A

RE RATU OSEA GAVIDI

[SUPREME COURT—Kermode J.—10 April 1984]

B In Bankruptcy

Bankruptcy—receiving order—proof of debt—admission of debt by counsel—signature of counsel upon petition—Bankruptcy Act (Cap. 48)—Bankruptcy Rules rr 169, 170, 277 and 278.

C The debtor sought to set aside a receiving order made against him on the ground that there was no evidence produced to the court on the day that the order was made that the debt remained unpaid.

Held: Despite the debt not being disputed a court may not make a receiving order unless satisfied that the debt remains unpaid.

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Per curiam: Although in England the courts have applied a stricter test the position in Fiji is that admission of a debt coupled with an absence of a notice of dispute may together with the contents of the petition constitute proof of the debt. An unincorporated body must specifically authorise it's attorney to sign a petition on its behalf.

E *S. M. Koya* for Judgment debtor
H. A. L. Marquardt-Gray for Judgment Creditor
Dr A. Singh for the Official Receiver

Cases referred to:

F *Re a debtor* (1935) C.L. 353
Ex parte the debtor v. Scott & Another (1954) 3 All E.R. 74
Re a debtor (1943) Ch. 210
Re Lindsay, Ex parte Lindsay (1874) LR 19 Eq.52
Ex parte Wallace In re Wallace (1884) 14 QBD 22

G KERMODE, J.:

Decision A

On the 19th day of July, 1983, a Receiving Order was made against the Judgment Debtor on his failure before the 28th March, 1983, to comply with the requirements of a Bankruptcy Notice duly served on him on the 21st March, 1983.

He now seeks rescission of that order upon the ground that no evidence was tendered to B the Court on the day the order was made to prove that the alleged debt was in existence on that day.

Neither Mr Marquardt-Gray nor Dr Ajit Singh oppose the application.

In the course of his argument Mr Koya drew attention also to a defect in the Petition C which I will refer to later.

The facts in this case are as follows:

On the 10th May 1983, Mr Marquardt-Gray appeared in Chambers on the hearing of the Petition for the Judgment Creditor and Mr D. K. Jamnadas appeared for the Judgment Debtor D who did not appear in person.

Mr Gray advised that arrangements were being made to settle the matter and he asked for an adjournment for two months. Mr Jamnadas agreed to the adjournment and the matter was adjourned to the 14th June, 1983, and adjourned again by consent to the 19th July, 1983.

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On that date Mr Jamnadas advised that he had received no further instructions and Mr Marquardt-Gray then asked for a Receiving Order against the debtor's estate which was made without any further enquiry by the Court.

Both Mr Jamnadas and the Judgment Debtor have filed affidavits verifying most of the facts stated above. Mr Jamnadas states that he had no instructions to admit the debt. The F Judgment Debtor states he had instructed Mr Kato to appear for him to dispute the debt.

Whatever the instructions may have been the Court assumed from the conduct of the counsel representing the parties that the debt was not disputed and an adjournment was being sought to discuss a settlement of that debt. The debtor at no time appeared personally to dispute the debt and no objection was taken by Mr Jamnadas in the absence of instructions G to the making of the Receiving Order. No notice was given by the debtor under rule 169 of the Bankruptcy rules that he intended to deny or dispute any allegations in the Petition.

Section 7(2) of the Bankruptcy Act provides as follows:

"7.—(2) At the hearing the court shall require proof of the debt of the petitioning creditor, H of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy and, if satisfied with the proof, may making a receiving order in pursuance of the petition."

A Bankruptcy Rules 169 and 170 also have to be considered. They are as follows:

"169. Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute, and transmit by post to the petitioning creditor and his solicitor, if known, a copy of the notice three days before the day on which the petition is to be heard.

B

170. If the debtor does not appear at the hearing, the Court may make a R.O. on such proof of the statements in the petition as the Court shall think sufficient."

There was no compliance by the debtor with Rule 169 and although he did not personally appear he was represented by counsel.

C

There was then no notice that any of the Statements in the Petition were challenged. The second paragraph of the Petition alleged that the debtor was indebted to the Judgment Creditor in the sum of $673.72.

