IN THE COURT OF APPEAL OF BRUNEI DARUSSALAM

CIVIL APPEAL NO. 6 OF 1999

BETWEEN

HJ ABDUR RAFAEA BIN KASSIM Appellant

AND

MORTGAGE AND FINANCE BERHAD Respondent

Before : FUAD, P.; HUGGINS, J.A. AND SILKE, J.A..

Date of Hearing : 11 NOVEMBER, 1999.

Reasons for Judgment dated: 15 NOVEMBER, 1999.

J U D G M E N T

FUAD, P.:

On 27 May 1999, Steven Chong J. refused to rescind a receiving order which had been made against Major Hj Abdur Rafaea Bin Hj Kassim ("the Debtor"). Judgment had been entered against him in default of appearance, in favour of Mortgage and Finance Berhad ("the Creditor") in the sum of B$236,589.52 with interest and costs. When he failed to satisfy the judgment debt, a bankruptcy notice was issued on 14 May 1998. The receiving order was made on 20 June 1998.

On 24 June 1999 solicitors acting for the Debtor filed a Notice of Appeal against Steven Chong J.'s judgment. The same solicitors acted for him until they ceased to act (with leave and by his consent) on 26 October 1999.

On 28 October 1999 the Debtor filed a Notice of Motion seeking leave to file a Petition of Appeal out of time. In his affidavit in support of the application, the Debtor said that he had been advised by his former solicitors that he needed the leave

of this Court before he could file his Notice of Appeal. A draft Notice of Appeal was filed at the same time.

The Debtor and Counsel appearing for the Creditor were unable to tell us the date upon which the Registrar had served, on the appellant's solicitors, the notice required by O.57, r.5(2). We were not able to find out the position from any other source. Before the relevant date, time does not begin to run against an appellant for the purposes of the time limit imposed by O.57, r.6(1). We therefore decided that it would be just to treat the Petition of Appeal before us as having been filed while time was still running in the appellant's favour.

When we announced our decision, Mr Andrew Ong, for the Creditor, was ready to go on with the appeal. After hearing the Debtor's submissions, we dismissed his appeal and now give our reasons.

The receiving order began with the usual recitals and concluded thus:

> "It is further ordered that the receiving order be suspended until end of July, 1998 to enable the Judgment Debtor to pay his debt by instalments. It is further ordered that if there is any default the receiving order shall be carried into effect."

The Debtor did not appeal against this Order.

Counsel appearing for the Debtor before the Judge submitted that neither party had intended a receiving order to be made and, therefore, no such order should have come into existence. As the Debtor had stated in his affidavit, after the bankruptcy notice had been issued, he had come to an arrangement with the Creditor about paying off the judgment debt. He had paid $40,000 on 28 July 1998 and a first instalment of $3,000 on 12 September in accordance with his undertaking. The Creditor had accepted those sums. He believed that no receiving order would be made so long as he kept up the instalments.

The Creditor relied on a letter dated 16 June 1998 addressed to the Debtor himself to show that the Debtor knew that a receiving order, suspended until the end of July, would be sought on 20 June 1998. This is the letter:

> "We refer to your discussion last evening with Ms.Hedy Leong and myself.
>
> We are instructed that provided you/your purchaser give an Undertaking that upon receipt of loan from DBS you will Immediately pay Hongkong Bank the sum of $40,000.00 Followed by monthly payments of $3,000.00 each.
>
> You are also to let Hongkong Bank have a Deed of Assignment Assigning payments from the insurance company on your BM8898.
>
> With the above two (2) documents in hand we shall on 20th June, 1998 attend Court to obtain the receiving order but its effect to be suspended end of July, 1998 to enable you to fulfil your obligations."

The Judge had before him an affidavit affirmed by an officer of the Creditor company. He asserted that the Debtor had not, in fact, kept the undertakings on the basis of which the receiving order had been suspended. The cheque he had given on 28 July 1998 for $40,000 had been post-dated to 10 August 1998 and was not cleared and paid until 10 days later. Nor had he paid the first instalment due by 31 July until 14 September 1998.

Until he had been told so by the company's lawyers in November 1998, he had not realised that a debtor could not pay a creditor when a receiving order was in force. This was why he had, until then, been pressing the Debtor to pay the arrears. His company had been prepared to let the Debtor pay the first instalment in September instead of July 1998 but they had informed him that the proceedings would only be withdrawn on full settlement of the judgment debt and legal fees. They had been prepared to rescind the receiving order if he undertook to pay all the arrears of monthly instalments starting in October 1998. They had therefore filed an application to rescind the receiving order on 10 April 1999 provided the undertaking was given. The application had been withdrawn when the Debtor's solicitors stated that no agreement had been reached and no undertaking given. They could therefore no longer rely on the Debtor's bona fides.

The Official Receiver's report, which was before the Judge, stated that the Debtor had an outstanding debt due to the Seria branch of Maybank, as a result of a

loan facility granted to him. The amount of the debt, as at 22 February 1999, stood at $421,500. When the bank asked whether they could file proof of the debt, the Official Receiver advised them that since the Debtor was actively seeking to rescind the Receiving Order, it would be advisable to delay the filing of their proof of debt for a few months.

In his judgment, the Judge briefly reviewed the way in which the matter before him had arisen. He set out the provisions of Rules 80(1) and (3) of the Bankruptcy Rules and referred to authorities on the principles which should govern the Court's discretion to rescind a receiving order. He also made reference to section 33(1) of the Bankruptcy Act.

