Emjay Enterprises Pte Ltd v Thakral Brothers (Private) Ltd and Others
[2000] SGHC 153

Case Number : OS 440/2000

Decision Date : 31 July 2000

Tribunal/Court : High Court

Coram : Tay Yong Kwang JC

Counsel Name(s) : Madan Assomull and Rathna Nathan (Assomull & Partners) for the plaintiffs; Darshan Singh Purain (Darshan & Teo) for the defendants

Parties : Emjay Enterprises Pte Ltd — Thakral Brothers (Private) Ltd

Civil Procedure – Judgments and orders – Attachment order – Setting aside of attachment order – Extent of duty of disclosure – Whether conditions for granting attachment order satisfied – Whether material non-disclosure by applicants for attachment order – When attachment order takes subject to writ of seizure and sale – ss 17 & 20 Debtors Act (Cap 73, 1985 Rev Ed)

Civil Procedure – Judgments and orders – Attachment order – Whether competing creditors having locus standi to apply to set aside attachment order – O 74 r 11 Rules of Court

: On 15 February 2000, the 15 defendants in this originating summons commenced Suit 600156/2000 against Lachman s/o Teckchand and Jethi Bai Bhagwandas, trading as Shah Electronics, and against Ramesh s/o Lachman, formerly trading as Shah Electronics (hereinafter referred to as `the debtors`). On the same day, the present defendants applied by ex parte summons-in-chambers for an attachment order before judgment pursuant to s 17 Debtors Act and for an order that the Sheriff be directed to seize the properties listed in a schedule attached to the summons-in-chambers as a pledge or surety to answer the just demand of the present defendants until the trial of the action and satisfaction of any judgment in the sum of $1,435,879.64 and costs estimated at $25,000. The properties described in the schedule comprised a shop unit B1-08 High Street Centre 1, a residential unit in Dunman Road, a motor car, all the stock-in-trade lying at the debtors` shop premises at [num]02-11, Satnam House, High Street and all moneys in the names of the debtors with DBS Bank, Raffles City Branch.

The affidavit in support of the above application was affirmed by one Raj Kumar who stated as follows (the `plaintiffs` mentioned in the affidavit being a reference to the present defendants):

> *1 I am the Operations Manager of the ninth plaintiffs and the duly appointed and authorised representative of the all the other plaintiffs in this action to make this affidavit.*
>
> *2 I depose that the facts and matters stated in this affidavit that are within my own personal knowledge are true and that the facts and matters stated in this affidavit that are not within my own personal knowledge are true to the best of my knowledge, information and belief.*
>
> *3 My appointment have been made on the basis that I am known to the various plaintiffs and I was previously appointed as one of the members of the creditors committee which was formed to enter into a scheme of arrangement with the defendants. I have been in the electronics industry for the last twenty four (24) years and I am personally known to most established electronics traders in Singapore.*
>
> *4 The plaintiffs in this action have a good cause of action against the*

defendants. Now produced herewith and marked as exh `RK-1` to `RK-15` are copies of invoices/statements of account supporting the plaintiffs` claims. The plaintiffs` claims total S$1,435,879.64.

5 The defendants` firm `Shah Electronics` was a customer of the plaintiffs and had purchased electronics goods from time to time. A perusal of the invoices would reveal that bulk of the electronics goods were purchased by the defendants in the third quarter of 1999, shortly before ceasing business.

6 About early December 1999 the defendants informed their creditors that they were facing financial difficulties and would be unable to pay their creditors. The defendants` total debts are in the region of about S$2,000,000.

7 The defendants firm `Shah Electronics` comprised three (3) partners, consisting of father and mother. The first and second defendants (husband and wife) left Singapore for India in or about late December 1999 and have not returned since. The third defendant is in Singapore although his exact whereabouts are not known. The third defendant has intimated to me recently that he may leave for India as his parents are not in good health. I have difficulty tracing the physical whereabouts of the third defendant presently.

8 In the absence of the first and second defendants, the third defendant, being the son of the first and second defendants, had purported to enter into a scheme of arrangement with creditors and had applied for an interim order under the bankruptcy act for a stay. I verily believe that such order was discharged principally on grounds that the third defendant has since withdrawn as a partner of the defendants firm of Shah Electronics and had no locus standi to in the matter to affirm affidavits.

