Jeyaretnam Joshua Benjamin v Indra Krishnan
[2001] SGCA 52

Case Number : CA 600011/2001

Decision Date : 07 August 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Appellant in person; Davinder Singh SC and Hri Kumar (Drew & Napier) for the respondent

Parties : Jeyaretnam Joshua Benjamin — Indra Krishnan

Insolvency Law – Bankruptcy – Bankruptcy order – Default by debtor under arrangement reflected in consent order – Prior consent by debtor to bankruptcy order being made – Whether creditor right to proceed with bankruptcy petition – Whether burden on creditor to prove inability of debtor to pay debts – Whether arrangement extortionate

(delivering the grounds of judgment of the court): This was an appeal against a decision of the High Court upholding an order made by the assistant registrar on 19 January 2001 adjudging the appellant a bankrupt. We heard the appeal on 23 July 2001 and dismissed it. We now give our reasons.

The facts

The material facts giving rise to the bankruptcy order were largely undisputed. The respondent and nine other persons successfully sued the appellant (among others) for defamation and were awarded damages. The debts due to two of the judgment creditors, after some legal wrangling, were paid, leaving unpaid the debts due to the other eight creditors, including the respondent. The appellant failed to satisfy the debts due even after statutory demands had been served on him on 31 May 2000. Eventually, on 23 September 2000 the respondent and the other creditors filed bankruptcy petitions against the appellant, and the petitions were fixed to be heard on 3 November 2000. The amount owing by the appellant to the respondent at the date of the petition was $27,721.66.

Before the petitions were due to be heard, the appellant offered to pay the debts due to the eight creditors by instalments. On 3 November 2000 the respondent and the other creditors agreed to accede to the appellant`s request for payment by instalments subject to conditions. The agreement was reached through the appellant`s solicitor, Mr G Raman.

In accordance with this agreement, the parties appeared on that day before the assistant registrar to record what they had agreed in the form of a consent order. At the hearing, the appellant was represented by Mr G Raman. The parties had agreed that the appellant was to pay the respondent a sum of $2,500 on 6 November 2000 (and similar or identical sums to the other creditors) and the remainder by nine monthly instalments, commencing 1 December 2000, the last instalment to be paid on 1 August 2001, and if the appellant should fail to make payment of any instalments on time, the respondent was entitled to terminate the agreement. The parties further agreed as follows (as set out in [para]2-4 of the consent order):

> *2. All payments are to be made by cash or cheque in the debtor`s name (such cheques being made payable to Drew & Napier). All such payments are to be made through the Debtor`s solicitors, G Raman & Partners and to the Creditor`s solicitors, and the letter accompanying such payments to be marked for the attention of Mr Davinder Singh or Mr Hri Kumar. If payment is made by*

cheque, the cheque must bear a date on or before the due date of payment. Otherwise, it will be treated as a failure to make payment on time.

3. The hearing of the Petition shall be adjourned for 1 week. In the event the Debtor pays the sum of $2,500.00 as provided in Clause 1(i) above, the Creditor`s solicitor shall inform the Court by 8 November 2000, whereupon the Petition will be withdrawn, with liberty to the Creditor to restore the same for hearing on or by 3 August 2001.

4. If the Debtor fails to make any of the payments set out in Clause 1 above, the Creditor shall be entitled, at his absolute discretion, to proceed with and/or restore this Bankruptcy Petition. In that event, the debtor shall consent to a bankruptcy order being made against him.

The appellant made the initial payment of $2,500 and paid the instalment due on 1 December 2000. However, on 28 December 2000, the appellant`s solicitors wrote to the respondent`s solicitors (and the other creditors` solicitors too) stating that he would not be able to make the instalment payment due on 1 January 2001 and asking for an extension until 16 January 2001 to make it. On 2 January 2001 the respondent`s solicitors replied acceding to the request, but stating very clearly that the extension was up to 12 noon on 16 January 2001 and that, if the appellant should fail to make the payment by the appointed time, the respondent reserved her right to proceed with bankruptcy. They further stated that their extension was granted without prejudice to the respondent`s rights under the terms of the consent order.

No payment was received by the respondent or her solicitors by noon on 16 January 2001. Thereupon by a letter of the same day, faxed at 12.01pm, the respondent`s solicitors wrote to the appellant`s solicitor terminating the agreement and stating that the respondent would proceed with the petition for a bankruptcy order. The respondent`s solicitors also wrote to the Registrar of the Supreme Court asking the latter to restore the petition (and the petitions of the other seven creditors) for hearing.

