

Lee Han Min Garry v Piong Michelle Lucia
[2016] SGHC 79

Case Number : Originating Summons (Bankruptcy) No 68 of 2015 (Registrar's Appeal No 310 of 2015)
Decision Date : 21 April 2016
Tribunal/Court : High Court
Coram : Lai Siu Chiu SJ
Counsel Name(s) : Remya Aravamuthan (Remya A Law Practice) for the appellant; Lee Chia Wen (RHTLaw Taylor Wessing LLP) for the respondent.
Parties : Lee Han Min Garry — Piong Michelle Lucia

Insolvency Law – Bankruptcy – Statutory Demand

21 April 2016

Lai Siu Chiu SJ:

Introduction

1 Lee Han Min Garry (“the appellant”) applied in Originating Summons (Bankruptcy) No 68 of 2015 (“the OSB”) to set aside the statutory demand dated 10 November 2014 for the sum of \$90,000 (“the demand”) that had been served on him by Piong Michelle Lucia (“the respondent”). The appellant’s application was dismissed by the Assistant Registrar (“the AR”) against whose decision he filed this Registrar’s Appeal No 310 of 2015 (“the Appeal”).

2 The Appeal came on for hearing before this court. At the conclusion of the hearing, this court dismissed the Appeal with costs. As the appellant has filed a notice of appeal (in Civil Appeal No 222 of 2015) against my decision, I now set out my reasons.

The facts

3 The appellant married the respondent on 15 August 2010, but the parties are in the midst of divorce proceedings instituted by the respondent in Divorce No 4672 of 2014.

4 At the material time, the appellant’s residential address was at 88A Shrewsbury Road, Singapore 307845 (“the premises”) which is a temple. On 10 and 30 November 2014, the respondent’s solicitors’ process server (“the process server”) attempted to serve the demand on him but did not succeed.

5 On 4 December 2014, by way of substituted service, the process server served the demand on the appellant by posting on the front door of the premises. The process server followed up by filing his affidavit of service on 2 April 2015.

6 Based on the demand, the respondent filed a creditor’s bankruptcy petition against the appellant in Bankruptcy No 581 of 2015. The process server attempted to serve the appellant with the bankruptcy petition and the respondent’s supporting affidavit (collectively, “the bankruptcy documents”) on 12, 13 and 14 April 2015 without success.

7 The respondent applied for substituted service of the bankruptcy documents *vide* Summons No 1806 of 2015 which application was granted on 20 April 2015. Thereafter, on 21 April 2015, substituted service of the bankruptcy documents was effected on the appellant by way of posting on the front gate of the premises.

8 According to the appellant's affidavit filed 25 August 2015 ("the appellant's first affidavit") in support of the OSB, service of the demand on him was improper and therefore ineffectual/invalid. He claimed that he did not receive or have notice of the demand until after the bankruptcy documents were served on him by being wired to the gate of the premises. He pointed out a discrepancy—the process server's affidavit of service deposed that substituted service was effected by posting the demand on the *front door* of the premises whereas in the process server's note exhibited to the process server's affidavit, he had stated that on 4 December 2015 he had posted the demand on the *letter box* of the premises. In her reply affidavit filed on 15 September 2015, the respondent repeated what the process server said in his note: namely, that service was effected on the appellant by posting on the letter box of the premises, which the respondent deposed was a conspicuous part of the premises.

9 In the appellant's first affidavit, he claimed (at [4]) that he did not receive the demand nor did he see a copy of the demand on the front door of the premises. He exhibited a photograph of the temple showing its front door inside the premises and the letter box on the compound's wall. He added (at [8]):

I am of the view that the [demand] was not posted on the front door of the premises and neither was it posted on the letter box of the said premises.

10 Apart from the bare statement, no explanation was given by the appellant as to why he did not receive notice of the demand. If, according to the appellant himself, he was and is the only occupant of the temple, why did he not check the letter box daily or regularly?

11 Reply affidavits were filed by the appellant and one Tay Thiam Chye in response to the respondent's reply affidavit. It is not necessary for purposes of the appellant's current appeal to address those affidavits as they touched on the merits of the debt which formed the basis of the demand and the bankruptcy petition of the respondent.

The decision

12 At this juncture, it would be appropriate to look at rr 96 and 97 of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) ("the Rules"). r 96 pertaining to service states:

(1) The creditor shall take all reasonable steps to bring the statutory demand to the debtor's attention.

(2) The creditor shall make reasonable attempts to effect personal service of the statutory demand.

(3) Where the creditor is not able to effect personal service, the demand may be served by such other means as would be most effective in bringing the demand to the notice of the debtor.

