IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

G. D. Samanmali
No. 110 C, Kudahakapola,
Ja-Ela.

DEFENDANT-APPELLANT

C.A 207/1998 (F)
D.C. Kalutara 3766/L

Vs.

G. Sanette Wijesiri
Malawangoda
Dharga Villege.

PLAINTIFF-RESPONDENT

G. Don Sirisena
Kosgahakanda,
Navuththuduwa.

And others

DEFENDANT-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: J.A.J. Udawatta for the 3rd Defendant-Appellant

Respondents absent and unrepresented

ARGUED ON: 30.11.2011

DECIDED ON: 23.01.2012

GOONERATNE

This is an appeal by the 3rd Defendant-Respondent from the order of the learned District Judge, Kalutara dated 31.3.1998 refusing to set aside the judgment and decree entered in default of appearance of the 3rd Defendant. It was the position of the 3rd Defendant-Appellant that an amended plaint of 30.1.1991, Plaintiff sought a declaration of title and eviction/damages from 11 Defendants named therein. It was submitted that Journal Entry dated 8.5.1991 fiscal has reported that summons served on Defendants Nos. 1, 10, 11, 2, 4, 5, 6 & 7. In the Petition filed before the District Court by the 3rd Defendant it is pleaded that (paragraph 4) summons had been served on the 3rd & 5th Defendants (Journal Entry 12.2.1992) on 3.3.1994. Trial commenced and ex-parte trial proceeded against the 3, 1, 5, 8, 9, 10 & 11 Defendants-Respondents.

In the oral submission before me by the learned counsel for the 3rd Defendant-Appellant and as pleaded in paragraph 6 of the petition it is the position of this Appellant that she was not residing in the address described in the above amended plaint at Dharga Town and that she resides

at Ja-Ela - Thudugahapola. At the inquiry held on 26 8.1996, 3rd Defendant's evidence is to the effect that she resides at Ja-Ela since she got married on 18.12.1979. Marriage Certificate marked 3P3, electoral lists marked 3P4 , 3P5, 3P6, 3P7 for the years 1985, 1990, 1991 & 1995 had been produced. These electoral list gives the residence at Ja-Ela. There has been no objection to the above documents. Cross-Examination does not reflect on any of the above documents. The process server has also given evidence and testified that he served summons by way of substituted service. Document 3P8 by Grama Sevaka is also noted.

I have perused the order of the learned District Judge on the question of service of summons. Only a very brief account is recorded in the order. In fact the last paragraph of the order and the last paragraph at pg. 145 contains the reasons for refusing to vacate the ex-parte judgment entered against the 3rd Defendant and refusal of the 3rd Defendant's application to the District Court. In brief the trial Judge concludes and gives his reasons to refuse the application only on the ground that the 3rd Defendant and other Defendants being members of the same family, she could not possibly deny any knowledge of the case in question. It is stated that:

ඉහත සඳහන් කරන ලද මෙම නඩුවේ කාර්යය පටිපාටිය නඩු වාර්තාව තුල හෙළිදරවු වන පරිදි බෙහෙවින්ම අවධිමත් වුවකි. එසේ වුවද විත්තිකරුවන්

එකම පවුලක සමාජිකයින් වන අතර 3 වන විත්තිකාරිය නමින් දෙවරක්ම මෙම නඩුවේ සිතාසි බාර කරනු ලැබ තිබියදී ඇය මෙම නඩුව පිළිබඳව නොදැන සිටියාය යන්න සත්‍යයක් නොවන්නේය යන්න ඇයගේ ඉල්ලීම සම්බන්ධයෙන් මෙම අධිකරණය ගන්නා නිගමනයයි.

The above reasons given by the trial Judge is highly unacceptable and this court observes that it is a perverse order as regards the 3rd Defendant-Appellant. Trial Judge has failed to consider whether summons in fact was served on the 3rd Defendant. Uncontradicted oral and documentary evidence of 3rd Defendant very strongly indicates that the 3rd Defendant was not residing at the place where summons had been alleged to be served. The 3rd Defendant after marriage had left the house at Dharga Town where the fiscal effected substituted service. Since 1979, 3rd Defendant resided at Ja-Ela. This evidence had not been contradicted. No court should presume or surmise material facts especially question of residence, and address in the absence of clear proof.

The trial Judge is only expected to ascertain whether there are reasonable grounds for default. Instead the trial Judge express the view that Defendants are all members of one family and that the 3rd Defendant should be aware of the case is not a method to ascertain reasonable grounds. In fact

it is nothing but unreasonable and poor thinking. Assuming for the sake of argument that the trial Judge's views are reasonable. What would be the position if one or more of the other defendants are not in good terms with the 3rd Defendant-Appellant, and there was deliberate suppression of pending case. The simple issue to be decided is whether the process server in fact served summons, on the party concerned at the correct address where the party is habitually resident. The entire order other than the portion mentioned above refer to a narration of events that took place in the case, which has nothing to connect the default.

A judgment is null and void and cannot be executed against a person who is not served with summons. 14 NLR 385: where summons has not been served at all, an ex-parte judgment against a defendant is void ab initio. Trial Judge should be mindful that in proceedings of this nature, the provisions of chap XII of the Code of are statutorily enacted proceedings where consequences of default and cure are enumerated independent of the main case based on right of parties. 2001 (3) SLR 17.

There is another matter to be kept in mind. On principle a Court of Appeal must not be called upon to decide on the merits where a case has only been heard ex-parte 30 NLR at 6.

The learned Counsel also submitted to this court the following:

(a) Before institution of action 1st Defendant was dead (certificate No. 4846 at folio 193)

(b) At the inquiry Plaintiff attempted to show a person by the name of Sirisena to be the 1st Defendant. Evidence did not disclose such position since 3rd Defendant denied that the person shown to her in court was 1st Defendant or her father. (proceedings of 26.8.1996). Therefore all proceedings would be a nullity.

(c) Section 495 of the Civil Procedure Code and he submitted that the Marriage Certificate of Karunalatha Wijegunaratne (3P9) who had been made the guardian of the 8th Defendant who was a minor is invalid – refer to 68 NLR 503.

In all the above circumstances the Petitioner has proved and satisfied Court that she had reasonable grounds for default. I am not inclined to accept the reasoning of the trial Court Judge. District Judge has failed to consider primary facts of this case. However I do not think this court need to consider the merits of the case where judgment had already been pronounced by the original court. In the circumstances I set aside the order dated 31.3.1998. Appellant would have to be advised as regards her future course of conduct and litigation by proper legal advice. I allow prayer (1) of the Petition of appeal with costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL