

Agong 8, 170

JUDICIAL COMMITTEE OF THE  
IN THE PRIVY COUNCIL

No. 5 of 1969

ON APPEAL  
FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N:-

N. RENGASAMY PILLAI

Appellant

- and -

THE COMPTROLLER OF INCOME TAX

Respondent

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
6 - DEC 1971  
25 RUSSELL SQUARE  
LONDON W.C.1

CASE FOR THE APPELLANT

Record

10 1. This is an Appeal from an order of the Federal Court of Malaysia (Syed Sheh Barakbah L.P., Ismail Khan A.C.J., Malaya, and Suffian F.J.) dated 16th April 1968 dismissing an appeal against the judgment of Chang Min Tat, J. in the High Court of Malaya, dated 14th November 1967, whereby he dismissed with costs, on 7th October 1967, the Appellant's motion to set aside a bankruptcy notice, dated 17th August 1967.

pp.53-54

pp.26-32  
p.22

pp. 1-3

2. The two points at issue in this appeal are whether:

20 (a) the Federal Court of Malaysia was right in concluding that the said bankruptcy notice did not specify a sum of money due in excess of the amount actually due to the Respondent;

and (b) the Federal Court of Malaysia was right in holding that there had been no failure of compliance with section 7(1), Courts of Judicature Act 1964, in that the bankruptcy notice had not been issued or expressed to be issued by the Chief Justice of the High Court of Malaya in the name of the Yang di-Pertuan Agong.

30

RecordFACTS

- pp. 1-2  
p. 7,  
ll. 1-2
3. On the 17th August 1967 the Appellant was served with a bankruptcy notice calling on him to pay to the Respondent the sum of \$54,826.68 being the amount due on a final judgment obtained on 3rd July 1964 by the Respondent in an action in the courts, less a subsequent deduction in the Appellant's tax liability and less a remission of tax penalty by virtue of a compromise between the parties consequent upon a decision of the Income Tax Board of Review, dated 30th June 1964. 10
- p. 4 C
- p. 14
4. The original amount of the judgment debt was \$309,660.53. The tax discharged by the Board of Review was \$191,839.20. There was a remission of tax penalties appropriate to the tax discharged amounting to \$9,591.90. There were further deductions of payments made, plus credit given in respect of re-payments in years of assessment not involved in this judgment debt amounting to \$53,402.75. This made a total deduction of \$254,833 from the judgment debt of \$309,660.53. 20
- pp. 1-3
5. The said bankruptcy notice was issued by the High Court in Malaya at Penang and signed by the Senior Assistant Registrar of that Court together with the seal of that Court. It was not issued, nor expressed to be issued, in the name of the Chief Justice of Malaya on behalf of the Yang di-Pertuan Agong in accordance with section 7(1), Courts of Judicature Act 1964.
- pp. 4-5
6. By notice, dated 28th August 1967, the Appellant gave notice under section 3(2), Bankruptcy Ordinance 1959 (now re-enacted in section 3(2), Bankruptcy Act 1967) that he was disputing the validity of the said bankruptcy notice on the ground that the sum specified in the said notice as the amount due exceeded the amount actually due. 30
- p. 18
7. By a letter, dated 16th August 1965, sent by the Penolong Pengawal Hasil Dalam Negeri under the signature of Mr. H. L. Edwards, the total liability of the Appellant to the Respondent was stated to be \$60,240.45. On 25th April and 5th August 1966 the Appellant made two payments of \$5,000 each, so reducing the stated liability to \$50,240. 40
- p. 49A

8. Chang Min Tat J., in his reserved judgment, dated 14th November 1967, held that the figure of \$50,240.45, accepted by the debtor as being the sum due from him did not constitute an admission in the said letter, dated 16th August 1965, from the tax authorities that the sum due and payable was anything less than the \$54,826.68 claimed. The learned judge calculated that the penalty of \$5,153.78 referable to the amount due after  
 10 deductions by the Board of Review had been omitted and had to be added to the tax liability of \$50,240.45 less a sum of \$567.55 allowed by the Respondent, thus making the net sum of \$54,826.68 claimed by the Respondent in the bankruptcy notice.

THE RELEVANT LAW

9. The relevant provisions of the law of Malaysia are as follows:-

A. The Income Tax Ordinance 1947

Section 84 provides:

- 20 (1) Subject to the provisions of sub-section 3 of this section, if any tax is not paid within the periods presented in section 82 of this Ordinance -
- 30 (a) a sum equal to five per centum of the amount of the tax payable shall be added thereto, and the provisions of this Ordinance relating to the collection and recovery of tax of such sum;
- (b) the Comptroller shall serve such a demand note upon the person addressed; and if payment is not made within one month from the date of the service of such demand note the Comptroller may proceed to enforce payment as hereinafter provided;
- 40 (c) a penalty imposed under this sub-section shall not be deemed to be part of the tax paid for the purpose of

Record

claiming relief under any of the provisions of this Ordinance.

