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

CALA Case No. 441/2002

DC Colombo Case No. 17923/L

K. Thilakanadar,
B 3/2, Dannister de Silva Mawatha,
Colombo 09.
Presently at
No. 72, Sri Mahindarama Mawatha,
Dematagoda,
Colombo 09.
DEFENDANT-PETITIONER-APPELLANT

-Vs-

Seyder Saburdeen,
C 4/2, St. Sebastian Street,
Colombo 12.
PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE : **A.H.M.D. Nawaz, J.**

COUNSEL : Rohan Sahabandu, PC for the Petitioner.

Nizam Kariapper with M.I.M. Iynullah for the Respondent.

Decided on : 11.12.2017

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

By a plaint dated 30.06.1997, the Plaintiff instituted action alleging that the Defendant had been in occupation of the premises -the subject-matter of the action since June 1996 and prayed for a declaration of title and ejectment. Upon a perusal of the Journal Entries it is apparent that upon the receipt of the plaint the District Court had made order to issue summons on the Defendant returnable for 01.10.1997. In terms of Journal Entry No. 2 the fiscal reported that he was unable to find the Defendant to serve the summons. Thereafter Journal Entry No. 4 dated 11.03.1998 shows that summons had been issued for substituted service, on an application made by the Plaintiff. Journal Entry No. 5 shows that summons were served on the Defendant by having the same affixed on the door and then Journal Entry No. 6 indicates that the Court had fixed the case for an *ex parte* trial on 26.06.1998. According to Journal Entry No. 7, the *ex parte* trial had taken place on 21.08.1998. At the conclusion of the *ex parte* trial, the learned District Judge had pronounced judgment on 21.08.1998 and directed the service of a copy of the decree on the Defendant. Thereafter one comes across Journal Entry No. 15 wherein the fiscal reported that he was unable to serve the decree on the Defendant-Petitioner as he had been regularly away from the address, and confronted with that situation, the Court had directed the service of decree by way of substituted service. In terms of Journal Entry No. 16, the case had been called on 27.10.1999 and the fiscal reported that the notice of decree was indeed served on the Defendant by way of substituted service, but it would appear that the Court made no order as the Plaintiff and the Defendant both were absent from Court and unrepresented.

It would next appear that the Plaintiff had moved to execute the decree and according to Journal Entry No. 18, the District Court on 31.10.2022, having observed that the Plaintiff had not taken any steps since 18.08.1999, nevertheless issued the writ of execution and made order that the case be called on 04.10.2012. It is noteworthy that the address given in the plaint is B 3/2, Danister de Silva Mawatha and the summons/**decree had to be served at that address.**

In his petition dated 05.11.2002, the Defendant-Petitioner avers that on or around 15.10.2002, he on some confidential information allegedly given by a friend of the Plaintiff became aware of the case for the 1st time, whereupon he had caused a perusal of the case record by his lawyers, albeit with great difficulties as he alleges and only after that search he became aware of what had actually happened as was reflected in the Journal Entries.

The Petitioner states that upon discovery of the above, he filed on 25.10.2002, a petition and affidavit setting out all the circumstances and moved to support as application to vacate the *ex parte* judgment and to recall the writ, on the basis **that he was never served with summons/decree**. Upon a perusal of the petition and affidavit it is clear that the Petitioner has taken up the position that he never received any summons/decree. He alleged that he was currently residing at No 72, Mahindarama Mawatha, Colombo -09 and this fact was known to the Plaintiff. In an earlier matter that came up in the Magistrate's Court, he was placed in possession of the land in question. The address given in the Magistrate's court proceedings is not the address given in the plaint in the instant case. In the circumstances the Defendant prayed **for a** vacation of the decree and pleaded that he be given an opportunity to file answer and proceed with the case.

It is apparent that the defendant moved to support the application on 29.10.2002 but the case was not called on that day. When one peruses the J.E. 20 on 29.10.2002, one finds that the learned District Judge had rejected the application in his chambers. This application is against the said order dated 29.10.2002.

