

The Hongkong and Shanghai Banking Corp Ltd v Rasmachayana Sulistyo alias Chang Whe
Ming
[2004] SGHC 87

Case Number : Bankrutcy 115/2004
Decision Date : 04 October 2004
Tribunal/Court : High Court
Coram : Joyce Low Wei Lin AR
Counsel Name(s) : Andrew Chan and Desmond Ho (Allen and Gledhill) for petitioning creditor;
Rodney Keong (Rodyk and Davidson) for debtor
Parties : The Hongkong and Shanghai Banking Corp Ltd — Rasmachayana Sulistyo alias
Chang Whe Ming

4 October 2004

AR Joyce Low:

1 The petitioning creditor, Hongkong and Shanghai Banking Corporation Limited ('HSBC') filed a bankruptcy petition against Rasmachayana Sulistyo ('Sulistyo'). As of 9 January 2004, Sulistyo was indebted to HSBC in the aggregate sums of US\$58,064,279.35 and \$27,820.08 pursuant to a judgment against him for failure to honour a personal guarantee with HSBC. Sulistyo opposed the bankruptcy petition on two grounds, *ie* that the statutory demand had not been properly served on him and that the court did not have jurisdiction to make the bankruptcy order. I rejected both these objections and made a bankruptcy order against Sulistyo for the reasons set out below.

2 I considered Sulistyo's objections to the service of the statutory demand first. Rule 96 of the Bankruptcy Rules ('the Rules') governs the service of a statutory demand. Rule 96(1) requires the creditor to take all reasonable steps to bring the demand to the debtor's attention. Pursuant to r 96(3), where the creditor is not able to effect personal service, he may effect substituted service by such other means as would be most effective in bringing the demand to the notice of the debtor. Rule 96(6) provides that a creditor shall not resort to substituted service unless he has taken all steps that would suffice to justify the court making an order for substituted service of a bankruptcy petition and the mode of substituted service would have been such that the court would have ordered in the circumstances. Rule 96(4) states that substituted service may be effected in the following manner:

- (a) by posting the statutory demand at the door or some other conspicuous part of the last known place of residence or business of the debtor or both;
- (b) by forwarding the statutory demand to the debtor by prepaid registered post to the last known place of residence, business or employment of the debtor;
- (c) where the creditor is unable to effect substituted service in accordance with subparagraph (a) or (b) by reason that he has no knowledge of the last known place of residence, business or employment of the debtor, by advertisement of the statutory demand in one or more local newspapers...
- (d) such other mode which the court would have ordered in an application for substituted service of a petition in the circumstances.

3 On the facts of the present case, according to the affidavit of service filed by HSBC's process server, three different modes of service were employed to serve the statutory demand. The

process server left a copy of the demand at the address of Sulistyo's forwarding agent. HSBC took out an advertisement of the notice of the statutory demand in "The Straits Times", an English newspaper circulating in Singapore. Finally, copies of the statutory demand were left at the residential addresses last known to HSBC, ie at 331 River Valley Road #13-02 and 61 Meyer Road #15-04. Counsel for Sulistyo, Mr Rodney Keong submitted that there was no proper service of the statutory demand as none of the three methods of service complied with r 96 of the Rules.

4 Mr Keong submitted that service by leaving a copy of the demand at the address of Sulistyo's forwarding agent did not amount to good service, although the parties agreed to this method of service. This is because the Rules do not provide for service of a statutory demand by agreement. He argued that although O 62 r 3(2) of the Rules of Court provides that personal service of documents may be effected in a manner as may be agreed between the parties, the provision is not applicable because O 1 r 2(4) excludes the application of the Rules of Court to bankruptcy proceedings.

