Pengkalen Concrete Sdn Bhd v Chow Mooi (guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor

HIGH COURT (SHAH ALAM) — SUIT NO MT122-702 OF 2000
SURIYADI J
31 MARCH 2003

Civil Procedure *— Writ of summons — Service — Writ not received personally by defendants but AR card returned with name 'Yanti' inscribed on it — Whether there was effective service of writ at defendants' address — Whether plaintiff free to send writ by prepaid AR registered post addressed to defendants' last known address*

Contract *— Guarantee — Personal guarantor — Writ not received personally by guarantors but AR card returned with name 'Yanti' inscribed on it — Whether there was requirement of personal service for cases which involved guarantors*

The defendants had stood as guarantors in favor of the plaintiff for a sum of money owed by a company ('KHSC'). The plaintiff sued the defendants when KHSC failed to repay the loan to the plaintiff. On 13 October 2000, two separate writs and statements of claim were filed and served on the defendants. On April 2001, the senior assistant registrar entered judgment in default against the defendants, as they were absent on the return date. The defendants, on 25 July 2002, applied to have that judgment in default set aside but failed. This was the defendants' appeal to the judge in chambers. The defendants admitted that the address was correct but contended that there was no effective service of the summonses at their address. This was because the AR card had been returned with the name 'Yanti' inscribed on it, which was not any of their names. According to the defendants, since they had stood as guarantors, service must be personal as anything less was bad service.

Held, dismissing the defendants' appeal:

(1) The defendants were out of Malaysia from 13 March 2001 until 6 April 2001. The summonses were sent by AR registered post on 2 March 2001 with the receipt of them being on 8 March 2001. These dates indicated that service and receipt of the summonses had taken place before the defendants left Malaysia. By obtaining the written receipt from the post office and the AR card, the plaintiff had done everything necessary to effect service by using the post office (see p 72A–B).

(2) Order 10 r 1(1) of the Rules of the High Court 1980 ('RHC') stipulated that '... subject to the provisions of any written law and these rules, a writ must be served personally on each defendant or by sending it by prepaid AR registered post addressed to his last known address ...'. The personal service requirement must be adhered to if the writ was 'subject to any written law and these rules'. The expression 'these rules' meant the RHC. If that writ was free of the requirements of any written law, and of the RHC,

or subsequently freed when permitted by a court pursuant to, say, a substituted service application, the plaintiff was thus free to send the writ by prepaid AR registered post addressed to the defendants' last known address. To do this, the plaintiff must convince the court that: (a) a writ was sent; (b) there was proof of sending; (c) it was sent by prepaid AR registered post; (d) there was proof of it being sent by prepaid AR registered post; (e) the address sent to was the last known address; and (f) the court was convinced that that address was the last known address (see pp 72D–73A).

(3) Nothing was indicated in O 10 r 1(1) of the RHC that the plaintiff must evidentially prove that, if the writ was sent by prepaid AR registered post, the named person in the writ must be the very person who had received it. In the instant case, all the prerequisites were fulfilled, and the fact that the recipient of the writ was 'Yanti' did not vitiate that service. In fact, whether that writ had physically arrived, or had been received at the last known address was not even legislated into O 10 r 1(1) of the RHC. If the plaintiff had direct and cogent evidence of that writ having been received by the intended person, that was a plus factor for the former, otherwise s 12 of the Interpretation Act 1967 ('the Act') would immediately come into play when invoked. Under s 12 of the Act, where a written law authorized postal service, then until the contrary was proved, service shall be presumed to have been effected at the time when the letter would have been delivered, in the ordinary course of the post. Therefore, unless rebutted by the defendants, service thus must be deemed to have taken place. Since there was no rebuttal evidence before the court, good service of the writ thus had taken place here (see p 73B–E).

(4) Contrary to the defendants' contention, there was no requirement of personal service for cases which involved guarantors (see p 73E–F); *OCBC Bank (M) Bhd & Anor v Livision Sdn Bhd & Ors* [2001] 5 MLJ 129 not followed.

(5) In setting aside the judgment in default, there must be a defence on the merits adduced before the court. Here, it was indisputable that the defendants had failed to produce a draft statements of defence. Without it, the court could only conclude that the defendants were definitely not serious in their attempts to challenge the plaintiff (see pp 74B–C, G, I–75A).

[Bahasa Malaysia summary

Defendan-defendan telah menjadi penjamin-penjamin bagi pihak plaintif untuk sejumlah wang yang terhutang oleh sebuah syarikat ('KHSC'). Plaintif telah menyaman defendan-defendan apabila KHSC telah gagal untuk membayar balik pinjaman tersebut kepada plaintif. Pada 13 Oktober 2000, dua writ dan pernyataan tuntutan

yang berasingan telah difail dan disampaikan ke atas defendan-defendan. Pada April 2001, penolong kanan pendaftar telah memasuki penghakiman ingkar terhadap defendan-defendan, kerana mereka tidak hadir pada hari tersebut. Defendan-defendan, pada 25 Julai 2002, telah memohon penghakiman ingkar tersebut diketepikan tetapi gagal. Ini adalah rayuan defendan-defendan kepada hakim dalam kamar. Defendan-defendan telah mengaku bahawa alamat tersebut adalah betul tetapi menegaskan bahawa tiada penyampaian saman-saman yang efektif telah dilakukan ke alamat mereka. Ini adalah kerana kad AR telah dipulangkan dengan nama 'Yanti' tertera di atasnya, yang bukan nama mereka. Menurut defendan-defendan, memandangkan mereka adalah penjamin, penyampaian tersebut hendaklah secara peribadi kerana selain dari itu adalah penyampaian yang tidak sempurna.

Diputuskan, menolak rayuan defendan-defendan:

(1) Defendan-defendan berada di luar negara Malaysia dari 13 Mac 2001 hingga 6 April 2001. Saman-saman tersebut telah dihantar melalui pos AR berdaftar pada 2 Mac 2001 yang telah diterima oleh mereka pada 8 Mac 2001. Tarikh-tarikh berikut menunjukkan bahawa penyampaian dan penerimaan saman-saman tersebut telah berlaku sebelum defendan-defendan ke luar negara Malaysia. Dengan mendapatkan resit bertulis daripada pejabat pos dan kad AR tersebut, plaintif telah melakukan apa yang perlu untuk melaksanakan penyampaian dengan menggunakan pejabat pos (lihat ms 72A–B).

(2) Aturan 10 k 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') menetapkan bahawa '... subject to the provisions of any written law and these rules, a writ must be served personally on each defendant or by sending it by prepaid AR registered post addressed to his last known address ...'. Keperluan penyampaian peribadi hendaklah dipatuhi jika writ tersebut adalah 'subject to any written law and these rules'. Ungkapan 'these rules' bermaksud KMT. Jika writ tersebut bebas daripada keperluan-keperluan apa-apa undang-undang bertulis, dan KMT, atau dibebaskan berikutan itu apabila dibenarkan oleh mahkamah menurut, contohnya, satu permohonan penyampaian gantian, plaintif oleh itu bebas untuk menghantar writ tersebut melalui pos AR berdaftar pra bayar yang dialamatkan kepada alamat terakhir defendan-defendan yang diketahui. Untuk berbuat demikian, plaintif perlu meyakinkan mahkamah bahawa: (a) satu writ telah dihantar; (b) terdapat bukti penghantaran; (c) ia dihantar melalui pos AR berdaftar pra bayar; (d) terdapat bukti bahawa ia dihantar melalui pos AR berdaftar pra bayar; (e) alamat yang dihantar adalah alamat terakhir yang diketahui; dan (f) mahkamah yakin bahawa alamat tersebut adalah alamat terakhir yang diketahui (lihat ms 72D–73A).

