

**IN THE HIGH COURT OF MALAYA IN SHAH ALAM
IN THE STATE OF SELANGOR DARUL EHSAN, MALAYSIA
WRIT OF SUMMONS NO: BA-22NCvC-497-10/2014
[SUIT NO: BA-37G-2-01/2023]**

BETWEEN

ONG KONG KUAN

(IDENTITY CARD NO: 710406-06-5193)

**... JUDGMENT
DEBTOR**

AND

1. ONG KONG BENG

(IDENTITY CARD NO: 550110-10-5265)

2. ONG KONG SEONG

(IDENTITY CARD NO: 570404-10-5461)

**... JUDGMENT
CREDITOR**

AND

1. CIMB BANK BERHAD

(COMPANY NO: 13491-P)

2. MALAYAN BANKING BERHAD

(COMPANY NO: 196001000142)

3. HONG LEONG BANK BERHAD

(COMPANY NO: 97141-X)

4. STANDARD CHARTERED BANK MALAYSIA BERHAD

(COMPANY NO: 115793-P)

5. OCBC BANK (MALAYSIA) BERHAD

(COMPANY NO: 295400-W)

6. **ALLIANCE BANK MALAYSIA BERHAD**
(COMPANY NO: 88103-W)

7. **PUBLIC BANK BERHAD**
(COMPANY NO: 6463-H)

... **GARNISHEES**

GROUND OF JUDGMENT
(Garnishment and Bankruptcy)

Introduction

- [1] The question of law in the present case involves an interplay of the law of execution of judgment and the law of insolvency. A judgment creditor has to tread with prudence and care as to whether he/she wants to initiate bankruptcy proceeding first before he/she applies for garnishment or writ of execution against the judgment debtor's assets.
- [2] A plaintiff who obtains a court judgment against a defendant becomes a judgment creditor by virtue of the court judgment, but that by itself does not make the plaintiff a secured creditor vis-à-vis any of the assets or properties of the defendant-judgment debtor.
- [3] A judgment creditor who relies solely upon the court judgment remains an unsecured creditor of the judgment debtor. It is only when the judgment creditor obtains the execution order in the form of garnishment order, charging order or writ of execution that he/she becomes a secured creditor of the judgment debtor in respect of the asset attached or secured by such execution order.
- [4] Once a judgment creditor becomes a secured creditor vis-a-vis a particular asset of the judgment debtor, he/she is still subject to the principles on priority of debts. Among the various secured creditors who have competing secured interests in respect of a particular asset of the debtor, the hierarchy of priority of debts is

determined according to the time of creating the secured interest. The earlier secured interest has priority over the later secured interest.

- [5] In deciding whether or not to issue an order of garnishment, the Court cannot contravene a provision of the statute on insolvency.

Background facts

- [6] On 14.11.2022 Bankruptcy Notice was filed by the Judgment Creditors against the 3rd Judgement Debtor/Appellant (“JD3”). The bankruptcy petition was filed and registered as Shah Alam High Court Bankruptcy Petition No. BA-29NCC-2834-11/2022 [see Exhibit “JD-1” to the 3rd Judgment Debtor’s Affidavit (pages 13 to 63 @ 14 to 19 in Enclosure 9).
- [7] On 28.12.2022 the Affidavit-in-Support of the *ex parte* Garnishee Application was filed by the Judgment Creditors.
- [8] Bankruptcy Notice was served by e-mail on the 3rd JD’s solicitor on 5.1.2023 and by hand on 6.1.2023.
- [9] On 6.1.2023, the Judgment Creditors filed the *ex parte* Garnishee Application against the 3rd Judgment Debtor (“JD3”).
- [10] On 27.02.2023 the Supplemental Affidavit in further support of the *ex parte* Garnishee Application was affirmed by a Judgment Creditor and filed.
- [11] On 28.3.2023 the Deputy Registrar granted the garnishee decree nisi in the form of Show Cause Order against the 1st, 2nd, 3rd and 5th Garnishees for the sum of RM3,222,550.56 (“the Show Cause Order”) [see Enclosure 6].
- [12] On 8.5.2025, JD3 filed Enclosure 8 to set aside the Show Cause Order solely on the ground that there was no full and disclosure

of the material facts by the Judgment Creditors, namely, the filing of the bankruptcy proceeding against the 3rd JD.