At 2.41pm the same day, the appellant`s solicitors faxed a letter to the respondent`s solicitors stating that the appellant would pay the overdue instalment the next morning. The respondent`s solicitor replied also on the same day, rejecting the appellant`s offer to pay, and stating that, in view of the breach, the respondent had terminated the agreement and was entitled to proceed with the bankruptcy proceedings.

The petition of the respondent (and also those of the other seven creditors) came up for hearing on 19 January 2001. The balance owing to all the petitioners as of that day was $175,313. After hearing counsel for the appellant and the respondent, the assistant registrar adjudged the appellant a bankrupt. In order to save costs, the other seven petitions were adjourned pending the present appeal.

The appellant`s appeal against the bankruptcy order was dismissed by the judge-in-chambers. The judge agreed with the assistant registrar that, upon the appellant`s failure to make the third payment on time, the respondent was entitled to terminate the agreement under which the respondent allowed the appellant to pay the debt by instalments and to demand that the appellant pay up all the outstanding debt. He noted that the main question which the court must decide in a bankruptcy petition hearing was to determine whether or not the debtor was able to pay his debt and, as he found like the assistant registrar, that the appellant was unable to pay up the debt, the assistant

registrar was correct to have made the bankruptcy order. There was accordingly no basis for him to overturn the decision of the assistant registrar. We should add that, in coming to his decision to uphold the order made by the assistant registrar, the judge did not rely on the terms of the consent order that the appellant would consent to the making of a bankruptcy order against him.

The law

Under s 61(1) of the Bankruptcy Act (Cap 20, 2000 Ed), a creditor is permitted to present a bankruptcy petition against a debtor only if, inter alia, (i) the debt or aggregate amount of the debts is not less than $10,000; (ii) the debt is for a liquidated sum payable to the petitioning creditor immediately; and (iii) the debtor is unable to pay the debt. Under s 62, a debtor is presumed to be unable to pay the debt if, upon expiry of 21 days after having been served with a statutory demand, he still fails to comply with it. The court may, for sufficient reason, order the stay of a bankruptcy petition, either altogether or for a specified time and on such terms and conditions as it may think just (s 64) and it may make a bankruptcy order only if it is satisfied that the debt has neither been paid nor secured or compounded for (s 65(1)).

Finally, we ought to mention that under s 7, the court is empowered to review, rescind or vary any order made by it under its bankruptcy jurisdiction.

Effect of consent order

In this appeal the appellant raised in essence three issues for the consideration of this court and we shall deal with them in turn. There was a fourth issue but it was very much part of the first issue, which was: did the fact that the appellant agreed with the respondent that he would consent to a bankruptcy order in the event of any default take away the power of the court granted under the Bankruptcy Act? He submitted that the court was not bound by the consent order. For this contention, he relied upon s 7 and submitted that:

> *The Bankruptcy Act is not just a matter of contract. A petitioning creditor in bankruptcy and the debtor could not agree between themselves that the debtor should give up any right given to him by the Act.*

In this regard, he cited in support, inter alia, two cases, **Hyman v Hyman** [1929] AC 601[1929] All ER Rep 245 and **Kearley v Thomson** [1890] 24 QBD 742, to argue that in relation to matters of status, the parties cannot contract out of what is provided by the law. He contended that to determine whether he was able or unable to pay the debts, the factual matrix must be considered. The respondent (and the other creditors), by accepting payment by instalments, showed that they `accepted that the appellant would be able to pay his debts given the time asked for`. This ability was demonstrated by the fact that the first two payments were made on time. As for the third payment, he was able to pay in cash on 17 January 2001 before 11am. Furthermore, in terms of availability of funds to the respondent, it would have made no difference because even if the cheque were tendered by noon on 16 January 2001, the funds would not have been available to the respondent any earlier. The cheque would have needed time to be cleared through the banking system.

In our view, it is critically important to bear in mind the substance of what the parties had agreed on 3 November 2000 before they went into the chambers of the assistant registrar to record that

understanding as a consent order. It was that the respondent (and the other seven creditors too) was prepared to allow the appellant to pay the debt owing by ten instalments, with the dates of each payment clearly spelt out, and that if the appellant should fail to pay up on time with any of the instalments, the respondent would be able to proceed with the bankruptcy petition for what remained outstanding of the original debt. This would mean that upon such a breach, the agreement for instalment payments would be terminated and all remaining instalments would be due and payable immediately.

The facts showed clearly that the appellant was not able to make the third payment on time. Shortly before the due date, he wrote for an extension. The respondent acceded to that request but specified clearly that the payment must be made by noon on 16 January 2001. In the circumstances, time was of the essence. This deadline the appellant failed to meet. Thus, in accordance with the agreement, the respondent was entitled to terminate the instalment arrangement and demand the payment of all outstanding instalments.