Mr Koya has pointed out that there is a Statement which is not factual in the second paragraph of the Petition where it is stated as follows:

D

"the consideration of the said judgment debt being the amount due and owing for cash lent and advanced to the said Ratu Osea Gavidi."

The debtor was sued as guarantor of one Emosi Dagoya who was indebted to the Judgment Creditor in the sum claimed in Supreme Court Civil Action 992 of 1982.

E

The error was not noticed by Mr Marquardt-Gray who made an affidavit verifying that the several statements in the Petition were true.

Williams and Muir Hunter on Bankruptcy 19th Edition at page 56 dealing with section 5 subsection (2) of the English Act which is identical to section 7 subsection (2) of the Fiji Act has this to say:

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"Since bankruptcy affects not only the debtor and his creditor, but also the general public, the Court has a duty to see all the requirements of the Act and Rules have been observed *(Re a debtor* 591 of 1934 (1935) C.L. 353).

G

They go on to say:

"The petitioning creditor's debt must be proved not only to have existed at the date of the act of Bankruptcy, and at the time of presentation of the petition but also to exist at the hearing and down to the making of the receiving order."

H

This statement appears to have been taken from *Ex parte the Debtor v. Scott & Another* (1954) 3 All E.R. 74 and reflects Sir Raymond Evershed M.R.'s views at page 78. The learned authors also go on to say:

"An affidavit of debt should normally be sworn within 24 hours before the first hearing; but if no notice to dispute is given, an admission of the debt may be sufficient proof. *(Re a debtor* (27 of 1943) (1943) Ch. 210.)

The reference by the authors to the case 27 of 1943 must be read in relation to the facts of that case. The Registrar made the order subject to an affidavit being filed that day to prove the debt and his order was upheld by the Court of Appeal.

It is clear from consideration of the English authorities that the procedure followed in England is not being followed in Fiji despite the fact that the Bankruptcy Acts and Rules of England and Fiji are very similar.

In the instant case it is now clear that the Court has placed too wide an interpretation on Rule 170 and has been accepting admissions by debtors or their counsel without further proof or enquiry.

The Court on the hearing of Petition has hitherto accepted the affidavits verifying the contents of petitions as being true as being proof of the existence of the debt and the act of bankruptcy in the absence of any notice of dispute given by the debtor.

Rule 170 allows the Court on non appearance of the debtor to make a Receiving Order on such proof of the Statements in the Petition as the Court shall think sufficient. This rule has been given a wide interpretation in Fiji.

Rule 171 provides that where a debtor does appear to show cause against the petition the petitioning creditors debt and the act of bankruptcy and disputed matters of which notice has been given must be proved.

Reading subsection 2 of section 7 of the Act by itself it would be thought that admission of the debt by the debtor or counsel on his behalf would be sufficient proof of it since an admission is a form of proof.

The effect of the section and the three Rules 169, 170 and 171 considered together would appear prima facie to indicate that where a debtor admits the debt and has given no notice to dispute the allegations in the Petition that can be accepted as proof of the debt. Such has been the view of the Court until that view was challenged in the present action.

In England, however, the Act and Rules have been interpreted differently and more strictly. It has been held there that the allegations in the petition should be supported by evidence other than the formal affidavit verifying the petition *(Re Lindsay, ex parte Lindsay* (1874) L.R. 19 Eq. 52). The verifying affidavit has been treated, in practice, not as establishing the truth of the allegations in the petition but merely as justification for the sealing of the petition.

At the hearing on the 19th July, 1983, when the Receiving Order was made in this action there was no proof adduced that the alleged judgment debt was still due and owing. Section

A 7(2) of the Bankruptcy Act was not complied with and the Court was not empowered to make the Order. Under section 100 of the Act the Court may review, rescind or vary any order made by it.

The Receiving Order made on the 19th day of July, 1983, was a nullity and is hereby rescinded.

B

Mr Marquardt-Gray on the 26th August, 1983, took out a summons seeking an order that the debtor be adjudged bankrupt consequent upon his failure to comply with section 16 of the Act relating to the debtor's statement of affairs.

