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

In the matter of an appeal from judgments made in DC Matale Case No.4707/MR.

Herath Mudiyanselage Kiri Banda,
No.47, Dambulla Road,
Naula.
PLAINTIFF

C.A. Case No. 427/1999 (F)

D.C. Matale Case No.4707/MR

-Vs-

1. **Masa Arachchilage Jayantha Wickramasinghe,**
   No.66, Batuambewatte,
   Nugawela *via* Kandy.
2. **Manuel Peiris Waduge Newton Clarence Godwin Peiris,**
   "M.J.R. Peiris & Sons",
   No.149, Katugasthota Road,
   Kandy.

DEFENDANTS

AND

1. **Masa Arachchilage Jayantha Wickramasinghe,**
   No.66, Batuambewatte,
   Nugawela *via* Kandy.

2. Manuel Peiris Waduge Newton Clarence Godwin Peiris,

"M.J.R. Peiris & Sons",

No.149, Katugasthota Road,

Kandy.

DEFENDANTS-APPELLANTS

-Vs-

Herath Mudiyanselage Kiri Banda,

No.47, Dambulla Road,

Naula.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

1. Masa Arachchilage Jayantha Wickramasinghe,

No.66, Batuambewatte,

Nugawela *via* Kandy.

2. Manuel Peiris Waduge Newton Clarence Godwin Peiris,

"M.J.R. Peiris & Sons",

No.149, Katugasthota Road,

Kandy.

DEFENDANTS - APPELLANTS - PETITIONERS

-Vs-

Herath Mudiyanselage Kiri Banda,
No.47, Dambulla Road,
Naula.

PLAINTIFF - RESPONDENT - RESPONDENT

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Chandaka Jayasundera for the Petitioners.
Argued on	:	28.07.2016
Decided on	:	05.09.2016

A.H.M.D. Nawaz, J.

This is an appeal from the order of the learned District Judge of Matale dated 26.03.1999, which refused to set aside the judgment entered *ex-parte* against the two defendants on 27.05.1997.

Both the 1st Defendant (employee) and 2nd Defendant (employer) were sued by the Plaintiff for damages in a sum of Rs.1,200,000/- in a tortious action in which the Plaintiff alleged that his son came by his death owing to the negligent driving by the 1st Defendant of the vehicle which was owned by the 2nd Defendant. Upon the institution of the action, summons was issued on both Defendants and the journal entries in the case indicate that the fiscal reported to court that both Defendants in the case were served with summons.

Since none of the Defendants were present in Court, an *ex-parte* trial was fixed on 13.06.1996 and the Plaintiff gave evidence on 27.05.1997 and closed his case on that day itself leading in evidence his documents. The learned District Judge of Matale pronounced his judgment on the same day casting both Defendants jointly and severally in damages as prayed for in the plaint. After the decree was served, the 2nd

Defendant made an application by a petition and affidavit in terms of Section 86 of the Civil Procedure Code to have the judgment and decree entered upon default set aside.

The only ground that the Defendant took up in evidence at the inquiry into his application to set aside the *ex-parte* judgment and decree was that he was not served with summons. The 2nd Defendant was cross-examined by the Counsel for the Plaintiff but the 2nd Defendant repeatedly, asserted that he had not received the summons. Nor did his driver the 1st Defendant ever inform him of the case. The Plaintiff did not call the process-server as a witness.

So we come across two rival positions. Whilst the 2nd Defendant asserts that he did not receive the summons pertaining to the case that resulted in his absence from Court, the only evidence that was placed in evidence against him was the report of the process-server that he served the summons on him. In fact the learned District Judge in dismissing the application to set aside the *ex-parte* judgment and decree has taken the report into his consideration.

Moreover, the learned District Judge also comments that there has to be a reason as to how the summons was not served but the decree was served at the same address. In fact, the fact that the decree was received at the same address cannot go to disprove the assertion that the 2nd Defendant made at the inquiry that he had not received the summons. The receipt of the decree at the same address cannot be conclusive of the fact that the summons was served at the same address, as the report of the process-server asserted.

In fact, I take the view that if the 2nd Defendant testified that he did not receive the summons thus contradicting the assertion in the report of the process-server, he in effect throws into doubt the veracity of the report of the process-server. Merely because a report speaks of service of summons, it cannot be treated as sacrosanct without more, when the Defendant seeks to contradict it in his testimony. Even if the service is referred to in the report, it must be due service. The service of summons should be a reality and not just a formality.

If the reality of service is challenged by a Defendant as in the case, it can be clarified or explained only by the adduction of the evidence of the process-server. In other words the process-server must give evidence and establish the fact that summons was duly served. He must be tendered to the Defendant for cross-examination. Section 86(2) of the Civil Procedure Code mandates the Court to satisfy itself that the Defendant offers reasonable grounds and when the Defendant alleges non-service of summons, reasonableness of this vital ground cannot be ascertained by merely looking at the fiscal report or journal entries that state that the Defendant was served with summons. The challenge of the Defendant to the veracity of the report must be repudiated by the oral testimony of the process-server. It has to be noted that the report filed by the process-server, though it may speak of the personal knowledge of the process-server of the fact of service, could still be hearsay as it is not heard and said in court by direct evidence. The Right Honourable L.M. de Silva in the Privy Council case of ***Subramaniam v. Public Prosecutor*** (1956) 1 W.L.R 965 at 969 defined "hearsay" thus:

> *"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."*

In other words if the statement in the fiscal report that the summons was served on the 2nd Defendant is sought to be led to prove the truth of that statement, it would be hearsay and become inadmissible unless the process-server is called and tendered for cross-examination.

The Evidence Ordinance which is inclusionary does not permit the reception of hearsay evidence and a process-server's report does not find a place in the exceptions that have been included in the Evidence Ordinance.

The presumption attached to the report in Section 114 of the Evidence Ordinance is rebuttable and when the 2nd Defendant in this case remains unshaken in his assertion that he was not served with summons, that presumption is rebutted. In the circumstances, the burden would shift to the Plaintiff to call the process-server and elicit direct evidence in order to render probable the fact of service of summons. After all, the power to dismiss an application for setting aside an *ex-parte* decree for default of appearance implies a duty on the part of Court to set aside such an order when there exist reasonable grounds for non-appearance. The right to make the application in terms of Section 86 of the Civil Procedure Code implies that the inquiry should be conducted in accordance with rules of natural justice which carries with it the duty to tender for cross-examination a person who has made a contrary statement against that of the Defendant. The right and duty are the *sine qua non* of judicial process.

The non-observance of this duty renders the order to refuse the setting aside of the *ex-parte* judgment null and void. It is axiomatic that where a decree is passed against a Defendant to whom no summons has been served, that decree will not be one that has been legally made.

When the Defendant has asserted that he was not served with summons but the process-server who is an essential witness to disprove the above is not called by the Plaintiff, the order passed to the prejudice of the defence without affording an opportunity to cross-examine the fiscal does not satisfy the test of fairness which is a fundamental tenet of judicial process.

Having carefully gone through the evidence of the 2nd Defendant, I take the view that the story of the 2nd Defendant remains unimpugned and unchallenged and there are reasonable grounds for his non-appearance. In the circumstances I proceed to set aside the order of the District Court dated 26.03.1999 refusing to set aside the *ex parte* judgment and decree. The *ex parte* judgment dated 13.06.1996 and the *ex parte* decree are also vacated.

I direct the learned District Judge of Matale to permit the 1st and 2nd Defendants to file their answers and thereafter proceed with the case.

JUDGE OF THE COURT OF APPEAL