[13] As at 23.5.2023 the bankruptcy petition was still pending and ongoing in the High Court: see paragraph 8.2 of the Judgment Creditor's Affidavit in Reply (Enclosure 13).

[14] By order dated 6.7.2023 the Deputy Registrar dismissed the 3rd JD's application in Enclosure 8 and thereupon entered the Garnishee Order Absolute against the Garnishees. [Enclosure 24]

[15] From the parties' respective affidavits and submissions, there is no document or allegation to show that the bankruptcy petition has been withdrawn or terminated even as at this Court's hearing of this appeal in September 2023. Hence, the bankruptcy petition was still pending during the period between January 2023 and September 2023.

Legal principles

[16] The UK Court of Appeal in the case of *Nationwide Building Society v. Wright and another* [2010] Ch 318 referred to the case of *Industrial Diseases Compensation Ltd v. Marrons* [2001] BPIR 600 and held as follows: -

“25 Industrial Diseases Compensation Ltd v. Marrons [2001] BPIR 600 provides an example of circumstances in which it was held to be wrong to make an order absolute in the period between the presentation of a bankruptcy petition and the making of the bankruptcy order. The Inland Revenue presented a bankruptcy petition against the debtor on 3 July 1998: on 5 August 1998 and, again, on 2 September 1998, the claimant (IDC), with knowledge of the petition, applied for and obtained garnishee orders nisi in respect of moneys which would become payable to the debtor on a contingency: on 3 December 2008 those orders were made absolute: a bankruptcy order was made on 12 January 1999. On

the application of the trustee in bankruptcy Judge Behrens, sitting as a judge of the High Court, set aside the garnishee orders on the grounds that they should not have been made. He accepted that the district judge was aware of the pending bankruptcy petition at the time when he made the orders nisi; and there was no doubt that the county court judge was so aware at the time when he made those orders absolute. After referring to the Roberts case [1983] 2 AC 192 and to observations of Buckley LJ in D Wilson (Birmingham) Ltd v. Metropolitan Property Developments Ltd [1975] 2 All ER 814 Judge Behrens said [2001] BPIR 600, 609:

*“It seems to [me] as a matter of principle that the words of Buckley LJ which I have set out are of direct application. **The presentation of the bankruptcy petition constituted proceedings to ensure the distribution of the available assets amongst the creditors according to the statutory scheme set out in the Insolvency Act 1986. In such a case the court should have regard to the creditors generally [and] not make an order which has the effect of giving one creditor priority over the others. It follows in my judgment that a garnishee order should not be made after the presentation of a bankruptcy petition.**”*

And he concluded, at p 611, that: “For these reasons I have come to the clear conclusion that none of these garnishee orders should have been made ... In the exercise of my discretion I set them aside.” [emphasis added]

The UK Court of Appeal further held that: -

“In the IDC case the garnishee orders should not have been made absolute at the time when they were made, because the court then knew of the pending bankruptcy petition: as I have said, the right course was to await the outcome of that petition.”

[17] The Bankruptcy Act 1967 (Revised 1988), being the applicable bankruptcy law as at the times material to this garnishee order here, provides inter alia as follows:

“Rules as to proof of debts

42. The rules in Schedule C shall be observed with respect to the mode of proving debts, the right of proof by secured and other creditors, the admission and rejection of proofs and other matters. Priority of debts

43. (1) In the distribution of the property of a bankrupt there shall be paid in priority to all other debts—

(a) all local rates and land tax due from the bankrupt at the date of the receiving order and having become due and payable within twelve months next before that time;

(b) income tax and other assessed taxes assessed on the bankrupt up to the 31st day of December next before the date of the receiving order and not exceeding in the whole one year’s assessment;

(c) all wages or salary of any clerk, servant, labourer or workman not exceeding one thousand ringgit for each whether payable for time or piece work or whether or not payable wholly or in part by way of commission in respect of services rendered to the bankrupt during the period of five months next before the date of the receiving order or the date of the termination of his service if the latter occurs within twelve months of and precedes the date of the receiving order:

Provided that, where any clerk, servant, labourer or workman has entered into a contract for the payment of his wages or any part thereof in a lump sum at the end of the year of hiring, the priority under this section shall extend to the whole of such sum, or a part

thereof, as the court may decide to be due under the contract, proportionate to the time of service up to the date of the receiving order;

(d) all amounts due in respect of contributions payable during the twelve months before the date of the receiving order by the bankrupt as the employer of any person under any law relating to provident funds; and

(e) all amounts due in respect of workmen's compensation under any law relating to workmen's compensation accrued before the date of the receiving order.

(2) The foregoing debts shall rank equally between themselves, and shall be paid in full unless the property of the bankrupt is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

(3) In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate.

(4) Subject to this Act all debts proved in the bankruptcy shall be paid pari passu.

(5) If there is any surplus after payment of the foregoing debts, the surplus shall not be applied in any payment of interest after the date of the receiving order to any creditor on any debt proved in the bankruptcy, except for the payment of interest to a secured creditor under subsection 8(2A).

Relation back of Director General of Insolvency's title

47. (1) The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor, shall be deemed to have relation back to and commence at the time of the act of bankruptcy being committed on which a receiving order is made against him, or if the bankrupt is proved to have committed more acts of bankruptcy than one to have relation back to and to commence at the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within six months next preceding the date of the presentation of the bankruptcy petition.

(2) No bankruptcy petition, receiving order or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor.

Description of bankrupt's property divisible amongst creditors

48. (1) The property of the bankrupt divisible among his creditors, and in this Act referred to as the property of the bankrupt—

(a) shall not comprise the following:

(i) property held by the bankrupt on trust for any other person;
(ii) the tools, if any, of his trade and the necessary wearing apparel and bedding and other like necessities of himself, his wife and children to a value inclusive of tools and apparel and the other things aforesaid not exceeding *five thousand ringgit in the whole;

(b) shall comprise the following:

(i) all such property as belongs to or is vested in the bankrupt at the commencement of the bankruptcy or is acquired by or devolves on him before his discharge;
(ii) the capacity to exercise and to take proceedings for

exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge; and (iii) subject to the law for the time being in force relating to bills of sale, all goods being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof.

(2) Things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section. ”

[18] In light of the provisions of our Bankruptcy Act 1967 it is clear that our Malaysian law on the property of the bankrupt and the effect of commencement of bankruptcy upon the pending court proceedings and court judgments is similar to what the UK Court of Appeal has decided in *Nationwide Building Society v. Wright and another* [2010] Ch 318.

[19] In summary, upon the commencement of the bankruptcy, no unsecured creditor can obtain any execution order from the Court which has the effect of converting him into a secured creditor in respect of an asset or property of the judgment debtor. By virtue of section 47(1) of the Bankruptcy Act 1967 (Revised 1988) which provides for relation back of the bankruptcy, the bankruptcy is deemed to “commence at the time of the act of bankruptcy being committed on which a receiving order is made against him”. Section 3(1)(i), on acts of bankruptcy provides that “A debtor commits an act of bankruptcy in each of the following cases:

... ..

- (i) *if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained: ”*

Evaluation and analysis

[20] The materially relevant dates and events in our present case are as summarised below:

Date of commencement of bankruptcy: 13.1.2023

(i.e. 7 days after the Bankruptcy Notice was served by e-mail on the 3rd JD’s solicitor on 5.1.2023 and by hand on 6.1.2023).

Date of the Registrar’s grant of garnishee order nisi (Order to Show Cause): 28.3.2023,

Date of the Registrar’s grant of garnishee order absolute (Garnishee Order): 6.7.2023.

Period when the bankruptcy petition was pending includes January 2023 to September 2023.