At the hearing on 20th September, 1983, the debtor was represented by Mr Koya. There
C was an adjournment to the 4th October, 1983, when Mr Koya advised the Court that the debtor would be "paying off". The hearing was adjourned to the 18th October, 1983, when the Court was advised that the matter was being settled. Leave to withdraw the summons was given to Mr Marquardt-Gray subject to reinstatement if the debt was not settled within 14 days. The debtor did not pay the debt.

D The next application was the present application seeking recission of the Receiving Order.

In view of those circumstances there will be no order as to costs.

Mr Koya also queried whether Mr Marquardt-Gray could sign the petition as agent for
E the Judgment Creditor. Mr Marquardt-Gray at the hearing advised that he was in fact authorised by the Attorneys of the Bank to present the petition on its behalf but there is no mention of such authorisation in the Petition or the Affidavit verifying the facts in it.

A duly constituted Attorney may sign a creditor's petition on behalf of the creditor (*Ex parte Wallace In reWallace* (1884) 14 Q.B.D. 22) if the Power of Attorney authorises that
F act.

Rule 5(1) provides for use of the forms in the Appendix. Form No. 10 is the Creditors Petition. The form indicates that it is to be signed by the petitioner. Rules 145 to 149 both inclusive deal with Bankruptcy petitions. Nowhere in those rules is there any provision that a petition may be presented by a solicitor or agent of the petitioner unless specifically
G authorised to do so.

In law the signature of a duly constituted attorney signing on behalf of a petitioner is deemed to be the act of the petitioner. Such a signature is in order. In my view, if a petitioner, not being an incorporated company, does not personally sign a petition he must authorise his attorney to do so under a Power of Attorney. A solicitor or agent without such specific power
H cannot do so in my view.

Where an incorporated company is the petitioning creditor the position is different. Section 130 of the Bankruptcy Act provides as follows:

"130. For all or any purposes of this Act, a corporation may act by any of its officers authorised in that behalf under the seal of the corporation, a firm may act by any of its members, and a person of unsound mind may act by his committee or the appointed manager of his estate."

The 1915 Rules make provision for proceedings by and against firms (Rule 278 et seq.) but not for corporation.

There are no specific rules regarding presentation of petitions by or on behalf of an incorporated company. In practice the current procedure in England is followed. Paragraph 283 of *Halsbury Laws of England* Volume 3, 4th Edition sets out the procedure and is as follows:

"Companies: A company may be a petitioning creditor, it may act by any of its officers duly authorised under its seal, and may give a general authority to an officer to present bankruptcy petitions in the future in respect of acts of bankruptcy which may not have arisen at the date when the authority is given. It is sufficient if the company's seal is affixed to the copy which constitutes the officer's authority, the sufficiency of which may be inquired into by the court although the debtor has not taken objection to it. Any person chosen bona fide by the company as its agent to present a bankruptcy petition becomes thereby an officer of the company for the purpose. The petition must be in the company's name; if the company is in liquidation, the petition must be in the name of the company, and not of the liquidator."

The authority for a single petition is usually filed with the petition. A general authority is filed in Court and reference is made to it in each affidavit verifying a petition.

Some confusion may have arisen over rule 277 which is as follows:

"A bankruptcy petition against, or bankruptcy notice to, any debtor to any company or co-partnership duly authorised to sue and be sued in the name of a public officer or agent of such company or co-partnership, may be presented by or sued out by such public officer or agent as the nominal petitioner for and on behalf of such company or co-partnership, on such public officer or agent filing an affidavit stating that he is such public officer or agent, and that he is authorised to present or sue out such petition or bankruptcy notice."

That rule enables a public officer or agent of a company authorised to sue or be sued in the name of such officer or agent to present a petition in his name for an on behalf of the company. It does not enable him to sign a petition presented by the company.

I am unable to say whether the Bank, which normally acts in Fiji by its duly constituted attorneys, and through those attorneys, lawfully appointed Mr Gray to sign the petition on its behalf. All I can say is that in the instant case, there is no proof of his authority to do so.

Application granted.