IN THE MATTER OF THE BANKRUPTCY OF T. H. COLLINGS

1936
* Oct. 9.
* Oct. 31.

EX PARTE T. H. COLLINGS

EX PARTE K. MURPHY

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy—Appeal—Application for special leave to appeal to Supreme Court of Canada—Time of notice—Jurisdiction to hear application—Bankruptcy rule 72.

The competency of the Supreme Court of Canada in bankruptcy proceedings is to be looked for exclusively in the *Bankruptcy Act* (R.S.C. 1927, c. 11) and the rules properly made under it; it is not controlled by the sections of the *Supreme Court Act* dealing with the Court's ordinary jurisdiction.

* Rinfret J. in chambers.

(1) (1886) 12 Can. S.C.R. 631.

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A trustee in bankruptcy applied to a Judge of this Court for leave to appeal from a decision of the Court of Appeal made on June 29, 1936. The court of original jurisdiction in bankruptcy, acting under s. 163 (5) of the *Bankruptcy Act*, on September 8, 1936, extended the time (which otherwise would have expired on July 29) within which to apply for such leave, its order providing that notice of motion for leave be served on or before September 28, and be made returnable on or before October 12. The notice was served on September 26 and made returnable on October 9; so it was not served "at least 14 days before the hearing thereof" as prescribed by bankruptcy rule 72.

Held: The motion could not be heard. A Judge of this Court has no power to excuse a party from compliance with rule 72, nor to abridge the time of notice thereby prescribed. Assuming the court of original jurisdiction in bankruptcy had power to abridge the time of notice, its said order did not do so.

In re Hudson Fashion Shoppe Ltd., [1926] Can. S.C.R. 26; *In re Gilbert*, [1925] Can. S.C.R. 275; *In re North Shore Trading Co.*, [1928] Can. S.C.R. 180, and *Boily* v. *McNulty*, [1927] Can. S.C.R. 275, cited.

The motion was dismissed; but with reservation of any right in the applicant to obtain from the court having jurisdiction to grant it a further extension of time to renew the application.

APPLICATIONS by the Trustee in Bankruptcy for special leave to appeal to this Court from the judgment of the Court of Appeal for Ontario (1) which allowed an appeal from the order of Mr. Justice McEvoy (2) dismissing applications for an order rescinding the receiving order made by the Registrar in Bankruptcy and annulling the adjudication in bankruptcy.

F. K. Ellis for the Trustee.

Lewis Duncan K.C. for T. H. Collings.

R. M. Willes Chitty for K. Murphy.

RINFRET J.—The applications for leave to appeal to the Supreme Court of Canada were made to me by the Trustee in these matters on the 9th day of October, 1936.

The appeals intended to be lodged, if leave therefor was granted, are from a decision of the Appeal Court pronounced on the 29th day of June, 1936, and application for leave to appeal therefrom ought therefore to have been made on or before the 29th day of July, 1936 (Rule 72 under the *Bankruptcy Act*); but the court of original jurisdiction in bankruptcy, acting under subs. 5 of s. 163 of the

(1) 17 C.B.R. 390; [1936] 4 D.L.R. 28; [1936] Ont. W.N. 409.

(2) [1936] O.R. 130; 17 C.B.R. 223; [1936] 2 D.L.R. 47.

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Bankruptcy Act, on the 8th day of September, 1936, extended the time within which the application might be made up to the 12th day of October, 1936. The order so made was

that the notice of motion for such special leave, if any, be served upon the parties entitled to notice on or before the 28th day of September, 1936, and that the said notice of motion for such special leave, if any, be made returnable before a Judge of the Supreme Court of Canada on or before the 12th day of October, 1936.

The notice of motion for leave to appeal now before me was served on the 26th day of September. As aforesaid, it was made returnable on the 9th of October. So that the notice was not "served on the other party at least fourteen days before the hearing thereof," as prescribed by Bankruptcy Rule No. 72 (1).

The objection was taken by opposing counsel for the respondents.

I am precluded by the rule from hearing the motion and from entertaining the application. (*In re Hudson Fashion Shoppe Limited* (1).)

Rule 72 is a statutory rule. Moreover, it is not a rule made under the provisions of the *Supreme Court Act* and from the compliance with which the Supreme Court of Canada or a Judge thereof may excuse a party under Rule 109 of this Court. The Rule is a Bankruptcy Rule made by the Governor in Council under the provisions of s. 161 of the *Bankruptcy Act;* and it is not inconsistent with the provisions of the Act. (*In re Gilbert; Boivin* v. *Larue, Trudel & Piché* (2).) It has been held further that a Judge of this Court had no power, under Supreme Court Rule 108, to enlarge or abridge the delay provided by Bankruptcy Rule 72. (*In re Gilbert* (2); *In re North Shore Trading Company* (3).) One reason for this is that the competency of this Court, in bankruptcy matters, is to be looked for exclusively in the *Bankruptcy Act* and the Rules properly made under it; it is not controlled by the sections of the *Supreme Court Act* dealing with the Court's ordinary jurisdiction (*Boily* v. *McNulty*) (4).

In the present instance, Rule 72 was clearly not followed. Under it, the notice must be served "at least" fourteen days before hearing. The use of the words "at least"

(1) [1926] Can. S.C.R. 26.
(2) [1925] Can. S.C.R. 275.
(3) [1928] Can. S.C.R. 180.
(4) [1927] Can. S.C.R. 275.

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means that "both the day of service or of giving notice and the day on which [the application was to be heard] shall be excluded from the computation." (Bankruptcy Rule 170).

Assuming the court of original jurisdiction in bankruptcy had the power to abridge the prescribed delay, such delay was not abridged by the order extending the time for applying for leave. The order prescribed an extreme date within which the notice should be served and another date within which the motion should be made returnable. Between the 8th of September (the date of the order) and the 12th of October (the date on or before which the motion was ordered to be made returnable) ample time was provided for complying both with the order and with Rule 72.

In the particular instance, counsel for the applicant complained that the 12th day of October happened to fall on a non-juridical day (Thanksgiving day) and that the previous day, the 11th of October, was a Sunday. But, far from operating to the prejudice of the applicant, these events really gave him additional time within which to comply with the order and with the Rule, for in such case he could have made his motion returnable on the 13th day of September and his proceedings would necessarily have been "considered as done or taken in due time" (*Bankruptcy Act*, s. 184; Rule 172).

I must, therefore, dismiss the motions and the applications with costs; but, as I am not passing on the merits of the applications, I will reserve any right which the applicant may have to obtain from the court having jurisdiction to grant it a further extension of time to renew the applications for special leave to appeal herein made.

Applications dismissed with costs (with reservation as stated).

Solicitors for the Trustee (applicant): *Ellis & Ellis.*

Solicitor for T. H. Collings: *Lewis Duncan.*

Solicitors for K. Murphy: *Joy & Chitty.*