9 Now annexed herewith marked `RK-16` is a recent Registry of Business search on the defendant firm which confirm the withdrawal of the third defendants as a partner.

10 The third defendant did not inform the creditors of his withdrawal. To the best of my knowledge the third defendant is carrying on business in electronics trade in Serangoon Road. There is no indication whatsoever of the return to Singapore of the first and second defendants. Their precise place of abode in India cannot be discovered. Being late in years their return to Singapore is unlikely.

11 In the proposed scheme of arrangement the assets for distribution proposed by third defendant, (without disclosure that he had ceased to be a partner) offered the following ownership whereof have been admitted. A copy of the written proposal is annexed marked `RK-17`.

12 Despite repeated requests for details of bank statements, to show his bona fides, the third defendant has refused to disclose his financial movements. This is clearly inconsistent with the proposal of scheme of arrangement made by the third defendant. On or about 15 December 1999, a cheque drawn by the defendants on their bankers DBS Bank, Raffles City branch, Singapore was countermanded. Although it is obvious there were funds in the said account,

payment was intentionally stopped by the defendants. To date in spite of the rejection by the court of the defendants` application for an interim order, the defendants have failed to take any step towards payment or account for the said sum to the 15 plaintiffs. Now produced herewith and marked as `RK-18` is a copy of the cheque and return advise from the bank dated 15th December 1999 which is self-explanatory. In the light of the fresh involvement by the third defendant in business, it is apparent that his non-disclosure of his current banking transactions indicate the defendants` intention to obstruct or delay the execution of any judgment or order that may be made against them.

13 On or about the 31 December 1999, the defendants` tenancy of their business premises, namely, No 67, High Street, [num]01-07 Satnam House expired. Although the registered principal place of business remains unaltered in the Registry of Business, the stock-in-trade of the defendants have been removed to unit [num]02-11, Satnam House. In the light of the third defendant`s resumed business at Serangoon Road under an unknown entity I am left with no illusion that the defendants singly or jointly as the case may be, hand over to other, (not excluding the new unknown entity, any or all the assets aforesaid with intent to obstruct or delay the execution of any judgment or order that may be made against the defendants.

14 Considering the cumulative effect of the circumstance aforesaid, that it is irresistable, but to draw the inference that the third defendant`s actions are inconsistent with prompt settlement of the debts or at all. There is no compulsion on the defendants, to retain the status quo of their assets for the purposes of fulfillment of any judgment.

15 Unless the property more particularly described in the Schedule to this application herein is seized by the Bailiff of this honourable court as a surety to answer the just demand of the plaintiffs, until the hearing of this action or satisfaction of any judgment that may be made against the defendants, I have no doubt that the defendants with intent to obstruct or delay have concealed and make away with their movable and immovable property.

16 I have been advised that this honourable court may at anytime on reasonable cause having shown release the property seized and of the consequence of improper attachment and I humbly pray for an order-in-terms of this application.

The ex parte summons-in-chambers was fixed for hearing before me at 10 am on 16 February 2000. Mr Darshan Singh Purain who attended the hearing as counsel for the 15 present defendants informed me that he was applying under s 17(1)(a) and (c) Debtors Act. I granted him the orders sought.

On 21 February 2000, the present plaintiffs applied by SIC 600852/2000 for leave to intervene in Suit 600156/2000 and for the attachment order made on 16 February 2000 to be discharged. The respective solicitors for the present plaintiffs, the present defendants and the debtors appeared before a judge on 24 February 2000 when the application was adjourned one week because of another application on 28 February 2000 which could resolve the matters raised.

The matter fixed for hearing on 28 February 2000 was an application for judgment by admission. Only the solicitors for the present defendants and for the debtors attended before the senior assistant registrar. The matter was not contested and judgment was entered for the amount claimed and for costs of $4,000.

On 9 March 2000, the application for leave to intervene was heard by a judge. Counsel for the said three parties attended. An order in the following terms was made:

> *1 Leave be granted to withdraw the applicants` application;*
>
> *2 No costs be payable by the applicants unless fresh proceedings relating to the same matter are instituted by the applicants. In such an event, cost of this application will be considered and will follow the event.*

The `applicants` referred to in the above order are the present plaintiffs in this originating summons.

