

Teo Song Kwang Richard v Seng Hup Electric Co (S) Pte Ltd
[2001] SGHC 105

Case Number : Originating Summons Bankruptcy 600022/2001, RA 600043/2001

Decision Date : 24 May 2001

Tribunal/Court : High Court

Coram : S Rajendran J

Counsel Name(s) : Chelva Rajah SC and MK Eusuff Ali (Tan Rajah & Cheah) for the appellant/plaintiff; Suresh Divyanathan (Drew & Napier) for the respondents/defendants

Parties : Teo Song Kwang Richard — Seng Hup Electric Co (S) Pte Ltd

Insolvency Law – Bankruptcy – Statutory demand – Whether court ought to exercise residual discretion to set aside statutory demand – Bankruptcy Act (Cap 20, 2000 Ed) s 62 – Bankruptcy Rules (Cap 20, R 1, 1996 Ed) r 98(2)(e)

Time – Computation – Prescribed period of time – Consent judgment requiring payment of instalments on last day of each month – Clause providing entire balance payable if any instalment paid more than four days after due date – Instalment due on 31 January – 4 February a Sunday – Payment of instalment on 5 February – Whether Saturday and Sunday to be excluded in reckoning of time – O 3 r 2(5) Rules of Court

: The terms of a settlement agreement between the plaintiff Richard Teo Song Kwang (`RT`) and the defendants Seng Hup Electric Co (S) Pte Ltd (`SHE`) contained, inter alia, the following provisions:

4 RT agrees to pay SHE the sum of \$1,500,000.00, on terms set out below, which sum SHE accepts as full and final settlement and discharge of all claims as set out in Suit No. 1656 of 1999 and Suit No. 1674 of 1999.

...

6 SHE and RT agree that the sum of \$1,500,000.00 shall be paid in the following manner:

...

(b) Equal instalments of \$56,250.00 for the first nine (9) months to SHE;

...

(e) Each of the above instalment shall be payable on the last day of each calendar month, the first instalment being due and payable on 31 August 2000;

...

11 In the event that any of the above payments is late by more than four (4) days from its due date, all outstanding instalments become due and payable immediately and SHE shall be entitled to levy execution for such outstanding amount.

This settlement agreement was reached after many days of negotiation between the solicitors for the respective parties and was incorporated into and formed part of a consent judgment between the parties dated 8 August 2000 in Suit Nos 1656/99 and 1074/99.

Pursuant to the terms of the consent judgment, RT, through his solicitors (M/s Tan Rajah & Cheah) paid the instalments for the first five months to the solicitors for SHE (M/s Drew & Napier). The dispute in this case arose in respect of the payment for the sixth instalment which, under cl 6(e) was payable on the last day of January 2001. If the sixth instalment was paid more than four days from 31 January 2001 then, by the terms of cl 11, the entire outstanding balance would become immediately due and payable.

RT wanted to pay that sixth instalment (of \$56,250) by Monday, 5 February 2001, and Tan Rajah & Cheah so informed Drew & Napier. Drew & Napier, by their letter to Tan Rajah & Cheah of 2 February 2001 refused this request and stated:

*As explained, our clients are not agreeable to the receipt of the 6th installment payment on **Monday, 5 February 2001** as this will be past the 4 days grace period provided for in the Settlement Agreement dated 8 August 2000.*

*In keeping with our office hours, if your clients are unable to make payment of the 6th installment by 5:30pm today, you may must [sic] payment to us on **Saturday, 3 February 2001 between 9:00am and 1:00pm** by contacting our duty solicitor, Mr Ajay Advani at 97652935 to arrange for receipt of the same.*

On Saturday, 3 February 2001, Tan Rajah & Cheah forwarded to Drew & Napier their cheque for \$45,662 as part payment of the sixth instalment. The letter stated:

We refer to the telephone conversation between your Mr Suresh Divyanathan and our Mr Eusuff Ali yesterday afternoon.

