IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 274

Originating Application No 165 of 2022

Between

Abuthahir s/o Abdul Gafoor
(as private trustee in
bankruptcy of Aparna Donti)

… *Claimant*

And

Bangkok Bank Public Co Ltd

… *Defendant*

And

(1) Oversea-Chinese Banking
Corp Ltd
(2) Indian Overseas Bank

… *Non-parties*

GROUNDS OF DECISION

[Insolvency Law — Bankruptcy — Bankruptcy effects — Effect of bankruptcy on antecedent transactions]

Version No 1: 31 Oct 2022 (16:49 hrs)

TABLE OF CONTENTS

INTRODUCTION **1**

FACTS **2**

THE FUNDING AGREEMENT **5**

THE ISSUES RELATING TO THE SURPLUS PROCEEDS **5**

WHEN WAS THE DEFENDANT'S EXECUTION AGAINST APARNA'S INTEREST IN THE PROPERTY COMPLETED **7**

WHETHER S 367(1) OR S 368(4) OF THE IRDA APPLIED IN THIS CASE **9**

CONCLUSION **11**

Version No 1: 31 Oct 2022 (16:49 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Abuthahir s/o Abdul Gafoor (as private trustee in bankruptcy of Aparna Donti)
v
Bangkok Bank Public Co Ltd (Oversea-Chinese Banking Corp Ltd and another, non-parties)

[2022] SGHC 274

General Division of the High Court — Originating Application No 165 of 2022
Chua Lee Ming J
10 August, 12 September 2022

31 October 2022

Chua Lee Ming J:

Introduction

1 These proceedings concerned a bankrupt's share of the surplus proceeds from a mortgagee's sale of a property of which the bankrupt was a joint owner. The dispute was over who had a prior right to the bankrupt's share of the surplus proceeds. The contest was between the bankrupt's estate and a judgment creditor who had registered an order of court attaching the bankrupt's interest in the property and issued a writ of seizure and sale.

2 The bankrupt in question was Mdm Aparna Donti ("Aparna"). The claimant in these proceedings was Mr Abuthahir s/o Abdul Gafoor, the private

trustee in bankruptcy (the "Private Trustee") of the estate of Aparna Donti (the "Estate").

3 The defendant, Bangkok Bank Public Co Ltd, a judgment creditor of Aparna, had attached Aparna's interest in a property in Singapore at 5A Shenton Way #09-23 (the "Property") and issued a writ of seizure and sale.

4 Two other creditors of Aparna – Oversea-Chinese Banking Corp Ltd ("OCBC") and Indian Overseas Bank ("IOB") – participated in these proceedings.

5 For reasons set out below, I decided in favour of the defendant.

Facts

6 Aparna and her husband, Mr Thanikesh Aravindan ("Thanikesh") jointly owned the Property. They also owned a company called Straits Global Pte Ltd ("Straits Global"). Both of them were co-guarantors in respect of credit facilities granted to Straits Global by several banks, including the defendant.

7 Straits Global was unable to repay the loans and was wound up on 7 August 2020. Thanikesh was adjudged a bankrupt on 1 October 2020.

8 On 5 February 2021, the defendant entered judgment in default of appearance against Aparna in the sum of US$2,364,330.50 (the "Judgment").

9 In April 2021, the mortgagee of the Property, Standard Chartered Bank (Singapore) Ltd ("SCB"), repossessed the Property.

Version No 1: 31 Oct 2022 (16:49 hrs)

10 On 22 April 2021, the defendant obtained an order of court for Aparna's interest in the Property to be attached and taken in execution to satisfy the Judgment (the "Attachment Order").

11 On 14 May 2021, the Attachment Order was registered with the Singapore Land Authority. On 8 June 2021, the defendant issued a writ of seizure and sale in respect of Aparna's interest in the Property (the "WSS"). Subsequently, the defendant's solicitors informed the Sheriff that the mortgagee (SCB) had taken steps to sell the Property. At the defendant's request, the Sheriff took no further steps on the WSS.

