IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA.

D.O. Amaratunga,
Digampitiya Ousada Osusala,
Kurundugaha Hataekma, Elpitiya.
DEFENDANT APPEALLANT

C. A NO. 1189/96 (F)
Vs
D.C. Balapitiya 1791/L

Chandrapala Bandarigoda,
Wickrama Stores, Pitigala,
PLAINTIFF - RESPONDENT.

Before : A.W.A. SALAM, J.

Counsel : Vidura Gunaratna for the defendant-appellant and Rohan Sahabandu for the plaintiff-respondent.

Argued on : 10.11.2010

Written Submissions tendered on: 12.01.2011.

Decided on: 26.04.2011

A W A Salam,J

The Plaintiff instituted action praying inter alia for a decree of ejectment and damages against the Defendant. The trial was heard exparte against the defendant and decree entered in favour of the plaintiff as prayed for in the plaint. Subsequently, the defendant made an application to have the said decree set aside for alleged want of service of summons.

The learned district judge dismissed the application by order dated 13.09.1996 and the present appeal has been preferred by the defendant to set aside the said order.

The journal entries maintained in the original court reveal that the action was filed on 13th September 1999 and summons issued for the first time returnable on 22nd January 1992. However as the defendant could not be traced summons had not been served on him on that day and it was reissued for 13th May 1992. According to the record summons had been served on the defendant on 22 April 1992. As the defendant was absent and unrepresented on that date the matter had been heard exparte.

The defendant in his attempt to purge default alleged that he was never served the summons as reported by the process server. As such the pivotal question that arose for determination at the inquiry held into the application of the defendant was whether summons had in fact been served on him as asserted by the plaintiff or there was want of such service.

At the inquiry into the application of the defendant, the defendant gave evidence and closed his case producing the documents marked as D1 to D3. In presenting the case of the plaintiff the process server's evidence was led in addition to the evidence of the plaintiff. According to the plaintiff summons on the defendant had not been served for a long period of time and the process server was not able to meet the defendant at the given address at least for a period of one year. (vide proceedings dated 15.12.1994 - page 16 - folio 134 of the brief). This evidence of the plaintiff is completely contradictory to the journal entries maintained by the lower court. According to the journal entries the summons

returnable date was 22.1.1992 and it was later extended to 13.5.1992 and summons had in fact been allegedly served on 22.04.1992 when the fiscal was accompanied by the plaintiff. Noticeably, as at 22.4.1992 a period of only seven months had lapsed after the institution of the case and the process server had been unsuccessful in serving summons only once. In this background it cannot be assumed that there was inordinate delay of one year in the service of summons as claimed by the plaintiff.

Incidentally, the plaintiff is a member of the Southern Provincial Council. His move to contact the process server and to accompany him in his car to serve summons was quite unusual. Further, without an order of court to effect "pointed out service of summons", by prior arrangement the plaintiff had met the process server and taken him to the address of the defendant in his car to serve the summons. As a matter of fact admittedly summons had been served upon the defendant on being pointed out by the plaintiff. The relevant evidence on this matter is reproduced below from the proceedings.

> ප්‍රශ්නය - තමන් සමඟ පැමිණිලිකරු පැමිණියාද එම ස්ථානයට?
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> උත්තරය - පැමිණිලිකරු පාරේ වාහනය නවතා සිටියා. කිසිම අපහසුතාවයක් නැහැ සොයාගන්න. බහිනකොටම පැමිණිලිකරු <u>පෙන්වා සිටියා විත්තිකරු.</u>

A significant difference between pointed out service of summons and personal service by fiscal is that in the former case the person who points out the defendant, takes the responsibility upon himself as to the regularity of service of summons. In order to ensure this he gives an affidavit to that

effect which is accompanied by an affidavit of the process server as well. In the case of the process server effecting personal service of summons on the defendant, an affidavit from the process server would suffice. In this matter the plaintiff had not filed any affidavit affirming to the fact that he pointed out the defendant or testified to that effect before the case was fixed for exparte hearing. It is difficult to understand as to what made the plaintiff to take the process server in his car to serve summons if the process server was able to effect personal service on the defendant without being pointed out. The process server had worked in this area for nearly 15 years i.e. from 1978 to 1992. The defendant is an Ayurvedic physician who runs a dispensary from the year 1986. There was no evidence that the defendant had been evading summons. As pointed out earlier no order has been made by court for pointed out service. The learned district judge has failed to advert to this factual background in ascertaining the credibility of the plaintiff's version.

The process server had been questioned as to whether he obtained the signature of the defendant at home service of the summons and he replied in the negative. Although there is no requirement to obtain the signature of the recipient of the summons, as the process server had served summons upon the defendant being pointed out he could have easily taken the precaution of demanding the signature of the defendant in the acknowledgement of the receipt of summons. In passing it must be mentioned that it would have been salutary had the process server made a sincere endeavour to obtain an acknowledgement in writing from the defendant as to the service of summons, particularly as he had followed a different method than what he had usually adopted in serving summons.

It has been contended in the original court that since the process server was facing a charge of bribery the learned district judge should have been cautious before accepting his evidence. As the process server had not been convicted of bribery, I do not think that any adverse inferences should have been drawn or the learned district judge should have been extraordinarily cautious before accepting his evidence.

Another salient defect in the impugned order is the failure to analyze the evidence placed before the learned district judge, prior to his coming to the conclusion that summons had in fact been served on the defendant. The learned district judge has not given any reason for his conclusion. The failure on the part of the learned district judge to give sufficient reasons for his decision is a manifest violation of the provisions of section 187 of the Civil Procedure Code. Yet, his decision cannot be given effect to as it had substantially prejudiced the rights of the defendant. As the circumstances in which summons had been served on the defendant appear to be tainted with irregularities and clouded with grave suspicion his decision on the disputed matter cannot in any event be justified.

To set aside the order of the learned district judge and to send the matter for a fresh inquiry would mean a protracted second inquiry and an unnecessary appeal. In the circumstances, I am of the view that the impugned order should be set aside as it has ended up in a miscarriage of Justice. Further, it is my opinion that the end of Justice can be met by substituting an appropriate order in place of the impugned order so as to facilitate the expeditious disposal of the main case. Therefore, I set aside the impugned order and substitute the same with the finding that the defendant has not been properly served with summons prior to the hearing

being fixed exparte. The learned district judge is directed to take steps to serve summons on the defendant according to law and to proceed with the matter.

There shall be no costs.

Judge of the Court of Appeal

NT/-