Of course, upon the restoration of the petition, the court must, notwithstanding the appellant`s consent to the making of the bankruptcy order, be satisfied that the appellant was unable to pay all that remained outstanding of the debt. It was clear that the assistant registrar was satisfied; and so was the judge-in-chambers.

We do not dispute what was decided in ***Hyman v Hyman*** (supra). There, the court held that a wife could not by agreement in a deed of separation preclude herself from invoking the jurisdiction conferred by statute upon the court to make provision for a wife on the dissolution of marriage as the power was conferred not only in the interests of the wife but also of the public.

In ***Kearley v Thomson*** (supra), a contract between a friend of a bankrupt and the solicitor for the petitioning creditor that upon payment of the solicitor`s costs, the defendant would not appear at the public examination of the bankrupt and not oppose his order of discharge (to which course of action the client consented), was held to be illegal. Because of the illegality, a part payment made by the friend of the bankrupt to the solicitor pursuant to the agreement, was held to be irrecoverable.

But we must point out that in both ***Hyman v Hyman*** and ***Kearley v Thomson*** what were involved were private agreements, not an order of court. An order of court stands unless set aside: see **Wilding v Sanderson** [1897] 2 Ch 534 and **Chia Sook Lan Maria v Bank of China** [1975-1977] SLR 9 [1976] 1 MLJ 245 .

At the hearing before the assistant registrar it seemed to us that the assistant registrar did not rely upon that part of the consent order, that the appellant would agree to the making of the bankruptcy order, to come to her decision to adjudge the appellant a bankrupt. She was satisfied that he was unable to pay up all the full outstanding amount. At the hearing before the judge-in-chambers, the judge asked the appellant`s solicitors if the appellant could pay the full outstanding sum and was told that he could not. In the circumstances, there was no basis for the judge to overrule the bankruptcy order made by the assistant registrar. Similarly before us, there was no cogent evidence that the appellant would be able to pay up the full amount of the outstanding debt.

While we recognised that the court had the power conferred under s 7, there was nothing in the circumstances of the present case indicating that the court need invoke that provision. Apart from the question as to the scope of this section, namely, whether it could apply to such a consent order, the fact of the matter was that neither the assistant registrar, nor the judge-in-chambers, had relied upon the appellant`s consent to a bankruptcy order being made, in deciding to make the order. Neither had we in dismissing this appeal. They were satisfied, as we were, that the appellant was not

able to pay up in full the outstanding debt to the respondent.

Burden of proof of inability to pay

The second ground raised by the appellant was that the burden rested on the respondent to show that the appellant was unable to pay the debt. And in this case, all that the respondent was able to do was to make a bare assertion that the appellant was so unable.

But in the light of s 62, the appellant was presumed to be unable to pay the debt following his non-compliance with the statutory demand. The burden thus shifted to the appellant to rebut that presumption and to show that he was able to pay the outstanding debt. In this connection, the arguments of the appellant repeated those dealt with under the first issue, namely, that he could make the third payment and that the lateness in making that payment was of no consequence. We do not propose to traverse the ground again.

The appellant relied upon the High Court decision in **Re Boey Hong Khim** [1998] 3 SLR 38 . It is true that there Warren Khoo J emphasised that it was incumbent on the creditor in a creditor`s petition to support his allegation that the debtor was unable to pay his debts. But the court there also added that to ease the burden of proof on the creditor, s 62 provides that there shall be a presumption of inability where certain objective facts are proven. Khoo J recognised that a common means of proof of inability to pay is a statutory demand served on the debtor. In that case the petitioning creditor was relying on a failure on the part of the debtor to comply with the obligations under a voluntary arrangement and that, in the view of the judge there, was not a sufficient ground to support a bankruptcy petition. The petitioning creditor was not relying on the presumption arising from the non-satisfaction of a statutory demand. In our opinion, the decision in ***Re Boey Hong Khim*** was of no assistance to the appellant.