The present plaintiffs and present defendants failed to resolve their differences and on 22 March 2000, the present plaintiffs commenced this originating summons against the 15 defendants for the following orders:

> *(1) The ex parte attachment order dated 16 February 2000 obtained in Suit 600156/2000 by the defendants (the plaintiffs in Suit 600156/2000) against (the debtors) be discharged and/or be set aside;*
>
> *(2) a declaration that the plaintiffs have priority of the sale proceeds pursuant to the WSS 51324/2000 filed in DC Suit 51250/99;*
>
> *(3) the Sheriff be directed to retain the sale proceeds or part thereof until the hearing of this matter and/or the final disposal of the same;*
>
> *(4) costs be paid by the defendants to the plaintiffs;*
>
> *(5) costs in respect of SIC 600852/2000 in Suit 600156/2000 be paid by the defendants to the plaintiffs; and*
>
> *(6) such further order or other relief as this honourable court deems just.*

Vishinu s/o Metharam, a director of the present plaintiffs, stated that on 14 December 1999, the present plaintiffs commenced proceedings against the debtors for goods sold and delivered for the sum of $135,737.51 in DC Suit 51250/99. What followed therefrom were listed in a chronology of events as follows:

29.12.99		Appearance entered by Harpal, Wong & M Seow
30.12.99		Plaintiffs` application for judgment under O 27 r 3

31.12.99		Interim order application by Lachman s/o Teckchand and Jethi Bhagwandas both trading as Shah Electronics and Ramesh s/o Lachman formerly trading as Shah Electronics (`debtors`) in OS 171/99
03.01.00		Order of court for an interim order granted
06.01.00		Plaintiffs` application for judgment adjourned to 11.01.00
11.01.00		Plaintiffs` application for judgment adjourned to 25.01.00
22.01.00		Plaintiffs` application to discharge interim order
24.01.00		Interim order extended to 14.02.00
		No order made for plaintiffs` application to discharge interim order
25.01.00		Plaintiffs` application for judgment adjourned to 15.02.00
27.01.00		Plaintiffs filed notice of appeal
09.02.00		Plaintiffs` appeal allowed in that the interim order be discharged
15.02.00		Plaintiffs` obtained judgment under O 27 r 3 for S$131,478.46 with interest and costs
15.02.00		Writ of summons filed by Darshan & Teo on behalf of the defendants (plaintiffs in Suit 600156/2000)
15.02.00		Application for attachment order filed by Darshan & Teo
16.02.00		Attachment order granted
17.02.00		Interim order application by debtors in OS 15/2000
21.02.00		Plaintiffs` application to discharge attachment order
22.02.00		Appearance entered by Messrs Harpal, Wong & M Seow
28.02.00		Interim order application by debtors in OS 15/2000 was dismissed with costs fixed at S$750 to plaintiffs
09.03.00		Plaintiffs` application to discharge attachment order withdrawn.

Due to the interim order obtained on 3 January 2000 by the debtors pursuant to Part V Bankruptcy

Act, the plaintiffs here only obtained judgment on 15 February 2000. The next day, the plaintiffs filed Writ of Seizure and Sale (`WSS`) 51324/2000 against the debtors` property. Vishinu then went on to set out the facts pertaining to Suit 600156/2000 mentioned earlier in this judgment. He explained that the application for leave to intervene was withdrawn on 9 March 2000 for the purpose of settling the matter amicably but talks held on 10 March 2000 failed to resolve the differences and hence the present originating summons.

On 9 March 2000, the Sheriff proceeded with the auction sale under the WSS 600019/2000 filed by the present defendants on 28 February 2000 pursuant to the judgment by admission obtained by them. The sale proceeds were still in the possession of the Sheriff.

Vishinu incorporated all the court papers filed in Suit 600156/2000 and stated that it was clear from the chronology set out by him that the present plaintiffs` application for judgment had either been prevented and/or adjourned by reason of the applications taken up by the debtors and/or the present defendants during the period between 3 January 2000 to 16 February 2000 and that the plaintiffs` application for judgment originally fixed to be heard on 6 January 2000 was eventually heard and granted only on 15 February 2000.

For the reasons stated in his affidavit filed on 21 February 2000 in Suit 600156/2000, he believed:

(1) the defendants had failed to make a case for an ex parte attachment order (`AO`) of the debtors` properties before judgment;

(2) that the purpose of obtaining the ex parte AO was to gain priority or at the least to rank equally with the plaintiffs` claim;

(3) that the debtors had no intention to obstruct or delay the execution of any judgment;

(4) that there was no evidence that the debtors had removed or concealed or were making away with any of their movable or immovable properties or had done any act with intent to obstruct or delay the execution of any judgment;

(5) that the debtors had disclosed liberally all their assets and their location/whereabouts and that their conduct throughout had been transparent.

