Jeyaretnam Joshua Benjamin v Indra Krishnan
[2004] SGCA 55

Case Number : CA 40/2004

Decision Date : 25 November 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; MPH Rubin J; Yong Pung How CJ

Counsel Name(s) : Appellant in person; Davinder Singh SC and Hri Kumar (Drew and Napier LLC) for the respondent; Ashok Kumar and Foo Hsiang Ming (Allen and Gledhill) for the first and eleventh creditors; Sarjit Singh (Official Assignee), Chan Wang Ho and Moey Weng Foo (Insolvency and Public Trustee's Office) for the Official Assignee

Parties : Jeyaretnam Joshua Benjamin — Indra Krishnan

Insolvency Law – Bankruptcy – Bankrupt's duties and liabilities – Bankrupt's duty to disclose all assets – Bankrupt's duty to co-operate with Official Assignee – Section 129 Bankruptcy Act (Cap 20, 2000 Rev Ed)

Insolvency Law – Bankruptcy – Bankruptcy effects – Creditors and Official Assignee opposing bankrupt's application for discharge from bankruptcy – Administration of bankrupt's estate incomplete – Whether court should exercise discretion to grant discharge – Section 124 Bankruptcy Act (Cap 20, 2000 Rev Ed)

Insolvency Law – Bankruptcy – Bankruptcy effects – Creditors and Official Assignee opposing bankrupt's application for discharge from bankruptcy – Bankrupt's dishonesty and lack of co-operation with Official Assignee considered – Whether court should grant bankrupt conditional discharge

25 November 2004 *Judgment reserved.*

Chao Hick Tin JA (delivering the judgment of the court):

1 This is an appeal against the decision of the High Court in *Re Jeyaretnam Joshua Benjamin, ex parte Indra Krishnan (No 2)* [2004] 3 SLR 133 refusing the appellant's application for his discharge from bankruptcy. The matter first came before the assistant registrar who denied his request and it went on appeal to a judge in chambers. Having failed before Choo Han Teck J, the application is now before this court. We heard the parties on 26 October 2004 and this is our reserved judgment.

The background

2 The appellant was adjudicated a bankrupt on 19 January 2001. Before the bankruptcy order was made, he was allowed by his petitioning creditors to pay his debts by instalments. As he had failed to keep up with his promise to pay by instalments, the creditors proceeded with the bankruptcy petition.

3 Fifteen creditors have filed proofs of debts against the appellant which in total came up to $618,205.51. Most of these debts arose from damages awarded against him in three libel suits brought by the creditors.

4 In January 2004, about three years after the making of the bankruptcy order, the appellant informed the Official Assignee ("OA") that he proposed to apply to court for a discharge from bankruptcy as he intended to make a composition offer of 20% of his proved debts to his creditors. The OA informed the appellant that in view of certain ongoing suits in which the appellant was

involved in Singapore, as well as an action in Malaysia relating to a property in Johor which was in the name of his late sister, and as his assets had not been fully realised, the OA could not support his application for a discharge. Notwithstanding this negative intimation, the appellant proceeded to file an application for his discharge.

5 Having failed before the assistant registrar, the appellant raised his composition to 25% when the matter came before the High Court. At the hearing, the appellant also made the assertion that the creditors were not really serious in wanting to recover the debts owed to them and that their real reason for opposing his discharge was political, which was to prevent him from taking part in Parliamentary elections. A bankrupt is not qualified to run for election. Choo J refused the appellant a discharge on the following grounds:

(a) The administration of the appellant's estate had not yet been completed;

(b) In view of the appellant's claim to his late sister's property in Johor, it would not be fair to the creditors if the bankruptcy order was to be so discharged;

(c) In the circumstances and bearing in mind that only three years had elapsed since the making of the bankruptcy order, to discharge the order at this time would be premature.

Issues on appeal

6 Before us, the bulk of the arguments by the appellant, who appeared in person, centred on his contention that the eight creditors who petitioned for his bankruptcy, as well as other creditors, were resisting his present application for a discharge on political grounds and that they had an agenda which was outside the scope of these proceedings. Having regard to the offer which he had made, the appellant argued that the court should, in the exercise of its discretion, grant the discharge as under his offer, each creditor would be paid a reasonable proportion of the debt owed by the appellant to that creditor. There would be no advantage to the creditors in making the appellant wait any more for his discharge. Moreover, he was now prepared to enhance his offer from a quarter to one-third of the proved debts. He told this court that funds to meet this offer would come from relatives and friends who would be helping him to gain his discharge.