Extortion

We now turn to the third ground: that it was extortionate of the respondent to impose the condition that, should the appellant fail to pay any of the instalments within time, he should consent to a bankruptcy order being made. In this regard, he relied upon the judgment of Evershed MR in **Re Majory, a Debtor** [1955] Ch 600[1955] 2 All ER 65:

> *(4) On the other hand, having regard to what Jenkins L.J. called "the potent instrument of oppression" which bankruptcy proceedings (with their potential consequences upon property and status) provide, the court will always look strictly at the conduct of a creditor using or threatening such proceedings; and if it concludes that the creditor has used or threatened the proceedings at all oppressively, for example, in order to obtain some payment or promise from the debtor or some other collateral advantage to himself properly attributable to the use of the threat, the court will not hesitate to declare the creditor`s conduct extortionate and will not allow him to make use of the process which he has abused.*

The appellant also alleged that he did not have adequate time to consider the full effect of the terms set out in the consent order as he was then very anxious to avoid the risk of being adjudged a

bankrupt.

We did not think there was anything in this allegation at all. At the relevant time, as the appellant was unable to pay up the debts due to the respondent and the other creditors, the latter were entitled to the bankruptcy order prayed for in their respective petitions. In acceding to his request for payment by instalments, the creditors had agreed but subject to conditions. The appellant accepted those conditions. He was then being advised by a senior member of the Bar. And we need hardly add that he himself, before he ceased his law practice, was also a senior member of the Bar. There could be no doubt that he fully appreciated the effect of the agreement reached which was reflected in the consent order. We were astonished to hear him claim that he did not know the effect of the consent order. The fact that he felt that he had to accept the terms offered because he had no other option did not mean that he did not appreciate what he was agreeing to. He obviously realised that if he did not accept the terms, then a bankruptcy order would have been made against him that very day. By accepting the terms he had bought himself time, which was to his advantage. The truth of the matter was that this was an act of indulgence, not an act of oppression.

It is necessary to look at what was in issue in ***Re Majory*** . There, after the issue of a specially indorsed writ claiming o800 for money lent, with o12 5s costs, and the issue of a judgment summons, the parties agreed to an arrangement for payment by instalments and the debtor was to pay the creditor`s reasonable costs. After judgment was obtained, the creditor insisted the costs payable should be o21, o8 15s more than that awarded by the judgment, representing the full amount of the legal costs which the creditor had incurred. Later, bankruptcy proceedings followed and the debtor disputed the petition on the ground that the creditor had attempted in connection with the proceedings to extort o8 15s from him in excess of the sum lawfully due. Thus, it was contended by the debtor that any arrangement made by a creditor under the shadow or threat of bankruptcy proceedings whereby the creditor might obtain from the debtor a penny more than the sum to which he was legally entitled amounted to extortion within the meaning of bankruptcy law even though there was no true element present of impropriety or oppression. There, the Court of Appeal, after an extensive review of the cases, summarised the position under the following heads ([1955] Ch 600 at 623-624; [1955] 2 All ER 65 at 78):

> *(1) There is no such hard and fast rule as Mr. Duveen suggested, namely, that any arrangement or agreement made by a petitioning creditor with his debtor, after the institution or under the shadow of bankruptcy proceedings, whereby the creditor is able to get more than that "to which he was legally entitled" (that is, more than he could have recovered at law at the time of the bankruptcy proceedings being started or threatened) amounts to extortion in bankruptcy law notwithstanding the absence of any mala fides or anything amounting to oppression in fact ...*
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> *(2) There is equally no rule that extortion has in bankruptcy law a special and artificial significance divorced altogether from the ordinary implication of the word.*
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> *(3) The so-called "rule" in bankruptcy is, in truth, no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by*

proceedings he has abused.

(4) [already quoted at [para]25 above]

(5) In every case it is a question of fact in all the circumstances of the case whether there has been, in truth, extortion.

In relation to that case the English Court of Appeal held that on the facts, the creditor was not guilty of extortion, for the promise by the debtor to pay costs was given when there was no threat of bankruptcy proceedings and was not given as a result of any threat.

Thus, whether there is extortion is a question of fact. Reverting to the present case, on 3 November 2001, when the appellant agreed to the respondent`s terms for instalment payment the respondent was entitled to a bankruptcy order against the appellant. Unlike the position in ***Re Majory*** , the agreement did not give the respondent any cent more. All that she and the other creditors sought by that agreement was to ensure that, by giving the appellant more time to pay, their position would not be jeopardized or made worse off. We did not see how the agreement could in any way be considered to be extortionate. The respondent and the other creditors were not attempting to obtain payment or a promise over and above what they were entitled to.

There was also the suggestion that the court should have disregarded the consent order pursuant to the powers conferred under s 7. We have dealt with this question above, and do not propose to reiterate those views.

Judgment

As none of the issues raised by the appellant had merit, we dismissed the appeal with costs. The security for costs (with any accrued interest) was ordered to be paid out to the respondent to account of her costs.

Outcome:

Appeal dismissed.