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

Appuhannadi Kotahewage Ariyapala
No.22, Bullers Lane
Colombo – 07

C.A. No.388/99(F) **Defendant-Petitioner-Appellant**

D.C. Colombo
Case No.11997/MR **Vs.**

People's Bank
75, Chittampalam A. Gardiner
Mawatha
Colombo 2

Plaintiff-Respondent

BEFORE : M.M.A. GAFFOOR J AND
JANAK DE SILVA J

COUNSEL : V. Thevasenathipathy for the Defendant-Petitioner-Appellant

Rasika Dissanayake for the Plaintiff-Respondent-Respondent

WRITTEN SUBMISSIONS
TENDERED ON : 10.11.2016 (Plaintiff-Respondent-Respondent)
17.01.2017 (Defendant-Petitioner-Appellant)

ARGUED ON : 22.11.2017

DECIDED ON : 21.02.2018

M.M.A. GAFFOOR J

The plaintiff-respondent-respondent (hereinafter referred to as the "plaintiff") filed plaint dated 12.03.1992 instituting an action bearing No.11997/MR in the District Court of Colombo. The relief prayed was for recovery of a sum of Rs.561,682/- together with the interest thereon from the appellant. According to the appeal brief summons were served on the defendant-petitioner-appellant (hereinafter referred to as the "defendant") and when the case was taken up for trial on 27.08.1992 the defendant was absent and unrepresented and therefore the case was fixed for ex-parte trial against the defendant. After the ex-parte decree was entered the defendant made an application to purge his default under Section 86(2) of the Civil Procedure Code. Subsequently, the plaintiff filed the statement of objections against the defendant's application and thus the matter was fixed for inquiry. After the inquiry the Additional District Judge dismissed the defendant's application by order dated 16.06.1999. Being aggrieved by the said order the defendant has preferred an appeal to this Court.

In this case the main issue to be decided evolves on the ex-parte order of the learned District Judge in view of the fact that summons to the defendant had not been served as argued by the said defendant.

Section 61 of the Civil Procedure Code states as follows:

> **61.** When a summons is served by registered post, the advice of delivery issued under the Inland Post Rules, and the endorsement of service, if any, and where the summons is served in any other manner, an affidavit of such service shall be sufficient evidence of the service of the summons and of the date of such service, and shall be admissible in evidence and the statements contained therein shall be deemed to be correct unless and until the contrary is proved.

At the inquiry only the defendant had given evidence, while the plaintiff called the Fiscal/Summons server who is alleged to have served summons on the defendant, who produced the affidavit marked 'P2'. It had been submitted by the plaintiff that the burden to purge default is on the party who seeks to vacate the said order, the defendant in the case in issue. Vide Section 102 of the Evidence Ordinance. In the case of ***Fonseka v. Dharmawardena*** (1994) 3 SLR 49 the Court of Appeal has held that:

> "Summons will be served by the fiscal as an officer of court and the discharge of his duty is evident by the report and the

affidavit that should be furnished in terms of section 371 of the Civil Procedure Code. In the circumstances, the provisions of section 114(d) of the evidence Ordinance will apply and the court may presume that the summons was duly served. Hence in terms of section 102 the burden of proof would lie on the defendant who asserts that there is no service, because his application to set aside the decree will fail, if no evidence is adduced by either party."

In the case of ***Ittepana v. Hemawathie*** *1981 (1) SLR 476* CA held inter alia:

"Service of summons through the Fiscal personally is certainly the better mode of service whereby the Court could be satisfied that summons/decree is served on the defendant."

Court further held that:

"The affidavit of the Fiscal could establish this fact and the Court could then safely act on this evidence on an affidavit."

"It is incumbent on the respondent to lead evidence in order to controvert and contradict the affidavit. The affidavit is prima facie evidence of the fact that summons was duly served."

In this case the defendant has failed to controvert the evidence led by the plaintiff which shows that summons was duly served on the defendant.

In view of the above facts and law we see no reason to interfere with the order of the learned District Judge and we dismiss the appeal with costs fixed at Rs.25000/-.

JUDGE OF THE COURT OF APPEAL

JANAK DE SILVA J

I agree.

JUDGE OF THE COURT OF APPEAL