcy*

Rules and no application to set it aside is outstanding.

5 I do not, nor does any person on my behalf, hold any security on the debtor`s estate, or any part thereof, for the payment of the above-mentioned sum.

6 There has been no stay of execution in respect of this debt.

The petition also contained a notice to the debtor stating that if he intended to oppose the petition, he must file a notice in court specifying the grounds of objections not later than three days before the day fixed for hearing. The annexure to the petition spelt out the particulars of the debt which comprised a judgment amount of $30,000 and interest thereon amounting to $1,504.10 as at 1 October 1999 awarded to the petitioner in Suit 2308/95. The debt here was therefore $31,504.10.

On 5 October 1999, the petition and the supporting documents were served on the debtor by delivering them personally to Mr Leo Fernando, the solicitor for the debtor, who had instructions to accept service on his behalf.

Bankruptcy 3129/99

As I have indicated, the petition by Ravindran s/o Ramasamy was for all practical purposes the same as that by R Kalamohan except that the judgment amount of $30,000 and the interest of $1,504.10 thereon were reduced by the amount of 8.710.95 being the net sum of costs ordered in favour of the debtor in various applications. The debt owing in this petition was therefore $22,793.15.

The hearing of the petitions

Both petitions first came on for hearing before an assistant registrar on 12 November 1999. The debtor did not attend the hearing and neither was he represented by a solicitor. The petitioners` solicitor informed the assistant registrar of an instalment plan and tendered some letters exchanged between the parties` solicitors. The letter dated 22 September 1999 from the petitioners` solicitors to the debtor`s solicitors reads:

SUIT 2308/95

We refer to your letter of 20 September 1999.

Our clients are prepared to let your client discharge his debts to them by way of eight instalments, but on the following terms and conditions:

(1)	The debts due from your client to our clients must be paid off by eight monthly instalments as follows:			
	To Mr Ravindran			

	- on or by 31 October 1999	-	$	3,000.00
	- on or by 30 November 1999	-	$	3,000.00
	- on or by 31 December 1999	-	$	3,000.00
	- on or by 31 January	-	$	3,000.00
	- on or by 29 February	-	$	3,000.00
	- on or by 31 March 2000	-	$	3,000.00
	- on or by 30 April 2000	-	$	3,000.00
	- on or by 31 May 2000	-	$	1,705.18
	To Mr Kalamohan			
	- on or by 31 October 1999	-	$	4,000.00
	- on or by 30 November 1999	-	$	4,000.00
	- on or by 31 December 1999	-	$	4,000.00
	- on or by 31 January 2000	-	$	4,000.00
	- on or by 29 February 2000	-	$	4,000.00
	- on or by 31 March 2000	-	$	4,000.00
	- on or by 30 April 2000	-	$	4,000.00
	- on or by 31 May 2000	-	$	3,387.75

(2)	Our clients shall file their respective bankruptcy petitions against your client, but will adjourn the hearing of the same until your client`s debts are fully discharged in accordance with the instalments referred to in (1) above.
(3)	Your client agrees that we may, on behalf of our clients, serve our clients` bankruptcy petitions on you, and that such service shall be deemed good service of the said bankruptcy petitions on your client.

(4)	In the event your client fails to make payment of any instalment on time, our clients shall be entitled, at their absolute discretion, to terminate this agreement and proceed with their respective bankruptcy petitions. Any notice of termination may be served on you by fax, post or by hand, or any one of such means at our clients` absolute discretion, and such service shall be deemed good service of the said notice on your client.
Please note that Mr M Loganthan did not make any payment pursuant to the garnishee order. In the circumstances, your client`s debt is not reduced by reason of the said order.Please let us know if your client agrees to the above terms.	

The letter from the debtor`s solicitors dated 11 November 1999 to the petitioners` solicitors advised that neither the debtor nor his solicitors would be attending the hearing on 12 November 1999 and requested that the assistant registrar be informed of the abovestated agreement and that the petitions be stayed.

The petitioners` solicitors replied the same day. They reminded the debtor`s solicitors about para (2) of their letter dated 22 September 1999 and stated that they would therefore be asking for the petitions to be adjourned to a date after 30 November 1999 when the second instalment would become due. They also suggested that the debtor`s solicitors attend the hearing on 12 November 1999 should they disagree with the proposed course of action. At the first hearing, the petitions were adjourned to 3 December 1999.

