a

RE MOHAMAD SUPARDI MD NOOR; EX P PUBLIC FINANCE BHD

HIGH COURT MALAYA, KUALA LUMPUR
ZULKEFLI AHMAD MAKINUDIN J
[BANKRUPTCY NO: D3-29-7218-2001]
10 JULY 2004

b

BANKRUPTCY: *Petition - Validity of creditor's petition - Creditor's claim arose from debtor's default in hire-purchase agreement - Petition did not state car under hire purchase as security or its value - Whether car was debtor's property to state as security held by creditor - Whether debtor's option to purchase was "property" under s. 2 Bankruptcy Act 1967 - Whether creditor was an unsecured creditor - Bankruptcy Act 1967, ss. 2, 5(2), 48(1)(b)(i) - Hire Purchase Act 1967, s. 2*

c

HIRE-PURCHASE: *Bankruptcy - Financier filed creditor's petition against hirer - Petition did not state car under hire purchase as security or its value - Whether car was debtor's property to state as security held by creditor - Whether debtor's option to purchase was "property" under s. 2 Bankruptcy Act 1967 - Whether creditor was an unsecured creditor - Bankruptcy Act 1967, ss. 2, 5(2), 48(1)(b)(i) - Hire Purchase Act 1967, s. 2*

d

e

HIRE-PURCHASE: *Ownership - Motor vehicle under hire-purchase - Whether property of financier or hirer - Bankruptcy Act 1967, ss. 2, 5(2), 48(1)(b)(i) - Hire Purchase Act 1967, s. 2*

f

HIRE-PURCHASE: *Hire-purchase agreement - Option to purchase - Whether 'property' under s. 2 Bankruptcy Act 1967*

HIRE-PURCHASE: *Ownership - Motor vehicle under hire-purchase - Car registration card - Endorsement of 'ownership claim' in financier's favour - Whether endorsement indicates car is security for debt due and owing from hirer - Bankruptcy Act 1967, ss. 2, 5(2), 48(1)(b)(i) - Hire Purchase Act 1967, s. 2*

g

The judgment debtor ('JD') purchased a car by way of loan financing granted by the judgment creditor ('JC') under a hire purchase agreement. The JD defaulted in the monthly instalments and the JC alleged that it could not repossess the car despite attempts to do so. The JC then instituted an action against the JD and obtained judgment in default that eventually resulted in a creditor's petition against the JD. The JD applied to set aside the petition but that was dismissed. Hence the JD's appeal. The JD raised

h

i

the issue that the JC was a secured creditor and its failure to state the car as security and its value was fatal to its petition as s. 5(2) of the Bankruptcy Act 1967 ('BA') was not complied with.

Held (dismissing the appeal):

[1] The car fell within the definition of "property" under s. 2 BA. However, to resolve whether it belonged to the JD, the nature of the hire-purchase agreement should be resorted to. Based on the meanings given to the terms "hire-purchase agreement", "owner", "hirer" and "hire-purchase price" in s. 2 Hire Purchase Act 1967 ('HPA'), the car was not the property of the JD until the hire purchase price was fully settled. Even though the registration card of the car named the JD as the registered owner, this fact did not make him the legal owner. As the car was not the property of the JD but the property of the JC, there could be no mortgage, charge or lien by the JC over it. Hence, the JC was not a secured creditor for the purposes of s. 5(2) BA. The JC could not surely take its own property as security. (pp 650 g-h, 651 a-h & 652 d-g)

[2] An option to purchase is "property" under s. 48(1)(b)(i) BA, only if it is exercisable, *ie*, if the hire purchase is fully settled. Unless and until the hire-purchase price is fully paid, the debtor is incapable of exercising any power over the option to purchase. The debtor definitely could not exercise his power over something that he did not have. In the present case, the JD did not exercise his option to purchase as he had not settled the full payment of the hire purchase price. Hence, the JC did not fall under the category of a secured creditor in s. 2 BA. Accordingly, s. 5(2) BA was inapplicable. Even if the option to purchase is property, there can be no charge over the said option as such option cannot be disposed of or realized to settle a debtor's debt. (pp 653 h, 654 a-h & 655 a-c)

[3] To hold that the car was security and that its value should be deducted from the amount claimed by the creditor from the debtor might produce very radical effects that could cripple the workability of a hire purchase transaction. This is because in a hire purchase transaction, the hirer has physical possession of the car. Although it is agreed that the car will only be kept at a certain address and that the financier owner has a statutory right to repossess the car in the event of default by the hirer, quite often than not the car cannot be successfully traced and/ or repossessed. In such cases, the only remedy available to the financier will be to institute legal proceedings against the hirer and

a guarantors. More frequent than not bankruptcy proceedings are brought against the hirer. It will be most unreasonable to expect the creditor to deduct the value of the car from the amount claimed when the car cannot be found. (p 655 d-f)

[4] It is a fallacy to state that the financier will be unjustly enriched by adjudging the hirer a bankrupt and still claim rights over the hired goods. This is because the hired goods do not belong to the debtor hirer. The debtor merely hired the goods and does not own the goods until the full hire purchase price is paid. Hence, the creditor can repossess the hired goods and sell the same. On the other hand the right to sue for the remainder of the instalments in the event of default is provided for in the hire purchase agreement and is not subject to repossession or sale of the hired goods. These courses of action available to the financier are distinct and independent of one another. (pp 655 g-h & 656 a)

[5] An endorsement of 'ownership claim' in the creditor's favour on the registration card of a motor vehicle is evidence that the creditor is the legal owner of the motor vehicle. It does not mean that the creditor is holding the motor vehicle as a security for a debt due and owing to the creditor from the debtor. (p 656 g)

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Hasliza Hasan [2001] 6 CLJ 137 HC ***(refd)***
Bank of China v. The First National Bank of Boston [1988] 3 MLJ 401 ***(refd)***
Bridge v. Campbell Discount Co Ltd [1962] 1 All ER 385 ***(refd)***
Credit Corporation (M) Bhd v. The Malaysia Industrial Finance Corporation & Anor [1976] 1 MLJ 83 ***(refd)***
M Hashimi Ibrahim v. Asia Commercial Finance (M) Bhd [2002] 5 CLJ 25 HC ***(not foll)***
Ng Ngat Siang v. Arab-Malaysian Finance Bhd & Anor [1988] 1 CLJ 800; [1988] 2 CLJ (Rep) 50 HC ***(refd)***
Perwira Habib Bank (M) Bhd v. Samuel Pakianathan [1993] 3 CLJ 349 SC ***(refd)***
Soon Teck Finance (M) v. Public Finance Bhd [1988] 3 MLJ 417 ***(refd)***
United Engineerings v. Lai Ping Yoon [1968] 1 MLJ 189 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 2, 5(2), 48(1)(b)(i)
Hire Purchase Act 1967, ss. 2, 16

Bankruptcy Act 1914 [UK], ss. 38(a)

Other source(s) referred to:

Halsbury's Laws of England, vol 22, 4th edn

For the judgment debtor - Ahmad Edham; M/s Zulpadli & Edham
For the judgment creditor - CK Kok; M/s Soo Thien Ming & Nashrah

Reported by Usha Thiagarajah

JUDGMENT

Zulkefli Ahmad Makinudin J:

This is an appeal by the judgment debtor ("the debtor") against the decision of the learned senior assistant registrar dismissing the debtor's application to set aside the creditor's petition (encl. 10).

Facts Of The Case

The relevant facts of the case are as follows:

(1) The judgment creditor ("the creditor") is a finance company which owns the vehicle No. WDQ 9239 ("the car").

(2) Pursuant to a hire purchase agreement dated 23 January 1997, the debtor purchased the car by way of a loan financing given by the creditor.

(3) The debtor defaulted in the payment of monthly instalment. The creditor contended that it could not repossess the car from the debtor despite numerous attempts.

