United Overseas Bank Limited v Victor F A Fernandez
[2003] SGHC 246

Case Number : Bankruptcy Petition 2095/2003/A

Decision Date : 20 October 2003

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Victor Fernandez (in person); Low Yew Shen (Ng Chong & Hue LLC) for the creditors

Parties : United Overseas Bank Limited — Victor F A Fernandez

Insolvency Law – Bankruptcy – Petition – Appeal – Whether bankruptcy order should be set aside – Whether bank had fully complied with provisions in raising presumption that debtor was unable to pay debts-Bankruptcy Act (Cap 20) ss 62(a) and 65(3).

The background

1 United Overseas Bank Limited (the Bank) filed the above Bankruptcy Petition (the Petition) against Victor Fernandez (the debtor) for the sum of $10,885.94 for credit card charges incurred by the debtor on his Visa credit card account, on which the Bank had obtained default judgment on 20 December 2001 in the principal sum of $8.141.33. Interest on the principal sum calculated up to 4 June 2003 totalled another $2,244.61, after taking into account part-payments of $500/- made by the debtor between 27 January and 29 May, 2003.

2 After the Petition had been duly served on the debtor, the requisite affidavit of non-satisfaction filed by the Bank on 9 July 2003 and one adjournment (on 11 July 2003) of the hearing, the Petition came on for hearing before the Assistant Registrar (Thian Yee Sze) on 25 July 2003. The debtor appeared before the Assistant Registrar and when asked, admitted owing the debt. Accordingly, the Assistant Registrar granted the bankruptcy order on the Petition.

3 The debtor filed Registrar's Appeal No. 283 of 2003 (the Appeal) against and applied for, the bankruptcy order to be set aside. I heard and dismissed the Appeal. The debtor has now filed a notice of appeal (in Civil Appeal No. 96 of 2003) against my decision.

The debtor's submissions

4 Before me, the debtor essentially repeated what he had stated in his Notice of Objections to the Petition (filed on 7 July 2003). He argued that all that he needed was more time and he would be able to discharge all his debts, including the judgment sum owed to the Bank. He wanted the Bank as his other creditors had done, to wait until he received his CPF savings when he turned 55 years of age on 5 December 2003. The debtor acknowledged (as I had pointed out to him) that the Bank had no legal right to his CPF savings; nevertheless he said he intended to use those savings when received, to discharge his debts. He had given a written commitment to do so and the Bank should not have questioned his integrity and proceeded with the Petition, which would serve no useful purpose to either party.

5 The debtor pointed out that the Bank's claim was the smallest debt he owed (out of a total of $70,000) compared to what he owed three (3) other banks. His other creditors had agreed to give him time to pay and it was unreasonable of the Bank not to similarly give him time. He complained he would be giving the Bank an unfair advantage if he were to pay them now in preference to his other creditors. He submitted that technically he was not insolvent.

6 In his Notice of Objections, the debtor stated he had been unemployed since December 2000. He added he had no other assets apart from his CPF savings. He stated he was a certified public/chartered accountant and intended to focus on "*professional income seeking activities*" once he had settled with his creditors. In the interim, he offered to pay the Bank monthly instalments of $100/- each until 22 December 2003.

7 The debtor also relied on s 65(3) of the Bankruptcy Act Cap 20 (the Act) which states:

> In determining for the purpose of subsection (2)(c) whether the debtor is able to pay all his debts, the court shall take into account his contingent and prospective liabilities.

He further relied on *Re Boey Hong Khim* [1998] 3 SLR 39 and extracts from the textbook *Law & Practice of Bankruptcy in Singapore and Malaysia*.

The decision

8 I dismissed the debtor's submissions and consequently the Appeal. There were no merits to his arguments. Nothing in the circumstances of the debtor's case warranted that I should exercise my discretion in his favour and rescind the bankruptcy order which had been properly obtained by the Bank.

9 First, s 65(3) of the Act which the debtor relied on had no application whatsoever as it referred to contingent liabilities not contingent assets. He had argued that the court should equally take into account contingent assets if contingent liabilities are considered. I had pointed out to him there was no such provision to that effect in the Act. Just because his other creditors (so he claimed) had agreed to do so did not mean that the Bank was obliged to accept his proposal to pay in four (4) months' time, upon receipt of his CPF savings.

10 It was also noteworthy that apart from his bare statements, the debtor did not tender any documentary evidence to support the amount ($250,000/-) of CPF savings he claimed he would be withdrawing in December 2003, and would use to discharge his debts. Indeed, there was not even evidence he would turn 55 years of age that month. Neither did the debtor produce evidence to support his contention that other bank creditors had agreed to give him time until December 2003 to discharge their claims; there was no evidence either that his debts totalled $76,000/-.

11 I was sceptical of his proposal to pay $100/- per month to the Bank before 22 December 2003, in the light of his unemployed status, his lack of any other source of income, and his admission he had no assets other than his CPF savings. In addition, counsel for the Bank informed the court that in the past, the debtor had been given time to pay but, he failed to abide by his instalment payments even when the proposal was only for him to pay $200/- per month for 6 months. The debtor had also written to the bank's solicitors on 26 February 2003 to say he was financially unable to pay for the time being. Consequently, he could not rely on the following paragraph (at p 82) from the textbook *Law & Practice of Bankruptcy in Malaysia and Singapore*:-

> The fact that a bankruptcy petition reflects the debtor's inability to pay does not automatically lead to bankruptcy. The presumption under section 62 is rebuttable and section 65(2)(c) states that the court may dismiss the bankruptcy petition if satisfied that the debtor is able to pay all his debts. Further, the court has the discretion to adjourn bankruptcy proceedings to give the debtor a reasonable time to settle his debts owing to the petitioning creditor.

as he had provided no basis whatsoever for the court to exercise any discretion in his favour, by

adjourning or dismissing the Petition.

