

A

PREM CHAND

v.

VELSON SERVICE STATION

[COURT OF APPEAL—Speight, V. P., Roper, J. A., Mishra, J. A.]

B

Civil Jurisdiction

Date of Hearing: 1 July, 1986

Delivery of Judgment: 4 July, 1986

C

M. S. Sahu Khan for the Appellant*H. M. Patel* for the Respondent

(Bankruptcy—Allegation of settlement of respondent's (petitioning creditor's debt—receiving order, made in absence of appellant-debtor due to misunderstanding, set aside.)

D

Prem Chand (appellant) appealed against two decisions of the Supreme Court in favour of the respondent refusing to extend the time within which to appeal against a receiving order made against him under s. 5 of the Bankruptcy Act (Cap. 48) and a second order by Cullinan, J. which refused to set aside the order.

E

Apparently the evidence was that a bankruptcy notice was served on respondent on 4 January, 1985 and demanding \$10,000 with which, it was alleged, he failed to comply. The petition and supporting affidavit were signed by Krishanji Velji.

F

On 22 March, 1986 appellant filed an affidavit in opposition to the petition admitting he had owed \$10,000 but claiming that he had "settled the balance of \$10,000 remaining under the judgment" by the respondent having agreed to accept shares in a company named Matei Developments Limited (Matei) which shares had been transferred to the respondent; and that further, after the Bankruptcy Notice had been served he had a conversation with the respondent in which the respondent advised the (share transfer) had been completed; whereupon the respondent undertook to have further proceedings withdrawn. The business carried on by Matei is referred to below.

G

The copy share transfer was produced in evidence signed by Krishanji Velji's brother. Also produced was a letter from Matei to Velji informing him the transfer had been approved and that his name would be included in the shareholder's register.

H

On 7 May, 1985 Velji filed an affidavit in which he alleged that "the property" was residential property whereas he (now) believed it to be agricultural land; that the signature of his brother on the share transfer had been obtained by a false representation; that the land had not been transferred to him; that he had told the respondent

on various occasions he was no longer interested in settling the debt for the said property: that there was nothing definite about the subdivision and issueing of separate titles by Matei; that he had informed the company secretary he was no longer interested in the property. The court noted that it appeared each shareholder in Matei was to have been entitled to a ¼ acre freehold block when a subdivision at Nasoso, Nadi was completed. A

After various adjournments, on 6 June, 1985 counsel for the appellant stated to the learned Judge in Chambers: B

“Our principals say the instructions are withdrawn. I am not in a position to oppose.”

Respondent’s counsel said that the agreement regarding the transfer of shares was signed by creditor’s brother without authority. He sought a receiving order; his client was not interested in the shares in Matei which were issued without consent. The receiving order was then made. However appellant filed an affidavit stating it was always his intention to defend. He had not been informed of the 6 June hearing. C

In each of the appeals the grounds of appeal alleged an exercise of discretion on wrong principles and took into account irrelevancies. These grounds are inappropriate. In the case of the application to extend the time the papers filed were inadequate and much of the relevant material was never presented. In the hearing before Cullinam, J. the failure of counsel to appear rendered the matter a mere formality. D

All the material before the Court indicated the appellant should have his day in court and be permitted to defend the action. E

Appeals allowed.

Receiving order set aside.

ROPER, J. A. F

Judgment of the Court

On the 6th June 1985 a receiving order under section 5 of the Bankruptcy Act (Cap. 48) was made against the Appellant by Rooney J. on the petition of the Respondent. We have before us two appeals which were heard together—one against the refusal of Mishra J. A., sitting as a single Judge of the Court of Appeal, to extend time within which to appeal against the making of the order; and the other against the refusal of Cullinan J., to set aside or rescind the order. G

The petition was issued on the 6th March 1985 on the ground that the Appellant had failed to comply with a bankruptcy notice served on him on the 4th January demanding payment of \$10,000. The petition and supporting affidavit are signed by Krishanji Velji. Paragraph 3 of the petition reads: H

“3. That the said *Velson Service Station* do not nor does any person hold on its behalf any security on the said Debtors estate or on any part thereof for the payment of the said sum.”

