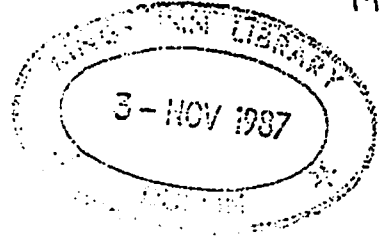


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THE HIGH COURT
BANKRUPTCY

IN THE MATTERS OF

JOHN J. McNEELA, A BANKRUPT

AND

MICHAEL KILKENNY, A BANKRUPT

No 2044

No 2045

Judgment of the President of the High Court delivered on the 23rd
day of September 1987

Both the above entitled bankrupts were adjudicated bankrupts on the 23rd day of December 1986 on foot of two separate petitions dated the 12th day of December 1986 presented on behalf of Allied Finance Limited, the petitioning creditor, in both cases.

The debtors summons in respect of Michael Kilkenny had been issued on the 20th day of May 1986 and in respect of Jack McNeela on the 17th day of June 1986.

It appears from the particulars of demand in each case that the amount alleged to be due to the petitioning creditor by the bankrupts was £22,623.54 on foot of five judgments obtained in various courts by the petitioning creditor against the bankrupts named in the title hereof.

The dates of the said judgments were respectively the 4th day of December 1984, the 28th day of January 1985, the 22nd day of May 1985 and the 11th day of October 1985.

The detailed particulars in respect of each of the judgments are set forth in detail in the particulars of demand served on both the bankrupts.

The petitions having been duly served on the Bankrupts a notice of intention to show cause was issued on behalf of Michael Kilkenny on the 5th day of January 1987 and on behalf of Jack McNeela on the 8th day of January 1987.

By Order dated the 19th day of January 1987 the Bankrupts were given liberty to continue to act as Directors of two companies which were in receipt of rents upon their undertaking to lodge such rents with the Official Assignee.

On the 8th day of May 1987, motions were issued on behalf of both the bankrupts claiming

1. An order dismissing the debtors summons issued by the Petitioning Creditor in each case.
2. An order dismissing the petitions of the Petitioning Creditor in each case and
3. An order annulling the orders of adjudication made on the 23rd day of December 1986 in respect of each of the Bankrupts.

The application was grounded on the affidavits of the Bankrupts and the point upon which they rely is common to both.

It is for this reason that I am dealing with both in the same judgment.

In their affidavits, they say:-

"I say and believe that Allied Finance Ltd., the Petitioning Creditor, in these proceedings is and was at all times a moneylender within the meaning of the Moneylenders Act, 1900. In this regard I beg to refer to a copy of the memorandum of Association of Allied Finance Ltd. and in particular to Paragraph 3(1) thereof upon which marked with the

letter A I have signed my name prior to swearing hereof. I say and believe that Allied Irish Finance Ltd. does not carry on business as a pawn broker. I say and believe that Allied Finance holds a moneylending licence which licence was renewed in the District Court on the 9th day July 1986.

I say and believe and am advised that Allied Irish Finance Ltd. being a moneylender has not complied with the Rules of the Superior Courts 1986 or with the provisions of the Moneylenders Act, 1933. In particular, I say that Allied Irish Finance Limited has failed to comply with the provisions of Order 76 Rule 12(3) and with the provisions of Order 76 Rule 36 together with the provisions of Section 11 and 16(2) of the Moneylenders Act, 1933. "

Section 11(1) of the Moneylenders Act, 1933 provides that:-

"No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless, before the money was lent or before the security was given, as the case may be, a note or memorandum in writing of the contract be made and signed personally by the borrower, or where the borrower is a married woman not living apart from her husband, by the borrower and her husband and unless a copy thereof be delivered or sent to the borrower within 7 days of the making of the contract.

2. The note or memorandum aforesaid shall contain all the terms of the contract and in particular shall show the date on which the loan is made, the amount of the principle of the loan, and, either the interest charged on the loan expressed in terms of a rate per-cent per annum or the rate per-cent per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act."