(2) (Repealed by Ordinance No. 11 of 1948)

(3) The Comptroller may for any good cause shown remit the whole or any part of the penalty due under sub-section (1) of this section.

Section 86 provides:

10

(1) Subject to the provisions of section 81 of this Ordinance tax may be sued for and recovered in a Court of Competent Jurisdiction by the Comptroller in his official name with full costs of suit from the person charged therewith as a debt due to the Government.

-----  
(3) In any suit under sub-section (1) of this section the production of a certificate served by the Comptroller giving the name and address of the opponent and the amount of tax due by him shall be sufficient evidence of the amount so due and sufficient authority for the Court to give judgment for the said amount.

20

B. The Bankruptcy Ordinance 1959

Section 3(2) provides:

30

A bankruptcy notice under this Ordinance shall be in the prescribed form and shall state the consequences of non-compliance therewith and shall be served in the prescribed manner:

Provided that a bankruptcy notice -

(i) -----

(ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds

40

the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake;

C. Courts of Judicature Act 1964

Section 7 provides:

- 10 (1) All summonses, warrants, orders, rules, notices and mandatory processes whatsoever, whether civil or criminal, shall be issued and shall be expressed to be issued by the Chief Justice of the High Court issuing the same in the name of the Yang di-Pertuan Agong and shall be signed by a Registrar of such Court; and any such summons, 20 warrant order, rule, notice and mandatory process shall be sealed with the seal of the Court issuing or making the same.
- (2) All summonses, warrants, orders, rules, notices and other processes whatsoever, whether civil or criminal, issued or made by or by the authority of any Court 30 respecting any cause or matter within its jurisdiction shall have full force and effect and may be served or executed anywhere within Malaysia.

PROCEDURE IN COURTS A QUO

10. On 15th September 1967 the Appellant filed a notice of motion applying to set aside the bankruptcy notice on grounds other than those contained in Bankruptcy Ordinance No. 20 of 1959, section 3(1)(i) namely, on, inter alia, two grounds:-

pp.10-11

- 40 (a) the substantive invalidity of the bankruptcy notice, in that the amount specified in such notice exceeded the amount due from the appellant: proviso (ii) to section 3(2) Bankruptcy

Record

Ordinance 1959;

and (b) the procedural invalidity of the bankruptcy notice, in that the "form prescribed" within section 3(2), Bankruptcy Ordinance 1959 did not comply with the ordinance requirement of section 7(1), Courts of Judicature Act 1964.

p.23 11. On 7th October 1967 Chang Min Tat J. dismissed the Appellant 's application to set aside the bankruptcy notice, dated 17th August 1967, with costs. The learned judge in a reserved judgment dated 14th November 1967, held 10

(i) in respect of para. 10(a) above,

p.30 A that the Respondent had not claimed any sum in excess of what was clearly due by the Appellant since the claim made by the Respondent in the letter of 16th August 1965 had to be mathematically adjusted to take account of the tax penalty exacted under section 84(1), Income Tax Ordinance 1947; and that the bankruptcy notice was not invalidated by any excess claimed. 20

(ii) in respect of para. 10(b) above,

p.31 A-B that a bankruptcy notice was not a "mandatory process" within section 7(1), Courts of Judicature Act 1964 but was a procedural notice of the kind envisaged by section 7(2), Courts of Judicature Act 1964 which does not require issuance by (and an expression of issuance by) the Chief Justice in the name of the Yang di-Pertuan Agong. 30

12. On 6th November 1967 the Appellant gave notice of appeal against the decision of Chang Min Tat J. The grounds mentioned in the memorandum of appeal, dated 18th December 1967, were (inter alia) that the learned judge had

(a) wrongly embarked upon a mathematical calculation in order to reconcile the claim on the judgment debt, as amended by the Board of Review of \$54,826.86, 40

with the amount of \$50,240.45 (without any evidence as to the discrepancy in the amounts);

and (b) had erred in law as to the effect of section 7(1) and (2), Courts of Judicature Act 1964.

13. The appeal came before the Federal Court of Malaysia on 16th April 1968, on which date the Court reserved its judgment.

pp.40-46

10 14. On 13th May 1968 the Court, in a judgment delivered by Suffian F.J., dismissed the Appellant's appeal with costs. The learned Federal Judge, agreeing with the decision of Chang Min Tat J. on the first point, held that the amount mentioned in the letter of 15th August 1965 as being due from the appellant to the tax authorities was only in respect of tax due and did not preclude the Respondent from adding a penalty to the tax. On the second point, the learned Federal Judge  
20 declined to follow the reasoning of Chang Min Tat J. and held that section 7, Courts of Judicature Act 1964 was inapplicable to a bankruptcy notice, which requires compliance only with section 3(2), Bankruptcy Ordinance 1959 prescribing special procedural rules for bankruptcy matters, and in accordance with the rule of construction, generalia specialibus non derogant, the general rule did not affect the special rules relative to bankruptcy.

