Present: Sir Charles Peter Layard, Chief Justice, and Mr. Justice Wendt.

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FERNANDO *v.* FERNANDO *et al.*

D. C., Kurunegala, 1,710.

Substituted service—Requirements—Last known place of abode—Affidavit of service—Place of service—Practice—Civil Procedure Code, ss. 60, 87, *and* 371.

Substituted service should not be allowed unless the Fiscal has reported that he is unable, although reasonable exertion has been made by him to do so, to effect personal service, and the Court is satisfied on evidence that the defendant, against whom substituted service is applied for, is within the Island.

Where substituted service is allowed, the Court must prescribe the mode of substituted service, and it must do so on proper materials which satisfy it that the mode selected is the most perfect substitute for personal service which, under the circumstances, it is possible to obtain.

In a return of personal service the affidavit of the process server should state the place where the service was effected.

THE facts sufficiently appear in the judgments.

H. J. C. Pereira, for third defendant, appellant.

Sampayo, K.C., for the plaintiff, respondent.

Cur. adv. vult.

7th May, 1903. LAYARD, C.J.—

This is an appeal from an order of the District Judge of Kurunegala refusing to open up a judgment entered against the third defendant, appellant.

The appellant and two others were sued in this action, which was instituted in July, 1899, on a promissory note dated 25th March, 1899. On the 27th July, 1899, summons issued, and I presume that as the third defendant was described in the plaint as of Wahakula, the Fiscal must have endeavoured to serve it in that village. There appeared difficulty in serving the summons, for it was returned to the Court more than once and had to be reissued five times. The returns to the summons were in some cases "Not to be found," and sometimes to the effect that the third defendant was not known, which point to the third defendant not being in the village mentioned in the plaint from the 27th July to the 28th November, and apparently not even then known in that village. On the 25th November

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1899, plaintiff's Proctor moved, as personal service was impracticable, that the Fiscal be directed to affix the summons to the last known place of abode of the third defendant. In support of that motion no material by way of affidavit or otherwise was placed before the District Judge to show that it was impracticable to serve the third defendant with a summons, or that the third defendant was in the Island. The Judge can under the circumstances mentioned in section 60 of the Civil Procedure Code prescribe another mode of service as equivalent for personal service. He can only, however, act under that section after the Fiscal has reported in writing that he is unable, although reasonable exertion has been made by him to do so, to effect personal service. Now, in this case there was no such report before the Court; on the contrary, the record was that the last return to the summons made by the Fiscal was to the effect the summons was not served for want of time. That return clearly does not disclose inability to serve the process, but that sufficient time was not allowed the Fiscal by the Court to effect service. Even, however, assuming that there was such a return before the Court, there was no evidence adduced before the Court to show that the third defendant was within the Island; this is expressly required by section 60 before the Court can prescribe a substituted mode of service. The Court's order allowing the motion was absolutely wrong for want of the required Fiscal's report, and further for want of evidence showing that the third defendant was within the Island. Further, the order for substituted service is bad because the Judge left it to the Fiscal to decide what the third defendant's last known place of abode was. Where a Court prescribes substituted service under section 60 and wishes to reach a defendant by affixing a summons to any particular house or premises, the Court itself should prescribe the house or premises in its order. To enable the Court to so prescribe there must be material before the Court as to the last known place of abode of the defendant. After this order was made by the District Judge the summons was twice returned to the Court unexecuted, but on the 10th January, 1900, the plaintiff's Proctor produced to the Court a return by the Fiscal that the summons had been affixed to the last known place of abode of the third defendant. The Fiscal's process server's affidavit, which is dated the 5th July, 1900, discloses that the process server swears that he affixed " a translation copy of the summons on the within-named second and third defendants' last known place of abode."

To begin with, this is not a compliance with the Judge's order, for he prescribed the affixing of the summons, not of " a translation

copy " of it. Again, the Fiscal should have stated on what house he affixed the translation copy and in which village the said house was situated. The Fiscal's process server's affidavit under section 371 must set out the " facts of the service effected," *i.e.*, in this case it should have stated whether the house was occupied or empty, if occupied by whom occupied, and how he knew the house was the last place of abode of the third defendant. The Fiscal's return and the process server's affidavit are absolutely silent as to the village or place where the house was situated and they do not even condescend to say in what Province or district in the Island it was situated.

The District Judge then proceeded on the strength of this return to enter a decree *nisi* against the third defendant. The Judge in entering that decree absolutely disregarded the provisions of the Civil Procedure Code. Section 5 of that Code provides expressly that the Judge must hear the case *ex parte;* the District Judge in this case did not hear a tittle of evidence, and it is obvious that the decree *nisi* was wrongly entered up.

Thereafter notice of decree *nisi* was issued. It appears from the record that great difficulty was experienced in serving that notice, and the notice was reissued several times for service by the Fiscal.

The decree *nisi* was entered, as I said above, on the 10th January, 1900, and the time fixed in the decree for showing cause was the 5th February, 1900. On that date, the plaintiff not having issued any notice of the decree, the Judge allowed a notice to issue on the third defendant giving him notice that, unless cause was shown to the contrary on the 26th February, 1900, the decree would be made absolute. On the 26th February, 1900, the date fixed by the notice for showing cause, the notice had not been served. The Judge on that day, without extending the date for showing cause, simply ordered that the former notice should reissue. This notice was returned several times to the Court and reissued for service, and on the 17th July, 1900, the Court on the application of the plaintiff's Proctor, and without any material being before it, made order that the stale notice should again reissue for service on the defendants, including the third defendant, at Moratuwa.

On the 14th of August, 1900, on the strength of the Fiscal's return, dated the 9th of August, 1900, that he had caused copies of a notice marked A, as would appear from the affidavit of his process server marked B, to be served on the first and third defendants, the Judge entered judgment against the third defendant.

The affidavit of the process server is most unsatisfactory; he states that he is " personally known to and was acquainted with the first and third defendants in the said case." Now, the name of the

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third defendant is a very common name, and there appears from the evidence in this case to be several of that name in Moratuwa alone—how the process server could possibly know whom the plaintiff wished to reach nowhere appears. Then he swears he served the notice marked A on the first and third defendants. He gives no information to the Court as to where the notice was served. He does not state whether the service was made on them when they were together or whether there were two services. The affidavit that accompanies the Fiscal's report does not, as required by section 371, set out the facts of the service effected. The notice that was served merely informs the person who it may reach that a decree *nisi* has been passed, and that unless sufficient cause be shown on the 25th day of February, 1900, such decree will be made formal. It is true that the notice has endorsed in it " Extended and reissued for service on the first and third defendants returnable on the 14th August, 1900," but it does not state that on that day, unless cause is shown to the contrary, the decree *nisi* will be made absolute. Notwithstanding these defects, however, the District Judge made the decree absolute on the 14th August, 1900. On the 29th November, 1900, plaintiff applied for writ to issue to enforce the judgment, and the writ issued on the 13th December, 1900. Although no copy of this writ was served on the appellant, property of his was seized and sold without any notice to him.

In view of the above circumstances the appellant applied to the District Court to set aside the decree entered against him on the 14th August, 1900. The record, it appears to me, shows gross irregularity in the obtaining of the decree, and from the evidence of the appellant it would appear that he was not served with a summons, decree *nisi*, or copy of writ. His evidence, which is uncontradicted, establishes that he did not have " *due* information " of the proceedings, and in view of section 87 of the Civil Procedure Code, I am of opinion that the District Judge should have set aside the decree and directed that the action should be proceeded with as from the stage at which the decree for default was made.

