

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO. W-03-25-06**

ANTARA

SOO KOK LOONG

...PERAYU

DAN

**HONG KONG & SHANGHAI BANKING
CORPORATION LIMITED**

**...RESPONDEN/
PEMPETISYEN**

[Dalam perkara Mahkamah Tinggi di Kuala Lumpur
Dalam Wilayah Persekutuan, Malaysia
No.Kebangkrapan: D2-29-292-1998

Antara

Hong Kong & Shanghai Banking
Corporation Limited

...Pempetisyen

Dan

Soo Kok Loong

...Responden]

**CORAM: SURIYADI HALIM OMAR, JCA
MOHD HISHAMUDIN MOHD YUNUS, JCA
AZHAR @ IZHAR HAJI MA'AH, JCA**

JUDGMENT OF SURIYADI HALIM OMAR, JCA

This panel heard the appeal filed by the judgment debtor (hereinafter referred to as the appellant) to annul the adjudication order of the court, and had allowed it with costs.

The appellant was previously the defendant in a credit card action commenced by the plaintiff (hereinafter referred to as the respondent) at the Magistrate Court. A consent judgment was recorded on 1.11.1996 with the terms being:

“...Defendan hendaklah membayar jumlah wang sebanyak S\$ 9,887.82 (*S\$ being Singapore dollars*) atau yang bersamaan dalam Ringgit Malaysia pada masa pembayaran secara ansuran bulanan iaitu ansuran pertama sebanyak S\$4,943.91 hendaklah dibayar dalam masa dua (2) minggu dari 1hb November 1996 dan empat (4) ansuran bulanan sebanyak S\$ 1,000.00 setiap satu pada atau sebelum... dengan ansuran terakhir sebanyak S\$ 943.91 pada atau sebelum 1 hb April 1997. Dan bahawa sekiranya berlaku kemungkiran di dalam mana-mana ansuran bulanan tersebut, kesemua jumlah sebanyak S\$ 9,887.82 menjadi terhutang dan kena dibayar dengan serta merta dengan kos tindakan RM 378.00 (*explanation ours*).”

The problem started when the appellant defaulted on the 3rd installment. Regardless of it he had paid altogether S\$ 5,943.91 (S\$ 4,943.91 and S\$ 1,000) for the first and second instalments prior to the filing of the bankruptcy notice. He then contended that the balance of the judgment sum owed at the time when the bankruptcy notice was issued, was only S\$ 3,943.82, but regretfully the respondent had computed the balance owed in ringgit Malaysia, in a manner that was disadvantageous to the appellant.

According to the appellant he had made the earlier two payments in Singapore dollars (SGD) but the respondent had converted the repayment from SGD into Malaysian ringgit (RM) at the time when the payments were made. A bankruptcy notice was served on the appellant on 9.6.1998, to be followed in its wake by a creditor's petition for the sum of RM 12,440.79 against him. An adjudication and receiving order was meted down against the appellant on 16.12.1998. After that AORO was obtained by the respondent against the appellant, the latter then applied to the Senior Assistant Registrar (SAR) for it to be annulled and or rescinded pursuant to s. 105 of the Bankruptcy Act 1967 (the Act).

The grounds of the application as set out in the summons in chambers were that, the respondent was not entitled to present the bankruptcy petition, given that the debt owed by the appellant was less than RM10,000.00, and that the bankruptcy notice dated 11.2.1988 was defective. Unfortunately the appellant was unsuccessful. Being dissatisfied with the decision, the appellant thereupon appealed to the High Court judge but again met with failure. He then filed to the Court of Appeal and we heard the appeal whereupon he was successful.

In the circumstances, the respondent had correctly filed the bankruptcy notice founded *only* on the balance of the judgment sum, as sums of money that have been paid and accepted by the respondent, cannot be construed as sums owing, as envisaged by s. 5 of the Act. The sums earlier paid, totaling S\$ 5,943.91 must be

taken as payment in part-satisfaction of the consent judgment as supplied above. S. 5 of the Act reads:

“Condition on which creditor may petition

5. (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 ...(*emphasis supplied*)”

In *Re Child* [1892] 2 QB 77, Vaughan C Williams, J observed:

“It can scarcely, I think, have been the intention of the legislature that a judgment debtor should be liable to be served with a bankruptcy notice claiming from him a sum which is not due, *inasmuch as it has been paid by him and accepted by the judgment creditor* in reduction of the judgment debt (emphasis supplied);

So what was the complaint by the appellant about? He was not denying that he owed a sum of money to the respondent, but what he denied was a larger sum that brought him within the threshold of a bankruptcy action i.e. above the sum of RM10,000.00. In a word a miscalculation had occurred. The appellant ventilated that the respondent was not entitled to present the bankruptcy petition against

him, as the amount owing as at the date of the issuance of bankruptcy notice dated 11.2.1998, was less than RM 10,000.00. The bankruptcy notice, which was premised on RM 12,440.79, was misleading and incorrect, with the actual balance being RM9, 031.35 (S\$ 3,943.82 x 2.29 {rate of S\$ 1.00}). The respondent had failed to deduct the part payment made by the appellant correctly; had it correctly deducted the said part payment, the balance sum owing by the appellant would be less than RM 10,000.00. It was erroneous for the respondent to convert the repayment, which was made in SGD in 1996 into ringgit Malaysia in 1998. The consent judgment had clearly stipulated that the repayment be made in SGD.