12 The debtor's citation of holdings 2 and 3 in *Re Boey Hong Khim ex-parte Medical Equipment Credit Pte Ltd* were equally misconceived; this can be seen from the headnotes of the case (up to holding no. 3) which read as follows:-

> The appellant creditors presented a petition against the respondent debtor (and another petition against the wife of the debtor, as a guarantor of the debtor) following the breakdown of a voluntary arrangement which the debtor had entered into with the creditors.
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> The petition alleged that the debtor had failed to comply with their obligations under the voluntary arrangement in that he (a) no longer intended to sell the property; (b) disputed and no longer intended to pay in full the debts due and owing to the petitioning creditors; (c) was making or intended to make individual arrangements with some or all of his creditors.
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> The petition was not served on the debtor despite the respondent's solicitors' request. The petitioner's solicitors had advisedly refused to do so as they took the view that it was not necessary to serve a petition founded, as they contended, on a failure to comply with a voluntary arrangement. The respondent, though not served, filed under protest a notice of objection. Both the petitions were dismissed by the Assistant Registrar. The appellant creditors appealed.
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> Held, dismissing the appeals:-
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> (1) It was clear on the fact of the petition that the petitioning creditors had merely reproduced word for word the conditions for the presentation of a petition set out in s 60 (relating to domicile and place of business) and s 61 (relating to debt and the debtor's inability to pay the debt) of the Bankruptcy Act (Cap 20) and stated that the conditions had not been satisfied. No effort had been made to relate these general statutory provisions to the facts of the case. The most glaring example was in relation to the amount of the debt. The amount alleged to be owing was not stated, let alone the other details required by r 101 of the Bankruptcy Rules 1995. The petitioning creditors had also not explained how ss 60 and 61 had been satisfied as they were clearly required to do by r 104;
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> (2) Inability to pay debts was a fundamental requirement for the presentation of a bankruptcy petition……It was therefore incumbent on the creditor in a creditor's petition to support his allegation that the debtor was unable to pay his debts……
>
> (3) The petitioning creditor could not therefore short-circuit the requirement of proof of inability to pay debts by a bare allegation. This was precisely what the petitioning creditors have done in this case. They have not relied on the debtor's inability to pay the debt……

The creditors' appeals against Khoo J's decision were dismissed by the Court of Appeal (see *Medical Equipment Credit Pte Ltd v Sim Kiok Lan Alice & Anor Appeal* [1999] 1 SLR 70).

13 It was clear from the above headnotes that the Petition of the Bank did not suffer from any of the deficiencies of the petitions presented by the creditors against Dr Boey and his wife in Bankruptcy Nos. 1644 and 1645 of 1997 respectively. The Bank had fully complied with the provisions of the Act in particular, in raising the presumption under s 62(a) that the debtor was unable to pay his debts. The section states:

> For the purposes of a creditor's petition, a debtor shall, until he proves to the contrary, be presumed to be unable to pay any debt within the meaning of section 61(1)(c) if the debt is immediately payable and —
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> (a) (i) the petitioning creditor to whom the debt is owed has served on him in the prescribed manner, a statutory demand;
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> (ii) at least 21 days have elapsed since the statutory demand was served: and
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> (iii) the debtor has neither complied with it nor applied to the court to set it aside.

14 The Bank further stated in the Petition that there had been compliance with s 62 of the Act in that, the statutory demand was served on the debtor on 29 March 2003, 21 days had lapsed since that day, the debtor had neither complied with the statutory demand nor set it aside, no application to set it aside was outstanding and, there was no stay of execution in respect of the judgment sum. The Petition complied with r 101 of the Bankruptcy Rules (2002 ed) by identifying and setting out full particulars of the judgment debt, including the computation of interest.

15 Another extract from *Law & Practice of Bankruptcy in Singapore and Malaysia* which the debtor relied on could not assist him. He had relied on this passage (at p 82):

> The inability of the debtor to pay his debts 'may be proved by reference to the assets and liabilities of the debtor'. In practice, however, it would often be far easier to prove his inability to pay by relying on a presumption since matters relating to the asset and liability position of the debtor are often matters primarily within the knowledge of the debtor.

The above extract cited Khoo J's as well as the Court of Appeal's decisions in *Boey Hong Khim's* case, for the meaning of inability to pay debts under s 62 of the Act. However, in the light of his admission of liability (before the Assistant Registrar on 25 July 2003) for the debt stated in the Petition and his proposal to pay the same towards the year end, it did not lie in the debtor's mouth to dispute his liability, nor could he rebut the presumption that he was unable to pay, under s 62 of the Act. Equally, it was too late in the day for him to contest the rate of interest (at 2% per month or 24% per annum) charged by the Bank on the original outstanding debt. Had he checked the terms and conditions set out in his agreement with the Bank at the time the Visa credit card was issued to him, the debtor would have known that it was the agreed contractual rate.

16 Consequently, I was unable to accept the debtor's argument relying on *Boey Hong Khim's* case, that the Bank had not proved the debt as well as, his inability to pay the same. Hence, I dismissed the Appeal.