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

CA 112/99 F

DC COLOMBO 11571/MR

1. PATHMA UDAYARATNA
2. W.V.IRESHA LEELANGANI UDAYARATNA
3. W.V.MANGALA NANDADEVA UDAYARATNA ALL OF KAPPAGODA, MAWANALLE

SUBSTITUTED-DEFENDANT-APPELLANTS

VS

G.D.PIYASENA SENEVIRATNA, POLAMBEYGODA, USSAPITIYA

PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE: A.W.ABDUS SALAM, J

COUNSEL: Nihal Jayamanna PC with Dilhan De Silva for the 1st and 2nd substituted defendant-appellants and Dr Sunil Cooray with Sumudu Saparamadu for the 3rd substituted defendant-appellant. S.Mandaleswaran with P.Peramunagama and P.H.G.Gunawardena for the plaintiff-respondent-respondent.

ARGUED ON : 5.10.2010, 22.11.2010, 17.12.2010,1.2.2011,23.6.2011 and 27.10.2011.

W/S FILED ON : 29.11.2011 and 19.01.2012

DECIDED ON : 24 April 2012

A.W.Abdus Salam, J.

This appeal relates to an order refusing to set aside a judgment and decree entered consequent upon the default of appearance of the Defendant (presently deceased) on the summons returnable day. The appeal has been preferred by the 1st, 2nd and 3rd substituted defendant-petitioner-appellants whom I propose to collectively refer to in the rest of the judgment as "appellants".

The factual background to the appeal, leaving out unnecessary details centers round the defendant's failure to appear in court or file the answer on the summons returnable day. Being satisfied that he was duly served with summons, the learned district judge proceeded to hear the case *expartē* against him and entered judgment followed by a decree and then caused a copy of the decree to be served on the defendant. As no attempts were made to satisfy court that he had reasonable grounds for the default, within the timeframe permitted by law, the plaintiff moved for writ of execution.

At that stage, the defendant made an application to have the proceedings, judgment and decree set aside on the ground of patent want of jurisdiction, arising on the failure to serve summons. Pending the determination of the application the defendant passed away and the appellants were appointed as substituted-defendants to represent the estate of the deceased defendant. The application of the defendant was refused by order dated 15.10.1998. This appeal has been filed thereafter by the appellants challenging it's propriety.

At the inquiry, the process server of the district court of Mount Lavinia, Y.S.Chandrapala gave evidence upon being summoned at the instance of the plaintiff and on behalf of the appellants, the son of the deceased defendant who is the 3rd substituted defendant gave evidence. In addition the appellants led the evidence of the following witnesses ...

1. M.H.W.Banda – a clerk attached to Hadabima Authority, Peradeniya.
2. P. Lakshmi Wijeratna – An Accountant attached to Hadabima Authority, Peradeniya.
3. J.Samaraweera – Chief Officer of Parliament
4. A.S.P.Chandralatha Edirisingha – A Clerk attached to the district court of Kagalle.

The case presented on behalf of the defendant was that the purported report of the process server is false and has been so done at the instance of the plaintiff with a fraudulent intention. Conversely, the plaintiff maintained that summons had in fact been served on the defendant as claimed by the process server and even the decree was caused to be served on him personally by the same process server at a different address.

By reason of this controversy the learned district judge was expected to evaluate the evidence and arrive at the finding on the pivotal issue relating to the service of summons, on a balance of probability. The evidence of the 3rd substituted-defendant-appellant was that his birthday falls on 12th

December. In the year 1991, on his birth day his father (the deceased defendant) left home around 5.30 AM and returned between 7.30 PM and 8.00 PM. He claimed that he could distinctly remember the important incidents that took place on that day, as it happened to be his birthday. The presence of the defendant in Colombo at 2 PM on that day has been established through the evidence of the officer attached to Parliament, as the defendant had attended a meeting at that time. The running chart maintained in respect of the motor vehicle used by the defendant has been produced marked A2. According to A2 the defendant has left home at 6.00 AM and returned in the evening.

If the evidence of the 3rd substituted-defendant-appellant and that of J Samaraweera is accepted along with document marked A2, then the evidence of the process server that he served summons personally on the defendant at 10.00 AM at Kappagoda in Mawanella is open to serious doubt. It is unfortunate that the process server has not obtained the signature of the defendant in acknowledgement of the receipt of the summons, at least for abundance of caution, although it is not a legal requirement. In passing, it is to be observed that a large number of heavily contested issues relating to the service of summons can be resolved without embarking upon protracted inquiries, if process servers are instructed to make every possible endeavour to obtain written acknowledgement of the personal service of summons. Remarkably, Section 5(B)(4) of The Debt Recovery (Special Provisions) Act No 2 of 1990, imposes such a duty on process servers. It requires them to set out in detail the

manner, the person, place and other particulars relating to the identity of the person, the date, and the time at which, the decree nisi was served and also state in the report, whether the person on whom it was served placed his signature or thumb impression or both, or refused to place the signature or thumb impression or both, in acknowledgement of such service. Such a salutary guideline to ensure the rights of the people and to eliminate the abuse of the process of court has now become necessary to be introduced into our CPC. Further, many judges of the original Court have yet not considered following the guideline in the exercise of their discretion as the head of the institution.

Be that as it may, the vital question that has to be answered in this matter is whether summons had in fact been served on the defendant. In terms of Section 114 of the Evidence Ordinance, the existence of any fact may be presumed which the court thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case. Based on this provision, it may be presumed that official acts have been regularly performed. Given the benefit of the provision, to the evidence of the process server and the reports filed by him, one may presume that he had performed his official acts in a balanced manner, avoiding irregularities. In such an instance, the burden is on the defendant, if he desires to have himself absolved from liability, to establish the facts he

asserts. In other words he has to rebut the "presumption of fact" arising under section 114 of the Evidence Ordinance.

Section 9 of the Civil Procedure Code enacts that the residence of a party defendant as one of the criteria to decide the territorial jurisdiction in which an action to be instituted. Section 40 of the CPC requires the plaintiff in an action, amongst other duties to disclose particulars regarding the place of residence of the defendant. The plaint filed in this case discloses 146/28, Andeson road, Dehiwela and Kappagoda, Mawanella as the addresses of the defendant. However, paragraph 1 of the plaint states that the defendant resides within the jurisdiction of the District Court of Colombo. If that be the case, it is difficult to understand as to what made the plaintiff to move for service of summons on the defendant at Mawanella. On the other hand, having served summons at Mawanella what made the plaintiff to move for service of decree on the defendant at Dehiwela remains a mystery. What is more important here is to ascertain whether it is a sheer coincidence or a prearranged scheme to abuse the process of law to serve summons at one place and the decree at another place. Amazingly, the summons on the defendant is said to have been served on the 12th of December 1991 at Mawanella while the decree has been served on 10th November 1992 at Dehiwela. Somewhat strangely, both summons and decree have been served by one particular process server. The process sever was attached to the District Court of Kegalle as at 12th December 1991 and to the District Court of Mt.Lavinia as at 10th November 1992. In the circumstances,

the appellants allege that the process server has been handpicked by the plaintiff to perpetrate a fraud.

In the light of allegation made against the plaintiff and the process server, the learned district judge was obliged to weigh the evidence adduced on behalf of both parties to ascertain the truth. In this respect, it is appropriate to reproduce some of the observations and comments made by His Lordship Gamini Amaratunga, Judge of the Court of Appeal (as he was then) in CALA 80/2001, when he disposed of the leave to appeal application filed by the appellants, in relation to the application for writ pending appeal. The thought provoking comments and observations made in detail, deserve to be reproduced. The relevant passage of it reads.. **I quote**

> "The defendant was an attorney-at-law and a former Member of Parliament. .....
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> The process server has given evidence that on 12/12/1991 he personally handed over summons to the defendant around 10.00 a.m. while the defendant was in his house at Kappagoda, Mawnella. The process server at that time was serving in the district court of Kegalle. The defendant's son has stated in evidence that on 12/12/1991 his father left home around 5.30 to 6.00 a.m. and returned home around 7.30 or 8.00p.m. He has stated that no summons was served on his father on that date and he remembered this date as it was his birthday. An officer from Parliament has testified that on 12.12.1991 the defendant had attended the session of Parliament held at 2.00 p.m. on that day. The running chart maintained for the car used by the defendant too had been produced in evidence and according to this document (A2) the defendant had left home at 6.00 a.m.

It was the same process server who has served the exparte decree on the defendant. By this time he has come on transfer to Mt.Lavinia. He has stated on 12.11.1992 he served the exparte decree personally on the defendant at the latter's house at Anderson road, Dehiwela. According to the evidence of one Wijerama, an employee of the Hadabima on 10.11.1992 the defendant was at the Gannoruwa office of Hadabima.

An attorney-at-law is presumed to know the consequences of the failure of the defendant, on whom summons had been served, to appear in court on the summons returnable date. If the defendant fails to appear the case against him is liable to be fixed or taken up for exparte trial. Is there any reason for an attorney-at-law who has received summons in a case where Rs 2.5 million is claimed from him to keep away from court? Is this normal conduct expected of an attorney-at-law? In considering this question the court has to consider the ordinary conduct of a person in the position of the defendant. Such consideration is necessary in examining whether this position that he did not receive summons is probably explanation for his failure to appear in court. If he has received summons what is that he was going to lose by appearing in court and what repercussions arise from his failure to appear in court? These are all very relevant considerations deciding whether the existence of the fact may be the non-receipt of the summons is so probably as to persuade the prudent man to act on the supposition that the fact is true. This is the test set out in section 3 of the Evidence Ordinance. There is a total failure by the trial judge to express his mind to any of the matters I have set out in this passage resulting in a failure to apply the probability test to evaluate defendants assertion that he did not receive summons. Such considerations with greater force apply in respect of the exparte decree. Will any sensible man

deliberately refrain from coming to court to purge his default when an exparte decree for Rs 2.5 million is served on him?

