UNIVERSAL MARKETING SERVICES (PVT) LTD. AND ANOTHER
v
INDIAN OVERSEAS BANK

COURT OF APPEAL
ROHINI PERERA, J.
CA 729/95
DC 9372/MR
FEBRUARY 2, 2007

Civil Procedure Code – S86(2), S839 – Vacation of an ex parte judgment – Refusal – Summons served on the Managing Director – Validity? – Carr-Braint Rule – Failure to serve summons – Fatal?

The District Judge of Colombo refused to vacate the *ex parte* judgment entered against the defendant-appellant company. The contention of the defendant-appellant was that, summons were not served, the plaintiff-respondent contended that summons were served personally on the Managing Director of the Company the 2nd defendant-appellant.

Held:

(1) It is clear in company law that the Secretary of the Company is the rightful person to receive summons.

(2) It is only by service of summons on the defendant the Court gets jurisdiction over the defendant. The failure to serve summons is a failure which goes to the root of the Court to hear and determine the action against the defendant.

(3) If the Court has no jurisdiction, it is of no consequence that, the proceedings were formally concluded for they are '*Corum Non Justice.*"

Per Rohini Perera, J.

"In cases where the defendant is a company it is always best that the summons be effected by registered post in the first instance, in case of a company, the summons shall also disclose as to whom that summons shall be delivered to . The plaintiff cannot be silent on this and expect any person in the company to accept the summons and expect Court to presume that, the

correct person had been served with notice° – When a person is not named on the precepts as the person to whom it should be delivered, it is always safe to deliver the summons by registered post.

(4) Applying the Carr-Braint Rule – (when Court has to form an opinion as to the truth of such evidence, any fact which may slightly even tilt to one side be regarded as a fact in favour of such party). Upon a balance of probabilities it is seen that summons had not been served on the defendant-appellants.

APPEAL from a judgment of the District Court of Colombo.

Cases referred to:

(1) *De Fonseka* v *Dhanawardane* – 1994 – 3 SLR 29.

(2) *Panorama Development (Guildford) Ltd.* v *Fidelis Furnishing Fabrics Ltd.* – 1971 2 QB 71 (CA).

(3) 1943 KB 607

(4) *SC Spl LA 90/80* – SCM 7.12.1981.

S. Amarasinghe for defendant-appellant.

N. Jayasundara for plaintiff-respondent.

Cur.adv. vult.

March 2, 2007

ROHINI PERERA, J.

The case was argued before Balapatabendi, J. and Rohini Perera, J. It was thereafter postponed for written submissions. During this period Justice Balapatabendi took oaths as a Judge of the Supreme Court. When the case was called on the 9th February, 2007 both Counsel agreed to a single Judge writing this judgment. Therefore this judgment is written by Rohini Perera, J.

The defendant/appellants sought unsuccessfully to have the *ex parte* judgment dated 24.10.90 vacated on the basis that summons were not served on them. This appeal is with regard to the judgment dated 14.12.95 by which the learned District Judge refused the application to vacate the *ex parte* judgment.

Section 86 (2) of the Civil Procedure Code which is the relevant section for these proceedings is as follows:

"Where, within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff makes application to an thereafter satisfies Court, that he had reasonable grounds for such default, the Court shall set aside the judgment and decree and permit the defendant to proceed with the defence as from the stage of default upon such terms as to cost or otherwise as to the Court shall appear proper."

It has been held in the case of *De Fonseka* v *Dharmawardene*(1).

That "an inquiry on an application to set aside an *ex parte* decree is not regulated by any specific provision in the Civil Procedure Code. Such inquiries must be conducted consistently with the principles of natural justice and the requirement of fairness. section 839 of the Civil Procedure Code recognizes the inherent power of the Court to make an order as may be necessary to meet the ends of justice."

The burden is on the defendant to satisfy Court that to his default there was a reasonable ground, and this ground must be proved on a balance of probabilities. In an instance if a party is claiming the grounds of non service of summons as a "reasonable ground" he has to prove facts upon a balance of probabilities. If the Court is satisfied on that point on a **balance of probabilities** the Court should vacate the judgment and decree and permit the defendant to proceed with the defence.

The inquiry to have the *ex parte* judgment vacated was held on the 30.8.1991. The evidence of the fiscal at the inquiry was that he served summons on both the 1st and the 2nd defendant-appellants personally by delivering them into the hand of the 2nd defendant/appellant. The report was marked as R1.

