

Re Kotjo Johanes Budisutrisno, ex parte International Factors Leasing Pte Ltd
[2004] SGHC 133

Case Number : Bankruptcy 4138/2003, RA 35/2004
Decision Date : 14 June 2004
Tribunal/Court : High Court
Coram : Belinda Ang Saw Ean J
Counsel Name(s) : Intekhab Khan (M and A Law Corporation) for debtor; Sean Lim (Hin Tat Augustine and Partners) for petitioning creditors
Parties : —

Insolvency Law – Bankruptcy – Jurisdiction – Whether r 102(2) Bankruptcy Rules operating as time frame within which to make application for leave to amend petition – Whether injustice to debtor caused if amendment allowed – Rules 102(2), 104 Bankruptcy Rules (Cap 20, R 1, 2002 Rev Ed), s 60 Bankruptcy Act (Cap 20, 2000 Rev Ed)

14 June 2004

Belinda Ang Saw Ean J:

1 This was an appeal by the debtor, Johanes Budisutrisno Kotjo ("Kotjo"), against the order of the assistant registrar made on 9 February 2004 granting the petitioning creditors, International Factors Leasing Pte Ltd, leave to amend the bankruptcy petition filed on 9 October 2003. The short point of the appeal, which I dismissed with costs fixed at \$700 on 10 March 2004, was whether this petition could be amended. On 6 April 2004, Kotjo appealed against my decision.

2 The statement in para 1 of the petition in its original form was presented on the basis that:

The Debtor has within the period of one year immediately preceding the date of the presentation of this Petition been domiciled and/or ordinarily resident in Singapore within the jurisdiction of this Court.

3 The assistant registrar granted leave to amend para 1 of the petition in the following manner:

The Debtor is domiciled in Singapore and/or has property in Singapore and/or has, within the period of one year immediately preceding the date of the presentation of the Petition (i) been ordinarily resident or has had a place of residence in Singapore; or (ii) carried on business in Singapore. The Debtor is a Singapore permanent resident and is the owner of and resides at the property No 10 Cuscaden Walk #23-01, Singapore 249694. He is also the director and/or shareholder in various companies and businesses in Singapore.

4 On 12 November 2003, an application was filed on Kotjo's behalf to set aside the petition for several reasons. One of the reasons was that he was not ordinarily resident within the jurisdiction. Neither was he domiciled in Singapore. Moreover, since 2000, he had ceased all his business activities in Singapore. The petitioning creditors then applied to amend para 1 of the petition on 12 January 2004. In support of the application to amend, Doreen Chia Lee Yoon, Assistant Vice President of the petitioning creditors, filed an affidavit on 12 January 2004. She deposed that Kotjo has property in Singapore in that he is the owner of 10 Cuscaden Walk #23-01, Singapore 249694. In addition, he has had, within the period of one year preceding the date of presentation of the petition, a place of residence in Singapore or carried on business in Singapore. Various searches were exhibited to her affidavit to show ownership of the property and his directorship and shareholdings in various

companies. Kotjo, on 8 February 2004, filed an affidavit in reply refuting the allegations as untrue. As stated, leave was granted by the assistant registrar to amend para 1 of the petition in the manner set out in [3].

5 Kotjo opposed the grant of leave to amend. His counsel, Mr Intekhab Khan, argued that the court has no jurisdiction to grant leave to amend the petition as the application to amend was made after expiry of the four months prescribed by r 102(2) of the Bankruptcy Rules (Cap 20, R 1, 2002 Rev Ed) ("the Rules") for presenting a petition. However, if the court has jurisdiction to entertain the application, no leave to amend should be granted, as the amendment was to add new facts and grounds after expiry of the prescribed four months. By analogy with the principle that leave should not be given to a plaintiff to amend his writ or statement of claim to add a new cause of action which is already time barred by the time of the application to amend, it was argued that leave should not be given to amend the petition to introduce new facts or grounds after the prescribed period of four months had lapsed.