Our clients are unable to make full payment today. However, we enclose herewith our OCBC cheque (Cheque No. 010782) for \$45,662/- in your favour as part payment of the 6th instalment sum. As the last due date falls tomorrow which is a Sunday, we shall forward you the balance (\$10,588) on Monday, 5th February 2001.

In their response on Monday, 5 February 2001, Drew & Napier invoked cl 11 of the consent judgment and demanded payment of the entire balance outstanding. Their letter read:

We refer to our fax dated 2 February 2001 and your letter dated 3 February 2001.

*Clause 11 of the Settlement Agreement dated 8 August 2000 ("Agreement") provides that if your client, Mr Richard Teo, is late by more than four (4) days in the payment of any instalments, **all outstanding statements become due and payable immediately and [our clients] shall be entitled to levy execution for such outstanding amount**.*

*As of this morning, 5 February 2001, we have only received payment of \$45,662 out of a total of \$56,250 due for the 6th instalment on 1 February 2001. Our clients have elected to enforce their contractual rights under Clause 11 of the Agreement. Please let us have the balance of \$1,023,088 by **4:00pm, Monday 12 February 2001** failing which our clients will exercise their right to levy execution for any amount outstanding.*

That same morning (5 February 2001), Tan Rajah & Cheah forwarded to Drew & Napier the balance of \$10,588 due on the sixth instalment.

On 6 February 2001, Drew & Napier wrote to Tan Rajah & Cheah as follows:

We refer to your letter dated 5 February 2001.

As we explained in the teleconversation between your Mr Eusuff Ali and our Suresh Divyanathan on 2 February 2001, we are of the view that Clause 11 of the Settlement Agreement dated 8 August 2000 ("Agreement") applies if payment is made on Monday, 5 February 2001. This was reiterated in our letter of the same date subsequent to the teleconversation.

Clause 6(e) of the Agreement requires payment to be made on the last day of each calendar month. Your clients have consistently been late in making payments and have made generous and frequent use of the 4 day grace period provided in the Agreement. On this occasion, in addition to taking their usual liberties in making payment past the deadline in Clause 6(e), your clients have also breached the 4 day grace period provided by the Agreement. It is clear to us that such exquisite delay fully entitles our clients to their right to demand immediate payment of the total outstanding balance under Clause 11 of the Agreement.

The fact that that the 4th and final day of the grace period allowed falls on a Sunday is irrelevant as your clients should have made payment on 31 January 2001 in the first place. Nowhere in the Agreement is there a provision that the final day of the grace period will be held over to the next working day and we are of the view that such a provision cannot be implied in a settlement contract negotiated at arms length by parties represented by solicitors throughout the negotiation and drafting of the said contract.

*It therefore only remains for us to reiterate the demand in our letter of 5 February 2001 that your clients let us have the balance of \$1,023,088 by **4:00pm, Monday 12 February 2001** failing which our clients will exercise their right to levy execution for any amount outstanding.*

As RT did not meet the demand in Drew & Napier's letter for the payment of \$1,023,088, SHE on 16 February 2001 served on RT a statutory demand under s 62 of the Bankruptcy Act (Cap 20, 2000 Ed) for the said sum. Under that section, a debtor shall, until he proves to the contrary, be presumed to be unable to pay his debt if, in a situation where the debt is immediately payable, the debtor does not, within 21 days of the service of a statutory demand on him, pay that debt.

By this originating summons, RT applied under r 97 of the Bankruptcy Rules (Cap 20, R 1, 1996 Ed) to have that statutory demand set aside. The application was heard by the deputy registrar on 12 March 2001. The deputy registrar dismissed the application and granted SHE liberty to commence bankruptcy proceedings against RT after 19 March 2001. This is an appeal by RT against that decision of the deputy registrar.

Rule 98(2) of the Bankruptcy Rules provides the circumstances in which the court may set aside a statutory demand. Rule 98(2)(e) gives a residual discretion for the court to set aside a statutory demand if the court is satisfied, *on other grounds*, that the demand ought to be set aside. RT, in his application before the deputy registrar and in the appeal before me, relied on r 98(2)(e).