Statutory regime for discharge

7 It is clear to us that the main reason why Choo J refused the application was because the administration of the bankrupt's estate had not yet been completed. This was also the basis upon which the OA was unable to support the application for a discharge, besides the fact that the appellant has been most uncooperative. The appellant has not challenged the fact that the administration of his affairs is not yet completed. What the appellant seems to be suggesting is that, notwithstanding the state of the administration, as he has made a reasonable offer to pay a part of the proved debts, that *per se* should be a sufficient ground to grant him a discharge. Moreover, the creditors have a political agenda in opposing his application.

8 The statutory provisions which govern the discharge of a bankrupt are contained in s 124 of the Bankruptcy Act (Cap 20, 2000 Rev Ed) ("the Act"). Subsection (1) provides that an application for a discharge may be made "at any time". Subsection (2) provides that before making an order of discharge, the court should hear the OA and the creditors. Subsection (3) reads:

Subject to subsection (4) on an application under this section, the court may —

(a) refuse to discharge the bankrupt from bankruptcy;

(b) make an order discharging him absolutely; or

(c) make an order discharging him subject to such conditions as it thinks fit to impose, including conditions with respect to —

(i) any income which may be subsequently

due to him; or

(ii) any property devolving upon him, or acquired by him, after his discharge,

as may be specified in the order.

Subsection (4) reads:

Where the bankrupt has committed an offence under this Act … or upon proof of any of the facts mentioned in subsection (5), the court shall —

(a) refuse to discharge the bankrupt from bankruptcy;

(b) make an order discharging him subject to his paying a dividend to his creditors of not less than 25% or to the payment of any income which may be subsequently due to him or with respect to property devolving upon him, or acquired by him, after his discharge, as may be specified in the order and to such other conditions as the court may think fit to impose; or

(c) if it is satisfied that the bankrupt is unable to fulfil any condition specified in paragraph (b) and if it thinks fit, make an order discharging the bankrupt subject to such conditions as the court may think fit to impose.

9 It is clear that under the regime as set out in s 124, it is entirely a matter for the court, in the exercise of its discretion, no doubt to be exercised judicially, and taking into account all the circumstances of the case, whether to make an order of discharge. While subsection (3) is subject to subsection (4), it is clear that the court may still refuse a discharge where subsection (4) does not apply. Where the factors mentioned in subsections (4) and (5) come into play, the court is prevented from granting an absolute discharge.

10 A local case which dealt extensively with the question of the exercise of such a discretion is *Re Siah Ooi Choe* [1998] 1 SLR 903. In that case, Siah, an entrepreneur and a self-made man of a large group of companies, fell into difficult times during the economic crisis which confronted Singapore in 1985–1986. The banks and financial institutions came down on him as he had given personal guarantees for the loans offered to his companies. His empire collapsed and he was made a bankrupt in September 1986, with proofs of debts amounting to some $125m. From January 1992, he began working as a business consultant earning $3,200 a month and made contributions to his bankrupt estate account. More than ten years later, he applied to have his bankruptcy discharged. Nine of the creditors, representing about half of the total indebtedness, objected to his application. The High Court upheld the assistant registrar's decision to grant Siah a discharge from bankruptcy. Warren L H Khoo J, in reviewing the objects of the statutory provisions, identified two major conflicting concerns that were embodied in s 124. On the one hand, businessmen who became

insolvent through being caught at the wrong turning of the economic cycle should be given a second chance in life. On the other hand, the provisions should not be allowed to be used by dishonest individuals who would get an undeserved advantage, to the detriment of their creditors, from their own wrongdoings. In exercising his discretion in favour of the applicant there, the judge had regard to the following:

(a) Siah had been in bankruptcy for more than ten years;

(b) he had co-operated fully with the OA;

(c) he had conducted himself in an exemplary manner and had paid a respectable amount every month from his small income to the estate account; and

(d) he had agreed to sell off his only asset, an Housng and Development Board flat, and pay the net proceeds to the OA.

11 Khoo J also noted at [17] that "except in very exceptional circumstances, the minimum waiting time for s 124 cases should be at least similar to that for s 125 cases" and that it should probably be longer. A s 125 discharge, which is by a certificate of the OA, involves an estate where the total debts proved do not exceed $500,000 and a period of three years has elapsed since the making of the bankruptcy order.