Section 16(1) of the said Act provides that:-

- (1) "Where a debt due to a moneylender in respect of a loan made by him after the commencement of this Act includes interest, that interest, shall for the purposes of the provisions of the Bankruptcy Acts relating to the presentation of a bankruptcy petition, voting at meetings, compositions and schemes of arrangements and dividend be calculated at a rate not exceeding 5% per annum, but nothing in the foregoing provisions shall prejudice the rights of the creditor to receive out of the estate after all the debts proved in the estate had been paid in full, any higher rate of interest to which he may be entitled.
- (2) No proof or admission of a debt due to a moneylender in respect of a loan made by him shall be admitted for any of the purposes of the Bankruptcy Act unless there is lodged in court by the moneylender a statement showing in detail
 - (a) the amount of the sums actually lent to the debtor and the dates on which they were lent, and the amount of every payment already received by the moneylender in

- respect of the loan and the date on which every such payment was made; and
- (b) the amount of the balance which remains unpaid distinguishing the amount of the principal from the amount of interest included therein, the appropriation between principal and interest being made in accordance with the provisions of this Act where the interest is not expressed by the contract for the loan in terms of a rate; and
- (c) where the amount of interest included in the unpaid balance represents a rate percent per annum exceeding 5%, the amount of interest which would be so included if it were calculated at the rate of 5% per annum.
- (3) Rules of Court may provide for carrying into effect the objects of this Section."

Order 76 Rule 12(3) in dealing with the issue of debtors summonses provides that:-

"Where the debt or any part thereof is in respect of money lent by a moneylender or interest or charges in connection therewith, the affidavit shall contain a statement of the date on which a copy of the note or memorandum in writing of the contract made pursuant to Section 11 of the Moneylenders Act, 1933 was delivered or sent to the borrower and a statement showing in detail the particulars mentioned in Section 16(2) of the said Act and a copy of the said note or memorandum shall be filed with and verified by the said affidavit."

Rule 36 of the said Rules provides that:-

"When the debt of a petitioning creditor or any part thereof is in respect of money lent by a moneylender or interest on

charges in connection therewith, the affidavit endorsed on the petition shall contain a statement of the date on which a copy of the note or memorandum in writing of the contract made pursuant to Section 11 of the Moneylenders Act, 1933 was delivered or sent to the borrower and the statement showing in detail the particulars mentioned in sub-Section 16(2) of the said Act, and a copy of the said note or memorandum shall be filed with and verified by the said affidavits."

It is submitted in each of these cases that:-

- (1) The Petitioning Creditor is a "Moneylender" in accordance with the provisions of the Moneylenders Act, 1933.
- (2) The amounts due by the Bankrupts are in respect of monies lent and interest charges in respect thereof;
- (3) That the requirements of the Moneylenders Act, 1933 and the Rules of the Superior Court herein before referred to were not complied with at the time of the issue of the debtors summons in each case and the presentation of the petition in each case.

It is submitted on behalf of the petitioning creditor that as they had obtained judgments in courts having jurisdiction against the Bankrupts they are entitled to rely on the said judgments and consequently I am not obliged to comply with the requirements of the Moneylenders Act, 1933 and the Rules of the Superior Courts with regard to the issue of the debtors summons in each case and the presentation of the petition in each case.

I cannot accept this submission. The provisions of the Moneylenders Act, 1933 and the Rules of the Superior Courts are quite clear and explicit.

A Petitioning Creditor who is a "Moneylender" within the meaning of the Moneylenders Act, 1933 must comply with the requirements of the Act and the Rules of the Superior Court.

Compliance with requirements of the Act and the Rules of the Superior Courts cannot be avoided by obtaining a judgment in another court having jurisdiction in respect thereof. The obligation to comply with the requirements of the Act and the Rules of the Superior Courts still remain.

They were not complied with in either of these cases in respect of the issue of the debtors summons and the presentation of the petition in bankruptcy.

In these circumstances, I have no alternative but to make an order setting aside the issue of the debtors summons, the petition for adjudication in bankruptcy presented in both cases and annulling the order of bankruptcy made in each case.

Agreed
L. H. H. H.