On 3 December 1999, the Assistant Registrar was informed of the instalment plan and the parties` agreement to have the petitions adjourned from month to month. The petitions were adjourned accordingly to 7 January 2000 on which date the Assistant Registrar ordered that the petitions be withdrawn subject to the petitioners` right to restore them for hearing in the event of default on the instalment payments. Neither the debtor nor his solicitor attended on any of the above hearing dates. The petitioners` solicitor mentioned the matters on their behalf each time.

On 17 April 2000, the petitioners` solicitors wrote to the Registrar. The letter stated that the debtor was to have made an instalment payment of $7,000 on or by 31 March 2000 and had requested through his solicitors` letter dated 5 April 2000 an extension of time to 15 April 2000 to make the said payment. As the debtor failed to pay by 15 April 2000, the petitioners` solicitors asked that the petitions be restored for hearing. A copy of the petitioners` letter was sent to the debtor`s solicitors.

In response, the Registry restored the two petitions for hearing on 28 April 2000.

On 27 April 2000, the petitioners` solicitors filed an affidavit setting out the brief history of the proceedings and stated that five instalments had been made but not the sixth instalment due by the extended deadline of 15 April 2000. The letter dated 22 September 1999, which set out the agreement of the parties, was exhibited in this affidavit and so was the debtor`s solicitors` letter dated 5 April 2000 which referred to both petitions here and stated:

> *1 We refer to your letter of 3rd instant.*
>
> *2 Our client regrets the delay in making payment of his sixth instalment of $7,000. We are instructed that our client will pay the said amount on or before 15 April 2000.*
>
> *3 Kindly hold your hands in the interim.*

On 28 April 2000, only the petitioners` solicitor attended the hearing. He informed the assistant registrar that the sixth instalment was paid the day before and that the seventh instalment would be due on 30 April 2000. He therefore requested an adjournment of one week. The Assistant Registrar acceded to the request and adjourned the hearing to 5 May 2000.

On 5 May 2000, the debtor`s solicitor turned up for the first time. The Assistant Registrar was informed by the petitioners` solicitor that the seventh instalment was not paid. The debtor`s solicitor applied for the matters to be stayed until the end of the month as the debtor`s solicitors, by their letter dated 27 April 2000, had informed the petitioners` solicitors that full payment of the balance due to both petitioners ($4,705.18 for Ravindran and $7,387.75 for R Kalamohan) would be made by 31 May 2000, the last day to settle the debts as stated in the agreement. It was also pointed out that almost 80% of both debts had already been settled. The reasons put forward to justify a stay were the following:

(1) a bankruptcy order could only be made where the amount of the debt was not less than $10,000 (see s 61 Bankruptcy Act set out later in this judgment) and the respective outstanding debts were below this amount;

(2) the court had to be satisfied that the debtor was unable to pay the debts and it had already been shown that, save for the previous instalment, he had been able to do so and there was therefore no reason to believe that he would not pay the outstanding balance.

The petitioners` solicitor, who had on 27 April 2000 rejected the proposal of the same date to pay the outstanding balance by 31 May 2000, objected to the application for a stay until 31 May 2000. He stated that the debtor had been late in all except one of the previous instalments and recalled the terms of the agreement under which the petitioners were entitled to proceed with the bankruptcy action in the event of default. It was also submitted that the debtor was still owing much larger amounts of money to the other eight plaintiffs in Suit 2308/95. He also argued that the $10,000 limit applied only at the time of presentation of the petitions.

The debtor`s solicitor then applied for an adjournment of one week which was similarly objected to on the ground that there was no assurance that payment would be made by then.

The assistant registrar decided to make a bankruptcy order against the debtor in Bankruptcy 3130/99 and, as a consequence, granted leave to withdraw the other petition.

The appeal

On 8 May 2000, this appeal was brought against the bankruptcy order made on 5 May 2000. The debtor, in his affidavit filed on 9 May 2000, set out the agreed instalment payment dates and exhibited a letter dated 29 September 1999 from his solicitors accepting the conditions specified in the petitioners` solicitors` letter dated 22 September 1999. He explained that on or about 27 October 1999, he forwarded a cheque for $7,000 (for the first instalment due to both petitioners) drawn on the Workers` Party account to the petitioners` solicitors. However, that was not accepted as there was a pending petition to wind up the Workers` Party. Nevertheless, an extension of time to 5 November 1999 was granted.

On 5 November 1999, the debtor went to pay the said amount of $7,000 in cash to the petitioners` solicitors. Any delay in the first instalment, he added, was therefore due to the refusal of the petitioners` solicitors to accept the Workers` Party cheque.

