

IN THE COURT OF APPEAL OF MALAYSIA

THE PALACE OF JUSTICE, PUTRA JAYA

CIVIL APPEAL NO. W-03-25-06

Appellant

SOO KOK LOONG

v.

Respondent

HONG KONG & SHANGHAI BANKING CORPORATION LIMITED

[In the matter of the High Court of Kuala Lumpur Bankruptcy Notice/Petition No.

D2-29-292-1998]

[In the matter of Re Soo Kok Leong; Ex p The Hong Kong and Shanghai Banking Corporation Limited]

Coram: YA Datuk Suriyadi Halim Omar, JCA

YA Mohd Hishamudin Yunus, JCA

YA Azhar Ma'ah, JCA

JUDGMENT OF THE COURT

[Separate grounds of judgment]

This is an appeal by the debtor (the appellant before this Court) against a decision in a bankruptcy petition that had been filed at, and heard by, the High Court of Kuala Lumpur (Commercial Division). The Senior Assistant Registrar ('the Registrar') of the High Court had made a receiving order and an adjudication order against the debtor on 16 December 1998. The debtor then on 23 July 2002 applied under section 105(1) of the Bankruptcy Act 1967 for the adjudication order to be annulled and for the receiving order to be rescinded. The Registrar refused the

application. Dissatisfied with the decision of the Registrar, the debtor appealed to the Judge in Chambers. The learned Judge, however, dismissed his appeal. The debtor now appeals to this Court (the Court of Appeal).

On 18 May 2009, this Court unanimously allowed the appeal.

I propose to begin my grounds by referring to section 105 of the Bankruptcy Act 1967. This provision states –

105. Power of court to annul adjudication in certain cases.

(1) Where in the opinion of the court a debtor ought not to have been adjudged a bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the adjudication.

(2) Where the adjudication is annulled under this section, all sales and dispositions of property, and payments duly made, and all acts theretofore done by the Official Assignee, or other person acting under his authority, or by the court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the court appoints, or in default of any such appointment revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the court declares by order.

(3) Notice of the order annulling an adjudication shall be forthwith gazetted and published in at least one local paper.

(4) For the purposes of this section any debt disputed by a debtor shall be considered as paid in full if the debtor enters into a bond, in such sum and with such sureties as the court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full into court.

(5) When the court annuls an adjudication under this section it shall also rescind the receiving order.

Next, I shall refer to section 5(1) of the Bankruptcy Act. This section stipulates –

5. Conditions on which creditor may petition.

(1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless –

(a) The debt owing by the debtor to the petitioning creditor, or if two or more creditors join in the petition the aggregate amount of debts owing to the several petitioning creditors, amounts to ten thousand ringgit; and

In the light of the above subsection (1) of section 5, the crucial issue before the Court is this: what was the amount of the debt owing by the appellant/debtor at the time of the issuance of the bankruptcy notice? Was it RM9,409 - as contended by the appellant? Or, was it RM12,440.79 - as maintained by the creditor (now the respondent before this Court)? If the former is the case, then, as contended by the appellant, the respondent was not entitled to file the bankruptcy notice, as the minimum amount requirement was not met; and the adjudication order should not have been made against the appellant in the first place; and, hence, now, ought to

be annulled. For, this would have been a case where the appellant ought not to have been adjudged a bankrupt.

In the present case the debt of the appellant, and the partial repayments of the debt by him, were in Singapore currency. Therefore, also tied to this issue of the actual amount owing, is the issue as to when the conversion from Singapore currency to Malaysian currency ought to be made, for the purpose of determining the actual amount owing at the time of the issuance of the bankruptcy notice.

The bankruptcy notice was issued on 11 February 1998. It was based on a consent judgment obtained by the respondent against the appellant at the Magistrate Court of Kuala Lumpur on 1 November 1996. A peculiar feature about this judgment is that the amount of the debt stated in the judgment is in Singapore currency - and it is S\$9,887.82. The judgment allows the debt to be paid either in Singapore currency or in Malaysian currency. The judgment allows the judgment debt to be paid in installments in the following manner. The first installment is S\$4,943.91, and this amount was to be paid within two weeks of 1 November 1996. This is then followed by four monthly installments of S\$1000 each, to be paid on the following dates: (1) on or before 1 December 1996, (2) on or before 1 January 1997, (3) on or

before 1 February 1997 and (4) on or before 1 March 1997. The final installment of S\$943.91 was to be paid on or before 1 April 1997. It is further stipulated in the judgment that should the debtor default in the paying of the installments, then the whole amount owing under the judgment becomes immediately due, together with legal costs of RM378.

The appellant paid the first installment of S\$4944 on 15 November 1996 and the second installment of S\$1000 on 16 December 1996. These installments were paid in Singapore currency. However, thereafter, the appellant defaulted in the payments of the remaining installments. As a consequence, the respondent caused the bankruptcy notice (mentioned earlier) to be issued on 11 February 1998. In the bankruptcy notice, the respondent had deducted the two installment amounts paid by the appellant, but had added legal costs of RM378; and arrived at the demand sum of RM12,440.79.