Rule 98(2) is in pari materia with r 6.5(4) of the Insolvency Rules 1986 in England. The English Court of Appeal in **Re A Debtor (No 1 of 1987)** [1989] 2 All ER 46[1989] 1 WLR 271 in construing the English provision held:

Under the 1986 Act, a statutory demand which is not complied with founds the consequence that the debtor is regarded as being unable to pay the debt in question or, if the debt is not immediately payable, as having no reasonable prospect of being able to pay the debt when it becomes due. That consequence, in turn, founds the ability of the creditor to present a bankruptcy petition because, under s 268(1), in the absence of an unsatisfied return to execution or other process, a debtor's inability to pay the debt in question is established if, but only if, the appropriate statutory demand has been served and not complied with.

*When therefore the rules provide, as does r 6.5(4)(d), for the court to have a residual discretion to set aside a statutory demand, the circumstances which normally will be required before a court can be satisfied that the demand 'ought' to be set aside, **are circumstances which would make it unjust for the statutory demand to give rise to those consequences in the particular case. The court's intervention is called for to prevent that injustice.***
[Emphasis is added.]

It was submitted on behalf of RT that there would be injustice to RT if the statutory demand was not set aside. In support of that submission, RT highlighted the following factors:

(1) RT's payment on the following working day when the last day for payment fell on a Sunday is not a breach of the terms of the settlement agreement. RT should not be deprived of his right especially so where SHE had not indicated that they would accept payment on Sunday.

(2) Apart from the present incident where the instalment payment was allegedly late by one day, which is denied, there is no evidence that RT is unable to pay his debts as they fall due. The courts should not allow a creditor to bankrupt a debtor by invoking the presumption under s 62 of the Bankruptcy Act for an alleged technical breach. One of the key reforms to the Bankruptcy Act is in fact to reduce bankruptcy proceedings from being instituted by trigger-happy creditors.

(3) On equitable principles, SHE have suffered no prejudice from the alleged late payment. Even if full payment was made on Saturday by cheque, as is the usual practice between the parties, SHE would only be able to present the cheque for clearance on Monday and receive their payment thereafter. In contrast to SHE, RT has acted in good faith in making all instalment payments to-date including the seventh instalment for February 2001.

(4) In law and in equity, SHE`s interpretation of the settlement agreement is highly doubtful. In such circumstances, it would be unfair and prejudicial to RT to allow the presumption under s 62 of the Bankruptcy Act to arise,

and urged the court to exercise the discretion it had, under r 98(2), to set aside the statutory demand.

As held in **Re A Debtor** (supra), the court would normally exercise its discretion under r 98(2)(e) to set aside a statutory demand, if it would be unjust, in the circumstances of any particular case, for the court to conclude from the failure to comply with the terms of a statutory demand, that the debtor is unable to pay the debt. In the present case, if indeed the entire balance of \$1,023,088 had, by the terms of the consent judgment, become due and payable to SHE when the statutory demand was issued, there can be little or no merit in RT`s claim that an injustice would be done to him if that statutory demand is not set aside. This is all the more so in a situation like the present where the terms of the settlement agreement had been negotiated at length between the parties. RT was fully aware at the time of the consent judgment that, by reason of cl 11 thereof, should he default in paying any instalment by more than four days after it became due, `all outstanding balances become due and payable immediately and SHE shall be entitled to levy execution for such outstanding amount". The principal issue that I have to consider and on which submissions have been made before me is whether the entire balance of \$1,023,088 had become due and payable when, by 4 February 2001, RT failed to pay in full the instalment due on 31 January 2001.

The time for the payment of each of the instalments was fixed by the consent judgment. As that was an order of court the reckoning of time would be governed by O 3 r 2 of the Rules of Court, which states:

*2(1) Any period of time fixed by these Rules **or by any judgment** , order or direction for doing any act shall be reckoned in accordance with this Rule.*

...

