KHOO BOO HONG

v.

LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA

High Court Malaya, Penang
Mohd Amin Firdaus Abdullah JC
[Bankruptcy No: 29-1604-05-2012]
15 April 2013

Bankruptcy: *Notice - Striking out - Whether company director liable to pay outstanding employees provident fund contributions jointly and severally with company - Whether bankruptcy notice excessive, irregular and not in accordance with judgment in default - Claims pursuant to ss 46(1) and 65 Employees Provident Fund Act 1991 - Whether s 6 Limitation Act 1953 applicable*

Limitation: *Bankruptcy notice - Claims pursuant to ss 46(1) and 65 Employees Provident Fund Act 1991 - Whether s 6 Limitation Act 1953 applicable*

Provident Fund: *Arrears of contributions - Recovery of arrears of contributions - Claims pursuant to ss 46(1) and 65 Employees Provident Fund Act 1991 - Whether s 6 Limitation Act 1953 applicable*

The judgment creditor ('JC') had obtained judgment in default against the judgment debtor ('JD'), a director of a company, on 7 October 2010 for a certain judgment sum together with dividend, interest and costs. The same was still due and owing and the JC filed a bankruptcy notice and served it on the JD. The JD then sought to strike out the bankruptcy notice and set aside the judgment in default. The issues to be determined were: (i) whether the JD as a director was liable to the outstanding Employees Provident Fund ('EPF') contributions; (ii) whether the bankruptcy notice was excessive, irregular and not in accordance with the judgment in default; and (iii) whether the claim was time-barred.

Held:

(1) The JD as a director of the company was liable to pay the outstanding EPF contributions of the employees jointly and severally with the company for the arrears of contributions together with the outstanding dividend and interest. (*Ong Kim Chuan & Anor v. Lembaga Kumpulan Wang Simpanan Pekerja (refd)*). (para 23)

(2) The JD did not provide any documentary evidence to show that the amount stated in the bankruptcy notice was excessive and irregular, and therefore wrong. The JD just referred to an example in 1996 when the calculation of dividend and interest was purportedly wrong without going into full details of the overall sum. The JC had the expertise, experience and manpower, to do the correct calculation. (para 26)

(3) In *Wong Kwai Wah v. Lembaga Kumpulan Wang Simpanan Pekerja* and *Lembaga Kumpulan Wang Simpanan Pekerja v. Rosly Abu Bakar*, the Court of Appeal held that the Limitation Act 1953 ('LA') did not apply to the claims by the EPF under ss 46(1) and 65 of the Employees Provident Fund Act 1991 ('Act'). Hence, s 6 of the LA did not apply to claims made by the JC under ss 46(1) and 65 of the Act. (paras 32 & 34)

(4) The JD, at all material times, was aware of the judgment in default entered against him but he did not take any step to set it aside. Therefore, the judgment in default and the bankruptcy notice did comply with the relevant statutory provisions. (paras 36-37)

[Order accordingly]

Case(s) referred to:

Affin Credit (1991) Sdn Bhd v. Dato' Hj Raun Djalil Atmosumarto [2004] 4 CLJ 337 (refd)

In Re Dato' Dr Elamaran M Sabapathy Ex Parte RHB Bank Bhd [2011] 10 CLJ 262 (refd)

J Raju M Kerpaya v. Commerce International Merchant Bankers Berhad [2000] 3 CLJ 104 (refd)

Lembaga Kumpulan Wang Simpanan Pekerja v. Goon Institution & Ors [2011] 10 CLJ 403 (refd)

Lembaga Kumpulan Wang Simpanan Pekerja v. Rosly bin Abu Bakar (Civil Appeal No N-01(IM)-158-2009) (refd)

Low Mun v. Chung Khiaw Bank Ltd [1987] CLJ (Rep) 172 (refd)

Ong Kim Chuan & Anor v. Lembaga Kumpulan Wang Simpanan Pekerja [2009] 6 CLJ 586 (refd)

Tang Kwor Ham & Ors v. Lembaga KWSP [2005] 8 CLJ 676 (refd)

Wong Kwai Wah v. Lembaga Kumpulan Wang Simpanan Pekerja (Civil Appeal No W-01(IM)-357-2009) (refd)

Legislation referred to:

Employees Provident Fund Act 1991, ss 46(1), 65

Limitation Act 1953, s 6

Counsel:

For the judgment creditor: Nabila Rosli; M/s Azrul Afifi & Azuan

For the judgment debtor: Rajdev Singh; M/s Wong-Chooi & Mohd Nor

JUDGMENT

Mohd Amin Firdaus Abdullah JC:

Salient Facts

[1] The Judgment Creditor (JC) obtained judgment in default against the Judgment Debtor (JD) on 7 October 2010 for the judgment sum of RM10,882.00, dividend, interest and cost for RM1,036.00.

