DE FONSEKA
v.
DHARMAWARDENA

COURT OF APPEAL.
S. N. SILVA, J. (PRESIDENT C/A)
DR. RANARAJA, J.
C.A. APPLICATION NO. 653/93
WITH C.A. (L.A.) APPLICATION NO. 182/93
D.C. COLOMBO 7940/RE
NOVEMBER 23, 1994.

Landlord and tenant – Ejectment – Arrears of rent – Removal of fittings from house – Excepted premises – Ex parte trial – Sections 86(2) and 839 of Civil Procedure Code – Service of summons – Burden of proof.

In an action for rent and ejectment the defendant having failed to appear on summons, *ex-parte* trial was held and decree entered on 18.12.1992. Thereafter the record was lost and *ex parte* evidence was led again and decree entered. When notice of decree was served on defendant, he appeared and pleaded that the summons had not been served on him. At the inquiry, after defendant closed his case, the plaintiff moved to call the fiscal who was not present as he was away on election duty. The application was refused. A date for written submissions was given. On written submissions being filed, a date was fixed for the order of court. On this day the court reconsidered its earlier decision and directed the fiscal to be called.

Held:

(1) The burden was on the defendant to establish that no summons was served on him.

(2) Since it relates to a matter of procedure, there was no error in the judge reconsidering the matter and permitting the fiscal to be called as a witness.

(3) The absence of the fiscal at the inquiry was not due to any default or negligence on the part of the plaintiff, but because of circumstances beyond the control of the plaintiff.

(4) An inquiry on an application to set aside an *ex parte* decree is not regulated by any specific provision of 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 for the ends of justice.

Cases referred to:

1. *Sangarapillai & Brothers v. Kathiravelu* Sriskantha's Law Reports Vol. II p. 99. 106.

APPLICATION for revision of the order of the District Court of Colombo.

S. Mahenthiran for petitioner.

J. W. Subasinghe P.C. with *K. S. Thillakeratne* for the respondent.

Cur adv. vult.

December 16, 1994.

S. N. SILVA, P/CA

The Defendant-Petitioner has filed this application to set aside the order dated 13-8-1993 made in the above case. By that order, learned Additional District Judge reversed a previous order dated 18.6.1993 and permitted the Plaintiff-Respondent to call the Fiscal to give evidence at the inquiry into the application of the Defendant to set aside the *ex parte* decree entered in the case.

The facts are briefly as follows:

The Plaintiff-Respondent (who is residing abroad) filed the above action through his Attorney (being her father) for the ejectment of the Defendant from the house bearing No. 2A, 33rd Lane, off Bagatalle Road, Colombo 3. The action was filed on the basis that the Rent Act No. 7 of 1972 does not apply since the house was constructed after 01.01.1980. The Defendant had rented the house for a period of one

year from 01.02.1990 at a rental of Rs. 20.000/- per month. Thereafter the period of tenancy was extended upto 31.12.1991. It is alleged in the plaint that the Defendant did not pay rent from August 1991 and that he removed the Air-conditioner and other fittings in the house, valued at Rs. 100,000/-. That, there is a criminal case pending against the Defendant in respect of this matter. This action is for ejectment, and recovery of damages amounting to Rs. 480,000/- and continuing damages at Rs. 40,000/- per month. Upon the action being filed summons was issued on the Defendant for 16.12.1992. According to the report of the Fiscal summons was served on 19.11.1992. There was default of appearance by the Defendant on 16.2.1992 and an ex parte trial was held on 18-12-1992. Decree was entered against the Defendant on that day. Shortly thereafter, the original record was lost in the District Court. Thereafter *ex parte* evidence was taken once again, on 22.01.1993 and decree entered. According to the report of the Fiscal, decree was served on 08.02.1993. The Defendant thereupon made an application to purge default and to vacate the *ex parte* decree, in terms of section 86(2) of the Civil Procedure code.