His affidavit of 21 February 2000 began by setting out the history of the proceedings from the time the plaintiffs commenced their action against the debtors in the District Court until the judgment obtained on 15 February 2000. It incorporated the court papers in the District Court proceedings and in the debtors` bankruptcy applications.

The 21 February 2000 affidavit went on to state that since the voluntary arrangement, the debtors had kept their stock-in-trade in [num]01-07 and [num]02-01 Satnam House and the present defendants were aware of this. Even when the debtors shifted their goods from [num]01-07 to [num]02-11, the defendants and other creditors were kept informed. An inventory of the goods was also provided to the creditors. As evidence of their sincerity in paying the creditors and preventing the dissipation of the goods, the debtors handed the keys of [num]02-11 to the creditors` committee convened on 21 December 1999 pursuant to the voluntary arrangement.

On 18 February 2000, after the AO had been granted to the present defendants, Vishinu visited [num]02-11 Satnam House and found the premises locked. He understood that the goods were still inside the premises with the Sheriff`s notice posted on the door.

According to Vishinu, it was plain that the defendants `orchestrated` the AO against the debtors on the day after the plaintiffs had obtained judgment in order to have a prior claim over the plaintiffs and not for the reasons stated in the affidavit supporting the application for the AO. The first two debtors, who are Singapore citizens, were presently in India for a short break as stated in their own affidavit of 11 January 2000. His salesman even saw the third debtor on a MRT train on 16 February 2000.

Raj Kumar, who affirmed the supporting affidavit for the AO application, explained that the defendants and the other creditors of the debtors had a creditors` meeting wherein it was resolved that all creditors would hold their hands in their respective claims with a view to achieving an amicable resolution. It was agreed that the assets of the debtors did not need to pass to the Official Assignee if they could be liquidated with the cooperation of all the creditors and the proceeds be distributed pro-rata. All the creditors, including the present plaintiffs, appointed a creditors` committee and resolved not to take legal action against the debtors. Raj Kumar was a member of that committee.

However, contrary to the aforesaid understanding, the present plaintiffs commenced an action `to procure and take advantage over the other creditors`. As a consequence, the debtors applied for an interim order under Part V Bankruptcy Act to stay all proceedings. The interim order was subsequently discharged on technical grounds by the plaintiffs.

As a result of the discharge of the interim order, all the creditors were free to proceed with their actions. Due to the changed circumstances, it was legitimate for the present defendants to preserve their interests collectively by commencing Suit 600156/2000, obtaining the AO and subsequently the judgment and the WSS.

On 9 March 2000, the plaintiffs (as proposed interveners in the abovesaid suit) saw the futility of their application and withdrew the same. They persuaded the present defendants not to demand costs as a result of the withdrawal as they had agreed to cooperate with them. The distribution of the sale proceeds under the defendants` WSS was thus left to the parties to resolve.

The defendants` position was that the plaintiffs would rank pari passu with all the creditors and be paid pro-rata. However, the plaintiffs rejected such proposals and commenced the present originating summons in disregard of their commitment to resolve the issue amicably. The defendants asserted that the plaintiffs` WSS was delayed not because of the defendants but because of the interim orders obtained by the debtors. The defendants still wished to honour the spirit of the original understanding of the creditors. If the debtors were made bankrupts, as they surely would by some creditor, the proceeds would ultimately be distributed in the same manner anyway.

On 27 March 2000, the defendants wrote to the debtors` solicitors on their clients` position in this originating summons but were informed that they had no instructions as the debtors were out of Singapore.

The plaintiffs had not taken any step in execution of their WSS in the subordinate courts by payment of the deposit required by the Bailiff or by attending any appointment for execution. The defendants had, on the other hand, finalized their execution and the net proceeds from the auction sale on 9 March 2000 amounted to $233,035.

Vishinu, in his affidavit of 25 April 2000, denied that there was any consensus among the creditors at the meeting on 15 December 1999. He attended that meeting, held one day after the plaintiffs had commenced the District Court action against the debtors. He left after the conclusion of that

meeting. The creditors` committee was not appointed during that meeting. An inspection team was formed to ascertain the worth of the stock kept at [num ]02-11 Satnam House. The plaintiffs did not attend any other creditors` meeting. Two other creditors also started actions against the debtors after 15 December 1999, further evidencing the lack of consensus that day.

At that meeting, it was suggested by the creditors that the keys of [num]02-11 Satnam House be handed over to the creditors` committee to be formed. Arrangements were made by the inspection team to verify the stock kept therein. Vishinu believed that Raj Kumar was a member of the inspection team and that the creditors collectively placed their own lock on [num]02-11.

Vishinu also disputed Raj Kumar`s account of the proceedings on 9 March 2000 leading to the withdrawal of the plaintiffs` application. He asserted that the withdrawal was for the purpose of allowing negotiations and that the plaintiffs did not persuade the defendants not to demand costs. The right to commence fresh proceedings was reserved by the plaintiffs and negotiations did break down.

Vishinu went on to state that there was no need for the plaintiffs to have proceeded further with their WSS in the subordinate courts as the Sheriff had already conducted the auction sale on 9 March 2000. The plaintiffs were not given an earlier date for execution of their WSS due to the existence of the defendants` AO. The plaintiffs` solicitors had asked for an early date for execution by their letter dated 15 February 2000 to the Bailiff stating:

> *We shall be grateful if you could allocate us an early date for seizure against the first, second and third judgment debtors` movable property at 67 High Street [num]02-11 Satnam House, Singapore 179431. The grounds of our request is that the first, second and third judgment debtors, we are instructed, may be removing goods from their premises and any delay may result in our clients being unable to realise the fruits of their judgment.*
>
> *We are prepared to conduct the seizure outside the normal working hours and are also prepared to bear the additional costs of the execution.*
>
> *Our clients do not wish to have the first, second and third judgment debtors notified of the intended execution and would be most obliged if you could let us have an early date for execution as a matter of urgency.*

Vishinu further alleged that the defendants had `failed to show utmost good faith by not holding back vital information touching upon matters pertinent to the application.` He also alleged that the defendants had suppressed material facts at the time the AO was granted.

Raj Kumar replied on 4 May 2000 stating that the creditors` committee was duly formed and that it carried out its appointed duties. The consensus of the creditors was that bankruptcy proceedings ought to be avoided and that consensus crystallized in the formation of the committee. Although some creditors might have taken independent steps, none of them had taken out execution proceedings.

Although one set of keys to [num]02-11 Satnam House was handed over to the committee, the committee had no access into the premises as the second key was with the third debtor who also retained the keys to the back door.

On 13 April 2000, the plaintiffs issued a 21-day statutory demand under the Bankruptcy Act against the second debtor.

In a further affidavit filed on 31 May 2000, Raj Kumar exhibited a letter by the defendants` solicitors dated 25 May 2000 to the debtors` solicitors enquiring about the whereabouts of their clients. The debtors` solicitors replied on 27 May 2000 that they had not heard from the first and second debtors `for quite some time` and upon receipt of that letter, had contacted the third debtor who informed them that his parents were out of jurisdiction.

Upon my directions, Mr Darshan Singh Purain conducted searches at the registries of the Supreme Court and of the Subordinate Courts and reported in his affidavit of 31 May 2000 as follows. The stamped page of the plaintiffs` WSS 51324/2000 indicated the time of stamping as 10.32am on 16 February 2000. The defendants` application for the AO was stamped at 4.20pm on 15 February 2000. Mr Darshan Singh Purain attended before me at 10am on 16 February 2000. From his recollection, the AO was granted in less than 15 minutes and the order was extracted and stamped at 11.52am the same day. It was executed by the Sheriff that same day.

The decision of the court

Section 17(1)(a) and (c) Debtors Act, on which the defendants had relied for the AO, read:

> *17(1) If it is shown to the satisfaction of the court or a judge, at any time after the issue of a writ of summons, by evidence on oath, that the plaintiff has a good cause of action against the defendant, and -*
>
> *(a) that the defendant is absent from Singapore and that his place of abode cannot be discovered;*
>
> *(b) ...; or*
>
> *(c) that the defendant, with intent to obstruct or delay the execution of any judgment which has been or may be made against him, has removed, or is about to remove, or has concealed, or is concealing, or making away with, or handing over to others, any of his movable or immovable property,*
>
> *the court or judge may order that the property of the defendant, or any part thereof, be forthwith seized by the Sheriff of the Supreme Court as a pledge or surety to answer the just demand of the plaintiff, until the trial of the action and satisfaction of any judgment that may be made against the defendant; but such order shall not constitute the plaintiff a secured creditor if the defendant is adjudicated bankrupt:*
>
> *Provided ...*

The proviso is not relevant to these proceedings.