12 On 5 July 2021, OCBC commenced bankruptcy proceedings against Aparna. On 13 July 2021, the defendant's solicitors informed OCBC's solicitors that (a) Aparna's interest in the Property had been attached and taken in execution; (b) the Attachment Order was registered with the Registrar of Land Titles on 14 May 2021; and (c) the defendant had requested SCB's solicitors to pay the surplus proceeds from the sale of the Property to the Sheriff.

13 On 9 September 2021, Aparna was adjudged a bankrupt.

14 On 14 September 2021, OCBC's solicitors informed the Sheriff that:

(a) a bankruptcy order had been made against Aparna; and

(b) pursuant to s 368(4) of the Insolvency, Restructuring and Dissolution Act 2018 (No 40 of 2018) ("IRDA"), the surplus proceeds should be paid to the Private Trustee.

15 On 23 September 2021, the Sheriff wrote to the Private Trustee, saying that:

Version No 1: 31 Oct 2022 (16:49 hrs)

> The [Property] was seized on 6-May-2021 pursuant to the [WSS].
>
> 2. As we are now made aware that [Aparna] is adjundged [*sic*] bankrupt … the seized property is handed over to you for administration.

16 On 27 September 2021, the defendant's solicitors wrote to the Sheriff, stating, among other things, that:

(a) the defendant's execution against Aparna's interest in the Property was deemed to have been completed before Aparna was adjudged a bankrupt; and

(b) pursuant to s 367 of the IRDA, the defendant was entitled to retain the surplus proceeds against the Private Trustee.

17 On 14 January 2022, the Sheriff informed the Private Trustee that having reconsidered the matter, "the Sheriff's Office no longer takes the position stated in [its] letter dated 23 September 2021".

18 On 28 January 2022, the mortgagee sale of the Property was completed. Aparna's portion of the surplus proceeds, after paying SCB, amounted to S$191,790.96 (the "Surplus Proceeds").

19 On 30 May 2022, the Private Trustee filed the present application for:

(a) an order that the Private Trustee be allowed to enter into a funding agreement and to be paid its legal fees and disbursements in relation to this application; and

(b) a declaration as to who was entitled to the Surplus Proceeds and an order for payment of the Surplus Proceeds accordingly.

Version No 1: 31 Oct 2022 (16:49 hrs)

20 The Surplus Proceeds were held in the Official Assignee's Bankruptcy Estate Account pending the court's determination of the application.

The funding agreement

21 Three of Aparna's creditors, IOB, OCBC and the defendant (the "Funding Creditors"), agreed to fund the present application by the Private Trustee on the following terms:

(a) The application would be funded in proportion to the value of the Funding Creditors' respective claims against the Estate.

(b) If the court determined that the Estate was entitled to the Surplus Proceeds, the Surplus Proceeds would first be used to pay the Private Trustee's fees followed by the bankrupt's outstanding income tax liability. The Funding Creditors were to enjoy an advantageous repayment over other creditors from the balance in proportion to the value of their claims. Any remaining balance would be distributed to the other creditors.

(c) No adverse costs orders would be sought regardless of the outcome of the application.

22 I agreed with the Private Trustee that the funding agreement should be approved (see *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597) and ordered accordingly.

The issues relating to the Surplus Proceeds

23 The issues relating to the Surplus Proceeds concerned ss 367, 368(3) and 368(4) of the IRDA.

Version No 1: 31 Oct 2022 (16:49 hrs)

24 Section 367 provides as follows:

> **Restriction of rights of creditor under execution or attachment**
>
> **367.**—(1) Where the creditor of a bankrupt has issued execution against the goods or lands of the bankrupt or has attached any debt due or property belonging to the bankrupt, the creditor is not entitled to retain the benefit of the execution or attachment against the Official Assignee unless the creditor has completed the execution or attachment before the date of the bankruptcy order, except that —
>
> …
>
> (2) For the purposes of this Act —
>
> …
>
> (*c*) an execution against land or any interest in land is completed by registering under any written law relating to the registration of land a writ of seizure and sale attaching the interest of the bankrupt in the land described in the writ of seizure and sale.

25 The Private Trustee and OCBC agreed with the defendant that the defendant had completed its execution against Aparna's interest in the Property when it registered the Attachment Order, and that on the basis of s 367 alone, the defendant would be entitled to the Surplus Proceeds. However, IOB contended that execution would be completed only when the Sheriff sold the seized property.

26 As for ss 368(3) and 368(4) of the IRDA, the provisions are as follows:

> **Duties of Sheriff as to property taken in execution**
>
> **368.**—…
>
> …
>
> (3) Where a writ of seizure and sale has been issued in respect of a judgment for a sum exceeding $2,000, the Sheriff must hold all moneys coming to the Sheriff's hands under the writ of seizure and sale for 14 days starting from the receipt of the moneys.

Version No 1: 31 Oct 2022 (16:49 hrs)

> (4) If within the time mentioned in subsection (3) —
>
> > (*a*) notice is served on the Sheriff of a bankruptcy application having been made against or by the debtor; and
> >
> > (*b*) a bankruptcy order is made against the debtor on the bankruptcy application or on any other application of which the Sheriff has notice,
>
> the Sheriff must deduct the costs of and incidental to the execution and pay the balance to the Official Assignee, who is entitled to retain the same as against the execution creditor.

27 If s 367(1) applied to this case, the defendant would be entitled to the Surplus Proceeds. However, if s 368(4) applied to this case, the Private Trustee would be entitled to the Surplus Proceeds. The Private Trustee and OCBC contended that s 368(4) was the applicable provision in this case and that therefore the Private Trustee was entitled to the Surplus Proceeds.

28 The issues before me were:

(a) When was the defendant's execution against Aparna's interest in the Property completed?

(b) Whether s 367(1) or s 368(4) of the IRDA applied in this case?

When was the defendant's execution against Aparna's interest in the Property completed

29 It should be noted that under the Rules of Court (2014 Rev Ed) (the "2014 Rules"), execution against immovable property involves the following steps:

(a) First, the judgment creditor has to apply for an order of court in Form 96 attaching the judgment debtor's interest in the immovable property under O 47 r 4(1) of the 2014 Rules (the "Form 96 order").

Version No 1: 31 Oct 2022 (16:49 hrs)

(b) Seizure is then effected by registering the Form 96 order under the relevant written law relating to the immovable property; upon registration, the debtor's interest is deemed to be seized by the Sheriff: O 47 r 4(1)(*a*) of the 2014 Rules.

(c) After registering the Form 96 order, the judgment creditor must "file a writ of seizure and sale in Form 83" and an undertaking, declaration and indemnity in Form 87: O 47 r 4(1)(*e*)(i) and O 47 r 4(1)(*e*)(ii) of the 2014 Rules. Although described as a writ of seizure and sale, Form 83 in fact operates as a direction to the Sheriff, if necessary, to sell the interest in the immovable property to satisfy the judgment debt. As stated above, seizure is effected by registering the Form 96 order. Form 83 itself acknowledges that the interest in the immovable property has been seized.

(d) The Sheriff must then serve a copy of the writ of seizure and sale together with the Form 96 order and the notice of seizure in Form 97 on the judgment debtor: O 47 r 4(1)(*e*)(iii) of the 2014 Rules.

The sale of the immovable property or any interest therein is subject to certain conditions set out in O 47 r 5 of the 2014 Rules, which includes a condition that there shall be no sale until the expiration of 30 days from the date of registration of the Form 96 order.

30 Under s 367(2)(*c*) of the IRDA (see [24] above), execution against land or any interest in land is completed by the registration of a writ of seizure and sale. It was not disputed that the "writ of seizure and sale" referred to in s 367(2)(*c*) is the Form 96 order. It was also not disputed that the Attachment Order in this case (see [10] above) was a Form 96 order and that it had been properly registered with the Singapore Land Authority.

Version No 1: 31 Oct 2022 (16:49 hrs)

31 IOB submitted that execution is completed under s 367(2)(*c*) only upon sale by the Sheriff. IOB argued that this was so because, pursuant to O 47 r 4(1)(*e*) of the 2014 Rules (see [29(c)] above), a sale of the land under execution was always intended to follow after the registration of the Form 96 order. IOB reasoned that the registration of the Form 96 order was meant to facilitate the Sheriff's power of sale.