- [21] As the garnishee order has the effect of attachment of the 3rd Judgment Debtor's monies (i.e. a form of his properties) in the hands of the garnishees thereby converting the judgment creditor into a secured creditor in respect of the attached monies, the garnishee order cannot legally be made during the pendency of a bankruptcy proceeding against the 3rd Judgment Debtor.
- [22] As is rightly held by the UK Court of Appeal, *"In the IDC case the garnishee orders should not have been made absolute at the time when they were made, because the court then knew of the pending bankruptcy petition: as I have said, the right course was to await the outcome of that petition."*
- [23] In such a situation, the judgment creditor has to wait until after the outcome of the bankruptcy petition. If the bankruptcy petition is granted by the Court, the judgment creditors remedy is to file his proof of debt but he cannot obtain any garnishee order against the judgment debtor. If the bankruptcy petition is finally dismissed by the Court, the judgment creditor may then apply for garnishee order against the judgment debtor.
- [24] In the premises, this Court held that the garnishee orders made in the present case are contrary to law and are invalid, and therefore should be set aside.

Alternative ground

- [25] It is settled law that an applicant for an *ex parte* order is under an obligation to make full and frank disclosure of all material facts and the 3rd Judgment Debtor submits that this golden rule applies to any *ex parte* application: see *Castle-Inn v. Bumiputera Commerce* [2009] 1 MLJ 542.

[26] In the Hong Kong case of *Chung Fai Engineering v. Maxwell Engineering* [2003] HKCU 1019, Burrell J sitting in the Hong Kong High Court set aside an *ex parte* garnishee order *nisi* for, inter alia, a failure to make full and frank disclosure: -

“3. The ‘garnishee to show cause’ was listed on 28 July 2003 for a three-day hearing. The directors of the garnishee have attended court for the purpose of cross-examination. However, at the 11th hour, the garnishee issued a summons to set aside the garnishee order nisi. Ms Teresa Cheng, SC, on their behalf, relies on two grounds for the setting aside. First, that Maxwell did not comply with the requirement of full and frank disclosure at the time of the ex parte order nisi. Second, that, even accepting Maxwell’s allegations at their highest, there is no ‘debt’ due from the garnishee to the judgment debtor for the purposes of garnishee proceedings. ...

12. In my judgment, the garnishee has made out a good case of non-disclosure which would enable the court to set aside the order under Order 32, rule 6. However, the primary reason for setting it aside is that Maxwell’s own case does not demonstrate that any debt, within the meaning of Order 49, rule 1, is due to the judgment debtor.”

[27] Although material facts for the purpose of *ex parte* garnishee order *nisi* are rather limited, this Court does not accept that an applicant in an *ex parte* application for garnishee order *nisi* has no duty whatsoever to disclose material facts.

[28] Pendency of bankruptcy proceeding against the judgment debtor is a material fact to be disclosed in the *ex parte* application for garnishee *nisi*. This is because the bankruptcy proceeding is intended to preserve the assets and properties of the bankrupt for the creditors as a whole for future distribution accordance to the

priority ranking recognised by the laws. When a person is adjudged bankrupt, his/her personal monies in bank accounts which have not been garnished prior to the commencement of bankruptcy shall form part of the “***property of the bankrupt divisible among his creditors***” within the meaning of s.48 of Bankruptcy Act. A garnishee order when granted has the effect of turning the judgment creditor from being an unsecured creditor into the secured creditor in respect of the judgment debtor’s monies sought to be garnished, thereby giving the judgment creditor the priority ranking over other unsecured creditors insofar as the garnished monies are concerned. As such, pendency of bankruptcy proceeding against the judgment debtor is a material fact to be disclosed in the *ex parte application for garnishee nisi*.

[29] On alternative ground, this Court has also held that the garnishee order here should be set aside on ground of non-disclosure of material fact.

Conclusion

[30] In conclusion this Court has set aside with costs both the *ex parte* Show Cause Order and the garnishee order absolute which the judgment creditor obtained in the present case.

Dated: 26 OCTOBER 2023

(TEE GEOK HOCK)

JUDGE

HIGH COURT OF MALAYA AT SHAH ALAM

(NCVC 10)

Counsel:

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For the defendants - Yeong Wen Ling; M/s Michael Chow