(3) Tiada apa-apa yang ditunjukkan dalam A 10 k 1(1) KMT bahawa plaintif perlu membuktikan dengan nyata bahawa, jika writ tersebut telah dihantar melalui pos AR berdaftar pra bayar, orang yang dinamakan dalam writ tersebut hendaklah merupakan orang yang sama yang menerimanya. Dalam kes semasa, semua prasyarat telah dipenuhi, dan hakikat bahawa penerima writ tersebut adalah 'Yanti' tidak menjadikan penyampaian tersebut tidak sah. Pada hakikatnya, sama ada writ tersebut telah sampai secara fisikal, atau telah diterima di alamat terakhir yang diketahui tidak pernah pun digubal dalam A 10 k 1(1) KMT. Sekiranya plaintif mempunyai keterangan yang jelas dan meyakinkan tentang writ yang telah diterima oleh orang yang ditujukan, ia adalah satu faktor penambah kepada yang terdahulu, jika tidak s 12 Akta Tafsiran 1967 ('Akta tersebut') akan serta merta terpakai jika digunakan. Di bawah s 12 Akta tersebut, di mana satu undang-undang bertulis memberi kuasa untuk penyampaian pos, maka sehingga yang sebaliknya dapat dibuktikan, penyampaian hendaklah dianggap telah disempurnakan pada masa bila surat tersebut telah dihantar, melalui proses biasa pos. Oleh demikian, kecuali jika dipatahkan oleh defendan-defendan, penyampaian tersebut oleh itu hendaklah dianggap telah berlaku. Memandangkan tiada keterangan pematahan di hadapan mahkamah, penyampaian yang sempurna writ tersebut telah berlaku (lihat ms 73B–E).

(4) Bertentangan dengan hujah defendan-defendan, tiada keperluan penyampaian peribadi untuk kes-kes yang melibatkan penjamin-penjamin (lihat ms 73E–F); *OCBC Bank (M) Bhd & Anor v Livision Sdn Bhd & Ors* [2001] 5 MLJ 129 tidak diikut.

(5) Dalam mengenepikan penghakiman ingkar, perlu ada pembelaan terhadap merit yang dikemukakan di hadapan mahkamah. Di sini, ia tidak boleh dipertikaikan bahawa defendan-defendan telah gagal untuk mengemukakan satu draf pernyataan pembelaan. Tanpanya, mahkamah hanya boleh membuat kesimpulan bahawa defendan-defendan tidak serius langsung dalam percubaan mereka untuk mencabar plaintif (lihat ms 74B–C, G, I–75A).]

Notes

For cases on personal guarantor, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) para 3016.

For cases on service of writ of summons, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6618–6627.

Cases referred to

AlliedBank (Malaysia) Bhd v Yau Jiok Hua [1998] 6 MLJ 1 (refd)

Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 132 (refd)

A *Idris bin Haji Salleh v Federal Auto Holdings Bhd* [1979] 2 MLJ 141 (refd)
MBf Finance Bhd v Tiong Kieng Seng [2001] MLJU 405; [2001] 4 CLJ 38 (refd)
OCBC Bank (M) Bhd & Anor v Livision Sdn Bhd & Ors [2001] 5 MLJ 129 (not folld)
B *RHB Bank Bhd v FGG Wood Mouldings Industries Sdn Bhd & Ors* [2001] 4 MLJ 86 (refd)
Tan Chiang Brother's Marble (S) Pte Ltd v Lightweight Concrete Sdn Bhd [1997] 4 CLJ 759; [1996] MLJU 170 (refd)
Tan Ooi Chee & Anor v Kanching Realty Sdn Bhd [1989] 1 MLJ 519
C (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 12
Rules of the High Court 1980 O 10 r 1(1)

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Prakash Mehta (*Prakash & Co*) for the plaintiff.
Yokinee Selvam (*Manjit Singh Sachdev, Mohammad Radzi & Partners*) for the defendants.

E **Suriyadi J**: The defendants who are husband and wife, also business partners, had stood as guarantors for a sum of money owed by a company called Kin Hup Seng Construction Sdn Bhd to the plaintiff. The former had defaulted, and the defendants thereafter became the soft target of the plaintiff. Both defendants had agreed in their respective agreements to use
F the same premises as their last known address. On 13 October 2000, two separate writs and statements of claim were filed and served, as alleged by the plaintiff against the defendants. On April 2001, the senior assistant registrar had meted out the order of 'judgment in default' against both, as they were absent on the return date. He adjudged that the defendants were to pay the plaintiff RMl,115,149.50, inclusive of interest and costs of
G RM225.

The defendants, on 25 July 2002 applied to have that judgment in default set aside but failed, thereafter to be followed by an appeal to the judge in chambers. On 16 January 2003, after hearing the appeal, I dismissed it with costs.

