[HIGH COURT OF AUSTRALIA.]

DELPH SING . . . . . APPELLANT;

AND

WOOD AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 20, 21.

Barton, Gavan Duffy and Rich JJ.

Bankruptcy—Sequestration order—Discharge of order—Act of bankruptcy—Non-payment of judgment debt—Proof of existence of debt—Going behind judgment—Bankruptcy Act 1898 (*N.S.W.*) (*No.* 25 *of* 1898), *sec.* 37.

Sec. 37 (1) of the *Bankruptcy Act* 1898 (N.S.W.) provides that "Where in the opinion of the Court a sequestration order ought not to have been made, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, the Court may on the application of any person interested by order discharge such order."

A sequestration order had been made against the appellant based upon failure to comply with a bankruptcy notice calling upon him to pay the amount due on a judgment against him. An application made by the appellant two years afterwards under sec. 37 of the *Bankruptcy Act* 1898 to discharge the sequestration order, in which he sought to go behind the judgment and show that no debt existed, was refused by the Registrar, and his decision was affirmed by the Supreme Court in Bankruptcy. On appeal to the High Court,

Held, that in the absence of any suggestion of fraud or collusion, and the question of indebtedness having been fought out in the action, the Registrar properly dismissed the application.

Decision of the Supreme Court of New South Wales (*Street* J.) affirmed.

APPEAL from the Supreme Court of New South Wales.

On 14th May 1915 a sequestration order was made against the estate of Delph Sing on the petition of Arthur Charles Jackson

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Wood. In the petition it was alleged that Delph Singh had committed two acts of bankruptcy by failing to comply with two bankruptcy notices. The first bankruptcy notice was issued by Thomas Welby Martin and Emily Elizabeth Martin, his wife, and called upon Delph Singh to pay the sum of £691 3s. 6d. being the amount due on a final judgment obtained by them against him in an action in the Supreme Court. The second bankruptcy notice was issued by Arthur Charles Jackson Wood, and called upon Delph Singh to pay the sum of £473 14s. 3d. being the amount due on a final judgment obtained by Wood against Delph Singh in an action in the Supreme Court.

On 30th May 1917 Delph Singh applied on motion to the Registrar in Bankruptcy for the annulment of the sequestration order, but the motion was dismissed with costs. Delph Singh appealed to the Supreme Court in Bankruptcy, and the appeal was heard by *Street* J., who made an order dismissing the appeal with costs. The judgment of the learned Judge was as follows :—

"On 19th May 1915 an order was made sequestrating the estate of the bankrupt. Two years later, that is to say, on 30th May of this year (1917), the bankrupt applied to the Court to discharge that order. That application came on to be heard by the Registrar, and was dismissed. The matter now comes before me by way of appeal from his decision. I think that Mr. *Loxton* has urged everything that could be urged on behalf of his client, but in my opinion the appeal fails. Sec. 37 of the *Bankruptcy Act* 1898 provides that if in the opinion of the Court a sequestration order ought not to have been made, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, the Court may, on the application of any person interested, discharge such order. Now, it is not suggested here that the debts of the bankrupt have been paid in full. Therefore the Court has to consider, in the first instance, whether in its opinion a sequestration order ought not to have been made, and, if it is of that opinion, then it has to consider whether in the exercise of its discretion that order should be discharged.

"Even if it were of opinion that the order ought not to have been made in the first instance, it does not follow as a matter of course that it will be discharged. The question of discharge is one for the

exercise of the discretion of the Court, and that discretion—no doubt a judicial discretion, to be exercised upon principle—must be exercised on the facts of each case.

"As was said by *Knight Bruce* V.C. in *Ex parte Maxwell* (1): 'Each case is one of circumstances, among which is the lapse of time.' Therefore, in every case, in considering whether the Court should exercise its discretion, it must take into consideration the whole of the circumstances, including the lapse of time which has taken place before the application for the annulment of the sequestration order.

