Neutral Citation: [2014] IEHC 344

THE HIGH COURT

BANKRUPTCY

[2446]

IN THE MATTER OF ANTHONY CASEY, OTHERWISE TONY CASEY (A BANKRUPT)

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 10th day of July, 2014

1. This motion concerns an application by the bankrupt to set aside the order of adjudication made against him on 14th January 2013. In the alternative, he seeks an order directing that the registration of a judgment obtained on 23rd January 2012, as a judgment mortgage be set aside, or directing the petitioning creditors to take all necessary steps to set aside the said registration.

2. The jurisdiction to show cause against adjudication is set out in s. 16 of the Bankruptcy Act 1998 (as amended). Section 16(1) states:

> *"The bankrupt may, within three days or such extended time not exceeding fourteen days as the Court thinks fit from the service of the copy of the order of adjudication on him, show cause to the Court against the validity of the adjudication."*

On the face of it, therefore, the application is out of time since the adjudication was made on 14th January 2013, and the notice of motion is dated 2nd April 2014.

3. However, s. 85C of the Act, states at sub-section (1):

> *"A person shall be entitled to an annulment of his adjudication (a) where he has shown cause pursuant to section 16, or*
>
> *(b) in any other case where, in the opinion of the Court, he ought not to have been adjudicated bankrupt."*

This section was inserted by s. 157 of the Personal Insolvency Act 2012. No time limit for bringing such an application is set out for such an application, although it does not displace the time limits applicable to an application under section 16. It seems to me that an application brought under s. 85C(1)(b) is not subject to the time limits prescribed in s. 16, but is in the general discretion of the judge hearing the application as a matter to be taken into account by the court in exercising its opinion as to whether or not the debtor ought to have been adjudicated bankrupt.

4. The basis for this application lies in the fact that after the adjudication, a judgment mortgage affidavit which had been sworn prior to the adjudication was registered over a property at 53, Lennox Street, Portobello, Dublin 8 ("the property"). The registration took place on 29th January 2013. The judgment mortgage affidavit was sworn on 12th March 2012.

5. An affidavit was filed by the petitioners' solicitor who outlined the circumstances leading to the registration of the judgment mortgage. On 23rd January 2012, the petitioners obtained judgment against the bankrupt. In the usual way, the petitioners' solicitor arranged for the preparation and issue of a suite of documents known as a 'Judgment Set' to enter judgment against the debtor, as would be his normal practice after obtaining judgment. At the same time, he had instructions from the petitioners to issue bankruptcy proceedings against the debtor. He arranged for the petitioners, who are living in Australia, to swear the affidavit of judgment and this was done on 12th March 2012, but says that, thereafter, he took no steps on the affidavit of judgment until around the time the adjudication was made. When going through the papers at that time, he came across the affidavit of judgment and says that he made a mental note to register the judgment mortgage. After the adjudication, he wrote a memorandum to his law clerk, instructing him to lodge the judgment mortgage in the Registry of Deeds, and admits that he did this in error, as he was not an expert in bankruptcy, and it had never occurred to him that the petitioning creditors could not register their judgment as a judgment mortgage in circumstances where they had petitioned for adjudication of the debtor a bankrupt.

6. On 10th September 2013, the Office of the Official Assignee wrote to the petitioners, informing them that their bankruptcy petition stated that they did not hold any security for the debt, whereas, in fact, they held a judgment mortgage. It was explained that as the petition debt had been admitted as an unsecured claim in the bankruptcy, it was now necessary for them to release the registration of the judgment mortgage. As there was no response to this letter, reminders were written on 15th October 2013, and 6th January 2014.

7. The solicitor for the petitioners has informed the court that he has since been advised, and accepts, that under the provisions of the Bankruptcy Act, the petitioning creditors were not entitled to register the judgment mortgage against the debtor's interest in the property once an adjudication has been made, and that such registration ought never to have taken place. They have consented to an order in the terms of paragraph two of the debtor's notice of motion.

8. At the hearing of the application, counsel for the bankrupt relied on two principal arguments. The first was a material non-disclosure and the second was that the petition had been brought for an improper purpose. A subsidiary point based on the re-using of an order of *fieri facias* was also raised. I propose to deal with the latter point first.

9. An order of *fieri facias* issued on 23rd January 2012, and was endorsed with a Certificate of *nulla bona* on 13th March 2012. The Sheriffs agents again sought to execute on foot of the order and a further return of *nulla bona* was certified on the same order on 13th September 2012. Counsel for the bankrupt contended that once the order had been returned on 13th March 2012, it was spent, and that being so, the petitioners were not entitled to rely on the further Certificate of *nulla bona* returned on 13th September 2012. He argued that if the order was spent, then it did not comply with s. 7(f) of the Bankruptcy Act, insofar as the act of bankruptcy relied on was the return of *nulla bona* since it did not occur within three months before the presentation of the petition as required by s. 11(1)(c). No legal authority for that proposition was advanced. In principle, I see no reason why the Sheriff or his agents cannot make more than one attempt to execute an order of *fieri facias*. What is important is that this process must take place within three months of a creditor's petition if that is the act of bankruptcy relied on. I reject the bankrupt's submission on this point.