6 In support of his argument, counsel referred me to *ABC Co v XYZ Co Ltd* [2003] 3 SLR 546. In that case, the applicant sought leave to amend the originating motion to set aside an arbitration award. Under Art 34 of the UNCITRAL Model Law on International Commercial Arbitration, which is found in the First Schedule to the International Arbitration Act (Cap 143A, 2002 Rev Ed), an application to set aside an arbitral award may not be made after the lapse of three months from the date on which the applicant had received the award. The originating motion set out two grounds as bases for setting aside the award. The applicant sought leave, after expiry of the statutory period of three months, to amend the originating motion to add six new grounds. Judith Prakash J held that the application to amend an originating motion should be governed by O 20 r 5(2) and O 20 r 5(5) of the Rules of Court (Cap 322, R 5, 1997 Rev Ed). Such an amendment will be allowed only if the proposed new grounds arise out of the same facts or substantially the same facts as the grounds originally specified.

7 In my view, Mr Khan's argument is unmeritorious and counsel's reliance on *ABC Co v XYZ Co Ltd* is misplaced. The decision is of no assistance even though cited as an analogy.

8 The prescribed period in r 102(2) of the Rules is for presentation of a petition based on a statutory demand. Rule 102(2) provides that "[t]he petition shall not be presented if the statutory demand was served more than 4 months before the date of presentation of the petition". It does not contemplate that a statutory demand should be available as the foundation or basis for a petition more than four months after service of that particular statutory demand. The present application for leave to amend the petition was not concerned with introducing a different statutory demand into this petition after the prescribed period. Simply put, r 102(2) of the Rules is not meant to operate as a time frame within which to make an application for leave to amend a petition to cover the requirements of s 60 of the Bankruptcy Act (Cap 20, 2000 Rev Ed) ("the Act"), which is a different provision conferring jurisdiction on the court to make a bankruptcy order.

9 My view is reinforced by s 13 of the Act. Section 13 provides that "[t]he court may *at any time* amend any written process or proceedings upon such terms, if any, as it may think fit" [emphasis added]. The language is in plain and unfettered terms and the power is expressly exercisable at any time.

10 Counsel for the petitioning creditors, Mr Sean Lim, argued that the amendment to para 1 of the petition was to ensure that the petition complied with r 104 of the Rules by stating the grounds on which the petitioning creditors believed that s 60(i)(c) of the Act had been satisfied so as to

confer jurisdiction on the court to make the bankruptcy order. In addition, the amendment was to include additional grounds like the debtor's property in Singapore, his place of residence and that the debtor had carried on business in Singapore within the relevant period. I agree with Mr Lim that the decision of *Medical Equipment Credit Pte Ltd v Sim Kiok Lan Alice* [1999] 1 SLR 70 referred by Mr Khan is distinguishable. The position here is quite different and it is about seeking an amendment to cure defects before the actual hearing of the application to set aside the petition. The Court of Appeal in *Medical Equipment Credit Pte Ltd v Sim Kiok Lan Alice* did not deal with the question of amendment. The defects there concerned non-compliance with s 61 of the Act. The petition stated that the debtor was unable to pay the debt without stating the precise amount of the debt owed by the debtor and without showing what was precisely the debt. The criticisms and ruling of the Court of Appeal was in respect of s 61 and not s 60 of the Act. The appellants had merely reproduced in the petition, in abbreviated form, ss 60 and 61 of the Act. L P Thean JA at [18] and [19] said:

While it may be said that this paragraph complies with s 60 of the Act in that it says that the debtor is domiciled in Singapore and/or has within the period of one year immediately preceding the date of presentation of the petition been ordinarily resident or has had a place of residence in Singapore or has carried on business in Singapore, it certainly does not comply with s 61 of the Act. ...

