





3. As the JC did not return the gas cylinders the JD demanded the payment of the adjudged liquidated sum.

4. The JC paid the said sum under protest. Later, the JC also applied in the Sessions Court for an order under O. 31 r. 11 of the Subordinate Court Rules 1980 to be permitted to enter satisfaction of the aforesaid judgment by entry in the Cause Book because the JC had offered subsequently to return the gas cylinders.

5. The JC's application was dismissed by the Sessions Court.

6. The JC appealed and succeeded in the High Court in setting aside the Sessions Court order for dismissal.

7. The order of the High Court dated 20.9.2005 ('the High Court Order') reads as follows:

- (a) rayuan ini dibenarkan (iaitu penjelasan Penghakiman bertarikh 20 Januari, 1998 dicatatkan dalam Buku Kausa) dengan kos di sinid an di bawah;
- (b) Perintah Mahkamah Sesyen bertarikh 1.7.2003 diketepikan;
- (c) Responden memulangkan kepada Perayuwang-wang berikut:-
  - (i) RM68,250.00 berserta faedah keatasnya pada kadar 8% setahun daripada 23.8.2002 sehingga tarikh penyelesaian penuh;
  - (ii) RM90,980.05 berserta faedah keatasnya pada kadar 8% setahun daripada 27.9.2002 sehingga tarikh penyelesaian penuh.



8. The BN in question was issued against the JD demanding payment of the sum of RM274,154.89 being the amount due on the High Court Order.

*[JD's Submission]*

9. Learned counsel for the JD argued that the High Court Order relied upon to found the BN is not capable of execution and is not one on which bankruptcy proceedings can be founded. The BN did not demand payment of the judgment debt in accordance with the terms of the judgment.

10. The JD's argument is premised on the following basis:-

- i. The High Court Order is an order of the High Court exercising its appellate jurisdiction in respect of an appeal from the Sessions Court is not a final judgment on which bankruptcy proceedings could be initiated. The JC ought to have extracted the High Court Order and have a judgment entered in the Sessions Court before the Sessions Court judgment could be enforced;
- ii. The High Court Order is not a final judgment. The JC must ensure the entry of the High Court Order in the Cause Book of the Sessions Court (pursuant to O. 31 r. 11 Subordinate Court Rules 1980) before the JD is obliged in law to make repayment as ordered; and
- iii. The order of the High Court exercising appellate jurisdiction is one which is corrective of the Sessions Court's decision on appeal. It is not a final judgment capable of being executed as it stands.



11. Learned counsel for the JD submitted that as the JC is not entitled to enforce a final judgment or final order, the JC is not a creditor within the meaning of s. 3(1)(i) of the Bankruptcy Act 1967 (BA 1967). As authority for the proposition, learned counsel cited *In Re Woodall, ex parte Woodall* 13 (1884) 479 and *Low Mun @ Low Sian Sun v. Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 SC.

12. It was also argued that the BN can only demand the payment of a judgment debt “in accordance with the terms of the judgment”. If the demand is otherwise, the BN is null and void *ab initio* (*J. Raju M. Kerpayya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104 CA; *Low Mun, supra*; *OCBC Bank (Malaysia) Bhd v. Sethu Ambalagara Thevar* [1998] 3 CLJ 563 CA).

13. Learned counsel also argued that the failure to make a record of the satisfaction in the Cause Book is an irregularity thereby rendering the BEEN invalid as it was not supported by a judgment or order capable of execution (O. 31 r. 11 & O. 52 r. 2 Subordinate Court Rules 1980; *Malayan Banking Bhd & Anor v. Swasta Jaya Sdn Bhd* [1990] 2 MLJ 12 SC).

*[JC's Reply]*

14. Learned counsel for the JC submitted that the BN was correctly premised on the High Court Order. Firstly, there was only one order for the refund of the monies with interest thereon. There was no order or judgment made by the Sessions Court for such refund. As such, it would be wrong to draw up another order or judgment before the Sessions Court.



15. Secondly, there is no question of drafting the order in the form of a ‘judgment’ because the order was made pursuant to an application made after judgment had previously been given after trial, and not pursuant to the relief claimed in the pleadings. There was a judgment of the Sessions Court already drawn up. The High Court Order is to the effect that the aforesaid judgment has already been satisfied. Further, the JD’s contention is not supported by any authorities.

16. Learned counsel also submitted that there is no mention in the High Court Order that the order for refund of the monies paid is only enforceable after the satisfaction of judgment has been recorded by the Sessions Court in the Cause Book. The order for the JD to refund the monies pursuant to paragraph (c) of the High Court Order is not conditional upon the other terms.

17. The JC is entitled to rely on the High Court Order for the purposes of initiating this bankruptcy proceedings because a judgment creditor can rely on either a judgment or an order (s. 3(1)(i) BA 1967; *Re Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (administratrix of the estate of Mohamad Shariff bin Haji Hussain)* [2000] 6 MLJ 155).

### **Findings of the Court**

18. There are 2 principal issues for determination in this appeal. The first relates to the question of whether the High Court Order is a final order within the meaning of s. 3(1)(i) BA 1967. If the question is answered in the affirmative, to consider the question of whether it is



necessary for the Sessions Court to record the satisfaction in the Cause Book before JC can initiate bankruptcy proceedings.