H Two separate summonses were indisputably posted to that impugned address. Regretfully, as stressed intensely by the defendants, on no account were there effective services at the address of the defendants, as confirmed by the AR card. The defendants admitted that the address was correct and was not disputed, but what was disputed was the service on them. They submitted that the AR card had been returned, with the name 'Yanti'
I inscribed on it, whilst their names were far from that (exh k3 as in encl 7). The defendants ventilated that as they had stood as guarantors, then service must also be personal, anything less being bad service.

According to the defendants, they were outside the shores of Malaysia from 13 March 2001 and had only returned on 6 April 2001, with a passport and a ticket as their evidence. As they knew nothing of the summonses or claims; they did nothing to counter the alleged statements of claim. The plaintiff had ready answers to those averments. It had countered by stating that the summonses had been sent by AR registered post on 2 March 2001 with the receipt of them being on 8 March 2001 (see S-1). Those dates indicated that service and receipt of the summonses had taken place before the supposed exits of the defendants from Malaysia. Evidentially, I was convinced that by obtaining the written receipt from the post office, and later to be rewarded by the return of the AR card, that everything necessary to effect service by using the post office had been carried out (*MBf Finance Bhd v Tiong Kieng Seng* [2001] MLJU 405, [2001] 4 CLJ 38). Returning to those two earlier exhibits, namely the passport and the ticket, I was also satisfied that they merely accentuated the assertion of the plaintiff that on the date of the services of the summonses, the defendants were in fact in Malaysia. To make things worse for the second defendant, there was a dearth of any exhibits, be they in the form of a passport or tickets, to confirm that he was abroad at any time.

As regards service, for purposes of this case, O 10 r 1(1) of the Rules of the High Court 1980 would be pertinent, and the relevant portion reads as follows:

Subject to the provisions of any written law and these rules, a writ must be served personally on each defendant *or by sending it by prepaid AR registered post addressed to his last known address* ... (Emphasis added.) ('the second portion'.)

Reading the above provision, it is my view that a plaintiff has to consider first of all whether the writ must be served personally or not. The personal service requirement must be adhered to if the writ is 'subject to any written law and these rules' . The latter two words of 'these rules' must mean the rules under O 10 of the Rules of the High Court 1980. If that writ is free of the requirements of any written law, and of rules under O 10, or subsequently freed when permitted by a court pursuant to, say, a substituted service application, the plaintiff is thus free to allude to the 'second portion' of the latter sub-rule, ie by sending it by prepaid AR registered post addressed to the defendant's last known address.

To have a successful postal service under that 'second portion' (apart from establishing that there are no impediments in the like of any requirements by any written law and the rules under O 10), a plaintiff must convince the court that:

(i) a writ was sent;

(ii) there is proof of sending;

(iii) it was sent by prepaid AR registered post;

(iv) there is proof of it being sent by prepaid AR registered post;

(v) the address sent to was the last known address; and

(vi) the court is convinced (requiring proof in the like of admitted facts, unrebutted affidavits, etc) that that address was the last known address.

To conjure or add something out of that brief 'second portion', which had not been provided for, would tantamount to importing certain ingredients that were not envisaged by Parliament. In fact under sub-r 1(1) of O 10, nothing is indicated that the plaintiff must evidentially prove that the named person in the writ must be the very person who had received it, ie if it was sent by prepaid AR registered post. It therefore was satisfied that as in this case, if all the prerequisites were fulfilled, as the plaintiff had done so, the recipient being 'Yanti' did not vitiate that service. In fact, whether that writ had physically arrived, or had been received at the last known address, normally confirmed by direct evidence, is not even legislated into that impugned provision. On that score, if the plaintiff had direct and cogent evidence of that writ having been received by the intended person, that was a plus factor for the former, otherwise s 12 of the Interpretation Acts 1948 and 1967 would immediately come into play when invoked. Under the latter section, where a written law authorizes postal service, then until the contrary is proved, service shall be presumed to have been effected at the time when the letter would have been delivered, in the ordinary course of the post. Therefore, unless rebutted by the defendants, service thus must be deemed to have taken place. As it were, I found no rebuttal evidence before me.