With the sum being less than the RM 10,000, and the bankruptcy notice being invalid, he had ventilated that he therefore should not be subject to any AORO. If that submission were correct then s.105 of the Act would be applicable and the bankruptcy order must be annulled.

S. 105 of the Act reads:

“Power of court to annual adjudication in certain cases

105. (1) *Where in the opinion of the court a debtor ought not to have been adjudged 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)

(3)

(4)

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

In *Re Shuaib bin Lazim ex parte Mercantile Insurance Sdn. Bhd.* [1992] 4 CLJ 2069, prior to granting the annulment order pursuant to s.105 of the Act, the court had said:

“Where it is clear that the debtor ought not to have been adjudged bankrupt but had been so adjudged (which does happen from time to time in bankruptcy proceedings), what normally happens is that a motion pursuant to s. 105 usually filed by the petitioner himself, is moved, and normally is not opposed, whereupon the orders sought, which as per the said s.105(1) and (5) are for annulment of the adjudication and rescission of the receiving order, are made as a matter of course.”

In *Re Mat Shah; ex parte Raghbir Singh* [1981] 2 M.L.J 159 the court had to consider whether a bankruptcy petition, pursuant to a bankruptcy notice, which had included illegal interest ought to be

entertained or not. With the sum reduced below the statutorily permitted amount, with the illegal interest now eliminated, the court had no recourse but to dismiss the bankruptcy petition.

The respondent here had canvassed that the deeming provision of s. 3 (2) (ii) of the Act, in the circumstances of the case validated the bankruptcy notice and the AORO thus was good. It added that the part payment had been deducted from the judgment sum as reflected in the bankruptcy notice, and as the appellant did not challenge the bankruptcy notice within 7 days, or at any time before he was adjudicated a bankrupt, he was prevented from nullifying the bankruptcy notice on the ground of mistake of excessive demand. The appellant thus was truly indebted to the respondent in the sum of more than the statutory minimum of RM 10,000.00.

S.3(2) (ii) of the Act reads:

“ Act of bankruptcy

3. (1)

(a)

....

(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)

- (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.”

Having construed the consent order, we held the view that it was sensible and reasonable to deduct all the part-payment sums from the principal sum in its original currency, and only prior to the filing of the bankruptcy notice should the respondent convert the balance into ringgit Malaysia, at the prevailing market value. If the sum owed exceeded the statutory threshold after the conversion then only may a bankruptcy notice be issued. Otherwise the matter ends there. On this score we agreed with the view of the appellant. With the sum owed at the time of issuance of the bankruptcy notice being RM9,031.35 (S\$ 3,943.82 x 2.29) the amount owing was below the permitted statutory limit for the filing of a bankruptcy action.

As regards the argument submitted by the respondent that s. 3(2) (ii) of the Act applied we thought otherwise. We held the view that this provision as being inapplicable, unhelpful to the respondent, and

irrelevant. In a gist, it demands that the bankruptcy notice be served in the prescribed manner and in the prescribed form, with consequences that will follow for want of its compliance. It legislates that a bankruptcy notice is not to be invalidated by reason only that the sum specified in the notice exceeds the amount actually due, unless within the time allowed for payment, the debtor gives notice to the creditor that he disputes the validity of the notice. If no notice is given the creditor shall be deemed to have complied with the bankruptcy notice.

It was obvious to us that the complaint of the appellant was not restricted to the mere incorrectness of the sum due to the respondent, in that it exceeded the amount actually due to the respondent, but something that was fatal. At the risk of repeating, mathematically speaking the appellant only owed the respondent \$S 3,943.82 (RM 9,031.35) and costs of RM 378.00 at the time of the filing of the bankruptcy notice, creditor's petition and at the date of the hearing.

From the facts supplied, and after adhering to the above mode of calculation of the balance sum owed, we agreed with the appellant's stance and concluded that the calculation was wrong. That being so the bankruptcy notice was bad. The error was fatal and could not be saved or salvaged by s.3 (2) (ii) as the sum owing to the respondent was far below the statutory bar. This was not a formal defect or irregularity that could be saved by s.131 of the Act. It had failed to comply with the mandatory requirement of s. 5 of the Act.

Based on all the above reasons we allowed the appeal with costs.
The order of the High Court was set aside and the deposit refunded.

My brother Judge Y.A. Dato' Azhar @ Izhar Haji Ma'ah, JCA have read the draft copy of this judgment and agree with the contents therein.

Dated this 2st day of June 2009

SURIYADI HALIM OMAR
Judge
Court of Appeal, Malaysia

Counsel for the appellant : H.C.Tan (K.H.Ch'ng with him)

Solicitors for the appellant : Messrs. Ch'ng Kim Hock & Assoc.

Counsel for The Respondent : Emilia Van Buerle

Solicitors for The Respondent : Messrs. Raja Derryl & Loh