Order 74 rr 5 to 11 of the Rules of Court govern the procedural matters pertaining to an application under the above section. In particular, r 8 provides that seizure shall be effected in the same manner

as under a WSS.

The plaintiffs cited various authorities for the proposition that the jurisdiction to grant an AO is extraordinary in nature and must therefore be sparingly exercised. This is because the restraint on the use of property would be before the respective rights of the parties are determined (see for instance **Kanshi Ram v Hindustan National Bank Ltd** [1928] AIR 376; **Nanyang Development (1966) Sdn Bhd v Malaysian Armed Forces Cooperative Housing Society Ltd** [1972] 2 MLJ 149). To this extent, the jurisdiction under the Debtors Act is akin to the general jurisdiction of the courts to grant injunctions and the principle of full and frank disclosure applies with equal force to both. It is of course axiomatic that the applicant for an AO must also satisfy the relevant conditions spelt out in the said s 17(1). The first prerequisite is that the applicant must have a good cause of action. He must then satisfy one or more of the disjunctive conditions stipulated in (a), (b) and (c).

It was further submitted that the jurisdiction in respect of an AO should only be invoked when the court is satisfied that the debtors are about to dispose of their property with intent to obstruct or delay the execution of any judgment and that it is imperative that the element of intent be satisfied.

In the High Court suit, the debtors had already conceded that they were indebted to the defendants here. In fact, within two weeks of the commencement of that action, judgment by admission was entered. There could therefore be no doubt that the defendants had a good cause of action against the debtors. In respect of s 17(1)(a), it was patent that the first and second debtors, the existing partners of the debtor firm, were not in Singapore at the time of the application and that, although they were said to have left for India, their place of abode could not be discovered. Suspecting or even knowing that the debtors were in any particular country does not detract from this fact. The fact that they are Singapore Citizens and may or will return some day also does not change the position. Similarly, the fact that they have solicitors in Singapore offers cold comfort when the solicitors could not reach them for instructions. As for s 17(1)(c), paras 5 to 14 of Raj Kumar`s affidavit filed in support of the AO do support amply the allegation that the debtors had concealed and made away with the stock-in-trade. The requisite intention, in almost all cases, can only be inferred from the circumstances. The countermanding of the cheque, the third Debtor`s resumption of a similar business elsewhere in Singapore, his failure to inform the creditors earlier about his withdrawal from the debtor firm and his ability to gain access to the stock-in-trade in [num]02-11 Satnam House were circumstances in which one could justifiably draw the inference that such an intention existed.

At first, I was a little perturbed by para 13 of Raj Kumar`s said affidavit in that it appeared to suggest that the goods had been siphoned off to [num]02-11 Satnam House when what was meant was that the goods could have been siphoned out from [num]02-11. After considering the matter further, I was satisfied that para 13 had been drafted inelegantly rather than deceptively. The failure to disclose the fact that the creditors` committee had one set of keys and that they had placed a lock on [num ]02-11 did not materially affect the position as the creditors` committee did not have access to [num]02-11 anyway and the third debtor had access to the back door of the premises, a fact the plaintiffs were unable to dispute. It also appeared that the third debtor could be contacted, at least by his solicitors, although his physical whereabouts might be unknown to the defendants then. However, this did not form the crux of the application for the AO.

A recurring theme which emerged in the plaintiffs` submissions was that the defendants had supported the debtors in their application for an interim order under the Bankruptcy Act both before and one day after obtaining the AO and therefore could not have held the belief that caused them to apply for the AO and that the AO was nothing more than an attempt to steal a march on the plaintiffs or to prevent the plaintiffs from doing the same to the other creditors. I note that the debtors had

not contested any of the matters alleged against them in the obtaining of the AO although the AO encompassed their personal property as well. It was not alleged that the defendants and the debtors were colluding in this matter. Although they had been generally cooperative with their creditors, it was not unreasonable for the defendants to have the fears stated in Raj Kumar`s affidavit supporting the AO in the light of the changing circumstances of the case. Despite all that the plaintiffs have argued about the debtors` noble intentions, their solicitors` letter dated 15 February 2000 to the Bailiff (quoted in para 27 above) betrayed their true feelings. Having obtained the protection of the AO, it was not inconsistent for the defendants to have supported the debtors` subsequent application for another interim order under the Bankruptcy Act if the terms proposed were acceptable to them.

