ABDUL RASHID MOHAMAD ISA

v.

PTT INTERNATIONAL TRADING PTE LTD

Federal Court, Putrajaya
Nallini Pathmanathan, Hasnah Mohammed Hashim, Abdul Karim Abdul Jalil FCJJ
[Civil Appeal No: 03-2-11-2023(B)]
9 July 2024

Bankruptcy: *Creditor's petition — Withdrawal — Whether withdrawal of creditor's petition would terminate all bankruptcy proceedings including bankruptcy notice — Whether there was no act of bankruptcy at all on which any creditor's petition could be premised in present appeal — Whether withdrawal correctly undertaken with saving that it could be filed again — Insolvency Act 1967, s 6(7) — Insolvency Rules 2017, r 93*

The core issue in the present appeal was whether the withdrawal of the Creditor's Petition would terminate all bankruptcy proceedings, including the bankruptcy notice. The bankruptcy notice was issued on 17 December 2018. Without any application to set aside the bankruptcy notice, the act of bankruptcy would have occurred on 25 December 2018. However, prior to 25 December 2018, the judgment debtor filed an application to set aside the bankruptcy notice under r 93 of the Insolvency Rules 2017 ("Rules"). The Registrar ruled that the application to set aside was inadequate, in that there was no affidavit in support and did not deal with it. Instead, the Registrar held that an act of bankruptcy occurred on 25 December 2018, as if no application to set aside was before the Court. Accordingly, the judgment creditor went on to file a Creditor's Petition. On the judgment debtor's appeal to the Judge in Chambers, the Judge set aside the declaration of an act of bankruptcy holding that, as the setting aside application had not been heard, no act of bankruptcy could occur. At the hearing of the Creditor's Petition before the Registrar, matters were compounded further when the Registrar allowed the judgment creditor to withdraw the Creditor's Petition with liberty to file afresh, but then went on to rule that all bankruptcy proceedings stood terminated solely by reason of the withdrawal. Eventually, the High Court and the Court of Appeal held that the setting aside application under r 93 of the Rules stood to be heard, and that the declaration of the act of bankruptcy as occurring on 25 December 2018 by the Registrar was erroneous. As it was erroneous, it followed that there was no act of bankruptcy on which any Creditor's Petition could be premised and, therefore, the judgment creditor correctly sought the withdrawal of the bankruptcy proceedings.

Held (dismissing the appeal with costs):

(1) It was open to the Court, based on the facts of any particular case on an application for amendment, to correct an error where it was suitable to do so, resulting in the creditor's petition being heard and disposed of. The Court certainly possessed the jurisdiction to do so. This exercise of discretion would be premised on the established principles of the exercise of a discretion judicially, as well as the Insolvency Act 1967 ("Act"). As to whether the termination of a Creditor's Petition terminated the entirety of the bankruptcy proceedings, this was most likely the case if the matter was heard and disposed of on its merits. Such a decision might be appealed upon, and any final adjudication on the matter would be determinative of such termination. Again, the term 'termination' ought to reflect the adjudication of the Creditor's Petition on its merits. Finally, s 6(7) of the Act stipulated that a Creditor's Petition could not be withdrawn without the leave of the Court. This fortified the rationale that a Creditor's Petition could be withdrawn without the entire proceedings necessarily coming to an end. The bankruptcy jurisdiction of the High Court accorded wide powers to impose any condition on withdrawal, including the liberty to file afresh. (paras 11, 12 & 14)

(2) In the present appeal, the situation was entirely different because there was, on the facts, no act of bankruptcy at all on which any Creditor's Petition could be premised. Therefore, the withdrawal was correctly undertaken with the saving that it could be filed again and this, in turn, was correct because it was not a 'second bite at the cherry', as the setting aside application had not been heard and any declaration of an act of bankruptcy was simply invalid and in contravention of the Act and the Rules. (para 15)

Case(s) referred to:

Datuk Lim Kheng Kim v. Malayan Banking Bhd [1993] 1 MLRA 288 (folld)

Hong Leong Bank Berhad v. Khairulnizam Jamaludin [2016] 4 MLRA 603 (distd)

