ITTEPANA

v.

HEMAWATHIE

SUPREME COURT
ISMAIL J., WEERARATNE, J., AND SHARVANANDA, J.
S.C. APPEAL NO. 74/80
S.C. SPECIAL L.A. 90/80
C.A. Application No. 1791/79
D.C. Gampaha No. 19464/D
October 8 and 23, 1981

Matrimonial action — Divorce - Failure to serve summons - Vacating of decree nisi and decree absolute — jurisdiction - Inherent powers ex debito justitiae — S. 839 C.P.C.

The plaintiff sued his wife for a divorce on the ground of malicious desertion. Summons was reported served on the defendant and a proxy was filed on her behalf. At the trial the defendant was represented by her lawyer but she was absent. Decree *nisi* was entered and later decree absolute. Later when the defendant wife appeared in Court in connection with her maintenance case the plaintiff produced the decree absolute of divorce. The defendant wife claimed she had not been served with summons and denied having filed proxy and filed papers in the District Court to have the divorce decree annulled on the ground of non-service of summons. The District Judge inquired into this and held with the defendant wife and vacated the decree. The only defence put up by the plaintiff was that the District Judge had no jurisdiction to vacate the decree entered by him.

Held :
The principles of natural justice are the basis of our laws 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.

'Jurisdiction' may be defined to be the power of a court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it. When the jurisdiction of a Court is challenged the Court is competent to determine the question of jurisdiction. An inquiry whether the Court has jurisdiction in a particular case is not an exercise of jurisdiction over the case itself. It is really an investigation as to whether the conditions of cognizance are satisfied. Therefore, a Court is always clothed with jurisdiction to see whether it has jurisdiction to try the cause submitted to it.

Failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant. It is only by service of summons on the defendant that the Court gets jurisdiction over the defendant. If a defendant is not served with summons or otherwise notified of the proceedings against him, the judgment entered against him in those circumstances is a nullity. The proceedings being void, the person affected by them can apply to have them set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court which is saved by S. 839 of the Civil Procedure Code. Hence the District Judge acted within his jurisdiction In inquiring into the question of non-service of summons.

Cases referred to:

(1) *Ramasamy Pulle v. De Silva (1909) 12 NLR 298*
(2) *Silva v. Silva (1910) 13 NLR 87*
(3) *Van Twest v. Gunewardene (1930) 34 NLR 220*
(4) *Paulusz v. Perera (1933) 34 NLR 438*
(5) *Craig v. Kanssen (1943) 1 A11 ER 108, 113*
(6) *Kofi Forie v. Seifah (1958) AC 59*
(7) *Macfoy v. United Africa Co. Ltd. (1961) 3 All ER 1169*
(8) *Sirinivasa Thero v. Sudassi Thero (1960) 63 NLR 31, 33*
(9) *Hewage v. Bandaranayake (1967) 70 NLR 119*
(10) *Perera v. Commissioner of National Housing (1974) 77 NLR 361*
(11) *Albert v. Veeriahpillai S.C. App. 73/80 - S.C. Minutes of 23.9.81*
(12) *Thambirajah v. Sinnamma (1935) 36 NLR 442*
(13) *James v. Dochinona (1942) 43 NLR 527*
(14) *Marjan v. Burah (1948) 51 NLR 34, 41*
(15) *Anisminic v. Foreign Compensation Commission (1969) 1 All ER 208*
(16) *Rodger v. Comptoir D' Excompte de Paris (1871) 3 PC 465*
(17) *Mcpherson v. Mcpherson (1936) AC 177*

Appeal from judgment of the Court of Appeal

Walter Jayawardene Q.C. with C. Ganesh and Miss K. Chelliah for the plaintiff-petitioner-appellant.

D. R. P. Gunatilleke with K. S. Tilakaratne for the defendant-respondent-respondent.

Cur. adv. vult.

December 7,1981

SHARVANANDA, J.

