

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

1. Mohammad Mohideen mohamad Sali,
2. Abdul Hameed, Kairoon Nisa,  
Both of  
357/A, Jumma Masjidh Road,  
Maligawatta, Colombo 10.

C.A. No. 1055 / 2000 F

Plaintiff

D.C. Colombo No. 18047 / L

Vs.

Jinathul Thuraisia,  
357/B, Jumma Masjidh Road,  
Maligawatta, Colombo 10.

Defendant

AND

Jinathul Thuraisia,  
357/B, Jumma Masjidh Road,  
Maligawatta, Colombo 10.

Defendant Petitioner

1. Mohammad Mohideen mohamad Sali,
2. Abdul Hameed, Kairoon Nisa,  
Both of  
357/A, Jumma Masjidh Road,  
Maligawatta, Colombo 10.

Plaintiff Respondent

**And Now Between**

Jinathul Thuraisia,  
357/B, Jumma Masjidh Road,  
Maligawatta, Colombo 10.

**Defendant Petitioner-Appellant**

**Vs**

1. Mohammad Mohideen mohamad Sali,
  2. Abdul Hameed, Kairoon Nisa,
- Both of  
357/A, Jumma Masjidh Road,  
Maligawatta, Colombo 10.

**Plaintiff Respondent-Respondents**

**BEFORE** : UPALY ABEYRATHNE J.

**COUNSEL** : C. Hettiarachchi for the Defendant Petitioner  
Appellant.  
M. Nizam Kariappar with M.I.M. Iynulla for  
the Plaintiff Respondent-Respondent  
Nimal Muthukumarana for the 1<sup>st</sup> Respondent

**ARGUED ON** : 19.03.2012

**DECIDED ON** : 31.05.2012

**UPALY ABEYRATHNE, J.**

The present appeal has been preferred by the Defendant Petitioner-Appellant (hereinafter referred to as the Appellant) from an order made by the

learned Additional District Judge of Colombo dated 30.11.2000. The facts of the case are briefly as follows;

The Plaintiff Respondent-Respondent (hereinafter referred to as the Respondent) instituted an action against the Appellant in the District Court of Colombo for a declaration of title and ejection of the Appellant from the premises described in the schedule to the plaint. The court accordingly made order to issue summons on the Appellant. Since the summons was not served on the Appellant substituted service of summons has been effected on an application made by the Respondent to that effect. Since the Appellant was absent and unrepresented on the summons returnable date, the case had been fixed for an ex-parte trial and a decree had been entered accordingly. Upon the service of a copy of the said ex-parte decree on the Appellant a writ of execution of the decree has been issued and the possession of the property in dispute has been delivered to the Respondent.

The Appellant in paragraph 5 and 6 of his written submission has stated that upon the receipt of the copy of the ex-parte decree he preferred an application under section 86(1) of the Civil Procedure Code (CPC) seeking to have the said ex-parte judgement and the decree vacated and after inquiry the learned Additional District Judge by his order dated 30.11.2000 dismissed the said application. It must be noted that the fact that the said application was preferred after the receipt of the ex-parte decree contradicts the proceedings of the main case record. (Vide J.E No. 15 to 18) In fact the said application to vacate the ex-parte decree has been preferred after the delivery of possession upon the writ of execution.

The Appellant in his application has taken up the position that the summons was not served on him. According to the J.E. of the main case record the fiscal has reported to court that the summons was served on the Appellant. The affidavit of the process server has been filed of record. This affidavit is prima facie evidence to conclude that the service of summons has been effected properly. The Appellant has not adduced any evidence to challenge the veracity of the said affidavit. It must be noted that the burden of proof that the summons was not served on him lies on the Appellant. The Appellant has failed discharge the said burden of proof.

In the said circumstances I see no reason to interfere with the order of the learned Additional District Judge dated 30.11.2000. Therefore I dismiss the appeal of the Appellant with costs.

*Appeal dismissed.*

Judge of the Court of Appeal