The debtor went on to detail the dates on which he paid the other instalments. The December 1999 instalment was paid one day early while the November 1999, January and February 2000 instalments were paid one or two days late. The sixth instalment due on 31 March 2000 was paid only on 27 April 2000 as he was unable to pay by the due date. In his solicitors` letter dated 27 April 2000, the petitioners` solicitors were informed as follows:

> *1 We refer to the above matter.*
>
> *2 Our client regrets the delay in making payment of his sixth instalment of $7,000.00. We forward herewith $7,000 being the sixth instalment payable. Our client instructs us that the balance due and owing to your clients under the said agreement will be paid on or by 31 May 2000.*
>
> *3 In the premises, kindly confirm that you will not be proceeding with tomorrow`s hearing. If your clients are still intending to proceed with the Bankruptcy hearing, kindly let us know before noon, 28 April 2000 and we will attend before the assistant registrar.*

The debtor stated that all the payments had therefore been made punctually except for the sixth instalment and that his ability to pay could be seen from the fact that he had paid $24,000 of the $31,387.75 due to R Kalamohan.

The debtor`s submissions

With this factual background, Ms Lynette Sathiasingam for the debtor submitted before me at the appeal that there were several reasons why the bankruptcy order should not have been made:

(1) At the date of the presentation of the petition on 1 October 1999, the first instalment under the

agreement (payable by 31 October 1999) was not due and no debt had accrued. Rule 101(1)(a) of the Bankruptcy Rules provides that the petition shall state the actual amount of the debt that has accrued as of the date of the petition.

(2) The petitioner had omitted to mention the voluntary agreement both in the petition and in the affidavit of truth of statements. In addition, he had stated incorrectly that the debtor appeared to be unable to pay the debt when no debt had accrued then and, by entering into the agreement, had already acknowledged that the debtor would be able to pay the debt. Reliance was placed upon **Re Boey Hong Khim & Anor, ex p Medical Equipment Credit Pte Ltd** [1998] 3 SLR 38 (High Court); [1999] 1 SLR 70 (Court of Appeal);

(3) The outstanding debt was below the $10,000 statutory minimum. Further, the debtor had paid about 76% of the total due and would pay the balance by 31 May 2000, the last date for payment under the agreement, and the court could therefore dismiss the petition under ss 65(2)(c) and (e) Bankruptcy Act conferring such power to do so if the court is `satisfied that the debtor is able to pay all his debts` or `that for other sufficient cause no order ought to be made thereon`.

She added that statutory requirements must take precedence over parties` agreements and that the petition as presented was not honest.

The petitioners` offer

Mr Davinder Singh SC for the petitioners began by enquiring whether the debtor would be able to pay the outstanding amounts by the next day (Friday, 12 May 2000) as he had made the request for a final one-week adjournment before the assistant registrar on Friday 5 May 2000 to pay the last two instalments.

Ms Sathiasingam replied that the debtor would be able to make full payment of the outstanding balance by the afternoon of Thursday 11 May 2000 if the money in his bank account, frozen by the bankruptcy order, could be utilized.

Mr Sarjit Singh for the Official Assignee informed me that two other proofs of debt had been lodged since the making of the bankruptcy order, in addition to those filed by the two petitioners here. He was however willing to assist in the matter.

After a short adjournment for Ms Sathiasingam to take instructions from her client, she was able to confirm that the debtor could muster the funds necessary to pay the outstanding balance to both petitioners if the funds in his bank account could be used as well. The matter was then adjourned to the afternoon for the debtor to make the payment.

When hearing resumed, a total of $12,092.93 (in cash and by way of a cashier`s order) was handed over by Ms Sathiasingam on behalf of the debtor to the petitioners` solicitors, whereupon Mr Davinder Singh SC withdrew both bankruptcy petitions and asked that the bankruptcy order be set aside. Consequently, he withdrew the two proofs of debt filed by the petitioners and, on behalf of the solicitors for the other two creditors, also withdrew their proofs of debt without prejudice to those creditors` rights. He was prepared not to pursue the issue of costs in these proceedings. However, as Ms Sathiasingam wished to pursue the question of costs based on her earlier submissions, Mr Davinder Singh SC made his response to those submissions.

The petitioners` submissions

Mr Davinder Singh SC argued that the facts in the Court of Appeal`s decision were far from relevant to those in the present situation. A 21-day statutory demand had been issued and served and the debtor`s inability to pay the debt had therefore been shown. There was no dispute that there was a debt as the debtor had, through his solicitors, requested time to pay. The petitioners` solicitors` letter of 22 September 1999 made it clear that the debt was due until fully discharged. It was implicit in the agreement that the debtor would not object to the petitions.

