

JUDGMENT OF THE COURT

1. The appeal before us is against the decision of the learned Judicial Commissioner (dated 12 September 2012) dismissing the Appellant's appeal against the decision of the learned Deputy Registrar (dated 26 Jun 2012) where the learned Deputy Registrar had dismissed his application to set aside the service of the creditor's petition and granted the Adjudication Order and Receiving Order (AORO) dated 15 September 2011 against him

Brief facts

2. The Respondent, Affin Bank Berhad had on 30 September 2009 obtained a judgment-in-default against the Appellant. A bankruptcy notice was filed against the Appellant on 29 April 2010 and was served on him by way of substituted service. Subsequently, a creditor's petition was filed on 12 November 2010; and an affidavit of service was affirmed on 25 March 2011.



3. In respect of the judgment-in-default, the Appellant had filed an application to set aside the said judgment at the Sessions Court. The said application is still pending

4. In respect of the creditor's petition, the Appellant had filed an application before the learned Deputy Registrar (*vide* Enclosure 20) to stay the execution of the said judgment-in-default. On 15 September 2011, the learned Deputy Registrar dismissed the stay application and proceeded to grant the AORO against the Appellant.

5. On 14 November 2011, the Appellant filed an application to set aside the service of the creditor's petition and the AORO before the learned Deputy Registrar. However his application was dismissed by the learned Deputy Registrar. The Appellant then filed an appeal before the learned Judicial Commissioner in chambers against the said decision of the learned Deputy Registrar. Again, the



appeal was dismissed by the learned Judicial Commissioner. Then the Appellant filed an appeal to the Court of Appeal against the decision of the learned Judicial Commissioner. Hence the present appeal before us.

At the Court of Appeal

6. Before us, the learned counsel for the Appellant raised two issues to support his appeal - namely:
 - (a) that the service of the creditor's petition was not effected personally on the Appellant (as the judgment debtor) but was served on the solicitors in contravention of Rule 109 of the Bankruptcy Rules 1969; and
 - (b) that the judgment-in-default was not a final judgment on the ground that an application to set aside the said judgment was filed at the Sessions Court within time and the application is still pending.



On these two grounds the Appellant submitted that the service of the creditor's petition and the AORO must be set aside.

7. The Respondent on the other hand contended that the service was regular in law despite the fact that the creditor's petition was only served by post to Tetuan Tan Hee Soon & Co on 23 March 2011 but not personally on the Appellant. The Respondent submitted that the Appellant knew about the petition and had not raised any objection on the issue of service. The Respondent further claimed that the Appellant only filed his application to set aside the service of the creditor's petition (on 14 November 2011) after the AORO was granted against him on 15 September 2011.
8. The learned Judicial Commissioner in dismissing the Appellant's application ruled that the failure in complying with Rule 109 of the Bankruptcy Rules



1969, by not serving the creditor's petition personally on the Appellant was just a mere irregularity as the Appellant had not raised any objection earlier; and the objection was only raised after the AORO was granted. It was further indicated by the learned Judicial Commissioner that the Appellant was not prejudiced and the AORO granted was regular in law.

Our Findings

9. Bankruptcy proceedings have a serious penal effect on a judgment debtor. He may be adjudged a bankrupt and his personal liberties may be at stake until his bankruptcy is discharged. Therefore the process and procedure in the proceedings must comply with the relevant provisions of the bankruptcy rules; including on the issue of service of the relevant cause papers on the judgment debtor.



10. Rule 109 of the Bankruptcy Rules 1969 provides as follows:

“109 - Personal Service.

A creditor’s petition shall be personally served and the service shall be effected by an officer of the court or by the creditor or his solicitor or a person in their employment by delivering a sealed copy of the petition to the debtor”

11. Rule 110 of the same Rules, provides for service of the petition by way of substituted service. It reads:

“110. Substituted service.

(1) If the court is satisfied by affidavit or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or any other legal process or for any other cause it may order substituted service to be effected in such manner as it thinks fit.

(2) Where any such order has been carried out the petition shall be deemed to have been duly served on the debtor.”