(4) The creditor instituted legal proceedings against the debtor in the Kuala Lumpur High Court Suit No. D6-22-570-2000.

(5) On 5 December 2000 the creditor obtained judgment in default against the debtor. Based on this judgment, the creditor instituted bankruptcy proceedings against the debtor.

The Issue

The issue raised by the debtor essentially is that the creditor's petition presented by the creditor did not state whether the creditor was willing to give up the car for the benefit of the creditors in the event the debtor being adjudged bankrupt and therefore did not comply with s. 5(2) of the Bankruptcy Act 1967 ("the Act"). In other words it is the contention of the debtor that the creditor is a secured creditor under the Act. Section 5(2) of the Act states as follows:

> If the petitioning creditor is a secured creditor he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of his security. In the latter case he may to the extent of the

> balance of the debt due to him, after deducting the value so estimated, be admitted as a petitioning creditor in the same manner as if he were an unsecured creditor.

On the other hand it is the contention of creditor that it is not a secured creditor under s. 5(2) of the Act.

Decision Of The Court

Under the Act, a petitioning creditor is a secured creditor, if he holds either a mortgage, charge or lien over the property of the debtor. Section 2 of the Act defines a 'secured creditor' as follows:

> a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in an action who has attached the property of the debtor before judgment.

It is important to determine at the outset what is the debtor's property under s. 2 of the Act. The mortgage, charge or lien must be over the debtor's property. The debtor's property must be something which belongs to him and not a third party (see the Supreme Court decision in *Perwira Habib Bank (M) Bhd. v. Samuel Pakianathan* [1993] 3 CLJ 349). In the present case, the debtor contends that the creditor failed to disclose in the petition the car and its value. The question now is whether the car is the debtor's property. Section 2 of the Act also defines "property" as follows:

> includes money, goods, things in action, land and every description of property, whether real or personal and whether situate in Malaysia or elsewhere; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of incident to property above defined.

In my view the car definitely falls under the definition of property in s. 2 of the Act. However, to resolve whether it belongs to the debtor, we have to look at the nature of a hire purchase agreement. In *Bridge v. Campbell Discount Co. Ltd.* [1962] 1 All ER 385. Lord Denning explained the nature of a hire purchase in simple terms at p. 398 as follows:

> So you arrive at the modern hire-purchase transaction whereby (i) the dealer sells the goods to a finance house for cash; and (ii) the finance house lets them out on hire to a hirer in return for rentals which are so calculated as to ensure that the finance house is eventually repaid the cash with interest, and (iii) when the finance house is repaid, the hirer has the option of purchasing the car for a nominal value. The dealer is the intermediary who arranges it all. The finance house supplies him with the printed forms, and

he gets them signed. In the result, the finance house buys a car it has never seen, and lets it to a hirer it has never met, and the dealer seemingly drops out.

To determine the issue further it is also necessary to reproduce the meanings given to the following terms under s. 2 of the Hire Purchase Act 1967 as follows:

(a) "hire purchase agreement" includes a letting of goods with an option to purchase and an agreement for the purchase of goods by instalments (whether the agreement describes the instalments as rent or hire or otherwise), but does not include any agreement:

(i) whereby the property in the goods comprised therein passes at the time of the agreement or upon or at any time before delivery of the goods; or

(ii) under which the person by whom the goods are being hired or purchased is a person who is engaged in the trade or business of selling goods of the same nature or description as the goods comprised in the agreement;

(b) "owner" means a person who lets or has let goods to a hirer under a hire-purchase agreement and includes a person to whom the owner's rights or liabilities under the agreement have passed by assignment or by operation of law;

(c) "hirer" means the person who takes or has taken goods from an owner under a hire-purchase agreement and includes a person to whom the hirer's right or liabilities under the agreement have passed by assignment or by operation of law;

(d) "hire purchase price" means the total sum payable by the hirer under a hirer purchase agreement in order to complete the purchase of goods to which the agreement relates, exclusive of any sum payable as a penalty or as compensation or damages for a breach of the agreement.

