

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. C.L. 384 of 1968

BETWEEN Lindon Leslie Plaintiff
AND Barbara Munt Defendant

October 1, 1976

In Chambers

Summons to Stay Proceedings

Mr. Karl Van Cork instructed by K. V. Cork and Company
for Defendant's Applicant.

Mr. E. C. L. Parkinson, Queen's Counsel instructed by
Williams and Williams for Plaintiff, Respondent.

Orr, J.

On the 26th July, 1976 the Master in Chambers made an
Order committing the defendant to prison for six weeks in default
of payment of \$3,000 being arrears due under the judgment and
\$52.00 for costs.

On the 28th day of July, 1976 an Absolute Order in Bank-
ruptcy was made against the defendant in the Resident Magistrate's
Court for the Parish of Saint Andrew.

On the 18th August, 1976 the Defendant filed this Summons
to stay proceedings and in particular the Order to commit on
the ground that the debt was provable in the Bankruptcy.

The Summons was heard on the 25th August, 1976.

Section 39 of the Bankruptcy Act reads as follows:

Section 39 (1) "When a provisional or an absolute order has
been made against a debtor, no creditor to
whom the debtor is indebted in respect of
any debt provable in Bankruptcy shall have
any remedy against the property or person
of the debtor in respect of such debt,
except in manner described by this Act."

- (2) "All proceedings to recover any such debt shall, if not already stayed, be stayed upon notice of such order being given in manner prescribed, but the Court may on application by any creditor or person interested, allow any proceedings commenced to be continued upon such terms and conditions as it thinks just."
- (3) "The provisions of this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with the same if the section had not been passed."

Mr. Cork submitted that the provisions of the section were mandatory and an automatic stay of the proceedings was created upon due notice of the Order in Bankruptcy.

Mr. Parkinson submitted:

- (1) That the debt was not provable in Bankruptcy
- (2) Assuming the debt was so provable the fact that the proceedings in Bankruptcy were commenced subsequent to the Order of the Master could not avail the Defendant. The Order of the Master was a Positive Order for a Contempt of Court and section 39 of the Bankruptcy Act was irrelevant to the application.

He cited the cases of James v James 1962. 2 A.E.R. 465 and Coles v Coles 1956. 3 A.E.R. 542 in support of his submissions at (1) subparagraph.

In James v James it was held that arrears of maintenance which were under the control of the Court and entirely at its discretion were not provable in Bankruptcy.

Coles v Coles was concerned with Alimony.

Neither of these cases were of assistance.

The definition of debts provable against a Debtor's Estate

is provided by section 123 of the Bankruptcy Act as follows:

Sub-section (1):

Demands in the nature of un-liquidated damages arising otherwise than by reason of a contract or promise shall not be provable under a bankruptcy petition,

Sub-section (2):

Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the provisional order or to which he may become subject by reason of any obligation incurred previously to the date of the order, shall be deemed to be debts provable under a Bankruptcy petition in pursuance of this Act.

The debt, the subject of the summons falls within the ambit of sub-section (2), the judgment having been given for an amount certain before the date of the Order in Bankruptcy. See Re: Newman Ex parte Brooke 1876. 3 Ch.D. 494.

I hold that the debt is provable in the Bankruptcy.

Mr. Parkinson relied heavily on the case of in re: Smith, Hand and Andrews 1893. 2 Ch. 1 and to a lesser extent on Re: Edgecombe 1902 2.K.B. 403.

The Headnote to in Re: Smith made as follows:

"The remedy against the property or person of a debtor prohibited by section 9 of the Bankruptcy Act 1883, is in respect of a debt, and intended to enforce payment of that debt, but the remedy by committal or attachment under the Debtor's Act 1869, is punishment for an offence. Therefore, the prohibition contained in the Act of 1883 does not take away the jurisdiction of the Court to order, under section 4 sub-section 2 of the Act of 1869, the committal or attachment of a defaulting trustee against whom a receiving order in bankruptcy has been made."

It is necessary to set out the relevant provisions of the

Bankruptcy Act 1883, United Kingdom.

Section 9 (1) "On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose."

- (2) But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

Section 10(1) "The Court may if it is shown to be necessary for the protection of the estate, at any time after the presentation of a bankruptcy petition, and before a receiving order is made, appoint the official receiver to be interim receiver of the property of the debtor, or of any part thereof, and direct him to take immediate possession thereof or of any part thereof.

Section 10 (2) "The Court may at any time after the presentation of a bankruptcy petition stay any action, execution or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor may on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just."

A comparison, with the local Act is illuminating.

Section 39 (1) of the local Act is almost identical to Section 9 of the United Kingdom Act.

Section 39 (2) reads:

"All proceedings to recover any such debt shall, if not already stayed be stayed upon notice being given in manner prescribed, but the Court may on application by any creditor or person interested, allow any proceedings commenced to be continued upon such terms and conditions as it thinks fit." (underlining mine).

Mr. Parkinson contended that the Draughtsman, had merely combined both sections of the United Kingdom Act in the local Act.

I am not so persuaded.

I hold that section 39 imposes an automatic stay of the proceedings upon due notice being given of the order in Bankruptcy and thereafter the Court in its discretion may permit a continuation of the proceedings.

The provisions of the United Kingdom Bankruptcy Act are clearly discretionary. In the circumstances the cases cited are not relevant to the present application by the debtor.

There will, therefore, be a stay of the proceedings herein pending the adjudication of the Petition in Bankruptcy.

There will be no order as to Costs.

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