[2] The same is still due and owing and the JC filed the Bankruptcy Notice on 24 May 2012 and served it on the JD by personal service on 11 July 2012.

[3] On 18 July 2012, the JD served the summons in chambers on the JC supported by the affidavit of Khoo Boo Hong (JD) which was affirmed on 17 July 2012 to strike out the Bankruptcy Notice.

Contentions – Judgment Debtor

The Sum Claimed Is Not In Accordance With The Judgment Obtained.

[4] The JD contended that the sum in the Bankruptcy Notice is excessive, irregular and not in accordance with the judgment in default recorded on 7 October 2010 and thus null and void *ab initio*.

[5] The rate of dividend and interest claimed by the JC in relation to the sum owed does not follow the judgment obtained at the Sessions Court in Kuala Lumpur vide Summons No 52-32213-2010. No details were given on the calculation regarding the rate of interest and dividend on the sum owed. The calculation was wrong and not correct thus making the whole sum owed incorrect. The JD argued that:

> "JD berhujah bahawa jumlah amaun di dalam Notis Kebankrapan tersebut adalah salah dan berlebihan yang tidak mengikut undang-undang dan adalah tidak sah.
>
> JD berhujah bahawa kiraan jumlah bagi dividen di dalam Notis Kebankrapan tersebut adalah tidak sah dan tidak teratur yang menjadikan keseluruhan jumlah yang terhutang di dalam Notis Kebankrapan tersebut adalah berlebihan dan tidak sah dan salah di sisi undang-undang dan adalah 'null and void *ab initio*'.
>
> JD merujuk kepada perenggan 10 Afidavit Sokongan tersebut dimana JD telah membuat suatu kiraan ringkas faedah yang diberikan oleh Mahkamah jumlah yang diperolehi adalah berlainan dengan apa yang dituntut oleh JC di dalam Notis Kebankrapan tersebut. JC hanya menafikan perenggan tersebut dan gagal memberi sebarang pengiraan bagaimana jumlah tersebut didapati."

[6] The learned counsel for the JD argued that the calculation on the interest and dividend did not follow the Judgment obtained which only allows dividend up to the year 2009 and for interest up to 5 March 2009 only but the JC claims until the date of the filing of the Bankruptcy Notice.

[7] He cited the case of *J Raju M Kerpaya v. Commerce International Merchant Bankers Berhad* [2000] 3 CLJ 104 which held:

> "When determining an issue under the Bankruptcy Act 1967, it is incumbent upon the court to accord its provisions a strict construction. The consequence of such an approach is that a bankruptcy notice that requires a debtor to pay a judgment debt otherwise than in accordance with the terms of the judgment is null and void *ab initio*.
>
> The appellant's complaint is not merely that the respondent in its bankruptcy notice mistakenly claimed more than what is actually due. The complaint here is that the bankruptcy notice is not in accordance with the judgment. It is a separate and distinct head of challenge under s 3(1)(i) of the Bankruptcy Act. It is a jurisdictional challenge because it is a condition precedent to the exercise of bankruptcy jurisdiction that a bankruptcy notice shall require the debtor to pay the judgment debt in accordance with the terms of the judgment on which it is founded. What we have here therefore falls outside the scope of proviso (ii) to s 3(2)."

[8] He also cited the case of *In Re Dato' Dr Elamaran M Sabapathy Ex Parte RHB Bank Bhd* [2011] 10 CLJ 262 to support his contention.

[9] The JC also did not display and/or inform on the sum of interest and dividend declared by the JC before filing the Bankruptcy Notice and this was challenged by the JD in para 13 of the supporting affidavit affirmed by the JD on 17 July 2012. The JC only responded by claiming that it is a bare assertion.

[10] It was contended that the amount of sum owed must be stated accurately in the Bankruptcy Notice. The case of *Low Mun v. Chung Khiaw Bank Ltd* [1987] CLJ (Rep) 172 was cited.

Time Barred

[11] The claim and/or interest in the Bankruptcy Notice is statute-barred. The JC claims interest beginning from the year 1991 until the date of the filing of the Bankruptcy Notice that is claiming for interest for as long as 21 years. The JD cited the case of *Lembaga Kumpulan Wang Simpanan Pekerja v. Goon Institution & Ors* [2011] 10 CLJ 403 to shore up his argument.

Abuse Of Court Process

[12] The inaccurate calculation on the dividend and interest has prejudiced the JD and is being oppressive. The JC took the opportunity to wait for the sum of RM10,882.00 to swell up until RM42,611.00 to initiate this bankruptcy proceeding. It is an abuse of the process of the court with a view to oppress the JD. The calculation of interest beginning from 1991 until 21 years later is also oppressive.