Based on the meanings above given to the terms "hire purchase agreement", "owner", "hirer" and "hire purchase price", I am of the view that the car is not the property of the debtor until the hire purchase price has been fully settled. On this point I would like to refer to the case of *Credit Corporation (M) Bhd v. The Malaysia Industrial Finance Corporation & Anor.* [1976] 1 MLJ 83. In that case the plaintiff purchased a car and entered into a hire purchase agreement with a hirer. The car was registered in the name of the hirer with the plaintiff's claim for ownership indorsed on the register and the registration card. The first defendant purchased the

car from a third party and entered into a hire purchase agreement with the second defendant. After terminating the hire, the plaintiff repossessed the car. The plaintiff thereupon sought a declaration that it was the owner of the car. The defendant counterclaimed for trespass, conversion and wrongful detention and damages. His lordship Abdul Hamid J (the Lord President as he then was) *inter alia* held that upon the true construction of the plaintiff's agreement which was of a type to which the Hire Purchase Act applied, until the hirer had exercised his option to purchase the car by paying the total rentals and fulfilling all his obligations under the agreement, no property in the car passed to the hirer. His Lordship was also of the view that even though the hirer was the registered owner of the car he was only in law the person who had possession and use of the car and this fact did not necessarily make him the legal owner of the car.

Therefore as in the present case even though the registration card of the car named the debtor as the "registered owner" this fact does not make him the legal owner. On this point in the case of *Ng Ngat Siang v. Arab-Malaysian Finance Bhd & Anor* [1988] 1 CLJ 800; [1988] 2 CLJ (Rep) 50, her ladyship Siti Norma Yaakob J (as she then was) stated as follows:

> That fact that the registration card was still in the second defendant's possession after 23 September 1986 is not disputed but mere possession alone does not give the second defendant the apparent authority to sell the car, as the registration card itself is not a document of title and it cannot be assumed that a person in possession of it is the legal owner of the car. This was so decided in *Central Newbury Car Auctions Ltd v. Unity Finance Ltd & Anor.* [1956] 3 All ER 905, a decision that had been adopted by our own courts in *PP v. Europe Motors Sdn Bhd* [1981] 2 MLJ 93.

As the car is not the property of the debtor, but the property of the creditor in my view there could be no mortgage, charge or lien by the creditor over it. Hence, the creditor in this case is not a secured creditor for the purposes of s. 5(2) of the Act. I am of the view that the creditor surely cannot take its own property as a security and it is to be noted also that the creditor's right to repossess the car is statutory in nature (see s. 16 of the Hire Purchase Act 1967).

The learned counsel for the debtor has relied heavily on the High Court case of *M Hashimi bin Ibrahim v. Asia Commercial Finance (M) Bhd* [2002] 5 CLJ 25 to argue that the creditor failed to comply with s. 5(2) of the Act. In *M Hashimi bin Ibrahim*'s case the bankruptcy proceeding against the debtor was based on the judgment in default obtained by the creditor arising from a hire purchase agreement entered between them for the hire purchase of a truck. The issue was whether the creditor who was

the financier owner of the truck, was a secured creditor in the hire purchase contract. His lordship Nik Hashim J (as he then was) at p. 73 of the said case *inter alia* stated as follows:

> the option to purchase in a hire purchase agreement is itself a property. This accords well with the wide definition of 'property' in the Act. Thus, even though no property in the truck has passed to the debtor, the option to purchase the truck by the debtor is his interest in the truck. As such, it is 'property' as defined under section 2 of the Act.

His lordship Nik Hashim J further held that being a secured creditor, the creditor should have stated the truck under the hire purchase agreement in the petition, giving its estimated value or stating that it had a security which it is willing to give up as provided for in s. 5(2) of the Act. In that case the creditor failed to state that fact in its petition and it was held that the failure to comply with the requirement was fatal to the petition.