Further, the petitions were before the court on no less than four occasions and the debtor and his solicitors chose not to attend each time. When the debtor`s solicitor attended the hearing on 5 May 2000, the thrust of her submissions was to ask for more time to pay the balance outstanding. In any event, the 22 September 1999 letter was not legally binding on the petitioners as there was no consideration furnished by the debtor.

The $10,000 threshold was applicable only at the time of presentation of the petitions as a contrary view would discourage creditors from granting indulgence to debtors. Further, a creditor who had received instalments after the presentation of the petition would have to return them to the Official Assignee if a bankruptcy order was subsequently made.

The official assignee`s views

Mr Sarjit Singh, who offered the views of the Official Assignee on this matter, was of the opinion that the petitions were not defective and that the Court of Appeal`s decision was clearly distinguishable on the facts. Insofar as the threshold of $10,000 provided in s 61 Bankruptcy Act was concerned, the position of the Official Assignee was that a bankruptcy order could be made even though the amount of the debt had fallen below that level after presentation of the petition.

The decision of the court

Section 61 Bankruptcy Act reads:

> *(1) No bankruptcy petition shall be presented to the court in respect of any debt or debts unless at the time the petition is presented-*
>
> *(a) the amount of the debt, or the aggregate amount of the debts, is not less than $10,000;*
>
> *(b) the debt or each of the debts is for a liquidated sum payable to the petitioning creditor immediately;*
>
> *(c) the debtor is unable to pay the debt or each of the debts; and*
>
> *(d) where the debt or each of the debts is incurred outside Singapore, such debt is payable by the debtor to the petitioning creditor by virtue of a judgment or award which is enforceable by execution in Singapore.*
>
> *(2) The Minister may, by order published in the Gazette, amend subsection (1) (a) by substituting a different sum for the sum for the time being specified therein.*

The minimum amount stated in s 61(1)(a) was raised from $2,000 to $10,000 with effect from 3 July 1999.

The debt in each case was above the statutory minimum and was for a liquidated sum payable immediately. I could not agree that there was dishonesty involved in presenting the petitions as they appeared on record. There was clearly no intention to conceal from the court the fact that the petitioners had allowed the debtor to pay according to an instalment plan. The letter dated 22 September 1999 was placed before the Assistant Registrar at the very first hearing and the fact that there was an instalment plan in place was repeated at each hearing. The said letter was exhibited and the fact of deferred payments reiterated in the petitioners` solicitors` affidavit filed on 27 April 2000. The court was therefore properly apprised of the situation at each hearing and, in particular, when the bankruptcy order was made on 5 May 2000.

The petitioners have complied with all the formal requirements specified by the Bankruptcy Act and the Bankruptcy Rules. The debtor has not rebutted to any extent the presumption in s 62(a) that he was unable to pay his debt. The section reads:

62	For the purpose of a creditor`s petition, a debtor shall, until he proves to the contrary, be presumed to be unable to pay any debt within the meaning of section 61(1)(c) if the debt is immediately payable and -		
	(a)	(i)	he petitioning creditor to whom the debt is owed has served on him in the prescribed manner, a statutory demand;at least 21 days have elapsed since the statutory demand was served; and

	(ii)	he petitioning creditor to whom the debt is owed has served on him in the prescribed manner, a statutory demand;at least 21 days have elapsed since the statutory demand was served; and
	(iii)	the debtor has neither complied with it nor applied to the court to set it aside;
	...	

Further, I would have thought that an arrangement for instalments to be paid over some eight months was clearly indicative of the debtor`s inability to pay rather than an acknowledgment that he could. If it were otherwise, para (4) of the 22 September 1999 letter would be completely otiose. One`s ability to pay must relate to a specific point in time - in this case, the time the petition was presented (s 61(1)(c)). There is not much point protesting that one is able to pay but only in eight months` time when the debt is payable immediately. Willingness (and even ability) to pay progressively in the future does not equate with ability to pay a debt forthwith.

In **Medical Equipment Credit Pte Ltd v Sim Kiok Lan Alice & Anor** [1999] 1 SLR 70 , two debtors entered into a scheme of arrangement with their creditors whereby the creditors would withhold taking action against the debtors for a period of time during which the debtors would sell a property to pay off their debts. A nominee was appointed the trustee of the proceeds of sale. The debtors were unsuccessful in selling the property during the agreed period. Extensions of time were given and it was agreed that if no firm sale and purchase agreement was made by a certain date, there would be a forced sale at a price decreasing at different times within a specific time frame. At the final creditors` meeting, the debtors through their solicitors said they no longer agreed with the resolution previously passed and that they did not necessarily admit the debts which they had previously admitted. One of the creditors then filed bankruptcy petitions against the debtors which were not served on them. However, one of the debtors filed an affidavit on behalf of himself and the other debtor to oppose the making of bankruptcy orders. The assistant registrar dismissed the petitions and that decision was affirmed by Warren LH Khoo J.