The respondent, in the bankruptcy notice, explain how they arrived at the sum of RM12,440.79. It is as follows:

Judgment sum RM22,643.11

(S\$9,887.82 x 2.29)

[as per the rate published on 11/2/1998]

Less

(i) payment made on 15/11/1996 RM8,800.32

(S\$4,944.00 x 1.7800)

[as per rate published on 15.11.96]

(ii) payment made on 16.12.96 RM1,780.00

(S\$1,000 x 1.7800)

[as per rate published on 16.12.96]

RM12,062.79

Add –

Costs RM 378.00

RM12,440.79

It is important to observe that in the above calculation by the respondent, currency conversion from Singapore currency to Malaysian currency were made thrice, that is to say, (1) on 11 February 1998 (date of the issuance of the bankruptcy notice), (2) on 15 November 1996 (date of the payment of the installment sum of S\$4,944) and (3) on 16 December 1996 (date of the payment of the installment sum of S\$1000). And having made these conversions, the respondent arrived at the ultimate sum of RM12,440.79.

The appellant contends that the above method of calculation is erroneous. The appellant argues that the currency conversion should be made only once, and that is at the time of the filing of the bankruptcy notice on 11 February 1998; and had the correct method of calculation been used by the respondent, then the amount owing, as at the date of the issuance of the bankruptcy notice, would be less than the minimum requirement of RM10,000; and by reason of section 5(1)(a) the respondent would not be entitled to commence the bankruptcy proceeding.

According to the learned counsel for the appellant, the calculation should have been made in the following manner:

Computation of debt

Principal		S\$9,887.82
<i>Less –</i>		
(1) Payment made on 15.11.1996	S\$4,944.00	
(2) Payment made on 16.12.1996	S\$1,000.00	
Balance of principal		S\$3,943.82

Conversion of principal sum in the judgment from SGD to RM

S\$3,943.82 x 2.29 RM9,031.35

[rate of exchange at 11 February 1998]

Add –

Costs RM 378.00

Debt due and owing RM9,409.35

It will be noted from the above computation by the appellant that conversion from Singapore currency to Malaysian currency is made only once, that is, after the deduction of the two installment payments made in the Singapore currency. In other words, what should be converted is only the balance sum of S\$3,943.82; and not any other sum (or sums).

In my judgment, the appellant's method of computation is fair and correct. This is because the judgment debt is stated in the Singapore currency and it is clearly stated in the judgment that the installments could be paid in that currency. Hence as a matter of principle, conversion to the Malaysia currency, for the purpose of the bankruptcy, should only be made at the time of the issuance of the bankruptcy notice (that is, 11 February 1998). To my mind, to embark on the conversion of any other sum or sums (other than the sum of S\$3,943.82), for the purpose of determining the actual amount owing at the time of the issuance of the bankruptcy notice, is tantamount to denying the appellant the exercise of his right under the judgment to the fullest.

It is submitted by the learned counsel for the respondent before this Court that it is too late now for the appellant to dispute the correctness of the amount stated under the bankruptcy notice. It is argued by counsel that if the appellant disputes the amount of debt owing as stated in the bankruptcy notice, then the appellant ought to have invoked paragraph (ii) of the proviso to section 3(2) of the Bankruptcy Act at the time of being served with the bankruptcy notice; and ought to have notified the respondent of the alleged error in the amount within the time frame as prescribed by the proviso. This proviso states –

(2)A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non-compliance therewith and shall be served in the prescribed manner:

Provided that a bankruptcy notice –

(i) [not relevant]

(ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the

time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

The respondent refers to the following cases:

(1) *Re Amarjit Kaur Bakshis Singh, Ex p BSN Commercial Bank (Malaysia)*

Bhd [2001] 1 CLJ 412;

(2) *Re Shuib Hj Ibrahim, Ex p BPK Credit & Leasing Sdn Bhd* [2003] 3 CLJ

679;

(3) *Development & Commercial Bank Bhd v. Datuk Ong Kian Seng* [1995] 3

CLJ 307;

(4) *Re Woo Yoke San, Ex p OCBC Bank (M) Bhd* [2006] 2 CLJ 589; and

(5) *Re: Woo Choo Tah @ Wang Tse Son; Ex p PhileoAllied Bank (M) Bhd*
[2004] 1 LNS 28.

In my judgment, paragraph (ii) of the proviso to subsection (2) of section 3 of the Bankruptcy Act is irrelevant. This is because the amount actually due under the bankruptcy notice does not in the first place meet the minimum requirement as stipulated by section 5(1)(a) of the Act. In other words, the request for the issuance of the bankruptcy notice ought not to have been made by the respondent in the first place. The above cases cited by the respondent, with respect, are also irrelevant. The issue in these cases concerns the stating of excessive demand in the bankruptcy notice. These cases do not deal with the issue of satisfying the minimum sum requirement as stipulated by section 5(1)(a).

[Appeal allowed with costs]

(DATO' MOHD HISHAMUDIN BIN MOHD YUNUS)

Judge, Court of Appeal

Putrajaya

Date of decision: 18 May 2009

Date of written grounds of judgment: 17 June 2009

Encik H. C. Tan and Encik K. H. Ch'ng (*Messrs Ch'ng Kim Hock & Associates*)

for the appellant

Cik Emilia Van Buerle (*Messrs Raja, Darryl & Loh*) for the respondent