In this action the 1st defendant is a company duly incorporated under the Companies Act. The 2nd defendant/appellant was the Managing Director of the 1st defendant/appellant company. It is alleged that the summons in these proceedings were served upon the 2nd defendant personally and the summons directed to be served on the 1st defendant was also served upon the 2nd defendant. One issue in question was whether the service of summons upon the 2nd defendant which were directed at the 1st

defendant was a proper service. There was no service of summons upon any member of the 1st defendant Company other than upon its Managing Director. **The issue therefore on this point resolves to a single question, namely whether summons could be served upon a company duly incorporated, by serving it upon its Managing Director.**

It is clear in Company Law that the Secretary of the company is the rightful person as the chief administrative officer to receive summons. In *Panorama Development (Guildford) Ltd.* v *Fidelis Furnishing Fabrics Ltd.*(2), Denning M.R. and Salmon L.J. at 716 and 717 it is stated:

"That a Company Secretary is a much more important person now than he was in 1887. He is the chief administrative officer of the company with extensive duties and responsibilities. This appears not only on the modern Companies Act but in the role which he plays in the day to day business of the company. He is no longer a mere clerk. He regularly makes representations on behalf of the company and enters in to contracts on it's behalf which come within the day to day running of its business. So much so that he may be regarded as having authority to do such things on behalf of the company. He is certainly entitled sign contracts connected with the administrative side of the company's affairs, such as employing staff and ordering cars. All such matters come within the ostensible or apparent authority of a Company's Secretary". (quoted from Charlesworth and Morse Company Law – Geoffrey Morse 14th ed. 427).

It is now alleged that the 2nd defendant while being the Managing Director of the 1st defendant company was served with the summons. If such were the truth of the matter of service of summons two questions immediately arise. First, whether summons were actually served. Second, if they were served, then were they served and received by the 2nd defendant as the Secretary of the 1st defendant company. This indeed is a question of fact. If the first question posed here is one that this Court were to answer in the negative then the answer to the first question will not arise.

The evidence of the Fiscal claiming that the summons were in fact served and accepted by the 2nd defendant/appellant stand in

contrast to the 2nd defendant's assertion that the summons were never delivered to him. The 2nd defendant/appellant named Gunaratnam Ravinranath Pathmarajah, the Managing Director gave evidence on oath. Wijamuni Sirisena Silva also gave evidence on oath and marked the fiscal report as R1. The evidence of both these witnesses were not contradicted on any material point. It is now necessary for this court to determine this issue on a balance of probability based on the well known *Carr-Briant Rule.*(3) Applying that rule one must now look at the facts as to whether there are reasons to shift this balance in favour of one party – the Fiscal or other. The learned district judge in the judgment states that the appellants have not given a satisfactory reason as to their inability to be present in court on 7.9.1990. This conclusion cannot be accepted as correct when the appellant in unequivocal terms have stated in the evidence, the affidavits and the written submissions that they did not receive summons. And furthermore to ascertain the genuineness of this application the court should have determined as to a probable reason to stay away from court. On the other hand the 2nd defendant had every reason to appear and defend the alleged claim. The 2nd defendant/appellant was not only the Managing Director of the 1st defendant company, but also the guarantor of the loan (Documents A and B) received by the said company on which he is being now sued. Additionally in the document marked "B" the 2nd defendant/appellant had surrendered his privileges as a surety laying him exposed to be sued at anytime before the debtor is sued. This places a considerable responsibility upon him, compelling him to appear and defend the claim. The plaintiff/respondent has countered by submitting to Court that the 2nd defendants' principle aim was to delay the proceedings by his failure to appear in Court. This explanation holds little water, in the sense that the 2nd defendant/appellant's positions in these proceeding were too grave as to warrant his absence from the hearing. By delaying it does not ensure him with a decree in his favour, but only an accumulation of further interest and being liable to pay legal costs as well.

It is only by service of summons on the defendant the Court gets jurisdiction over the defendant. The failure to serve summons

is a failure which goes to the root of the Court to hear and determine the action against the defendant. If a defendant is not served with summons or is otherwise notified of the proceedings against him, the judgment entered against him in those circumstances is a nullity.

"In oder to have validity of a judgment, the court must have jurisdiction of the persons, of the subject matter and of the particular section which it assumes to decide. It cannot let upon persons who are not legally before it, upon one who is not a party to the suit ..... upon a defendant who has never been notified of the proceedings. If the court has no jurisdiction, it is of no consequence that the proceeding had been formally conducted, for they are '*corum non justice*'. A judgment entered by such Court is void and a mere nullity. (Black on Judgments p 261) (S.C.Special LA/90/80 decided on 7the December 1981)[4] This quote aptly explains the consequences of a judgment that had been delivered without the proper parties before it. It is a basic principle of natural justice that all parties are heard. Therefore it is not only the responsibility of the plaintiff but also the Court to be sufficiently satisfied that reasonable methods have been followed to have the defendants noticed of the action before court. This notice may be by personal service, substituted service or by registered post or on behalf of the defendant/appellants. According to the *Carr-Briant Rule* 'when the court has to form an opinion as to the truth of such evidence, any fact which may slightly even tilt to one side be regarded as a fact in favour of such party'. Therefore, applying the *Carr-Briant Rule* upon a balance of probabilities this court finds that there had not been service of summons upon the defendant/ appellants.

This Court vacates the *ex parte* judgment delivered on 24.10.90 and also the judgment delivered on 14.12.95 and permit defendants/appellants to file answer. This case is now remitted to the District Court of Colombo.

The Appeal upheld. No costs.

Appeal allowed.