*(5) Where, apart from this paragraph, the period in question, **being a period of 7 days or less** , would include a Saturday, Sunday or public holiday, that day shall be excluded. [Emphasis is added.]*

It was submitted by Mr Suresh Divyanathan, counsel for SHE, that since by the terms of the consent judgment given on 8 August 2000, the sixth instalment had to be paid by the fourth day after 31 January 2001, the time period was one which was well in excess of the seven days referred to in O 3 r 2(5), and O 3 r 2(5) would not apply.

In support of that submission, Mr Divyanathan cited the case of **Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd** [1993] 1 MLJ 316 . The plaintiffs in that case had granted several extensions of time to the defendants to file their defence. In the final extension granted by letter dated 20 March 1987 the plaintiffs granted ` **an extension of seven (7) days from 23 March 1987** ` to enable the defendants to file their defence.

The Rules of Court of the High Court of Malaysia had a provision similar to that in O 3 r 2(5) of our

Rules. It was common ground that 23 March 1987 was a Monday. Accordingly, there was a Saturday and a Sunday within the seven-day period granted by the plaintiffs. Counsel for the defendants had argued that, that being so, under O 3 r 2(5), that Saturday and Sunday must be excluded in the calculation of the seven-day period. This would result in the seven-day period ending on 2 April 1987. Counsel argued that since the defence was in fact filed on 2 April 1987, it was futile to suggest that the defendants were in default of defence and submitted that the judgment in default of defence that had been entered was wrongly entered and should be set aside ex debito justitiae. Lim Beng Choon J rejected this submission and said at pp 321-322 of his judgment:

*In considering the contention of counsel, it is my considered opinion that the letter of 20 March 1987 ... should not be read in isolation. It must be read, together with the letter of 2 March 1987 ... The last letter dated 20 March 1987 merely allowed another extension of the 21-day period by a further seven-day period to file the defence. [The defendants] had at least a total of some 28 days to file their defence ... Construed in this manner, it is to my mind idle to contend that a **further** extension of seven days for the performance of an act which should have been performed some 21 days earlier must attract the provisions of O 3 r 2(5) for the construction of such a seven-day extension. I therefore hold that O 3 r 2(5) cannot apply in the reckoning of the seven-day extension.*

Mr Divyanathan submitted that, similarly, the true construction of the settlement agreement in the present case was that RT had a period well in excess of seven days to pay the sixth instalment. He argued that whilst the sixth instalment was due on 31 January 2001, the parties had by cl 11 agreed to an extension of the due date by four days and that, in those circumstances, the provisions of O 3 r 2(5) would not be attracted.

Mr Chelva Rajah SC who appeared for RT argued that the consent judgment had provided for two separate matters in cll 6(e) and 11 respectively. Clause 6(e), he submitted, required each instalment to be paid by the last day of each calendar month. Each instalment would therefore be due by the end of the month and if RT defaulted in paying any instalment, SHE would be entitled to sue for that instalment. But cl 11, he submitted, provided for an entirely different situation. Clause 11, he submitted, did not provide for an extension of four days for the payment of each instalment. It dealt with a different matter. It gave SHE the right to call upon RT to immediately pay up the entire outstanding balance if any instalment was paid more than four days after the due date. He submitted that as the period of time prescribed under cl 11 for that right to arise was less than seven days, O 3 r 2(5) was applicable. He submitted that if Saturday and Sunday were excluded from the reckoning of time, the payment of the sixth instalment by Monday, 5 February 2001, would not attract the provisions of cl 11.

I accept that submission by Mr Rajah. The parties had specifically agreed in cl 11 of the consent judgment that SHE would be entitled to call upon RT to pay up the entire balance of the purchase price if payment of any instalment is made more than four days after the due date. As the period of default specified in the judgment for this right to arise is less than seven days, O 3 r 2(5) is attracted and any Saturday, Sunday or public holiday that fell within that period has to be excluded. The case of ***Pembinaan KSY Sdn Bhd*** (supra) relied on by SHE is distinguishable on the facts. In any event, it is relevant to note that that decision runs counter to the decision of VC George J in ***Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd*** [1989] 3 MLJ 172 .

For the above reasons, I allow the appeal with costs here and below and grant the application by RT in this originating summons that the statutory demand be set aside.

Outcome:

Appeal allowed.

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