The District Judge in his judgment found that the summons was served by affixing copy to third defendant's last known place of abode. There is no material in the record to support that finding. The process server who affixed that notice has not been called as a witness, and there is no evidence, even if we need his affidavit, to show where that notice was fixed, and, if it was affixed as deposed to in that affidavit, that the house to which it was affixed was the last known place of abode of the appellant in the Kegalla District. There is not even evidence that he ever lived or even

stayed in that house. Then the District Judge finds that notice of decree *nisi* was served on the third defendant at Moratuwa. The third defendant has denied it, and the process server has not been called to prove that he served on the third defendant whom he identifies in Court. Even if we looked to his affidavit, the process server does not there depose to having served the process at Moratuwa, and his affidavit certainly does not clearly identify the appellant as the person on whom he served the document marked A. The Korala, who says a summons was served on him, which the appellant suggests is the notice of decree *nisi*, bears the same name as the appellant. Both counsel for the appellant and respondent admit that the Sinhalese word used by the Korala was probably one that covered both a notice and summons, which would do away with the difficulty raised by the District Judge that the summons itself never went to Moratuwa. The District Judge further says he does not believe the Korala would have allowed the process server to serve the process with him and would not have pointed out the mistake. The recorded evidence shows that the Korala did point out the mistake to the process server and refused to accept the summons. He could not have done more, and I cannot understand how the Judge has overlooked that portion of the Korala's evidence. The Judge further says he cannot believe that the Korala did not tell the third defendant or his father. I do not see why he must necessarily have told either, but, assuming he did, the appellant would not have received "*due* information" of the proceedings. Lastly, the Judge says: "I am not satisfied that third defendant (appellant) had not notice of the proceedings; that is not sufficient under section 87—he must have received '*due*' information of the proceedings." He also adds: "He believes that the third defendant received notice of the decree *nisi*, but he does not find when and where he received such notice and that such notice was *due* notice." There is in my opinion no material on which the Judge could find that third defendant received *due* information of the proceedings. The evidence is all the other way, and as the proceedings in the Court below teem with irregularities, I am of opinion that the decree of the Court below, dated the 14th August, 1900, should be set aside and the action be proceeded with as and from the stage at which the decree for default was made—provided the third defendant do pay into Court within two weeks of the receipt of this record by the District Court the amount of Rs. 570.92, with interest thereon at 9 per cent. from the 25th March, 1899, until payment to Court. In the event of such payment not being made within such date the decree of the

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District Court dated the 14th August, 1900, must stand. The appellant is entitled to the costs of his application in the District Court and of this appeal

WENDT J.—

I entirely agree with what has fallen from the Chief Justice, and would only add a word on account of the importance of the case as a matter of practice. Although the contrary practice, that of leaving the Fiscal to discover what was the last known place of abode of the defendant—a practice which prevailed under the old Rules and Orders—appears to die hard, it is perfectly clear from the wording of section 60 of the Civil Procedure Code that the Court has to prescribe the mode of substituted service, and it must do so upon proper materials which satisfy it that the mode selected is the most perfect substitute for personal service which under the circumstances it is possible to obtain. Accordingly section 61 prescribes that the substituted service shall be as effectual as if it had been made on the defendant personally. Before substituted service by affixing the process to some " place of abode " is prescribed, the Court must be satisfied that the defendant is within the Island, and that after reasonable exertions in that behalf, that place is the last place of abode of the defendant that has been discovered. In the present instance all the information the Court had before it in ordering substituted service was the statement in the caption of the plaint, were defendants were described as " all of Wahakula in ————." This appears to be a village in the Kegalla District. It appears from the proceedings at the inquiry into appellant's motion that the appellant was a native of Moratuwa. He was residing at Wahakula, in connection with his plumbago trade in 1899, and he there signed the promissory note sued upon in March, 1899, but he left that village two or three months later. It is suggested that at some time thereafter he resided in Katana in the District of Negombo, and the caption to the petition of appeal describes him as " now of Katana." In view of these facts the Court should have been satisfied of some unsuccessful effort to find the defendant at Moratuwa and Katana before it resorted to substituted service.

I also agree that in a return of personal service the accompanying affidavit of the process server should certainly state the place where the service was effected. That is an important one among the " facts of the service " of which section 371 speaks. As for the service of the decree *nisi*, the evidence is practically all one way and in favour of the appellant.

I think the appellant should be left in to defend.