The papers filed by the Petitioner before the learned District Judge **show** that the summons had been taken out on the Defendant by giving a different address. I am driven to the conclusion that even if Section 59 of the Code had been followed namely summons shall ordinarily be served by registered post, it would have gone to a different address- not the address of the Defendant. Section 59 of the Code had not been complied with in this case at all and it is illogical that Section 60 of the Code was followed without utilizing Section 59. In fact Section 60 (1) lays down that, "Court shall, where it is reported that summons **cannot** be effected by registered post, direct that summons be

served personally on the Defendant by delivering or tendering to him the said summons through the fiscal." In other words the fiscal moves to serve summons personally only when an attempt was made to take out summons through registered post. The fact remains that summons had not been sent by registered post-a fact that the Court had not quite appreciated.

It is worthy of note that Section 60 (1) was activated without having followed Section 50. Section 66 (2) of the Code next comes into play but with preconditions. Section 66 (2) states that if the service cannot by the exercise of due diligence be effected the fiscal shall affix the summons to some conspicuous part of the house, a process which is known as substituted service of summons. In ***Fernando v. Fernando*** 9 N.L.R 325 it was laid down that substituted service should not be allowed unless the fiscal has reported that he is unable to effect personal service and the Court is satisfied on evidence that the Defendant is within the Island. This position was reiterated in ***Ramanathan and Another v. Sathyaseelan*** (2006) 2 Sri.LR 369. In this instance the Court in ordering substituted service had not formed the aforesaid opinion.

Furthermore in ***Palaniappa Chetty v. Arnolis Hamy*** 22 N.L.R 368 objections were taken to an order for substituted service of summons on three grounds namely it was made without a report that the fiscal was unable to effect personal service, without proof that the Defendant was in the island, and without directing at what spot summons was to be served as substituted service. it was held that all grounds of objections were well taken and that the order for substituted service was bad.

The record does not bear out that these necessary preconditions were followed.

Submissions have been made that if the Petitioner had been permitted to support his application, all these salient aspects could have been brought home to the notice of the learned District Judge. In a 66 application bearing No. MC Colombo 69553/2/96, the possession of the subject-matter of the action had been given to the Petitioner, when the

Plaintiff himself was a party to that application. An appeal lodged against this order has been dismissed by the High Court.

The inescapable allegation that has been made is that the Plaintiff knowing very well that the Petitioner was at No. 72, Sri Dharmaratne Mawatha, Colombo 9 had fraudulently and unlawfully filed this action giving a wrong address for the Defendant namely No. B 3/2, Danister de Silva Mawatha, Colombo 9. In such a situation it goes without saying that the Fiscal was bound to report that the Plaintiff could not be found at that address. In other words the allegation made against the Plaintiff is that he had adopted this ruse in order to secure an advantage. I find a reference to this in the petition filed before the learned District Judge and it then boils down to a complaint of deprivation of an opportunity to place matters before the learned District Judge. The Defendant-Petitioner demonstrably complains that the Plaintiff had acted fraudulently, in order to secure a declaration to the very same premises, where the Magistrate's Court **had** issued an order to place the Petitioner in possession.

One bears in mind the case of ***Ittepane v. Hemawathie*** (1989) 1 Sri LR 476 (SC) where nonservice of summons was assimilated to want of due process in the following stipulation. "The principles of natural justice are the basis of our law of procedure. The requirement that the Defendant should have notice of the action either by personal service or substituted service of summons is a condition precedent to the assumption of jurisdiction against the defendant."

In the same case it was laid down that failure to serve summons is a fatal irregularity-a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the Defendant. It is crystal clear that it is the service of summons that vests jurisdiction in a court to commence proceedings against a Defendant. If a Defendant is not served with summons or otherwise **not** notified of the proceedings against him, the judgment entered against him in those circumstances, would be a nullity. Sharvananda, J. articulated the issue of nullity in ***Ittepane v. Hemawathie (supra)*** thus *"the person affected by them can apply to have the order set aside ex debito justitiae in the exercise of the inherent*

jurisdiction of the Court which is saved by Section 839. The District Court in such instances, has jurisdiction to inquire into the complaint."

There is no doubt that the Defendant cannot invoke Sections 86-87 of the Civil Procedure Code as he was not served with summons. In such a situation Section 839 of the Code would apply in full force. An omission to refer to that section in the petition filed is not fatal to the application as the jurisdiction is inherent and the Court is bound to embark on the inquiry to ascertain whether the Court had its jurisdiction to proceed with the matter.

In ***Thambirajah v. Sinnamma*** 36 N.L.R 442 after a partition decree, the 1st Defendant appealed to have the decree set aside on the ground that she had not been served with summons Maartensz, J. held, "the trend of authority is that the lower Court had jurisdiction to set aside a decree on the application of a party to the suit who had not been served with summons". In ***Jamis v. Dochinona*** 43 N.L.R 527 the judgment had been entered *ex parte.* The Defendant moved Court within 3 days to have the judgment vacated on the ground that he was not served with summons. The Supreme Court held that the Commissioner of Requests acted without jurisdiction in entering judgment against the Defendant when he had not been served with summons.

In ***Perera v. Commissioner of National Housing*** 77 N.L.R 36, the Supreme Court held that where there was neither personal service nor substituted service of summons on the Defendant, Court was without competence to proceed with the action. A judgment entered under such circumstances is void and can be challenged in the very Court.

It is axiomatic that a Court in the absence of express provisions in the Civil Procedure Code, for that purpose, would possess, in its very constitution, all such powers as are necessary to undo a wrong in the course of the administration of justice. Section 839 preserves the inherent power of Court to make such order as may be necessary for the ends of justice or to arrest the abuse of the process of Court.

Having examined the proceedings in this matter I take the view that there are matters that need clarification and an injustice is bound to occur if the order dated 29.10.2002 is allowed to stand. The Court possesses inherent power to remedy such injustice on the principles '*actus curia neminem gravabit* -'*An act of the Court shall prejudice none.* - "one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors".

I cannot turn a blind eye to the complaint that injustice has been caused by the default of court in not having effected due service of summons. In those circumstance it behoves the District Court to institute a judicial inquiry into the complaint and ascertain whether summons had been served or not and if in the process of that inquiry the Court finds that summons had not been served, it should declare the *ex parte* order null and void and vacate it.

In the instance case, the learned District Judge has failed to do just that and overlooked his bounden duty to remedy the injustice that the Petitioner alleged **had been** caused to him. The dismissal of the application in chambers, is in gross infringement of the principles of *audi alterm partem* rule, more so when it is apparent that the procedure adumbrated in the Code as adverted to above, has been flouted by the Plaintiff and the learned District Judge has not appreciated that the procedural law enjoys parity of status along with substantive law -see the pertinent observations to this effect in ***Fernando v. Sybil Fernando*** (1997) (3) Sri.LR 1 (SC).

Accordingly I am of the view that the District Court should go into an adjudication as to whether summons was in the first instance served at all on the Defendant. The documentary evidence tendered warrants an inquiry to be held as to why the Plaintiff gave a different address of the Defendant in the District Court when in the Magistrate's Court proceedings the Defendant had another address.

In the circumstances I proceed to set aside the order made by the learned District Judge on 29.10.2002 in Case No. 17923/L and remit the case back to the District Court of

Colombo to initiate an inquiry to ascertain whether the summons was served on the Defendant or not. If it is established that the Defendant was not served with summons, the learned District must proceed to set aside the *ex parte* judgment and decree entered in the said case. Upon proof that summons had not been served upon the Defendant, the *ex parte* judgment could be declared null and void and thereafter the Defendant may be allowed to file his answer and proceed with the case.

JUDGE OF THE COURT OF APPEAL