... Secondly and more importantly, r 104 of the Rules requires the appellants to explain how the conditions and grounds specified in ss 60 and 61 respectively have been satisfied. That clearly the appellants had not done, in so far as s 61 is concerned.

11 As stated, the court is given wide powers under s 13 of the Act to amend any written process or proceedings. There is also r 278 of the Rules, which provides:

Non-compliance with any of these Rules or with any rule of practice shall not render any proceeding void unless the court so directs, but such proceeding may be set aside wholly or in part, amended or otherwise dealt with in such manner and upon such terms as the court thinks fit.

The importance of compliance with r 104 of the Rules where s 60 of the Act is concerned cannot be denied. However, it does not lead automatically to the conclusion that a bankruptcy petition that contravenes r 104 of the Rules cannot be cured by amendment. Neither the language of s 13 nor r 278 compels that result. In appropriate cases, the court should allow an amendment of the petition rather than dismissing it as Judith Prakash J did in *Re Wong Kin Heng, ex parte Imperial Steel Drum Manufacturers Sdn Bhd* [1998] SGHC 237.

12 To illustrate, in *Re Wong Kin Heng, ex parte Imperial Steel Drum Manufacturers Sdn Bhd*, Prakash J initially heard arguments on an appeal against the issue of a bankruptcy order. The arguments were whether the creditors had established the basis of the court's jurisdiction in that the debtor had been resident in or carrying on business on Singapore within the period of one year prior to the filing of the petition. The debtor there filed a notice of intention to oppose the petition contesting the jurisdiction of the court on the aforementioned basis. Prakash J allowed the appeal but did not dismiss the petition, preferring an intermediate position. Leave was granted to the petitioning creditors to amend the petition to state the grounds on which they believed that s 60(1)© of the Act had been satisfied so that the petition after amendment might in due course be reheard. The petitioning creditors amended the petition. The debtor filed a fresh notice of intention to oppose the petition. The notice was heard and dismissed. On appeal, the matter was before Prakash J and this time around, the appeal centred on the status of the statutory demand, which does not concern me here.

13 The court will naturally not permit any amendment, nor will the court validate invalid proceedings, unless it is satisfied that by so doing no injustice is done to other parties: *per* Farwell J in *In re Small; Westminster Bank v Trustee* [1934] Ch 541 at 545. Those words remain relevant today. I had to consider whether it was possible in a case of this kind for the court to permit the amendment of the petition. The petitioning creditors wished to amend the petition to correct the petition so as not to contravene r 104 of the Rules and to further rely on other grounds in s 60 of the Act to confer jurisdiction on the court to make the bankruptcy order. It was implicit from Mr Khan's arguments that the petitioning creditors could amend if leave to amend was sought before the expiry of the four months' period, *ie* on or before 9 October 2003. He was not suggesting, and quite rightly, that the court has no power to allow such an amendment. The opposition was not due to the introduction of new grounds and compliance with r 104 of the Rules but in the amendments not taking place within the prescribed four months. Be that as it may, having decided that the four months in r 102(2) of the Rules did not apply, there was nothing to the argument that the petition was not capable of being made good by amendment on the analogy that it amounted to adding a new cause of action after a time bar.

14 It was also not Kotjo's case that he would be prejudiced by the amendments. There was no injustice to Kotjo in allowing the amendments to para 1 of the petition. It was still open to him to take the point at the hearing of his application to set aside the bankruptcy petition that s 60 of the Act was not satisfied. Kotjo's application to set aside the petition was adjourned to 12 April 2004 to be heard by the Registrar. Besides, the affidavits filed on both sides already canvassed the possible grounds on which jurisdiction on the bankruptcy might be founded. The amendments did no more than to state, in para 1 of the petition, matters which were already in dispute between the parties. It was sensible that the petition reflected the full scope of the jurisdictional dispute. The amendment was also to comply with r 104 of the Rules.

15 Under those circumstances, in my judgment, there was jurisdiction to accede to the application to amend the petition and this was a proper case to do so.