Re Ng Kai Tee, Ex Parte CIMB Bank Berhad (Bankruptcy Proceedings No: 29-71-2009-11) (Unreported) (distd)

V Gopal Re: Ex P; Bank Buruh (M) Bhd [1985] 1 MLRH 654 (distd)

Re: Subramaniam Paidathally; Ex-Parte: G Ragumaren & Co [2010] 17 MLRH 199 (distd)

Legislation referred to:

Insolvency Act 1967, ss 3(1)(i), 5(3), 6(7)

Insolvency Rules 2017, r 93

Counsel:

For the appellant: Chan Siew Cheong (Chen Jia Yee with him); M/s Teh & Lee

For the respondent: Alvin Julian (Neo Chi Chyn with him); M/s Firoz Julian

JUDGMENT

Nallini Pathmanathan FCJ:

[1] The core issue in this appeal is whether the withdrawal of the Creditor's Petition will terminate all bankruptcy proceedings including the bankruptcy notice. This is reflected in the questions of law put forward for our consideration.

Salient Facts

[2] The chronology of events discloses the following salient facts:

(i) The bankruptcy notice was issued on 17 December 2018;

(ii) Without any application to set aside the bankruptcy notice, the act of bankruptcy would have occurred on 25 December 2018;

(iii) However, prior to 25 December 2018, the judgment debtor filed an application to set aside the bankruptcy notice under r 93 of the Insolvency Rules 2017;

(iv) The Registrar ruled that the application to set aside in encl 6 was inadequate in that there was no affidavit in support and did not deal with it. Instead, the Registrar held that an act of bankruptcy occurred on 25 December 2018, as if no application to set aside was before the Court;

(v) Accordingly, the judgment creditor went on to file a Creditor's Petition;

(vi) On the judgment debtor's appeal to the Judge in Chambers, the learned Judge set aside the declaration of an act of bankruptcy holding, as per r 93 that, as the setting aside application had not been heard, no act of bankruptcy could occur. It is not in issue that at the time of the hearing before the Court of Appeal, the setting aside application in encl 6 had not been heard.

(vii) At the hearing of the Creditor's Petition before the Registrar, matters were compounded further when the Registrar allowed the judgment creditor to withdraw the Creditor's Petition with liberty to file afresh, but then went on to rule that all bankruptcy proceedings stood terminated solely by reason of the withdrawal.

[3] By this stage, therefore, two glaring issues required clarification – firstly, whether an act of bankruptcy could be declared despite the failure to dispose of the application to set aside the bankruptcy notice; and secondly, within this unique context, whether the Creditor's Petition could be withdrawn with liberty to file afresh, given that it had been filed as a consequence of the earlier erroneous ruling by the Registrar that an act of bankruptcy had occurred. This erroneous ruling was correctly reversed by the High Court.

[4] In these circumstances, it follows that, as there was no act of bankruptcy that could be relied on pending the disposal of the application for the setting aside of the bankruptcy notice, there could be no basis on which to file a Creditor's Petition. Accordingly, the judgment creditor asked that the Creditor's Petition be withdrawn with liberty to file afresh. However, the Registrar, while allowing the application for the Creditor's Petition to be withdrawn with liberty to file afresh, went on to rule that all bankruptcy proceedings stood terminated. It is unclear on what legal basis the Registrar so determined, given that there was no clear act of bankruptcy at that point in time, as the setting aside application in encl 6 had not been heard.

[5] The High Court and the Court of Appeal, with respect, correctly held that the setting aside application under r 93 stood to be heard, and that the declaration of the act of bankruptcy as occurring on 25 December 2018 by the Registrar was erroneous. As it is erroneous, it follows that there is no act of bankruptcy on which any Creditor's Petition could be premised, and therefore, the judgment creditor correctly sought the withdrawal of the bankruptcy proceedings.