Further, contrary to what the defendants had ventilated, I had also failed to identify anywhere in that provision of the requirement of personal service, for cases which involved guarantors. Regretfully and with respect, I was thus unable to acquiesce and subscribe to the view put forward by the court in *OCBC Bank (M) Bhd & Anor v Livision Sdn Bhd & Ors* [2001] 5 MLJ 129, where it opined that as the fourth defendant there was being sued as a guarantor, the service must be personal. It must be stressed that O 10 r 1(1) talks of a writ and not of, say a notice of demand (*AlliedBank (Malaysia) Bhd v Yau Jiok Hua* [1998] 6 MLJ 1). A dissertation of the latter case revealed that the court was discussing the mode, methodology and requirement of service of a notice of demand by postal method, a legal requirement prior to the issuance of a writ (and not discussing the service of a writ). Suffice for me to merely advert to the portion of 'held (5c)' in the latter case, which reads, at p 38:

> In order to prove service of the notices of demand and the AR card, it must have been properly admitted in evidence. This was not done by the plaintiffs. In the absence of any evidence to show that the AR card had been returned duly acknowledged to constitute effective service of the notice of demand on the defendant ... . Therefore, there could be no presumption that the notices of demand were received by the defendant.

To complete the picture, in the event there is no dispute of the regularity of the service on the defendants, coupled with there being no objection pertaining to the address, or the procedure adhered to by the plaintiff, Kang Hwee Gee J in *RHB Bank Bhd v FGG Wood Mouldings Industries Sdn Bhd*

& Ors [2001] 4 MLJ 86, also had occasion to opine that it must be construed that the defendants had constructive notice of the issuance of the summonses. Whether one wishes to call it constructive notice or deemed to have been served, either way, the complaint of the defendants here was not that there were infringements as to the preconditions of the postal service, but merely that someone else had acknowledged that AR card. Regardless of the nomenclature, given the facts before me, I was satisfied that with no rebuttal evidence adduced, and every precondition having been adhered to, good service of the writ thus had taken place.

It is trite that in a default judgment case, the setting aside of that judgment in default order is generally the norm. The presiding court before so doing, on the other hand must have some good reason and that there is a defence on the merits adduced before the court (*Tan Ooi Chee & Anor v Kanching Realty Sdn Bhd* [1989] 1 MLJ 519). The supposed good reason given by the defendants, as I scrutinized the evidence was that they were unaware of the case being called up in court on 9 April 2001, founded on the abovementioned reason of non-service of the writs. Factually, even if I were to submit to those evidential assertions, by 6 April 2001 they were already in Malaysia, three days before their cases were called up in court. As I was satisfied that good service had taken place, this part of the ingredient, ie 'good reason' had fallen flat.

The next ingredient to be established by the defendants was whether there was a defense of merit before me for consideration, ie. by at least filing their draft defences. In *Idris bin Haji Salleh v Federal Auto Holdings Bhd* [1979] 2 MLJ 141 Syed Agil Barakbah J had occasion to say at p 143:

> ... The courts in a case of this nature prefer that it be decided on merits and do not invoke procedural rules to prevent a defendant from defending an action unless it has no merits in his application.

The court in *Tan Chiang Brother's Marble (S) Pte Ltd v Lightweight Concrete Sdn Bhd* [1997] 4 CLJ 759, also in [1996] MLJU 170, in similar vein had remarked at [1997] 4 CLJ 759 at p 760:

> A defence on the merits means a defence which discloses an arguable and triable issue. It does not have to show that there is a real prospect of success or that it has to carry some degree of conviction.

In the current case, it was indisputable that the defendants had failed to produce that all important draft statements of defence. Without them, I was thus without any option but to find again for the plaintiff, even on this second ingredient. Not only was there no prima facie defence, raising serious issues as bona fide reasonable defence that ought to be tried, but there was not even a sham one (*Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 132). Not wishing to encourage a sham defense, and rhetoric aside, what else could have I done? Common sense would convince anyone that to allow the appeal, and set aside a default judgment when no prima facie defence worthy of consideration was before the court, would portray the court as a lame duck prolonging the agony of all parties. Without them before me, I could only

A conclude that the defendants were definitely not serious in their attempts to challenge the plaintiff — delaying and defeating the latter from taking up more anticipatory drastic actions during these bad times, and waiting for better ones, being one of the conclusions that I could arrive at.

Defendants' appeal dismissed.

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Reported by Lim Lee Na

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