With respect, I wish to depart and take a different view from the decision of the High Court in *M Hashimi bin Ibrahim*'s case. In *M Hashimi bin Ibrahim*'s case the court appeared to agree that the truck was not the debtor's property but held that the term "property" under the Act was wide in its meaning under s. 2 and went to construe what was the debtor's property. In construing it the court was asked to consider s. 48(1)(b)(i) of the Act which provided for the bankrupt's property divisible amongst the creditors, namely, "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". The commentary in *Halsbury's Laws of England*, vol. 22 (4th edn) on *inter alia* s. 38(a) of the English Bankruptcy Act 1914 (in pari material to our s. 48(1)(b)(i)) was also referred to which stated that for the purposes of division among the creditors, the debtor's property would include an option to purchase in a hire purchase agreement. Based on this, the court concluded that even though no property in the truck has passed to the debtor, the option to purchase the truck by the debtor is his interest in the truck and as such it is "property" under s. 2. The creditor has a charge over the same hence rendering it a secured creditor.

With the greatest respect, the above mentioned view and reasoning in *M Hashimi bin Ibrahim*'s case is incorrect. It is my finding that s. 48 of the Act only applies for the purposes of administration of property after a receiving order and an adjudication order are made and the debtor is adjudicated bankrupt An option to purchase is a property under s. 48(1)(b)(i) of the Act, only if it is exercisable, ie, if the hire purchase price is fully settled. It is my view that when *Halsbury's Law of England*

a commented about an option to purchase being a property of the debtor for the purposes of division to the creditors, it meant cases where the debtor was declared bankrupt and the hire purchase price was fully settled or the trustee opted to settle it. m such cases, the trustee in bankruptcy could exercise the option to purchase the goods on hire purchase and divide it b among the creditors. This to my mind was why *Halsbury's Laws of England* when describing such option as a property of the debtor at p. 107 (para 124) had this to say:

> Upon the making of an adjudication order against the bailee of goods under a credit or hire agreement, it is his property in the goods and his capacity c to exercise any power over them (the option to purchase), as conferred by the agreement which vests in the trustee for the benefit of the creditors.

I am of the view until and unless the hire purchase price is fully paid, the debtor is incapable of exercising any power over the option to purchase. The debtor definitely could not exercise his power over something which d he did not have. On this point I would like to refer to the case of *United Engineerings v. Lai Ping Yoon* [1968] 1 MLJ 189, wherein his lordship Gill J (as he then was) at p. 194 stated as follows:

> By granting the option, the owner makes an irrevocable offer to sell the e goods to the hirer if the conditions laid down in the agreement are fulfilled. On his part, however, the hirer is under no obligation to buy the goods. He may exercise the option, this is to say, he may accept the offer once he has fulfilled the conditions, if he so wishes, but he may also elect to terminate the hiring and return the goods to the owner without buying the goods.

f

In the present case the debtor cannot be said to have exercised his option when he has not fulfilled the condition of full payment of the hire purchase price. Hence, the creditor does not fall under the category of a secured creditor in s. 2 of the Act and s. 5(2) of the Act is therefore not applicable. Even assuming that an option to purchase is the debtor's property, I take g the view that there could not be a charge over the option to purchase as held in *M Hashimi bin Ibrahim*'s case. Whilst a charge usually is over lands, it is agreed that there could be a charge over movable properties. However, for there to be a charge, the creditor must have a right to sell or dispose the property charged when the debtor is in default. On the issue h of creation of a judicial charge over the property for security of payment of the judgment debt in the case of *Bank of China v. The First National Bank of Boston* [1988] 3 MLJ 401 his lordship Lai Kew Chai J at p. 405 had this to say:

i

> **As stated in Fisher & Lightwood's Law of Mortgages, p 4,** A charge is the appropriation of real or personal property for the discharge of a debt ... without giving the creditor either a general or special property in, or possession of the subject of the security ... The creditor has a right of realization by judicial process in case of non-payment of the debts.