(4) Substituted service under paragraph (3) may be effected in the following manner:

(a) by posting the statutory demand at the door or some other ***conspicuous part*** of the last

known place of residence or business of the debtor or both;

(b) by forwarding the statutory demand to the debtor by prepaid registered post to the last known place of residence, business or employment of the debtor;

...

(d) such other mode which the court would have ordered in an application for substituted service of an originating summons in the circumstances.

[emphasis added]

13 Rule 97 relates to applications to set aside statutory demands and the relevant provisions read as follows:

(1) Subject to paragraph (2), the debtor who has been served with a statutory demand may —

(a) within 14 days; or

(b) where the demand was served outside jurisdiction, within 21 days,

from the date on which the demand is served or deemed in accordance with these Rules to be served on him, apply to court by way of originating summons for an order setting aside the statutory demand.

...

(5) The application shall be supported by an affidavit —

(a) specifying the date on which the statutory demand came into the debtor's hands;

(b) stating the grounds on which the statutory demand should be set aside; and

(c) exhibiting a copy of the statutory demand.

14 As stated earlier at [9]–[10], the appellant gave no explanation why the demand did not and/or would not have come to his notice. He failed to comply with r 97(5)(b) of the Rules. The court was also sceptical of his contention that he had no notice of the demand when the bankruptcy documents had in fact come to his notice.

15 In this regard, the case of *Re Rasmachayana Sulistyono (alias Chang Whe Ming), ex parte The Hongkong and Shanghai Banking Corp Ltd* [2005] 1 SLR(R) 483 is instructive. There, the petitioner bank who was the judgment creditor made several attempts to effect personal service of the requisite statutory demand on the three judgment debtor plaintiffs. Service was made by three modes, namely (i) by the process server leaving a copy of the demand at the address of the debtors' nominated forwarding agent in Singapore; (ii) by way of advertisement in the Straits Times newspaper; and (iii) by leaving copies of the demands at the debtors' last known residential addresses. However, the bankruptcy petitions were only served on the debtors' nominated forwarding agent. The debtors appealed to a judge against the decision of an Assistant Registrar in granting the bankruptcy petitions and dismissing the debtors' objections that the statutory demands had not been effectively served. In dismissing the debtors' appeals, the judge held *inter alia* (at [21]):

The essence of the service requirements under the [Bankruptcy Rules] is to ensure that the statutory demand, bankruptcy petition and other relevant processes are brought to the *personal* attention of the debtor prior to the hearing of the petition. A bankruptcy order results in the transformation of the legal status of the debtor and ought not to be made unless the court is satisfied that the debtor had actual or deemed notice of the proceedings.

16 Even if the appellant did not have actual notice, he had deemed notice of the demand as he should have but failed to check the letter box of the premises.

17 Not surprisingly therefore, when the OSB came on for hearing in the court below, the AR felt that there was little merit in the appellant's application and dismissed it with costs, noting that the letter box of the premises would come within the meaning of a "conspicuous part" of the premises under r 96(4)(a) of the Rules set out above.

18 It was not necessary for the appellant to depose in his affidavits (and for the respondent to respond thereto) to the circumstances of the respondent's loan. In this regard, s 62 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("the Act") is relevant. The material portion states:

Presumption of inability to pay debts

62. For the purposes of a creditor's bankruptcy application, 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 —

(a) (i) the applicant creditor to whom the debt is owed has served on him in the prescribed manner, a statutory demand;

(ii) at least 21 days have elapsed since the statutory demand was served; and

(iii) the debtor has neither complied with it nor applied to the court to set it aside;

19 The appellant must discharge the burden to prove there was invalid or defective service of the demand on him. If he had succeeded earlier in the OSB, the merits of the respondent's demand would become academic as the respondent would not be able to pursue the matter by filing her creditor's petition against him. It is only if the appellant fails to set aside the demand that he would have to contest the respondent's claim on the merits – either because the "debt" underlying the demand is disputed under s 62 of the Act, or he is not unable to pay the "debt" under s 61(1)(c) thereof. The respondent's claim for \$90,000 against the appellant was based on his written acknowledgment of the debt dated 23 May 2013 witnessed by a solicitor, which he agreed to but failed to repay within six months. The appellant should not conflate the two issues (as he had done) by challenging the merits of the "debt" against him in the same affidavits in which he deposed to the reasons/circumstances why the demand should be set aside.

20 At the two Appeal hearings, counsel for the appellant repeated her client's error. No submissions were made on why the service of the demand was said to be defective and/or invalid and counsel focused solely on the merits of the underlying "debt" upon which the demand was based.

21 As I shared the AR's views that the appellant's application was without merit, I similarly dismissed the Appeal with costs fixed at \$2,000/- to the respondent.