32 I disagreed with IOB's submission. It is true that execution of a judgment by way of a writ of seizure and sale contemplates both seizure and sale so that the proceeds of sale can be used to satisfy the judgment debt. Nevertheless, the language in s 367(2)(*c*) of the IRDA is crystal clear – for purposes of the IRDA, an execution against land or any interest in land is completed by registering the order attaching the land or interest in land under the appropriate written law. Section 367(2)(*c*) of the IRDA is simply not capable of being interpreted in the manner contended for by IOB.

33 In my view, it was unarguable that pursuant to s 367(2)(*c*) of the IRDA, the defendant completed its execution against Aparna's interest in the Property on 14 May 2021 when the Attachment Order was registered with the Singapore Land Authority. As stated earlier, this was also the position taken by the Private Trustee and OCBC.

Whether s 367(1) or s 368(4) of the IRDA applied in this case

34 Section 368(4) requires the Sheriff to be notified of the bankruptcy application and the bankruptcy order to be made "within the time mentioned in subsection (3)" (see [26] above). The time mentioned in s 368(3) is the period of 14 days starting from the Sheriff's receipt of the moneys *under the writ of seizure and sale* (the "14-day period"). This means the seized property must first be sold pursuant to the writ of seizure and sale.

Version No 1: 31 Oct 2022 (16:49 hrs)

35 Section 368(4) then states that the Official Assignee is entitled to the balance proceeds of sale if the Sheriff is notified of the bankruptcy application, and the bankruptcy order is made, within the 14-day period.

36 Therefore, for s 368(4) to apply:

(a) a writ of seizure and sale must have been filed;

(b) the seized property must have been sold pursuant to the writ of seizure and sale;

(c) the Sheriff must have received the proceeds of the sale; and

(d) the Sheriff must have been notified of the bankruptcy application, and the bankruptcy order must have been made, within the 14-day period.

37 However, O 47 r 4(1)(*e*)(i) of the 2014 Rules clearly states:

> (*e*) after registering the [Form 96] order, the judgment creditor must —
>
> (i) file a writ of seizure and sale in Form 83 …

Therefore, the judgment creditor would have had to register its Form 96 order *before* filing the writ of seizure and sale. This means that any case that falls within s 368(4) would also fall within s 367(1). Yet, the party entitled to the balance proceeds of sale under s 367(1) is the judgment creditor whilst under s 368(4) it is the Official Assignee.

38 The only way to reconcile s 367(1) and s 368(4) is to restrict s 367(1) to cases which do not fall within s 368(4). However, there appears to be no apparent reason justifying such a distinction and s 367(1) and s 368(4) should perhaps be reviewed.

Version No 1: 31 Oct 2022 (16:49 hrs)

39 That said, it was unnecessary for me to resolve the inconsistency between s 367(1) and s 368(4) in the present case. I agreed with the defendant that on the facts, the present case did not fall within s 368(4). The Property was sold by the mortgagee; it was not sold by the Sheriff under the WSS. There was therefore no "moneys coming to the Sheriff's hands under the writ of seizure and sale" for the purpose of s 368(3). Thus, the commencement of the 14-day period was not triggered and neither the notification of the bankruptcy application to the Sheriff nor the making of the bankruptcy order could be said to have been made "within the time mentioned in subsection (3)".

40 I therefore concluded that s 368(4) did not apply in the present case; instead, s 367(1) was the applicable provision.

Conclusion

41 For the above reasons, I found that the defendant was entitled to the Surplus Proceeds in priority to the Private Trustee.

Chua Lee Ming
Judge of the High Court

Version No 1: 31 Oct 2022 (16:49 hrs)

Lim Hui Li Debby and Cheng Si Yuan Shaun (Dentons Rodyk & Davidson LLP) for the claimant;
Loong Tse Chuan and Yew Wei Li Avery (Allen & Gledhill LLP) for the defendant;
Koh Kia Jeng and Ooi Shu Min (Dentons Rodyk & Davidson LLP) for the first non-party;
Chan Cong Yen Lionel and Caleb Tan Jia Chween (Oon & Bazul LLP) for the second non-party.

Version No 1: 31 Oct 2022 (16:49 hrs)