10. The material non-disclosure alleged is based on an argument that the affidavit of debt sworn by Ms. Carmel Casey on behalf of the petitioners states, *inter alia, "... I say that no manner of satisfaction or security whatsoever has been, to my knowledge or belief, had or received, save as set forth in the said Schedules*". The bankrupt says that neither the petition nor the affidavit

grounding it made reference to other execution process which was in train at the time of its presentation. That is undoubtedly true, but the solicitor for the petitioners has explained what happened and that he was not familiar with the bankruptcy process at the time when he was arranging to create the judgment mortgage. The registration of the judgment mortgage did not take place until after the adjudication and its effectiveness must be in question as all the estate of the bankrupt vested in the Official Assignee when the adjudication was made. If the matter had been drawn to the court's attention before the adjudication, the petitioners would have been put on their election as to whether or not they wished to rely on this security or not. They would either have to give up their security for the benefit of all creditors in the bankruptcy or else wait until the security had been realised to see whether there was any balance due and owing, in which case it could be proved in any bankruptcy as an unsecured debt.

11. While there is no adequate explanation given for the failure to respond to the correspondence from the Office of the Official Assignee on this matter, the petitioners have now accepted that they must consent to an order in the terms of paragraph two of notice of motion setting aside the registration of the judgment mortgage. That disposes of issue number two in the notice of motion.

12. Having regard to what I said at para. 2 above, it seems that the application if it is made under s. 16 of the Act is out of time. But in any event, the bankrupt has not shown that any of the requirements of s. 11(1) of the Act have not been complied with. The debt is not denied and it amounts to more than €20,000.00. The other requirements of s. 11(1) have been met. So far as s. 85C(1)(b) are concerned the applicant alleges that the petition was brought for an improper purpose. The applicant also relies on the non-disclosure point which I have dealt with in para. 10 above, and for which an adequate explanation has been given by the creditors solicitor. Since the petitioning creditors are prepared to give up their security for the benefit of all creditors in the bankruptcy, the non-disclosure has been cured. There is no evidence that the non-disclosure was other than innocent or that it was made in circumstances which would warrant the court concluding that on that account the applicant ought not to have been adjudicated bankrupt.

13. That leaves the issue of improper purpose which has been raised by the applicant. In *Gill v. O'Reilly* [2003] 1 I.R. 434, Fennelly J. said at P 441 that:-

> "The machinery of bankruptcy ...cannot be undone without extremely compelling reasons."

In this case after the bankrupt was adjudicated on 14th January, 2013, he did not bring an application to show cause why his adjudication should be annulled under s. 16 of the Act within the time limits allowed. Instead, a statement of affairs was filed by him on 6th February, 2013, and the statutory sitting was passed by the court on 1st July, 2013. He now urges the court to use its power under s. 85C to annul the bankruptcy on the grounds that the petition was brought for an improper purpose and for some ulterior or collateral purpose. Quite what this purpose was is not clear. In written submissions the bankrupt claims that this "...was part of a strategy to put pressure on the Applicant and was not undertaken as part of a process which would enure for the benefit of creditors". No evidence has been adduced to establish that this was so, or that the petition was brought for any purpose other than for the recovery of the debt. The fact that a petition for adjudication was brought may well have "put pressure" on the Applicant but was not in any way illegal.

14. In *McGinn v Beagan* [1962] I.R. 364, Budd J. held that the courts processes should not be allowed to be used for an ulterior or collateral purpose. In that case it was established that the debtor summons had been issued, not for the purpose of recovering money, but for the purpose of making the debtor a bankrupt and unseating him from the local urban District Council and as such had been brought for improper reasons. This decision was followed by Dunne J. in *B.D. v. J.D.* (Unreported, 3rd December, 2008) where she stated at p. 11:-

> "It is clear from the examination of the authorities referred to that if someone commences bankruptcy proceedings not for the purpose of recovering the debt due, but to inflict damage on the debtor, e.g. for the purpose of ousting someone as a trustee, or having someone disqualified from a position such as that of a local councillor, then the proceedings are an abuse of process and liable to be dismissed."

15. There is simply no evidence that the petition in this case was brought for an improper purpose or, indeed, for any purpose other than the recovery of the debt.

16. No grounds have been established by the applicant which would permit the court to exercise its discretion to annul the adjudication in this case. The application is refused.