Analysis

[6] The reliance on *Re: Subramaniam Paidathally; Ex-Parte: G Ragumaren & Co* [2010] 17 MLRH 199 ('*Subramaniam*') is, with respect, somewhat misplaced. *Subramaniam*'s case relies on *Re Ng Kai Tee, Ex Parte CIMB Bank Berhad* (Bankruptcy Proceedings No. 29-71-2009-11) *(Ng),* where it was held that it was not possible to file a second Creditor's Petition even where the bankruptcy act was not spent. However, it is pertinent in both *Ng*'s case as well as *Subramaniam*'s case that:

(a) There was an act of bankruptcy that could be relied upon without dispute;

(b) In *Ng*'s case, there was a discontinuance of the Creditor's Petition – meaning that the judgment creditor no longer sought to continue with the entirety of the bankruptcy proceedings. Having chosen to discontinue the bankruptcy proceedings, it was not open to the judgment creditor to renege or reprobate from its earlier stance, which was final in nature. That is not the case here;

(c) *Subramaniam*'s case relies on the reasoning in *Ng*'s case, although the issue in the former, i.e., *Subramaniam*'s case, was different. The issue was whether a second creditor's petition, based on the same act of bankruptcy, could in fact be filed, due to an error in the statement of the date of the act of bankruptcy. However, in that case, there was no appeal against the first decision disallowing the creditor's petition, due to the mistake in the statement of the date of the act of bankruptcy. So the filing of the second creditor's petition could be viewed, arguably, as trying to have the same matter heard again.

[7] The case also went on to hold that a termination of a creditor's petition amounted to a termination of the entirety of the proceedings. The latter point ought to be viewed with circumspection because the existence of a typographical error, for example, or an inadvertent mistake, ought not to have the severe and far-reaching effect of conclusively bringing to an end the entirety of the bankruptcy proceedings.

[8] For example, an inadvertent erroneous statement of the quantum, or even an inadvertent statement of the incorrect date in the body of the Creditor's Petition should not automatically warrant a striking out, and thereby, a termination of the entirety of the bankruptcy proceedings.

[9] In this context, the purpose and intent of the Insolvency Act and its Rules is significant. The purpose of bankruptcy proceedings is to safeguard the estate of the judgment debtor to ensure that there is no unnecessary or wrongful dissipation of assets in the interests of the creditors as a whole. In other words, such securing of the estate is for the benefit of the creditors as a whole. Therefore, while it is trite that the nature of bankruptcy proceedings is penal in nature, the interests of the creditors as a whole also require consideration. It is a balance which lies in weighing up the harshness of the bankruptcy law against the genuine interests of creditors whose chances of recovery will be greatly diminished by unlawful dissipation of the judgment debtor's assets. In this context, if bankruptcy proceedings are delayed on grounds that are not substantive, but merely typographical or inadvertent, the interests of the creditors as a whole will be adversely affected. This is a factor that also requires consideration.

[10] Put in this perspective, it is apparent that, to require a judgment creditor to embark on the whole process of initiating bankruptcy proceedings afresh, by reason of a typographical or inadvertent error, does not serve the purpose and intent of the Act, but conversely, results in considerable delay and expense, and more significantly, dissipation of the judgment debtor's estate, leaving little to no recourse for other creditors. For this reason, each case ought to be perused with care and caution to ascertain whether the error in the Creditor's Petition is substantive, going to the root of the act of bankruptcy or to the viability of the creditor's petition, or on the other hand, an error that is capable of remedy by reason that it is *de minimis* and/or inadvertent, and causes no substantive prejudice to the judgment debtor.

[11] It should, therefore, be open to the Court based on the facts of any particular case, on an application for amendment, to correct an error where it is suitable to do so, resulting in the creditor's petition being heard and disposed of. The Court certainly possesses the jurisdiction to do so. This exercise of discretion will be premised on the established principles of the exercise of a discretion judicially, as well as the Insolvency Act1967.

[12] As to whether the termination of a Creditor's Petition terminates the entirety of the bankruptcy proceedings, this is most likely the case if the matter is heard and disposed of on its merits. Such a decision may be appealed upon, and any final adjudication on the matter would be determinative of such termination. Again, the term 'termination' ought to reflect the adjudication of the Creditor's Petition on its merits for the reasons set out above.