"Now, in the present case, the act of bankruptcy upon which the sequestration order was founded was non-compliance with the terms of a bankruptcy notice issued by one Wood, a judgment creditor of the bankrupt. It has been contended on behalf of the bankrupt that the order ought not to have been made as, upon the facts now before the Court, it would appear that the judgment obtained by Wood against the bankrupt amounted to a miscarriage of justice. By agreement made on 25th September 1914, between the bankrupt and Wood, after reciting various agreements entered into between the bankrupt, a company called the Universal Brickmaking Supply Co. Ltd. and other people, and after reciting that the bankrupt had applied to Wood for an advance of £375, the bankrupt, in consideration of that advance, covenanted with Wood to repay him that amount on 28th January 1915. He also agreed that, in order more effectively to secure the repayment to Wood of the sum of £375, Wood should have the right to receive certain moneys which were alleged to be due to the bankrupt by the Company. He further agreed that, as an additional or collateral security, he would give Wood a promissory note for the sum of £375 which was to be payable on the same day on which the debt was payable under the covenant, that is, 28th January 1915. The agreement further provided that if on the due date of the said promissory note the bankrupt should not pay the sum advanced with interest then, in such case, Wood should at the request of the bankrupt renew the promissory note from time to time until such time as the Company should be in a position to pay to the bankrupt some part of the moneys which he

(1) 3 M. D. & D., 708, at p. 713.

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had assigned to Wood as a further security for the repayment of the loan. The loan was not paid on 28th January, and Wood sued to recover it. I forgot to say that, within a day or two after the money fell due, the bankrupt applied to Wood to renew the promissory note, but that application was refused. Now, it seems to me that it is clear that there was one advance only, that is, the sum of £375, and that the bankrupt on the terms of the agreement entered into was entitled in the circumstances to a renewal of the promissory note. The renewal of the promissory note meant, on the true construction of the agreement between the parties, the postponement of the obligation to pay. However, as I say, the bankrupt's application for the renewal of the note was refused, and Wood then instituted his action. The bankrupt did not set up by way of defence in that action his right to a renewal of the promissory note, nor did he take any proceedings in equity to restrain the action upon the ground that he was entitled to a renewal of the note and that that right had been refused him. The action was defended, and a verdict passed for the plaintiff. On the judgment so obtained the bankruptcy notice was issued, and, upon non-compliance with that bankruptcy notice, the petition for sequestration was presented.

"Mr. *Loxton* has contended that the case is one in which, if the whole of the facts now before the Court had been known to it at the time this sequestration order was made, the sequestration order would not have been made. I think, as I have already said, that Wood acted in violation of his agreement in refusing to renew the promissory note when asked. I think that the true intention of the parties was that the promissory note should be renewed, and that this renewal would carry with it a postponement of the obligation to pay. In refusing to renew, Wood violated his agreement, and it is conceivable that if the facts had been brought before this Court before the order of sequestration was made, the Court might, in the exercise of its discretion, have refused to make an order. Without expressly so deciding, I assume, at all events, in favour of the bankrupt that that would have been so. Assuming that, the question now arises whether the sequestration order should be discharged. That, as I have said, depends upon all the circumstances of the case, including, amongst others, the lapse of time. Now, certain features