Political purpose

12 Before we move on to consider the substantive points raised by the OA to oppose the appellant's discharge at this stage, we would like to briefly address the contention of the appellant that the creditors opposed his discharge because they have a political agenda, a purpose which would amount to an abuse of the court's process. We would reiterate that in considering the question as to whether a bankruptcy order should be discharged, the court should be guided by the letter and the spirit of the law. Indeed, that was precisely the way the judge below dealt with this point at [4]:

> The appellant charged that the creditors' only reason for objecting to his application was a political one, namely to prevent his return to Parliament. In reply, Mr Davinder Singh disagreed and contended that it was the dishonesty of the appellant that required his application to be dismissed. The appellant submitted that had this application been made by anyone else it would not have been objected to by the creditors or the OA. That is a hypothetical point which I take the appellant to have made for purposes of emphasis only. But, in determining the merits of this appeal, the court will have to make its decision as if the appellant had been anybody else, and *vice versa*, as if the creditors had been some other creditors.

13 The cases cited by the appellant in this regard, namely, *In re Majory, A Debtor* [1955] Ch 600, *Re Laserworks Computer Services Inc* (1998) 78 ACWS (3d) 19, *In re Davies* (1876) 3 Ch D 461 and *In re Adams* (1879) 12 Ch D 480, are all cases where the issue was whether the grant of a bankruptcy petition would be an abuse of process, which is not the question here. The principle established in these cases is not in dispute and to the extent that an abuse of process would be a ground to refuse the making of a bankruptcy order, it must follow that if a creditor's objection to a discharge is based on a ground which constitutes an abuse of process, the court should have no regard whatsoever to that objection. From the passage of the judge below which we have just quoted, it is clear that he totally disregarded the irrelevant extraneous factors. He had regard only to the objective facts in coming to his determination. This is the area to which we now turn.

Our consideration

14 In relation to the present application, the OA listed the following three circumstances as being germane:

(a) whether the administration of the bankrupt's affairs by the OA is complete and whether the bankrupt's discharge will prejudice the administration of his estate;

(b) whether the bankrupt is able to make a significant contribution to his estate; and

(c) whether the bankrupt has co-operated with the OA in the administration of his estate and whether there are any matters arising out of his conduct which are still being investigated by the OA.

15 We will first look at the state of the administration of the appellant's estate. According to the report of the OA, the appellant is staking a claim to a property owned by his late sister, Emily Thanapakian ("Emily") at No 50A, Jalan Abdul Samad, 801000 Johor Baru ("the JB property"). Emily passed away on 2 September 1997. The appellant is also involved in two legal actions in Singapore where he claims for sums due to him from third parties and those two actions are still pending.

16 The appellant did not inform the OA of his interest in Emily's estate or his claim on the JB property. The OA's knowledge of this came about from information received by the OA from others. Indeed, after Emily's death, the appellant, through his Malaysian lawyers, filed a petition for letters of administration to the estate of Emily to be granted to him. In the petition, the JB property was referred to as a part of Emily's estate. Later, the appellant amended his petition to exclude the JB property from Emily's estate on the ground that although the property was in Emily's name, she was actually holding it in trust for the appellant. In May 2001, the appellant was granted letters of administration to Emily's estate based on the amended petition.

17 In July 2001, the OA instructed Malaysian solicitors to lodge a caveat against the JB property on his behalf. In December 2001, one Robert Henry ("Robert"), a nephew of the appellant, and a son of Emily, wrote through his solicitors to inform the OA that he would be instituting an action to determine the interest of the various beneficiaries to the JB property.

18 Notwithstanding the claim to the JB property made by Robert, the appellant stated in his affidavit of 20 April 2004 that no proceedings had yet been instituted. The appellant also alleged that even if proceedings were commenced, the Malaysian courts would "take a very long time" to conclude the proceedings.

19 In the light of the foregoing, it is beyond dispute that the administration of the appellant's estate is far from complete. The JB property was estimated, as at 31 July 2004, to have a value of RM750,000 (approximately S$328,000).

20 If the JB property is eventually ruled by the Malaysian courts as belonging beneficially to the appellant, then that will certainly contribute significantly towards the estate. In this eventuality, the creditors would not only be able to get repayment of just one quarter or one-third, but more than half of the debts owing to them.