The Judge observed that in the circumstances, a stay of the order, rather than a suspension, should more appropriately have been asked for and granted, under section 104 of the Bankruptcy Act, but he found any suggestion that no receiving order had been intended by the parties to be untenable. He went on to say that whatever the agreement between the parties on the terms of payment, a receiving order had been properly made on 20 June 1998 on proof of the Debtor's act of bankruptcy which had been "suspended". Despite the fact that the Creditor's application for a stay of the proceedings under the receiving order was not in compliance with Rule 80(1) of the Bankruptcy Rules for want of notice to the Official Receiver, no appeal had been preferred. The order remained good and valid and became effective on 1 August 1998.

The receiving order had been properly advertised on 2 September 1998 as required by Rule 78 and a proof of debt would be filed by the Maybank for a debt due by the Debtor. The judge also explained the change of heart by the Creditor who was no longer able to rely on his bona fides, and therefore did not consent to the rescission.

The Judge cited Re Hester (1899) 22 QBD 632 at p.634 where Cave, J. said

> "….. the absence of consent by the creditors would in most cases by quite conclusive in favour of rejecting an application

> to annul an adjudication or to rescind a receiving order, because, the moment the receiving order, is made, the creditors acquire a right to have debtor's assets distributed in due course of administration in bankruptcy, and it would require very strong grounds indeed to induce the Court to take away that right without their consent."

This is how the Judge summarized the position as he saw it – the debt to the Creditor had not been paid in full. The Creditor had been entitled to apply for a receiving order on the ground of the act of bankruptcy. The receiving order had been properly made on 20 June 1998, and the stay of proceedings under it was only until the end of July 1998. The Debtor was also indebted to Maybank. There was no evidence to suggest that his assets for division among the creditors would not be sufficient to pay a dividend of 15 per cent [for the purposes of section 33(1) of the Bankruptcy Act.]

The Judge concluded:

> "In my judgment, it would now be wholly inappropriate to rescind the receiving order in the circumstances. A rescission would not only be detrimental to the interests of the existing creditors but to the interests of the public and commercial morality because it would place future creditors at risk of the debtor's insolvency."

In dismissing the application, the Judge ordered that the Official Receiver, pursuant to section 12(1) of the Bankruptcy Act, be constituted the receiver of the Debtor's property, from the date of the making of the receiving order and that the sum of $43,000 paid by the Debtor to the Creditor be paid over to the Official Receiver.

When addressing us, the Debtor explained how he had been totally misled about his position by the Creditor's conduct. His cheque (albeit post-dated) had been accepted, as had been the first instalment of $3,000 (although late payment was made). He had been led to believe that if he continued the instalments, and thus satisfied the Creditor, the bankruptcy proceedings instituted against him would go no further. He had kept the undertaking he had given and so had not expected a receiving order to be made.

One has only to read the affidavit, dated 12 May 1999, of one of the Creditor's officers (in which he explained how they had continued to press the Debtor for payment after the end of July 1998, until they were told this was improper) to understand the Debtor's confusion about how he stood. We mention here that this was the reason why we refused the Creditor the costs of the appeal.

Whatever indulgence was accorded to the Debtor by the Creditor, it is important to note that the receiving order itself does not speak of a suspension beyond "the end of July 1998".

Of course, the Debtor's case is that the receiving order should never have been made. It is understandable that he does not appreciate that if the Court holds that such an order was properly made, and later advertised, it ceased to be a matter between only him and the petitioning Creditor. The Debtor also appears not to appreciate that this Court must consider only the state of affairs which existed when the receiving order was made, and later when the Judge was considering the application to rescind the order. Whatever may be his financial position today is not relevant to the issues before us.

Although we will have something to say about the form of the receiving order, we are unable to accept that the Judge erred in finding that it had been properly made and advertised. Even if, contrary to our conclusions, grounds might have existed to found an appeal against the receiving order, once no appeal has been made, it may be that the same grounds will be insufficient to persuade the Court to order rescission.

The Judge had a discretion to exercise. We are not persuaded that he exercised his discretion wrongly on the facts before him.

The Debtor explained how appalling were the consequences to him of the receiving order he said should not have been made, and which the Judge refused to rescind. All that had happened had very seriously affected his military career. He had not been allowed to attend a Staff course for which he had been eligible and he expected to have to face a court martial. He had suffered great stress and anxiety. He

said he was now in a position to pay his debts to Maybank and to continue to pay the agreed instalments to the Creditor, if he were allowed to do so.

His moving account of the career and financial problems he and his family are facing cannot, of course, affect the result of this appeal once this Court has decided not to interfere with the exercise of the Judge's discretion.

We feel that we should state, most emphatically, that we do not encourage suspension orders (more properly called stay orders) in the form which appears in the 20 June 1998 order. The coming into operation of a receiving order should not depend on private arrangements between the petitioning creditor and the debtor about payment of the debt.

It seems to us that since the Creditor wished to give the Debtor time to pay the debt which was the subject of the bankruptcy notice, the better course would have been to obtain a stay of the bankruptcy proceedings under section 104 of the Bankruptcy Act before the receiving order was made.

The Court has wide powers, under section 104 of the Act, to stay proceedings at any stage. An example of the circumstances in which a general stay, or a stay of the advertisement alone, might be granted, would be pending an appeal by a person against whom a receiving order has been made. A stay of the advertisement might also appropriately be granted if the debtor shows that he might be able to arrange to pay all his creditors in full. What a proper order for a stay cannot do is, in effect, to treat the sum relevant to the act of bankruptcy as if it were a judgment debt, and allow time to pay it by instalments, with "the usual default clause".

DATO SERI PADUKA KUTLU TEKIN FUAD
President, Court of Appeal

SIR ALAN HUGGINS
Judge, Court of Appeal

WILLIAM JAMES SILKE
Judge, Court of Appeal

Appellant

In Person

Andrew Ong

for the Respondent