5 I disagree with Mr Keong that O 62 r 3 is irrelevant to bankruptcy proceedings. Section 11 of the Bankruptcy Act reads "[i]n any matter of practice or procedure for which no specific provision has been made in the Act or the Bankruptcy Rules, the practice or procedure of the Supreme Court shall be followed and adopted as nearly as may be". The Rules are silent as to how personal service may be effected and whether this includes service in a manner as may be agreed between the parties. Therefore, by s 11 of the Bankruptcy Act ('the Act'), the practice of the Supreme Court in this regard that is embodied in O 62 r 3 of the Rules of Court should be followed. In any case, O 1 r 2(4) is qualified by O 1 r 2(5) of the Rules of Court which provides that O 1 r 2(4) shall not be taken as affecting any provision by which the Rules of Court are applied. Applying O 1 r 2(5) to the instant case, O 1 r 2(4) does not affect s 11 of the Act pursuant to which O 62 r 3 of the Rules of Court may be applied to bankruptcy proceedings. In addition, r 96(1) of the Rules requires reasonable steps to be taken to effect service and service by the very method that parties have mutually agreed to must be considered such reasonable steps. Consequently, I am of the opinion that leaving the statutory demand at the forwarding agent's address according to the agreement between the parties amounts to proper personal service of the statutory demand.

6 If I am wrong in this conclusion, I am of the view that HSBC has effected proper substituted service of the statutory demand pursuant to r 96(4)(c) of the Rules by advertising a notice of the statutory demand. Mr Keong argued that the service by advertisement was bad on two grounds. First, r 96(4)(c) states that service by advertisement should only be attempted if service cannot be effected by posting or forwarding by prepaid post to the last known address of the debtor and since HSBC knew what Sulistyo's last known addresses were, they were not entitled to effect service by advertisement. Secondly, even if service by advertisement was appropriate, the advertisement of the notice of the statutory demand, taken out by HSBC was bad. This is because r 96(4)(c) requires the advertisement of the entire statutory demand and not merely a notice of the same, pursuant to the decision of Rajendran J in *Wong Kwei Cheong v ABN-AMRO Bank NV* [2002] 3 SLR 594.

7 In *Wong Kwei Cheong*, the petitioning creditor made three unsuccessful attempts to serve the demand at the debtor's last known address. The premises were locked on all three occasions and a property tax search showed that the debtor was not the owner of the premises. The petitioning creditor effected service by advertisement despite being in contact with the debtor's solicitors. Rajendran J held that such service was bad because they could have effected service by posting or sending by prepaid post to the last known address of the debtor or alternatively, they should have contacted the debtor's solicitors. His Honour went on to state that even if the petitioning creditor could rely on service by advertisement, its advertisement of the notice of the statutory demand did not comply with r 96(4)(c) which required the advertisement of the whole statutory demand.

8 Mr Andrew Chan, who acted for HSBC, argued that I was not bound to follow the proposition in *Wong Kwei Cheong* that an advertisement of a statutory demand must be an advertisement of the whole statutory demand because that point was not argued in that case. He cited Cross and Harris on *Precedents in English Law*, at p 158 that if a proposition of law, though implicit in a decision, was never expressly stated either in argument or in the judgment, the decision is not binding authority for it.

9 Mr Chan urged me to interpret the phrase "advertisement of the statutory demand" in r 96(4)(c) to include the advertisement of a notice of a statutory demand. He relied on r 96(6) of the Rules that provides that method of substituted service employed must be one that the court would order and contended that, in the circumstances, the court would have ordered advertisement of the notice of the statutory demand. He also raised the argument that, in the case of substituted service of writs, the court may make an order that the notice of the writ be advertised and not the entire writ, pursuant to O 62 r 5 of the Rules of Court. Finally, Mr Chan referred to the practice under the old bankruptcy regime before the amendments to the Rules in 1995. Rule 97 of the old Bankruptcy Rules, 1990 Ed, states that a bankruptcy notice shall be served in the like manner as is by these Rules prescribed for the service of a creditors' petition. Rule 109(1) read with Form 15 of the old rules provide for service of a petition or bankruptcy notice by advertising a notice of the petition or bankruptcy notice. He submitted that the position with respect to the requirements in relation to content of the advertisement remains unchanged with r 96.