In the present case, I find that there could not be a 'charge' over the debtor's option to purchase as such option is not something which the creditor could dispose of or realized to settle the debtor's debt. Therefore, with respect, the creditor is not a secured creditor and could not be made to state the car under hire purchase as a security in its petition, giving its estimated value or stating that it had a security which it is willing to give up as provided for in s. 5(2) of the Act.

Whether The Creditor Must State The Value Of The Car In The Petition

It is my finding that the car is not a form of security under s. 5(2) of the Act. To hold that the car is a security and to hold that the value of the car must be deducted from the amount claimed by the creditor from the debtor may produce very radical effects that could cripple the workability of a hire purchase transaction. This is so because, in hire purchase transaction, the hirer would have physical possession of the car. Although it is agreed that the car would only be kept at a certain address and the financier owner has a statutory right to repossess the car in the event of default by the hirer it is quite often that the car could not be successfully traced and/or repossessed. In such cases, the only remedy available to the financier would be to institute legal proceedings against the hirer and guarantors. More frequent than not, bankruptcy proceedings are brought against the hirer. To say that the creditor must deduct the value of the car from the amount it is claiming, would be most unreasonable as the car is no where to be found.

In *M Hashimi bin Ibrahim*'s case it was argued that the financier would be unjustly enriched as he would have the best of both worlds, ie, adjudge the hirer a bankrupt based on a certain judgment sum, and still claim rights over the hired goods. This is a fallacy for such argument is inconsistent with the nature of a hire purchase transaction as the hired goods do not belong to the debtor hirer. The debtor merely hired the goods and he does not own the goods until the full hire purchase price was paid. Hence, the creditor could repossess the hired goods and sell the same. On the other hand, the right to sue for the remainder of the instalment in the event of default is provided for in the hire purchase agreement and is not subject

a to repossession or sale of the hired goods. These courses of action available to the financier are distinct and independent of one another (see the case of *Arab-Malaysian Finance Bhd v. Hasliza bt Hasan* [2001] 6 CLJ 137).

The Endorsement Of 'Ownership Claim' On The Registration Card

b The debtor argued that so long as the endorsement of ownership claim has not been withdrawn and cancelled, the creditor is holding on to the "ownership claim of the car" as a security for the debt due to the creditor from the debtor. The significance of the an indorsement of ownership claim was explained by his lordship Mohamed Dzaiddin J (the Chief Justice as he then was) in the case of *Soon Teck Finance (M) v. Public Finance Bhd* c [1988] 3 MLJ 417. There the plaintiff entered into a hire-purchase agreement with Chong Chan Fatt for the hiring of a vehicle bearing Registration No. AV 3366. The vehicle was then registered with the Registrar and Inspector of Motor Vehicles, Penang in the name of Chong Chan Fatt but with the ownership claimed by the plaintiff. Chong Chan d Fatt never paid the instalments due and the plaintiff terminated the agreement. In the course of repossession inquiries, the plaintiff discovered that the Registration No. AV 3366 had been changed to PY 4598 and the indorsement of "ownership claim' had been cancelled and replaced by the defendant company. The plaintiff sought, *inter alia*, a declaration that the e vehicle is the property of the plaintiff. During the trial, the defendant called three witnesses to testify that the hire purchase transactions in respect of vehicle Registration No. PY 4598 was proper and legal and in accordance with normal business transactions. It was common ground that the only issue in this case was who has a better title to the vehicle. In dismissing f the plaintiff's claim, his lordship Mohamed Dzaiddin J made a finding that on the face of all available documents, in particular the vehicle registration card, the defendant was said to be *prima facie* the legal owner as he was the registered owner under the 'ownership claimed' of the vehicle bearing Registration Number PY 4598. Following the decision of *Soon Teck Finance (M)*'s case in my view an indorsement of ownership claim in the g creditor's favour as in the present case is merely an evidence that the creditor is the legal owner. It does not mean that the creditor is holding the motor vehicle as a 'security' for debt due and owing to the creditor from the debtor.

h For the above stated reasons, I hereby dismissed the judgment debtor's appeal with costs.

i