[13] As for the decision cited this morning by counsel for the Appellant, *V Gopal Re: Ex P; Bank Buruh (M) Bhd* [1985] 1 MLRH 654 and *Hong Leong Bank Berhad v. Khairulnizam Jamaludin* [2016] 4 MLRA 603 seemingly for the position that bankruptcy proceedings only commence upon the filing of the Creditor's Petition and, therefore, must cease when it is withdrawn, we are unable to agree with learned counsel because:

(a) With regards to *V Gopal*, counsel relied on one sentence in the penultimate paragraph of the judgment, "It is the filing of the petition that commences the bankruptcy proceedings." The issue in that case was whether an act of bankruptcy could be said to have been committed where s 3(1)(i) of the Bankruptcy Act 1967 was relied on but where the bankruptcy notice was caused to be issued a few days before 6 years had lapsed from the date of the relevant final judgment, and which notice was only served a few days after the 6-year period lapsed. That had no relevance in the instant appeal. It certainly cannot comprise authority for the proposition that because bankruptcy proceedings commence on the filing of a petition, the withdrawal of the same necessarily determinatively brings to an end bankruptcy proceedings, particularly where the withdrawal is made to correct a formal error or where no act of bankruptcy subsists as is the case in this appeal. This is because the Court's bankruptcy jurisdiction allows it to review, amend, and correct a petition. In the instant appeal, the Creditor's Petition is a non-starter, as there can be no commencement of bankruptcy proceedings without an act of bankruptcy subsisting. Therefore, the withdrawal of the same cannot have the effect of bringing to an end non-existent proceedings;

(b) The citation of *Khairulnizam* was also of no assistance as that case deals with s 5 of the Bankruptcy Act 1967, more particularly s 5(3). Reliance was placed on para 34 of the judgment dealing with the definition of bankruptcy action where the court held that the words 'bankruptcy action' in s 5(3) of the Act has to be read as 'bankruptcy petition'. Again, this does not mean that the withdrawal of a bankruptcy petition necessarily equates to a cessation of the proceedings, particularly where liberty to file afresh is granted by the Court;

(c) Both those cases were decided in the context of their factual matrices and the provisions arising there. Our case is different, as no act of bankruptcy has occurred to base a petition on, and there could have been no act of bankruptcy as the setting aside application had not yet been heard;

(d) Perhaps, most importantly, counsel referred to the non-hearing of the application to set aside the bankruptcy notice as a 'red herring'. We fail to comprehend how this crucial issue can be a red herring when r 93 specifically requires a setting aside application to be disposed of before an act of bankruptcy can be declared. Pending this, no act of bankruptcy can be deemed to have been committed;

(e) We note that the points of law and authorities raised this morning are neither in the written submissions and no notice of the same was accorded to the Court or opposing counsel. This is not good practice. Fair play and substantive justice requires that notice of new arguments taken at the oral hearing and the filing of new authorities be given to the Court and opposing counsel, and highlighted expressly to both.

[14] Finally, s 6(7) of the Insolvency Act 1967 stipulates that a Creditor's Petition cannot be withdrawn without the leave of the Court. This fortifies our rationale that a Creditor's Petition can be withdrawn without the entire proceedings necessarily coming to an end. The bankruptcy jurisdiction of the High Court accords wide powers to impose any condition on withdrawal, including liberty to file afresh.

The Appeal

[15] Reverting to the present appeal, the situation is entirely different as correctly pointed out by the Court of Appeal, because there is simply no act of bankruptcy at all on which any Creditor's Petition could be premised. Therefore, the withdrawal was correctly undertaken with the saving that it could be filed again, and this in turn, is correct because it is not a 'second bite at the cherry' as the setting aside application has not been heard and any declaration of an act of bankruptcy is simply invalid and in contravention of the Act and Insolvency Rules. In this context, we rely on the case of *Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 1 MLRA 288 as follows:

> "In passing, we wish to emphasize that contrary to what had been expressed in *Soh Bok Yew,* if a bankruptcy petition is to be founded on an act of bankruptcy based on a failure to comply with a bankruptcy notice, it is self-evident that such a petition can only be filed after the application to set aside the bankruptcy notice is heard and dismissed."

[16] We do not think it is necessary to answer the questions of law put forward for our consideration.

[17] For these reasons, we are of the view that the appeal has no merits and it is dismissed with costs of RM30,000.00 to the Respondent, subject to allocatur.