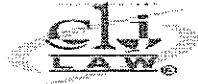
12. Rule 109 makes it mandatory for the creditor's petition to be served personally (kediri) on the judgment debtor. The sealed copy of the petition must be delivered personally to the debtor. In the event that prompt personal service cannot be effected, after attempts have been made, the only avenue left is to apply for substituted service as provided for under Rule 110. Substituted service can only be effected with leave of the court. With the clear provisions of the above rules, it is our view that the creditor's petition against a judgment debtor cannot be served by any other means. It cannot be served on a firm of solicitors, unless there is a clear indication (in writing) that the said firm of solicitors has the authority to accept service of the documents on behalf of the judgment debtor.
13. In the present case, the affidavit of service by the Respondent deposes that the said creditor's petition was served on "*Peguan cara Defendan iaitu*

Tetuan Ian Hee Soon & Co (Peguan bela dan Peguan cara) di alamat No. 14-2 (2nd Floor) Jalan Harimau Taman Century Garden, 80250 Johor Bahru, Johor ” There is no indication to show that the said solicitor has the authority to accept service of the creditor’s petition on behalf of the judgment debtor. The learned counsel for the Respondent on being queried by the court could not produce any form of ‘authority’ authorising the said solicitors to accept service of the petition on behalf of the judgment debtor

14. The process server in her affidavit of service states that:

“Saya telah dimaklumkan oleh Plaintiff bahawa Defendan di atas masih tinggal di alamat B10, Kg Baru Ban Foo, 81800 Ulu Tiram, Johor dan/atau No. GM11, Lot 1356, Mukim Sungai Terap, 84000 Muar, Johor seperti mana alamat di dalam surat Perjanjian Pinjaman Defendan juga telah tidak memaklumkan kepada pihak Plaintiff sebarang pertukaran alamat yang baru Oleh itu, saya percaya bahawa alamat tersebut adalah alamat terakhir Defendan.”

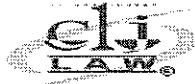
15. The averment by the process server clearly shows that she knew that the judgment debtor was staying at the given address (as stated in the relevant loan agreement) and believed that the said given address was the last known address of the judgment debtor. But, there is no indication to show that any attempt had been made to effect service personally on the judgment debtor at the said address. The Appellant complained that the petition was not served personally on him and he had never authorised the solicitors Tetuan Tan Hee Soon & Co to accept service of the petition on his behalf.
16. In the premise, we are of the view that the said service of the creditor's petition on the judgment debtor was bad for failure to comply with the relevant rules ie, Rule 109 and Rule 110 of the Bankruptcy Rules 1969. It is fatal to the Respondent's case. It is not a mere irregularity which can be cured.



17. The Respondent argued that the Appellant cannot raise any objection on the service of the creditor's petition on the ground that any objection must be made within the stipulated time in accordance with Rule 117 of the Bankruptcy of Rules 1969. This argument in our view does not hold water at all. Our view is that before a judgment debtor can exercise his right to object or to challenge the creditor's petition within the time stipulated the creditor's petition must first have been served effectively on him as provided for under Rule 109 or Rule 110. If the service is bad (as in the present case) the issue of raising any objection on the petition does not arise. A judgment debtor cannot be faulted for failure to raise objection within the stipulated time if the service of the creditor's petition is irregular and bad in law. Failure to serve the petition personally on the judgment debtor will cause substantial injustice to him. He will not be able to exercise his

right to object or to challenge the petition within the stipulated time, more so, as in the present case where the judgment debt was obtained by way of a judgment-in-default.

18. The Appellant claimed that he did not know about the judgment-in-default (which was obtained by the Respondent on 30 September 2009). After knowing about it the Appellant had filed an application at the Sessions Court Johor Bahru to set aside the said judgment-in-default. The Appellant also claimed that beside the notice of demand on the amount claimed from the Respondent's solicitors, he did not receive any Writ and Statement of Claim on the said sum issued by the Sessions Court. He also claimed that he has merit in his application to set aside the judgment-in-default and that the Respondent's claim against him was time barred. On this issue, we agree that the Appellant has merit in his application to set aside the judgment-in-default on which the



Respondent based its bankruptcy notice and the creditor's petition

Conclusion

19. Based on the above consideration, we allow the appeal with costs of RM5,000 to the Appellant. We set aside the order of the High Court. Consequently, we allow the Appellant's application to set aside the creditor's petition as well as the AORO dated 15 September 2011. We also make an order that the deposit be refunded to the Appellant.

Dated: 22 FEBRUARY 2013

RAMLY HJ ALI
Judge
Court of Appeal
Malaysia



Counsel:

For the appellant - Wong Kai Fen, M/s Tan Hee Soon, Wong & Partners

For the respondent - Mohd Fairuz Mahmood; M/s Mohd Akhir & Partners

Legislation Referred to:

Bankruptcy Rules 1969, rules 109, 110, 117