21 In his statement of affairs, filed on 3 April 2001, which was subsequently amended thrice, the appellant did not once mention his interest in the JB property. Instead, in the present proceedings, he sought to put the blame for the non-disclosure on the OA. Like the OA, we do not see how the OA

can be faulted for this when it is clearly the obligation of a bankrupt to disclose all his assets: see s 129 of the Act. The OA also pointed out that even when the appellant filed the present application for a discharge, he did not come clean. He stated in his affidavit that:

> I have, in my statement of affairs lodged with the Official Assignee disclosed that I have no assets from which payment of the debts can be realised.

22 The OA also referred to a specific incident to show how the appellant not only refused to assist the OA in getting in the assets, but deliberately took a position to make it difficult for the OA to get assets due to the appellant. Upon learning that the appellant was entitled to RM9,275.33 from Emily's estate, and that the money was available for distribution, the appellant's Malaysian solicitors refused to forward the same to the OA and instead required the OA to get an order from the Malaysian courts pursuant to s 104 of the Malaysian Bankruptcy Act. The appellant could have just handed the money over to the OA, or instructed his Malaysian solicitors to do so, without requiring the additional formality, which would mean incurring further legal costs. After all, the sum in question was small.

23 The OA appeared in person before us at the hearing of this appeal. He did not mince his words when he said that this was one of the "most dishonest bankrupt" he had encountered. It was clear that the appellant extended no
co-operation to the OA.

24 The OA, moreover, pointed out that by the appellant's persistent non-cooperation and non-disclosure, the appellant has probably committed an offence under ss 134 and 135 of the Act. In addition, his non-disclosure is a material omission relating to his affairs, a breach of s 137(a) of the Act.

25 The crux of the appellant's case in this appeal is that the creditors would not agree to his discharge because of political reasons. He failed to address the specific grounds set out by the OA as to why a discharge at this time would not be appropriate. As can be seen from the statutory provisions cited above, a bankrupt is not entitled to demand his discharge just because a period of time has elapsed since he was made a bankrupt or he has made an offer to pay a portion of the proved debts. The court must consider all the circumstances, including the conduct of the bankrupt and the state of the administration of the estate, to determine whether it is just to order his discharge from bankruptcy. In this exercise, the court should not only take into account the interests of the bankrupt but also those of his creditors. We do not for a moment say that there can be no discharge unless administration is completed. But completion of administration of the bankrupt's estate is certainly an important factor. Here, we would refer to *Totterdell v Nelson* (1990) 97 ALR 341 where Morling J (at 344) quoted with approval a passage from an unreported decision of Burchett J of the Federal Court of Australia dated 27 June 1986 in *Re Weiss; Ex parte Official Trustee in Bankruptcy*, as follows:

> There may be cases where it would be unfair to a bankrupt to delay his discharge by reason of an incomplete investigation, lethargically pursued, to the torpor of which he has not contributed. But no such unfairness may appear where there has been concealment or lack of cooperation on his own part.

26 Given the appellant's lack of co-operation thus far, the OA's expression of concern, that he might not receive any co-operation or assistance from the appellant, if the latter were to be discharged from that state, is not without some valid foundation. The appellant claimed that he had paid for the JB property and that was the basis of his claim as the beneficial owner thereof. His

assistance is vital to establishing that claim. Section 152 of the Act and s 104 of the Malaysian Bankruptcy Act provide for the reciprocal recognition of OAs of both countries. The Malaysian section also recognises the title of the Singapore OA in relation to a property, situated in Malaysia, belonging to a bankrupt of Singapore. If the appellant here were to be discharged from bankruptcy, even subject to conditions, there may be difficulties in the OA pursuing the appellant's claim to the JB property.

27 All said, the appellant's main concern is that the Malaysian proceedings will take some time to come to a conclusion and that will delay his discharge. We are unable to see how this can be a good ground for a discharge when the administration is clearly incomplete and only three years have elapsed since the making of the order. The following comment of the OA is entirely apt:

> The getting in, administration and distribution of a bankrupt's estate is often a long and intricate task and the task of administration and realisation is made more difficult and protracted where realisation of assets as in this case are overseas involving complex cross-border issues and litigation.