pp.47-52

p. 50 B

p. 51C-D

30 15. On 13th May 1968 the Federal Court of Malaysia ordered that the appeal be dismissed with costs. On 6th January 1969 an order was made granting the Appellant final leave to appeal to His Majesty the Yang di-Pertuan Agong.

p.53-4

p. 55

#### SUBMISSIONS

16. The Appellant humbly makes the following submission on the two issues in this appeal:-

(a) Substantial invalidity of bankruptcy notice

40

Both the Courts a quo held that there had been compliance with proviso (ii) to section 3(2), Bankruptcy Ordinance: the sum specified in the bankruptcy notice did not

Record

exceed the sum actually due since the former included an amount referable to a tax penalty and was not part of the tax due as claimed in the letter of 16th August 1965. It is submitted that this finding is insupportable in law, for the following reasons:-

(i) It is indisputable that if the sum specified in the bankruptcy notice exceeds the amount actually due then the bankruptcy notice is void and of no effect: Re Arunachalam, ex parte Indian Overseas Bank Ltd. (1968) 1 M.L.J. 89.

On the face of the record, there was such an excess in the amount claimed in the bankruptcy notice; the absence of such an excess could be implied only by treating the amount in the bankruptcy notice as containing an element of tax penalty, whereas the amount claimed in the letter setting out the tax due might reasonably have implied that the additional tax penalty had been waived under section 84(3), Income Tax Ordinance 1947.

(ii) The Courts a quo concluded, wrongly it is submitted, that section 84(1)(c) created a dichotomy between the tax due and any penalty imposed under the same sub-section. It is submitted that any penalty imposed is not to be part of the tax paid "for the purpose of claiming relief under any of the provisions of this Ordinance"; and, therefore, any final penalty is part of the tax paid or payable for the purpose of issues under the bankruptcy legislation. Hence the claim made in the letter of 8th August 1959 must be construed as a claim for tax, including any penalty under section 84(1), if applicable. There is, moreover, no presumption to be inferred that the tax authorities had not remitted the whole or any part of a penalty due under section 84(3); indeed, on the contrary, having regard to the substantial reduction in the appellant's tax liability as a result of the decision of the Board of Review

10

20

30

40



the Courts might reasonably have inferred that the Comptroller had exercised his discretionary powers of remission of any penalty.

10 (iii) Once a debtor has given notice under section 3(2), Bankruptcy Ordinance 1959 that he disputes the validity of the notice on the ground that there is an excess in the amount stated in the bankruptcy notice, the burden of proving that such notice complies with the provisions of section 3(2), Bankruptcy Ordinance 1959 is on the Respondent. The Respondent failed, it is submitted, to discharge that onus of proof.

(b) Procedural invalidity of bankruptcy notice.

20 The Federal Court of Malaysia held that the bankruptcy notice was issued in accordance with section 3(2), Bankruptcy Ordinance 1959, in that it complied with the form prescribed under that Ordinance and did not need to conform to the general rules enunciated in section 7, Courts of Judicature Act 1964. It is submitted that the prescribed form for a bankruptcy notice cannot override the clear requirements of section 7(1), Courts of Judicature Act 1964, for the following reasons:-

30 (i) A bankruptcy notice is a "notice or other mandatory process" within the meaning of section 7(1) Courts of Judicature Act 1964, since the consequence of non-compliance by the debtor is to constitute such failure an act of bankruptcy.

40 (ii) The rule of construction, generalibus specialibus non derogant, is not applicable where the special provision is in the form of subsidiary legislation and the general provision is primary legislation.

17. The Appellant humbly submits that this appeal should be allowed and that the judgment and order of the Federal Court of Malaysia, dated

Record

13th May, 1968, should be set aside and judgment entered for the Appellant and that he be awarded costs throughout for the following, among other

R E A S O N S

- (1) BECAUSE the sum specified in the bankruptcy notice exceeded the amount actually due, and as such the bankruptcy notice was void and of no effect under section 3(2), Bankruptcy Ordinance 1959.
- (2) BECAUSE the Courts a quo wrongly assumed that the amount actually due from the Appellant did not properly include the element of tax penalty which was part of the amount claimed. 10
- (3) BECAUSE that on the face of the record there is a discrepancy between the amount actually due and the amount claimed (the latter exceeding the former), the burden of proving the contrary being upon the Respondent.
- (4) BECAUSE the bankruptcy notice, dated 17th August 1967, was void and of no effect as containing the mandatory provision of section 7(1), Courts of Judicature Act 1964. 20
- (5) BECAUSE the reasoning of the Federal Court of Malaysia was wrong and ought to be reversed.

L. J. BLOM-COOPER.

No. 5 of 1969  
JUDICIAL COMMITTEE OF THE  
IN THE PRIVY COUNCIL

ON APPEAL  
FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N:

N. RENGASAMY PILLAI  
Appellant

- and -

THE COMPTROLLER OF INCOME TAX  
Respondent

---

CASE FOR THE APPELLANT

---

T. L. WILSON & CO.,  
6, Westminster Palace Gardens,  
London, S.W.1