A On the 22nd March the Appellant filed an affidavit in opposition to the petition. After admitting that he had been indebted to the Respondent in the sum of \$10,000 he deposed:

B "3. That on the 28th day of August, 1984 I had settled the balance of \$10,000 (Ten Thousand Dollars) remaining under the Judgment by the Creditor agreeing to take 5,500 shares in Matei Developments Limited which were then registered in my wife Sulochana Chand's name. I now annex hereto to copy of the transfer marked 'A' which was also executed by the Judgment Creditor."

and further

C "7. That after service of the Bankruptcy Notice on me I approached the Judgment Creditor and informed him that the transfer had been completed. The Judgment Creditor had undertaken to have further proceedings withdrawn. I was surprised to receive the Petition herein in view of the settlement of the debt."

D Annexed to the affidavit is a copy of the share transfer which is signed on behalf of the transferee by Krishanji Velji's brother. Also annexed is a letter to Velji himself dated the 26th September '84 from Matei Developments Limited informing him that the transfer of shares had been approved and that his name would be included in the register of shareholders. On the 7th May Velji filed an affidavit in reply. The relevant parts read:

E "2 That the Judgment Debtor had mentioned to me that the property was a residential property but I believe it is an agricultural land which is useless to me. The signature of my brother Motilal Velji on the Transfer of Shares annexed to the Debtor's Affidavit was obtained under false representation.

3. That the land has not yet been transferred to me and I have already informed the Debtor on several occasions that I am no longer interested in settling the debt for the said property.

F 4. That in fact there is nothing definite about the subdivision and issuing of separate titles by the Matei Development Limited and I also informed the Company Secretary that I am no longer interested in the said property."

(It appears that each of the shareholders in Matei is entitled to a ¼ acre freehold block when the company's subdivision at Nasoso Nadi is completed).

G The petition first came before Rooney J., on the 26th March 1985 when Mrs Hoffman appeared for the Appellant and Mr A.K. Singh for the Respondent. The matter was stood over to the 16th April "in view of the affidavit filed by the debtor." On the 16th April Mr Vijay Maharaj appeared for the Appellant and Mr Anu Patel for the Respondent. It was indicated that the petition was opposed, and it was adjourned to the 7th May. On that date Mr Maharaj again appeared for the Appellant. Mr H. M. Patel appeared for the Respondent. The petition was adjourned "to a date to be fixed for hearing."

H The matter came before the Court again on the 6th June when Mrs Hoffman appeared for the Appellant. She is recorded as saying "Our principals say the

instructions are withdrawn. I am not in a position to oppose." Mr Patel is recorded as making the following remarks:

"The agreement in regard to the Transfer of Shares was not signed by the Creditor, but by his brother. He had no authority to enter into such agreement. I therefore ask for a receiving order.

My client is not interested in the shares in Matei Development Co. Ltd., which were issued to him without his consent."

A receiving order was then made.

We mean no criticism of Mr Patel who was simply relaying his client's instructions, but those instructions hardly accord with what Velji deposed to in his affidavit.

The Appellant then filed the application for an order setting aside or rescinding the receiving order. It was supported by his affidavit in which he traced the history of the various hearings and his instructions to his solicitors. He deposed that it had always been his intention to defend, that he had never instructed his solicitors otherwise, and that he had not been informed of the 6th June hearing. The application to set aside came before Cullinan J., on the 13th August. It appears that owing to some confusion within the Appellant's solicitors' firm no-one appeared to represent him, and he was not present himself. Mr Shah, the Official Receiver was the only one to appear before Cullinan J., in Chambers. The application was dismissed after Cullinan J., had recorded that he had read the report, referring presumably to the report of the Official Receiver which is on the file.

In each of the appeals before us the grounds of appeal allege that the Judge exercised his discretion on wrong principles, took irrelevant matters into account or disregarded relevant considerations. Such grounds are inappropriate in the circumstances. In the case of the application before Mishra J. A., the papers filed in support of the application were quite inadequate and much of the relevant material was never presented to him for consideration. In the case of the application before Cullinan J., the failure of the Appellant's Counsel to appear at the hearing meant that the matter became a mere formality. The Official Receiver was the only one to appear and he asked for the application to be dismissed. There being no appearance in support of the application we see no reason why the Judge should have taken it upon himself to launch a full scale enquiry into the matter.

Now, having all the material before us, we are satisfied that justice required that the Appellant have his day in Court. The allegation that the debt had been settled requires investigation, particularly as we were informed from the Bar that Krishanji Velji still holds the shares in Matei Developments.

We therefore allow both appeals and order that the receiving order be set aside.

We make no order for costs.

Appeals allowed.