Warren LH Khoo J held that a failure to comply with obligations under a voluntary arrangement was not a ground for petitioning for bankruptcy. An admission of debt also could not be equated with or displace proof of inability to pay the debt. The only ground for a petition, the learned judged held, was inability to pay a debt or debts of more than the (then) minimum of $2,000. However, the petitioning creditors had not relied on this ground but on the allegation that the debtor had breached his obligations under the voluntary arrangement.

The Court of Appeal affirmed Warren LH Khoo J`s dismissal of the petitions, agreeing that `the underlying foundation of a petition in bankruptcy against a debtor, whether it be a petition under s 57(1)(a)(i) or under s 57(1)(a)(ii), is the inability of the debtor to pay a debt which satisfies the requirements of s 61 of the Act`. On the appellants` arguments that a failure to comply with s 61 was a formal defect or irregularity which did not cause substantial injustice and therefore should not invalidate the proceedings, the Court of Appeal said (at [para] 25 of the judgment):

We are unable to agree. The breach of the statutory requirements here is not a

mere formal defect or an irregularity. In our judgment, it is a serious and fundamental breach.

The facts of the above authority are clearly inapplicable to the present case. The petitions before me have complied with s 61 both in form and in substance because the presumption in s 62 was invoked in para 4 of the petitions.

The instalment plan was an indulgence granted by the petitioners and its terms were unique in that the debtor agreed to the petitions being filed and then adjourned until the debts were fully discharged. For such future cases, it would be preferable for the petition to mention the fact that an instalment plan is in place and to spell out the terms of that plan or to have a copy of the terms attached. Nevertheless, the petitioners` solicitors have complied with this in substance by tendering the letter dated 22 September 1999 to the court at the very first hearing.

Even if I am wrong in holding that the petitions were not defective as they stood, I do not think the debtor should now be allowed to capitalize on the error (if an error it was). He had unequivocally agreed to the course of action proposed, had knowledge of the petitions and had elected not to raise any objection whatsoever to them previously while enjoying the benefit of paying off the debts in monthly instalments.

The final point I have to deal with concerns the statutory minimum debt of $10,000 specified in s 61(1)(a). The clear words of that section support the petitioners` and the Official Assignee`s arguments that it applies only at the time of presentation of a petition. None of the subsequent sections in the Act spelling out the grounds on which the court may dismiss a petition includes the ground that the debt has since fallen below the statutory minimum.

Again, even if I am wrong on this, the bankruptcy order could still have been validly made. Section 57(1)(a)(i) allows the presentation of a petition jointly by more than one creditor. It cannot be disputed that the two creditors here were owed a total of $12,092.93 on 5 May 2000 when the assistant registrar made the bankruptcy order. The court has the power (see s 13) to amend any one of the two petitions here to allow a joint petition to be made by the two creditors on record and to grant leave to withdraw the other, with the result that `the aggregate amount of the debts` (see s 61(1)(a)) is not less than $10,000. Such an amendment would not have prejudiced the debtor in any way as he was aware of both petitions from their inception and obviously knew the amounts outstanding in each. Further, both petitions were practically identical and had arisen out of the same proceedings.

Conclusion

It can be seen from the above that the petitions were not defective, that even if they were, the debtor could not take advantage of the situation, and that a bankruptcy order could have been validly made on 5 May 2000. The withdrawal of the petitions and the setting aside of the bankruptcy order were the result of a further indulgence granted by the petitioners in accepting yet another late payment. In all the circumstances, therefore, the debtor should pay the costs of the appeal before me. I decided to apportion the costs between the two petitioners as it was clear from the start that the two were proceeding side by side and that leave was granted to withdraw Bankruptcy 3129/99 only because a bankruptcy order had been granted in Bankruptcy 3130/99. I fixed the amount of costs at $600 per petition for the appeal. I therefore granted leave to the petitioners to withdraw

their bankruptcy petitions, set aside the bankruptcy order made on 5 May 2000 and ordered the debtor to pay costs of $600 to each of the petitioners in respect of the appeal before me. I made no order as to costs for the Official Assignee but wish to record my appreciation for the assistance rendered by his representative.

Outcome:

Order accordingly.