which have to be considered are these. No explanation has been put forward by the bankrupt as to why it was that he took no steps to prevent Wood from obtaining judgment for payment of the debt before it was properly payable to him. Not only that, but after Wood had obtained judgment the bankrupt took out a notice of motion to set aside the bankruptcy notice and filed an affidavit in support of that application showing that he was fully alive to his rights under the agreement and to the violation of those rights. For some reason unknown to me, that application was not proceeded with, nor was the matter brought to the notice of the Court on the petition for sequestration. The bankrupt was content to allow the order to go without calling the attention of the Court to the facts and to the significance of those facts, of which he was perfectly well aware. He then filed his statement of affairs, in which he included Wood as a creditor, and Wood had lodged a proof of debt which has been admitted. The matter, however, does not rest there. One of the provisions of the agreement was in these words: 'Provided that if the said Company shall go into liquidation either voluntary or by compulsion, the said sum of £375 or such part thereof as may remain due or unpaid together with interest thereon shall thereupon become due by the said Delph Singh to the said Wood.' So that the parties expressly stipulated that whatever other provisions might be contained in their agreement as to the payment of this sum of £375, it was to become immediately payable in the event of the Company going into liquidation, either voluntary liquidation or by compulsion. The Company did, in fact, go into voluntary liquidation on 10th November 1915, some six months or so after the sequestration of the bankrupt's estate. The debt thereupon became due. Now, in these circumstances, and having regard to the lapse of time, why should the Court interfere? Why should the Court at the instance of the bankrupt discharge the order obtained on the petition of Wood? Assuming, for the sake of argument, as I have already said I have assumed, that Wood, if the whole of the facts had been known to the Court, might not have succeeded at the time in establishing a good petitioning creditor's debt entitling him to make his debtor bankrupt, the facts show that the debt, on which his petition is based, ripened some six months

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afterwards into an actual liability payable immediately. The bankrupt took no proceedings during those six months, nor for eighteen months afterwards. In those circumstances, seeing that there is now a debt undeniably owing by the bankrupt to Wood, and seeing that, on the bankrupt's own sworn admission as contained in his statement of affairs, he is absolutely insolvent, it seems to me that in the exercise of its discretion the Court should not interfere with the sequestration order which has been made.

"It might be sufficient, perhaps, to leave the case there, because, on that ground alone, it seems to me that the appeal fails altogether. As, however, considerable discussion has taken place regarding the validity of the judgment obtained by Martin and his wife against the bankrupt, perhaps it is right that I should say a word or two as to that. It was brought into the matter in this way :—The legal advisers of the bankrupt, recognizing that it might be possible that, even if they succeeded in showing that a sequestration order ought not to have been made on Wood's petition, still the Court, in the exercise of its discretion, might refuse to annul that order if it appeared that the bankrupt was insolvent, endeavoured to get rid of Martin and his wife as creditors by showing that the judgment which they obtained was obtained under such circumstances as to amount to a miscarriage of justice. That was endeavoured to be made out by showing that the advances made by Martin and his wife to the bankrupt were made to the bankrupt as the agent of the Company in such circumstances that Martin and his wife both knew that the bankrupt was only contracting as agent for the Company, and was contracting so as not to incur any personal liability. Well, undoubtedly, if Martin and his wife knew that though the money was actually advanced to the bankrupt he was to be under no personal liability to repay it, and if it was understood between them that Martin and his wife should only look to the Company for payment, then undoubtedly, as Mr. *Loxton* has said, they would have been acting unconscientiously in endeavouring to enforce against the bankrupt a liability which they knew he had never undertaken. Now, the bankrupt's contention that he was only an agent in the matter is not now being raised by him for the first time. It appears, from the affidavit of Mr. Houston, the solicitor who

acted for the plaintiffs in the action brought by the Martins against the bankrupt, that at the hearing of that action the bankrupt swore that the money advanced by the Martins was not lent to him personally but only as agent for the Company, and that he also called witnesses in support of his case. It is evident, therefore, that he not only had an opportunity of raising the question of his personal liability, but that he actually did raise it and submitted the facts to a jury. How, then, can it be said that any miscarriage of justice took place? The jury was a proper tribunal to determine the matter, and the proper parties were before it. There is no suggestion that there are any facts brought forward now that were not known then to the bankrupt. He was represented by solicitor and counsel, and, in point of fact, he set up the very contention which is now being set up. I am altogether at a loss to see, in those circumstances, how it can be said that there has been anything in the nature of a miscarriage of justice which would justify the Court in reopening the matter and allowing the bankrupt to litigate it again. If that could be done in this case, it might be done in any cases in which an unsuccessful litigant asked the Court for a fresh adjudication on the ground that he might have adduced further arguments or further facts. If that kind of thing were allowed, there would never be an end to litigation. No doubt there are cases in which, in this branch of the Court's jurisdiction, a judgment will be gone behind and the consideration for the judgment debt will be inquired into; but that is not done as a matter of course. In every case the Court must have some circumstances before it going to show that a miscarriage of justice has taken place. In the present case, whatever the rights of the parties may have been between themselves, and whatever rights the bankrupt may have had to recover over against the Company, not only did he set up his defence before the proper tribunal, but, in addition to that, it seems to me that on the additional facts brought before me there is nothing which would justify me in saying that on the whole of the facts as now presented to the Court the jury would not have been justified in coming to exactly the same conclusion as they did in fact come to. The circumstances show that the bankrupt is hopelessly insolvent. On his sworn statement of affairs his assets consist of property to the value of