**19.** The BA 1967 sets out 9 situations under which a debtor may be said to have committed an act of bankruptcy. For the purposes of this appeal, the relevant provision is contained in paragraph (i) of subsection (1) of s. 3 BA 1967 and it provides as follows:

**3. Acts of bankruptcy**

(1) A debtor commits an Act of bankruptcy in each of the following cases:

(a)

...

...

(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 the Federation, 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 given 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 where he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:

Provided that for the purposes of this paragraph and of section 5 **any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or order;**



*(Emphasis added)*

*[Whether the High Court Order is a final order?]*

**20.** It is clear that under the BA 1976 a bankruptcy notice must be founded on a final judgment or final order. What is a final judgment or final order is not defined in the BA 1967.

**21.** In this instance, since the appeal against the High Court Order was also dismissed by the Court of Appeal on 27.5.2010, the High Court Order had the legal effect of finally disposing the rights of the JC and the liability of the JD. In that regard, the High Court Order is in the nature of a final order as the matter has been finally adjudicated by the court (see *Re Tioh Ngee Heng, supra*).

**22.** The cases cited by learned counsel for the JD are distinguishable on the facts and are of no aid to the JD's contention. In *Re Woodall, supra* it was held that an executor, as opposed to the judgment creditor himself, is not entitled to enforce the judgment by bankruptcy proceedings without obtaining the prior leave of court. In *J. Raju M. Kerpaya, supra* it was held that a bankruptcy notice that included a demand for sums (penalty interest and stamp duty) that were not awarded under the judgment is invalid. In *Low Mun, supra* the court held that a bankruptcy notice that included a demand for unspecified sums (of interest and costs that have not been taxed) is invalid. In *OCBC Bank (Malaysia) Bhd, supra* the court held that a judgment creditor is obliged to accept the full sum tendered by the judgment debtor instead of prosecuting the bankruptcy proceedings.



23. In *LohEng Leong, supra* the appellant appealed to the Court of Appeal against the High Court's dismissal of their application for the rectification of the share register. The appellant's appeal was allowed and the Court of Appeal by its order dated 21.7.2001 directed rectification. The appellant later filed a motion for leave in the Court of Appeal for a committal order against the respondents for breach of the Court of Appeal order. The Court of Appeal held that when it acts in its appellate jurisdiction, any order that it makes is an order that ought to have been made by the High Court. Therefore, any order made by the Court of Appeal in its appellate jurisdiction must go to be enforced by the court that ought to have made the order, namely, the High Court.

24. *LohEng Leong, supra* is also distinguishable on the facts and on the law. In this instance the bankruptcy proceedings are governed by the BA 1967 under which the court having jurisdiction in bankruptcy is the High Court. Accordingly, the JD's contention that the enforcement proceedings ought to have been taken out at the Sessions Court is of no merit.

25. In the light of the above finding, the Court will now consider the question of whether it is necessary for the Sessions Court to record the satisfaction in the Cause Book before the JC can initiate bankruptcy proceedings. At the outset, it is pertinent to note the wordings of paragraph (a) of the High Court Order which states that: '*rayuan dibenarkan (iaitu penjelesan Penghakiman bertarikh 20 Januari 1998 dicatatkan dalam Buku Kausa) dengan kos di sini dan dibawah;*'.



**26.** Clearly, what was required to be recorded in the Cause Book was the satisfaction of the judgment in question. According to the grounds of decision of Suriyadi Bin Halim Omar J (now FCJ), the JC had agreed and indicated their readiness to comply with the judgment of the Sessions Court dated 10.1.1998 to return the 195 gas cylinders to the JD. In fact, the JC had requested the JD to indicate the date, time and place of delivery of the gas cylinders. As such, the JC is deemed to have satisfied the judgment of the Sessions Court and the JC was entitled to apply to court for an order that satisfaction be entered under O. 31 r. 11 Subordinate Court Rules 1980. As the JD had refused or neglected to accept delivery of the gas cylinders, the High Court applied s. 68 of the Contracts Act 1950 in favour of the JC so as to excuse the JC from its promise due to the JD's neglect or refusal to afford the JC reasonable facilities for the performance of its promise to return the gas cylinders. The High Court then set aside the Sessions Court's decision dismissing the JC's application for an order that satisfaction be entered. Having made that order setting aside the Sessions Court order, Suriyadi J then made a consequential order whereby the JD was ordered to refund the monies back to the JC.

**27.** There is nothing in the High Court Order or in the grounds of judgment to indicate that the order for the refund of the monies is conditional upon the satisfaction being recorded in the Cause Book. The consequential order was not made pursuant to any claim or counterclaim by the JC in the Sessions Court.

**28.** In *Swasta Jaya, supra* the second and third defendants had filed appearances but the appearances were not entered into the Cause Book



of the registry. Relying on the Cause Book, the plaintiffs obtained judgment in default against the said defendants. The Supreme Court set aside the default judgments on the ground that they were not obtained regularly as appearances were clearly entered and should have been registered by the registry. The rationale being that the fact that the appearances were not entered into the Cause Book did not make the appearances invalid.

**29.** Accordingly, the question is answered in the negative. It is not necessary for the satisfaction to be recorded in the Cause Book before any execution or bankruptcy proceedings can be initiated by the JC against the JD.

**30.** For the foregoing reasons, the JD's appeal is dismissed with costs.

**(VERNON ONG)**  
JUDGE  
HIGH COURT MALAYA  
SHAH ALAM

**DATED:** 31 JULY 2014



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