Considering all the circumstances of this case, I was of the view that the AO was properly obtained and that there was no material non-disclosure. The duty of disclosure here need not extend to disclosing each and every affidavit filed in related proceedings so long as the picture presented to the court is true and fair.

The matter, however, does not rest there as s 20 Debtors Act provides:

> *Any property so seized, or the proceeds of sale thereof, shall be liable to execution in satisfaction of any judgment in the action against the defendant; but it shall be subject to the prior claims of any judgment creditor whose judgment was obtained within one year before the seizure thereof under this Part if the judgment creditor had issued execution against the defendant`s property before the making of any order under this Part.*

Both ss 17 and 20 fall within Part III of the Debtors Act. It was obvious that the plaintiffs` judgment had been obtained within one year before the seizure by the defendants. Have they `issued execution` before the making of the AO?

The defendants said, no, because in **Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd** [1966] 1 QB 764[1964] 2 All ER 732, Edmund Davies J, in considering s 26(1) of the Sale of Goods Act 1893, made it clear that until either payment or sale, a WSS remained `unexecuted`. With respect, I fear that this submission was based on an erroneous reading of the case and counsel`s submissions therein have been taken as the learned judge`s finding. The proviso to the said s 26(1) states that no WSS shall prejudice the title to goods acquired by any person in good faith and for valuable consideration unless he had at the time when he acquired his title notice that such WSS had been delivered to and remained unexecuted in the hands of the Sheriff. Edmund Davies J said (at [1966] 1 QB 764, 781; [1964] 2 All ER 732, 740):

> *... and where such an essential step in execution as actual seizure has already been effected, it is, I hold, impossible to regard the writ as one which still `remained unexecuted in the hands of the sheriff`.*

In any case, s 20 speaks of `issued execution` and not whether a WSS had been executed. Order 46 r 4(1) provides that `issue of a writ of execution takes place on its being sealed by an officer of the Registry`. Order 46 r 1 defines a writ of execution to include a WSS. Clearly, therefore, the plaintiffs had `issued execution` against the debtors` property when they took out their WSS. But did they do so `before the making of any order` under s 17?

Order 42 r 7(1) states that a judgment or order of the court takes effect from the day of its date. If `before the making of any order` in the said s 20 means the plaintiffs` WSS must have been issued a day earlier, then the plaintiffs do not obtain priority over the defendants. If those words relate to the precise time of the day, in all probability the AO was made well before 10.32 am on 16 February 2000 (the earliest time the plaintiffs` WSS could have been sealed as stamping was required first). The fact that the AO was extracted well after 10.32am does not change the legal position that it had been made before the plaintiffs `issued execution`. I therefore hold that s 20 does not accord priority to the plaintiffs.

The defendants also submitted that the plaintiffs had no locus standi to take out such an application to set aside the AO as the Debtors Act contemplated an application by the debtor only. In any case, they argued, O 74 r 11 provides that any claim by a third party to the property seized shall be dealt with in the manner relating to interpleader proceedings. I do not agree. In the unusual circumstances here, the plaintiffs obviously had a legitimate interest as competing creditors to protect. Further, O 74 r 11 only governs applications by the Sheriff who would proceed by way of interpleader should he face conflicting claims. It does not deal with the manner in which the plaintiffs should seek to establish their claim.

In respect of costs, whatever the circumstances leading to the withdrawal of the plaintiffs` application in Suit 600156/2000 may have been, the order dated 9 March 2000 is clear - it leaves me free to consider the appropriate amount of costs to award for this originating summons as well as the said earlier application. As I agreed with some and not all of the defendants` contentions, I decided that a fair amount of costs to be awarded for both matters would be $5,000.

In the result, the originating summons was dismissed with costs fixed at $5,000 to be paid by the plaintiffs to the defendants.

Outcome:

Application dismissed.