10 In my view, Mr Chan is right in his conclusion that I am not bound by the decision of *Wong Kwei Cheong* to rule that substituted service of a statutory demand by advertisement can only be effected by the advertisement of the entire demand. Mr Chan based his conclusion on the fact that this issue had not been argued before the court in *Wong Kwei Cheong*. I reach the same conclusion on the basis that the portion of the decision that the entire statutory demand must be advertised to effect good service did not form part of the *ratio decidendi* of the case. This was made clear by Rajendran J himself in the subsequent decision of *United Overseas Bank Ltd v Ishak Bin Ismail* [2003] 3 SLR 302. In that case, His Honour stated that the *ratio decidendi* of his decision in *Wong Kwei Cheong* was that the petitioning creditors were not entitled to rely on service by advertisement when they had chosen to ignore a more effective and appropriate way to effect service through contacting the debtor's solicitors.

11 The phrase "advertisement of the statutory demand" in r 96(4)(c) is capable of both meanings that the parties have sought to ascribe to it. While a literal reading of r 96(4)(c) will result in the conclusion that the entire statutory demand has to be advertised to effect good service, a purposive interpretation of the sub-rule supports the conclusion that the advertisement of the notice of a statutory demand is also an "advertisement of the statutory demand". The objective of r 96 is expressed in r 96(1) *ie* to ensure that creditors take all reasonable steps to bring the statutory demand to the attention of the debtor. This is also the reason why r 96(6) provides that the mode of substituted service should be one that the court would have ordered in the circumstances, being a reasonable step to bring the statutory demand to the notice of the debtor. The purpose of r 96(4)(c) is therefore to ensure that a creditor takes reasonable steps to ensure that the statutory demand is brought to the notice of the debtor by advertisement.

12 I am of the view that this purpose may be fulfilled by the advertisement of a notice of the statutory demand. It is not disputed that substituted service of documents to be served pursuant to the Rules of Court and bankruptcy petitions may be served by an advertisement of the notice of the documents. Service of bankruptcy notices under the old bankruptcy rules may also be effected by the advertisement of a notice of the bankruptcy notice. The advertisement of the notice of a document has been treated, in other contexts, as a reasonable step in bringing the document to the attention

of the person to be served. I see no reason for the service of a statutory demand to be treated any differently. In the result, I agree with Mr Chan that the expression "advertisement of a statutory demand" in r 96(4)(c) includes the advertisement of a notice of the statutory demand.

13 I return to the facts in the present case. HSBC would be entitled to advertise a notice of the statutory demand if it met the pre-condition of r 96(4)(c), *ie* they did not know Sulistyo's address. According to the affidavit of service filed, the process server made four attempts of service at the River Valley address. On two occasions, there was no response and on the other two occasions, an occupant told him that the debtor was not staying there. He also made three attempts at the Meyer Road address and on all three occasions, he was told that the debtor did not reside at the premises. In the circumstances, as personal service could not be effected and HSBC did not know Sulistyo's address, it was entitled to rely on the advertisement of the notice of the statutory demand to bring the statutory demand to his attention.

14 As I am of the view that service of the statutory demand by HSBC was properly effected by leaving the statutory demand at the address of Sulistyo's forwarding agent or by the advertisement of the notice of the statutory demand, it is unnecessary for me to consider the validity of HSBC's last mode of service, *ie* leaving the statutory demand at the Meyer Road and River Valley addresses.

15 Sulistyo's other objection to the bankruptcy order being made is that this court does not have the jurisdiction under s 60(1) of the Act to make the order. In brief, I do not see the merit of this objection. It is not disputed that Sulistyo held substantial shareholdings in various Singapore companies. This amounts to having property in Singapore. HSBC is entitled to present a bankruptcy petition against Sulistyo and rely on the ground that Sulistyo has property in Singapore to found jurisdiction pursuant to s 60(1)(b) of the Act.

16 I am satisfied that all the other requirements for a bankruptcy order to be made against Sulistyo have been fulfilled in the present case and accordingly, I made the bankruptcy order against him.

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