IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1995] SGHC 269

Suit 1953/1993, WSS 104/1995

Between

United Overseas Bank Ltd

… *Plaintiff*

And

Promotion & Sales Centre Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Civil Procedure — Judgments and orders; Credit and Security — Remedies — Writs of seizure and sale; Provident Fund — Contributions — Arrears

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United Overseas Bank Ltd v Promotion & Sales Centre Pte Ltd and Others

[1995] SGHC 269

Suit 1953/1993, WSS 104/1995
Choo Han Teck JC
11 November 1995

1 The primary facts are not in dispute. United Overseas Bank Ltd (UOB) granted a factoring facility to Promotion & Sales Centre Pte Ltd (the judgment debtor). They are secured creditors with a fixed charge over the machinery and equipment of the judgment debtor. On 4 November 1993 UOB entered judgment against the judgment debtor in the sum of S$102,019.96. On 5 April 1995 UOB applied to levy execution of the judgment debt by way of a writ of seizure and sale. The machinery belonging to the judgment creditor (as charged to UOB) were seized and sold by the Sheriff on 18 April 1995 and 9 May 1995 with a net proceeds of S$28,918.30. The Central Provident Fund Board (the Board) lodged a claim on 9 May 1995. UOB admitted the Board`s claim on 17 May 1995 as judgment creditors which they were bound to do under s 68(1) of the Central Provident Fund Act (the CPF Act). However, on 20 May 1995 UOB lodged their claim as secured creditors.

2 It is not disputed that the Board`s claim is founded on s 68(1) of the CPF Act alone. Section 68(1) states:

> *Whenever a writ of seizure and sale has been issued in execution of a judgment against an employer and any movable or*

> *immovable property or other assets belonging to the employer has been seized or sold or otherwise realised in pursuance of the execution, and, prior to the payment of the proceeds of the sale or other realisation to an execution creditor, notice has been given to the Sheriff or other officer charged with the execution of the writ by the Board that any sum is due to the Fund, no part of the proceeds shall be paid to an execution creditor, unless the court issuing the writ has ascertained and provided for the sum due to the Fund at the date of the sale or other realisation.*

3 The Board does not have a prior right over a secured creditor or anybody else prior to the Sheriff`s sale. The issue on the facts in the instant case is whether UOB, having doffed the hat of a secured creditor and donned the hat of a judgment creditor can, now that the Board has stated its claim under s 68(1), change hats again.

4 Mr Chew Swee Leng, counsel for the Board, argued that UOB has lost their status and rights as secured creditors when they seized the machinery and sold them as the goods of a judgment debtor. They had made an election to proceed as a judgment creditor and not as a secured creditor. The process by which the latter realizes its security is by way of a mortgagee sale which is a different process and imposes different obligations on the creditor. He also argued that UOB is estopped from claiming its rights as a secured creditor. I do not think that estoppel is a valid ground. There was no express representation by UOB to the Board that they will not proceed as secured creditors and the Board`s claim was not actuated by any such representation but solely on the basis of their statutory right under s 68(1).

5 Mr Chee Chi Meng, counsel for UOB, argued that the UOB as a secured creditor had a number of options and, on the established authorities, is entitled to pursue any or all the remedies available to it. He relied on ***Gordon Grant & Co v Boos*** where the House of Lords held that a mortgagee who has obtained

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an order for sale is not precluded from suing the mortgagor upon his personal covenant in the mortgage for the difference between the sum due under the mortgage and the proceeds of the sale. In this case the creditor had separate and distinct rights. One was against the mortgaged property and the other against the mortgagor personally. UOB`s position in this case is different. It had separate and distinct rights over the same property, and the property can be dealt with only once. Section 68(1) says no more than that before any sum of money from the proceeds of a sale is paid to an execution creditor any sum due to the Fund must first be satisfied. The emphasis is on `execution creditor`. It appears that the legislature did not intend that the right of a secured creditor should be affected. However, a secured creditor is only entitled to exercise its right to a mortgagee sale or, when it has asserted its rights as a secured creditor, be entitled in priority over unsecured creditors upon the realization of the assets of the debtor. In the instant case, UOB neither proceeded with a mortgagee sale nor asserted its rights as a secured creditor in any way. It is not disputed by Mr Chew that had UOB asserted their rights prior to the sale, the Board would have no basis for a claim on the sale proceeds. Counsel are unable to refer to any authority for the proposition that a secured creditor may intervene as such after the security has been sold. In ***Re Opera Ltd*** [1891] 3 Ch 261 Lindley LJ said (at p 263):

> *[A]fter the decision in* ***Re Standard Manufacturing Co****, it seems tolerably plain and settled that the rights of the holders of debentures must prevail even as against the execution creditor, at least before the sale. What the position of the debenture holders is after the property is sold and the money handed over, I do not know, and I will not say at the moment.*

6 A mortgagee`s sale and a sale by the Sheriff under a writ of seizure and sale are distinct and alternative processes. A secured creditor is not precluded from pursuing the debtor by way of a Sheriff`s sale over other assets of the

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judgment debtor if the security he had obtained was inadequate. However, once he embarks on this process he must be subject to the rules and principles regulating it. The opening word of s 68(1), `whenever`, underlines the mandatory application of this provision once a writ of seizure and sale has been issued in execution of a judgment. The doctrine of election applies in this case. UOB had alternative rights. It is not the same right claimed in a larger degree. In ***Lissenden v CAV Bosch Ltd*** [1940] AC 412, Lord Atkin said at p 429 (see also Lord Wright at p 436):

> *In cases where the doctrine does apply the person concerned has the choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one he cannot afterwards assert the other.*

7 On the facts, that case clearly did not justify the application of the doctrine of election, but the doctrine would indeed apply to a case such as the instant one before me. UOB had chosen to forgo its right to a mortgagee sale and instead, proceeded as a judgment creditor. They cannot reap the benefits that this course gives them and at the same time ask that they be shielded from any consequences adverse to them that may arise from that course. This is not a case where the plaintiff is not fully satisfied by a particular remedy and seeks to complete his satisfaction through an alternative remedy. UOB had made a choice which they cannot now resile. They had abandoned the one course and chose the other. It is impossible for them to undertake a mortgagee sale now that the machinery charged had been sold by the Sheriff under a writ of seizure and sale. The security is gone and UOB is, in my view, no longer a secured creditor. Their security was despatched by their own act through the process of the execution of a judgment debt. They are, today, a judgment creditor simpliciter. Section 68(1) of the Central Provident Fund Act (Cap 36) applies

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and the sum due to the Fund at the date of sale must be paid to the Board from the net sale proceeds.

8 CPF Board`s claim allowed.

Choo Han Teck JC

Chee Chi Meng, Alvin Yeo and Tan Pei Fong (Wong Partnership) for the plaintiff
Chew Swee Leng (Cooma Lau and Loh) for the Central Provident Fund Board

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