The inquiry into the application of the Defendant commenced on 19.5.1993. The Defendant gave evidence first and stated *inter alia* that no summons was served on him. He was cross examined and the evidence of the Defendant at the inquiry was closed. Therafter, the Plaintiff made an application for a postponement on the ground that the Fiscal Officer who was to give evidence had not come to Court since he had to report for election duty. Learned Judge refused this application on the basis that at the commencement of the inquiry counsel for the Plaintiff marked the case ready and that he should have checked on the presence of the officer, at the stage. It appears that the Defendant had made a complaint earlier that day, that the father of the Plaintiff had pointed out the Defendant to a person wearing trousers. Suggestion seems to have been that the Defendant was shown to the Fiscal Officer. Learned Judge has observed that even at that stage counsel should have checked whether the Fiscal Officer was present to give evidence at the inquiry. Having made the order refusing the application of the Plaintiff for an adjournment, learned Judge fixed the matter for written submissions for 18.6.1993 and for order on 13.8.1993. On that day learned Judge reconsidered

his previous order refusing the application of the Plaintiff for a postponement to lead the evidence of the Fiscal Officer and specifically observed that the Fiscal officer is a necessary witness to ascertain the truth of the allegation of non-service of summons and to give a correct decision upon the application of the Defendant. Thereupon he refixed the matter for further inquiry on 3.9.1993. This inquiry has been stayed by the interim order made by this Court after hearing parties.

Learned President's Counsel for the plaintiff-petitioner submitted that the order of 19.5.1993 made by the learned Addl. District Judge refusing the application for a postponement to call the Fiscal officer as a witness is clearly unsupportable. That, the Fiscal Officer was absent from Court not due to any default or negligence on the part of the Plaintiff but because of circumstances beyond the control of the Plaintiff. In that, the particular officer was engaged in election duty. It was submitted that in those circumstances learned judge had the power to act in the interests of justice and to reverse the order by permitting the Plaintiff to call the Fiscal Officer as a witness. Counsel for the Defendant submitted that the absence of the Fiscal officer, should have been brought to the notice of Court by counsel prior to the commencement of the inquiry and that in any event the learned Judge had no jurisdiction to reverse his previous order and to permit further time to the Plaintiff to call the Fiscal Officer.

I have carefully considered the submissions of learned counsel. It has to be borne in mind that the two orders referred to above do not relate to proceedings at the trial proper and that they related to proceedings made at an incidental inquiry. An inquiry that is held upon an application made by a defendant to set aside an *ex parte* decree, in terms of section 86 (2), is not regulated by any specific provision of the Civil Procedure Code. Therefore, the inquiry should be conducted by the Judge in a manner that is consistent with the principles of natural justice and fairness. In the case of *Sangarapillai & Brothers v. Kathiravelu* [1] Siva Selliah, J made the following observation regarding the onus of proof in an inquiry of this nature. He stated :

"Further the District Judge has misdirected himself on the onus of proof – for the burden squarely lay on the defendant who asserted that no summons was served on him to establish that fact and it was wrong for the District Judge to require from the plaintiff proof beyond reasonable doubt of the service of summons on the defendant."

This observation is consistent with the Law of Evidence which would be applicable at an inquiry of this nature. Summons is served by the Fiscal as an officer of Court and the discharge of his duty is evidenced 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 was no service, because his application to set aside the decree, will fail, if no evidence is adduced by either party.

In the face of the evidence of the Defendant that summons was not served on him personally, the report and the affidavit of the Fiscal is challenged. Therefore, the report and affidavit of the Fiscal should be tested in evidence. This evidence is an essential component of an inquiry into an application of a defendant to set aside an *ex parte* decree on the basis of non-service of summons. In this case the Fiscal Officer who was scheduled to give evidence was absent not due to any default or negligence of the Plaintiff. It is not contested, that his absence was occasioned by causes beyond the control of the Plaintiff. In the circumstances learned Judge was clearly in error in refusing the application of the Plaintiff for a postponement to call the Fiscal Officer as a witness. The refusal denies to the Plaintiff a fair hearing at the inquiry. Since that relates to a matter of procedure, there appears to be no error in the learned Judge reconsidering the matter and permiting the Fiscal Officer to be called as a witness. It has to be borne in mind that an inquiry of this nature would be undeniably incomplete without the evidence of the Fiscal Officer who has reported due service of summons on the defendant in default. Since the order relates to a matter of procedure and does not affect the substantive rights of the parties we are of the view that there is no

error in the subsequent order of the learned Judge which is consistent with the principles of natural justice and the requirement of fairness in the conduct of proceedings at the inquiry. Section 839 of the Civil Procedure Code recognises the inherent power of the Court to make an order as may be necessary for the ends of justice. There is no error or illegality that has caused any prejudice to the substantive rights of the parties. In the circumstances we see no basis to exercise appellate or revisionary jurisdiction. The application is accordingly dismissed. We make no order for costs.

DR. RANARAJA, J. – I agree.

Application dismissed.