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£2 and some bad debts amounting to £100. His statement of affairs shows debts amounting to £1,300 and upwards. The attempt to show that the debt claimed by the Martins is one which should be further investigated by the Court has failed. The debt to Wood was—as the Registrar found—a matter between Wood and the bankrupt alone, and, whatever the position may have been at the time the sequestration order was made, that debt is now undeniably due and payable. Having regard therefore to the fact that that debt is now due and payable, and that the bankrupt is insolvent, and having regard to the unexplained delay for upwards of two years before asking the Court to discharge the sequestration order, I think that the Registrar was perfectly right in coming to the conclusion to which he did come, that is, that the application should be dismissed. I accordingly dismiss this appeal and I order the bankrupt to pay the costs."

From that decision Delph Sing now appealed to the High Court. The respondents were Wood, Martin and his wife, and William Harrington Palmer, the Official Assignee.

Loxton K.C. (with him *Saunders*), for the appellant. If it were proved that at the time the petition for sequestration was presented no debt was due either to Martin and his wife or to Wood, then the onus was cast upon the petitioning creditor of supporting the sequestration on equitable grounds, and in the absence of such support the Registrar ought under sec. 37 of the *Bankruptcy Act* 1898 to have annulled the sequestration order. The appellant is entitled to go behind the judgments obtained by the respondents Wood and Martin and his wife for the purpose of showing that no debt existed in either case. The principles which guide the Court in dealing with bankruptcy matters such as this are stated in *Ex parte Lennox*; *In re Lennox* (1). The judgment in the present case is founded on conduct of the appellant which is held to preclude him from denying the existence of the debts. But the conduct of the appellant is immaterial. The only matters to be taken into consideration are matters relevant to the provisions of the *Bankruptcy*

(1) 16 Q.B.D., 315.

Act. A debtor cannot admit that that which was not really a debt was a debt, because it affects his other creditors. Although the Court will not go behind a judgment where issues of fact have been fought out before, and decided by, a jury, yet where the judgment proceeds on undisputed facts and there is a mistake of law as to their effect the Court will review the decision. Here the question of the existence of the debts depends on written documents and the undisputed circumstances under which those documents came into existence.

Clive Teece, for the respondents, was not called upon.

BARTON J. I am of opinion that this appeal should be dismissed. I do not wish to add anything except that the reasons given by *Street* J. satisfy me.

GAVAN DUFFY J. There are many peculiar circumstances in this case and, without laying down any general rule, it is enough for me to say that I think that the Registrar in Bankruptcy properly exercised his discretion under sec. 37 (1) of the *Bankruptcy Act* 1898, and that the order appealed against is right.

RICH J. I agree. There is no suggestion of fraud or collusion, and miscarriage of justice cannot be predicated of the judgment sought to be impeached, obtained as it was in an action where the issue of indebtedness was fought out between the parties before the jury (*In re Howell* (1)).

Appeal dismissed with costs.

Solicitor for the appellant, *A. J. Grant.*

Solicitor for the respondents, *J. W. H. Houston.*

B. L.

(1) 84 L.J.K.B., 1399.