28 Here, as the OA so very strongly pointed out, the appellant has not been co-operative. Under the law, he is obliged to disclose and assist the OA in collating his assets and realising them. A bankrupt seeking discharge from bankruptcy is expected to give up everything that he has. This point was clearly enunciated by Vaughan Williams LJ in *In re Gaskell* [1904] 2 KB 478 at 482 as follows:

> [T]he overriding intention of the Legislature in all Bankruptcy Acts is that the debtor on giving up the whole of his property shall be a free man again, able to earn his livelihood, and having the ordinary inducements to industry.

The OA quite clearly stated in his report that "there are still substantial and material work to be completed in the administration of the bankrupt's estate".

29 It seems to us clear that the appellant's only purpose in seeking an early discharge is so that he can contest the next Parliamentary elections. But he has failed to adequately address the grounds upon which the OA does not support his application. Instead, he has expressed his displeasure with the OA's administration of his estate. He said that although the OA has known of the appellant's claim to the JB property since 2001, he has not taken any action to administer the property in the past three years. As we have already pointed out, the appellant's full co-operation is necessary before the OA can properly carry out his job of administration. Since the appellant claims that he paid for the JB property, the OA can only make the claim on the appellant's behalf if the appellant provides him with the full facts and all necessary documentary evidence.

30 Having regard to all that has been alluded to before, it is really early days to talk of a discharge. We will also note that the appellant does not help himself by the stance he has taken, consisting of non-cooperation and concealment. In this connection, we are reminded of the words of Lockhart J of the Federal Court of Australia in *Re Harding* (1981) 57 FLR 320 at 337:

> [T]he bankrupt's conduct, in particular since his bankruptcy, has been such that before he can obtain a discharge, he must show that he is worthy of it. He must make amends by doing what he can to help his creditors. He has the capacity to do so. Doubtless this will mean that he should conduct his affairs in the future so as to make available some of his real income to his creditors. … [H]e must demonstrate before he seeks a discharge again that he has acted reasonably to assist his creditors.

31 There is hardly any basis for us to differ from the judge below when the latter pointed out that the OA is in the best position to monitor the situation and assess the amount which can be paid out to the appellant's creditors. This was an exercise of a discretion which an appellate court should not interfere with unless the court below had misdirected itself on the law or taken into account irrelevant matters or failed to take into account relevant matters or had come to a conclusion which was plainly wrong: see *Re Reed* [1979] 2 All ER 22 at 25 *per* Goulding J and *The Vishva Apurva* [1992] 2 SLR 175.

32 Finally, we ought to refer to one other factor which the appellant has raised, which is his age. He is now 79 years old. In *Re Mallan* (1975) 6 ALR 161, where the person became a bankrupt because of his improper business practices, and was a bankrupt for ten years, the court took into account his age, which was 75, in granting a discharge on the condition that he did not return to business. From the case report it did not appear that the administration of the bankrupt's estate was incomplete. We recognise that age is a factor, but it is no more than a factor which ought to be weighed with the other factors, including the opposing factors, to see where the balance lies. The judge below did take the age of the appellant into account.

Conditional discharge

33 In the alternative, the appellant asked for a conditional discharge. He has also asked rhetorically that if an offer to pay one-third of the debts was not good enough, how much would suffice. We have set out above what stood in the way of the appellant's application. A conditional discharge would have to be premised on the appellant's good faith in fulfilling the condition imposed. In view of the appellant's conduct thus far, it is perhaps not difficult to understand why the creditors and the OA do not think that the circumstances warrant even a conditional discharge. He must help himself in order that others, including the court, can help him. Having regard to the state of affairs, a discharge at this time, whether absolute or conditional, would be unwarranted and premature.

34 The appellant claimed to be entitled to the JB property. If the equivalent value of the property could be brought into the bankruptcy estate, through perhaps the help of relatives or friends (see [6] above), that would go a long way toward overcoming a major obstacle. It would also assist the appellant's case if he would give an undertaking (which he has through his solicitors indicated that he would) to turn over to the OA all sums received from the defendants in the two legal actions he has commenced in Singapore, should judgment be given in his favour.

Conclusion

35 In the premises, there is no basis for us to overturn the decision of the court below. The judge had not erred on a matter of principle and neither had he taken into account irrelevant considerations or failed to take into account relevant considerations. His decision is amply justified. Accordingly, this appeal is dismissed with costs, with the usual consequential orders.

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