In considering the above matters the court also should have considered whether the connection of the same process server in two vital steps in a civil action has any bearing in the evaluation of the defendant's version" – **Unquote.**

Considering the totality of the evidence led at the inquiry, I am of the firm view that the learned district judge has failed to evaluate the evidence prior to arriving at the conclusion that the defendant has failed to establish that he was not served with summons.

As to the claim made by the process server and the plaintiff that summons was duly served on the defendant there was overwhelming evidence to the contrary. The day in question being the birthday of the 3rd substituted defendant-appellant he could not have possibly made any mistake as to the movements of the defendant on that day. The running chart maintained in respect of the official motor-vehicle used by the defendant which also falls within the ambit of performing official duty has not been properly considered by the learned district judge. On the contrary the learned district judge without an iota of evidence has unreasonably guessed certain matters as having actually existed based on mere surmises. The trial Judge has in fact looked at the evidence and then proceeded to conjecture on certain unproven matters as well.

For example the appellants have produced the running chart of the defendant's vehicle applicable to the particular day and certain other days. According to the running charts the defendant has left his residence at Mawanalla around 5:30 AM. The learned district judge has rejected the running charts including the one applicable to the day in question on the assumption that it has been so maintained to claim the monetary benefit of "subsistence".

The defendant at the inquiry before the learned trial judge attempted to prove that summons and the decree could not have been possibly served on him for the reason that he was elsewhere when summons and decree are said to have been served. As far as the service of summons is concerned, the defendant had taken upon the burden of proving the negative by his denial that he ever received summons. This he could have proved only through circumstantial evidence unlike adducing evidence in proof of a positive fact. In order to discharge this burden the defendant had sought to prove amongst other things, that he was not available at the place when summons is alleged to have been served on him. It is in that respect the 3rd substituted defendant-appellant has testified.

The learned judge however had adopted a tendency to find and call attention to errors and flaws of the evidence of the defendant's son without any basis. The conclusion reached by the learned district judge that the 3rd substituted-defendant-appellant showed bias towards the deceased

defendant is baseless and an opinion formed beforehand without valid justification.

As regards the evidence of the 3rd substituted defendant-appellant, the learned district judge has failed to make any meaningful evaluation as to the veracity of his evidence, corroboration of his version by documentary evidence, the degree of consistency and logical coherence maintained by him. On the contrary the learned judge has embarked upon a voyage of discovery on his own adopting an unreasonable critical attitude.

The officer from the Parliament testified with certainty as to the presence of the defendant at 2 PM on the day in question at a meeting held at the parliamentary premises. It is common sense that to be present at the parliamentary premises around 2 PM, one has to leave Mawanella at least by 11 A.M.

As regards the alleged service of decree, the defendant had taken up the position that he was elsewhere on that day as well. It was also spoken to by two official witnesses. The witnesses who testified on this matter had spoken to the presence of the defendant at Peradeniya on that day, not from their memory but from official documents regularly maintained.

The manner in which the summons and decree have been served lead to the truth of the defendant's version. It is more so when summons has been served at one address and decree at another address. The learned district judge ought to have elicited the truth as to whether the same process server having to serve the summons and decree in an

unusual manner was a mere coincidence or a deliberate attempt to mislead court. It is strange that the plaintiff has not given any plausible explanation as to what made him move for service of decree through Mount Lavinia fiscal. Whether it is a prearranged scheme to abuse the process of court remains unanswered leaving a very high degree of doubt as to the bona fides of the entire move.

According to the process server, he serves summons and other legal documents between 6AM and 6PM. He has failed to record the time at which he served the summons on 12th December 1991 on the defendant. In evidence in chief, he categorically stated that he cannot recall the time at which summons was served on the defendant. Testifying after more than five years of the service of summons, it is hardly possible for him to have disclosed or recalled the exact time of service, especially when he serves summons between 6 AM and 6 PM. Taking into consideration the sanctity attached to the duties performed by the process server who facilitates the process of implementing the *audi alteram partem* rule, it is absolutely necessary that he should maintain contemporaneous record for important matters relating to service of summons. Both in P3 and P4 he has never recorded the time at which he has served summons to various people or any other useful details. As stated above, he has never obtained the signature of the recipient of the summons. Tainted with the infirmities P3 and P4 are of no assistance to resolve the issue in favour of the plaintiff.

In the circumstances, it is my opinion that it is the duty of court to rescue the defendant from being subject to an

injustice in the hands of the process server who is it's agent. As the appellants have established (on a balance of probability) that there has been no service of summons, the court had no authority or power to have proceeded against the defendant. Undoubtedly, the principles of natural justice being our basis of procedural law and jealously guarded hitherto against possible violation should be given effect to over all other issues. In the event of a reasonable doubt arising as to the service of summons, it is my view that the issue should be resolved in favour of the person who alleges to have been deprived of the opportunity of being heard.

Consequently, the judgment entered against the defendant is set aside and the learned district judge directed to take steps to serve summons on those who are entitled to receive the same, if the cause of action survives.

There shall be no costs.

Judge of the Court of Appeal

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