[13] Thus the JD prays that the application to strike out the Bankruptcy Notice be allowed.

Judgment Creditor

Claim Excessive And Irregular

[14] The learned counsel for the JC argued that the claim by the JD that the Bankruptcy Notice sum is excessive and irregular and not in accordance with the judgment in default is a bare assertion.

[15] The learned counsel for the JC put forward the following argument:

> "Based on the provisions of the EPF (Employees Provident Fund 1991) (Act 452) Act 1991, EPF Regulations 2001 and the Rules of the EPF 1991, the JD as director of the company is liable to pay the outstanding EPF contributions of the employees jointly and severally with the company for arrears of contributions in accordance with the liabilities of JD, together with dividend and interest which is still due and outstanding to be paid by the JD to the JC."

[16] The Act 452, the EPF Regulations and the EPF Rules were referred to:

I. Section 2 EPF Act 1991;

II. Section 43 and 45, EPF Act 1991;

III. Rules 3, EPF Regulations 2001;

IV. Order 25 (3), EPF Rules 1991;

V. Section 46 EPF Act 1991; and

VI. Section 49 EPF Act 1991.

[17] The cases of *Tang Kwor Ham & Ors v. Lembaga KWSP* [2005] 8 CLJ 676 and *Ong Kim Chuan & Anor v. Lembaga Kumpulan Wang Simpanan Pekerja* [2009] 6 CLJ 586 were cited to show the liability of directors under s 46(1) of Act 452.

[18] The Certificate of the Particulars of Contributions is "*prima facie*" evidence of the amount of contributions that is due and owing by the JD under s 64 EPF Act 1991 as decided by the case of *Tang Kwor Ham & Ors*.

[19] The JD argued that irregular and excessive calculation of the interest and dividend by the JD without disclosing documentary evidence to rebut the "*prima facie*" evidence that is the Certificate of Particulars of Contribution, exhibited by the JC is baseless.

[20] The JD in making his own assumptions of the the possibility of errors that led to wrong calculation of the amount of dividend and interest due had made a mistake.

[21] The JC contended that the JD is merely giving a bare denial without any supporting evidence by making an assumption based on his own manual calculation without producing any documentary evidence to show any error made by the JC leading to the calculation of the amount of dividend and interest due. Thus, the issues raised by the JD are without merit.

[22] It was pointed out that the position of the JC as a creature of a statute which is responsible for managing the funds and contributions, possesses the due expertise, knowledge and capacity more than the JD in calculating the amount of dividend and interest accurately.

Findings Of The Court

The JD's Liability

[23] The JD as a director of the company is liable to pay the outstanding EPF contributions of the employees jointly and severally with the company for the arrears of contributions together with the outstanding dividend and interest. In *Ong Kim Chuan & Anor v. Lembaga Kumpulan Wang Simpanan Pekerja* [2009] 6 CLJ 586, the Court of Appeal held:

> "Under s 46, it is crystal clear that directors of a company (including persons or former directors who were directors during such periods in which contributions were liable to be paid to the EPF) shall together with the company be jointly and severally liable for the contributions due and payable to the fund. These provisions are to be enforceable 'notwithstanding anything to the contrary in any other written law'.
>
> Being 'jointly and severally liable' the said directors are liable either jointly together with the company or severally on their own independently of the company. In the present case, the plaintiff may choose to initiate its claim against the company (1st defendant) jointly with the two appellants (which was done initially) or to sue the appellants alone without the company (which was done later when the plaintiff withdrew its claim against the 1st defendant after the 1st defendant was wound up). The liability of the appellants (as directors at the relevant times) is based on the provisions of s 46 of the EPF Act above, not on common law or any other written law, not even the Companies Act 1965. Section 46 stands by itself 'notwithstanding anything to the contrary in the EPF Act or any other written law'."

Demand In The Bankruptcy Notice Not In Accordance With The Terms of Judgment

[24] Section 64 of The Employees Provident Fund Act 1991 (Act 452) states :

> "In any legal proceedings, a certificate in relation to a claim on contributions payable and duly certified by an authorised officer of the Board shall be *prima facie* evidence of such certificate having been made and of the truth of the contents thereof."

[25] In *Tang Kwor Ham & Ors* [2005] 8 CLJ 676, the court held:

> "Section 64 of the Act elevates the evidential weight of the certificates in Form E to the level of *prima facie* evidence of such entry and the truth of the contents thereof. The company has responded to the said certificates by paying part of the contributions, thereby signalling its affirmation of the truth of the contents thereof. There can be no two views, thereof, that the plaintiff's certificates in Form E stood firmly unrebutted.

> The plaintiff's certificates in Form E, in any case, do contain particulars of the employees' names, their EPF numbers, and the period for which arrears of EPF contributions, dividend and interest were due and payable by the company. In the circumstances, the issue raised by the defendants on this point is not a triable issue."

[26] The JD did not provide any documentary evidence to show that the amount stated in the Bankruptcy Notice is excessive and irregular and therefore wrong. The JD just referred to an example in 1996 when the calculation of dividend and interest is purportedly wrong without going into full details of the overall sum. This court shares the same view with the JC that the JC has the expertise, experience and manpower, to do the correct calculation.

[27] The JD claimed that the amount in the Bankruptcy Notice is excessive and contrary to the law and the calculation for the interest and dividend in the said Notice was irregular and excessive. The learned counsel for the JD argued in conjuction with the issues on interest and dividend:

> "Sebagai contoh bagi tahun 1996 kadar faedah adalah 9.00% setahun ke atas jumlah RM10,882.00 adalah RM979.38 adalah suatu pengiraan mudah. Dan sekiranya jumlah tersebut dikira setiap tahun atas faedah berbeza sehingga 2012 adalah berjumlah RM10,961.12 dan bukannya RM13,047.00 seperti yang dituntut oleh JC di dalam Notis Kebankrapan tersebut.
>
> Sebagai contoh bagi tahun 1996 kadar dividen adalah 7.70% setahun ke atas jumlah RM10,882.00 adalah RM837.91 adalah suatu pengiraan mudah. Dan sekiranya jumlah tersebut dikira setiap tahun atas dividen berbeza sehingga 2012 adalah berjumlah RM10,8576.14 dan bukannya RM17,646.00 seperti yang dituntut oleh JC di dalam Notis Kebankrapan tersebut."

[28] He argued that the calculation for interest and dividend did not comply with the terms of the judgment which only allows for interest up to 5 March 2009 and for dividend up to the year 2009 but the JC has claimed the same until the date of the filing of the Bankruptcy Notice.

[29] The JD had only referred to the year 1996 for both interest and dividend but he did not refer to other years involving interest and dividend for other contributions. This is not a true reflection of the purportedly excessive and irregular sum claimed in the Bankruptcy Notice.

[30] Section 64 of Act 452 is *prima facie* evidence of the amount of contributions due and owing by the JD.

Statute-barred

[31] The JD argued that the claim and/or for interest in the Bankruptcy Notice is statute-barred as the JC claims interest beginning from the year 1991 up to the date of the filing of the Bankruptcy Notice, the claim for interest for as long as 21 years.

[32] In *Wong Kwai Wah v. Lembaga Kumpulan Wang Simpanan Pekerja* (Civil Appeal No W-01(IM)-357-2009) and *Lembaga Kumpulan Wang Simpanan Pekerja v. Rosly bin Abu Bakar* (Civil Appeal No N-01(IM)-158-2009), the Court of Appeal held on 5 January 2012 that the Limitation Act 1953 does not apply to the claims by the EPF under s 46 (1) and s 65 of the EPF Act 1991.

[33] The decision has been followed in the case of *Teo Si Meng v. Lembaga Kumpulan Wang Simpanan Pekerja* (Civil Appeal No B-01-245-2010), on 22 May 2012 in *Sivamurthy s/o Muniandy & Ors v. Lembaga Kumpulan Wang Simpanan Pekerja* (Civil Appeal No W-01-(IM)-633-10-2011) on 2 July 2012 and the latest decision in *Lembaga Kumpulan Simpanan Wang Pekerja v. Ibrahim Hashim Transport Sdn Bhd & Ors* (Civil Appeal No P-01(IM)-69-02-2012) on 4 July 2012.

[34] Thus s 6 of the Limitation Act 1953 does not apply to claims by the EPF under s 46(1) and s 65 of the EPF Act 1991.

Judgment In Default

[35] The JD cannot seek to set aside the judgment in default obtained against him on 7 October 2010 because the said judgment should not be challenged at the bankruptcy stage on the authority of the Court of Appeal case of *Affin Credit (1991) Sdn Bhd v. Dato' Hj Raun Djalil Atmosumarto* [2004] 4 CLJ 337, which viewed:

> "Again with the greatest of respect, we are of the view that the learned Judicial Commissioner has failed to consider that the respondent has not raised this issue by way of counterclaim or a cross claim in the original proceedings in civil suit no D1-23-3911-8, in which the judgment in default has not been set aside."

[36] The JD at all material times was aware of the judgment in default entered against him on 7 October 2010 but he did not take any step to set it aside.

[37] The court is of the view the judgment in default obtained on 7 October 2010 and the Bankruptcy Notice dated 24 May 2012 have complied with the relevant statutory provisions. Thus, the JD's appeal is dismissed.