The plaintiff-appellant instituted on 7.10.77 this action for divorce a *vinculo matrimonii* against the defendant-respondent on the ground of malicious desertion and for the custody of the only child Indranie. In accordance with the provisions of the Administration of Justice (Amendment) Law, No. 25 of 1975, which was in operation at that time, summons was issued on 11.10.77. The record contains the following journal entries.

"(1) **21.10.77**
Return to service of summons received.

(2) **15.11.77**
Memorandum of appearance for defence tendered.

(3) **20.12.77**
Mr. W. E. C. Perera, Attorney-at-Law, files his appointment and also answer of the Defendant.

(4) **10.10.78**
Attorney-at-Law for Defendant moves for trial as answer has already been filed.
Call case on 20.01.78 to fix date of trial.

(5) **24.01.78**
Case not called on 20.01.78.
Called today to fix date of trial
Mr. K.S. Subasinghe, A/L for Plaintiff.
Mr. W.E.C. Perera, A/L for Defendant.
Trial 28.02.78."

The case was taken up for trial on 28.2.78. According to the record, Mr. Dharmawardena, Attorney-at-Law, instructed by Mr. K. S. Subasinghe, Attorney-at Law, appeared for the Plaintiff, and Mr. Karunaratne, Attorney-at-Law, instructed by Mr. Perera, Attorney-at-Law, appeared for the defendant. The Plaintiff was present, but the defendant was absent. It is recorded that "the Plaintiff as well as the Defendant in this case are seeking a divorce. There is no contest in this case". The plaintiff gave evidence and stated that the defendant deserted him on 10th February 1964 and thereafter had not come back in spite of his attempts to bring her back and that she was guilty of malicious desertion. There was no cross-examination of the plaintiff. Mr. Karunaratne, Attorney-at-Law who appeared for the defendant, then stated that the defence was not calling any evidence. At the conclusion of the trial, the District Judge granted the prayer of the plaintiff and ordered decree *nisi* to be entered annulling the marriage. On 16th June 1978, decree absolute was entered. In October 1978, the plaintiff contracted a second marriage and a child was born to him by that marriage in July 1979.

On 9th April 1979, the defendant filed petition and affidavit stating that no summons was served on her, that she did not file the proxy or memorandum of appearance alleged to have been given by her to Mr. W. E. C. Perera and that she had given no instructions to him to file answer or to appear for her. She prayed that all proceedings be set aside and that the decree *nisi* and decree absolute be vacated and that she be allowed to defend the action.

The matter was taken up for inquiry on 9th April 1979. The defendant stated that she had not received summons in that case and became aware of this action only when she appeared in the Magistrate's Court on 9th March 1979 in her maintenance case. As Mr. W. E. C. Perera was not an Attorney-at-Law practising in the District Court of Gampaha and who had given his registered ad-

dress as "No. 247, Hultsdorf Street, Colombo 12", the District Judge, having ascertained that Mr. Karunaratne, Attorney-at-Law, who normally practised in that Court had not appeared in that case, issued notice on Mr. W. E. C. Perera and the plaintiff to appear in Court on 2.5.79. The notice sent by Court to Mr. Perera was returned udelivered with the endorsement that "there was no such person at the address given", but the notice was served on the plaintiff to appear in Court on 2nd May 1979. The plaintiff appeared in Court on that date and was represented by Mr. M. A. Dharmawardena, and the defendant was represented by Mr. R. M. P. Dharmawardena. The defendant testified that she had filed an action for maintenance against the plaintiff. As he had defaulted for eight months in the payment of maintenance, she had appeared in Court on 9.3.79 to claim the arrears. On that date, the plaintiff had appeared in Court and stated that he had obtained a divorce and produced the decree absolute. She re-affirmed that she hadn't received any summons. She denied having signed any proxy or other documents or that she gave any instructions to any Attorney-at-Law to file answer. Counsel who appeared for the plaintiff said that he was neither cross-examining nor calling any evidence as it was his position that the Court had no jurisdiction to vacate the judgment entered by it on 28.2.78.

The District Judge delivered his order on 8.5.79 accepting the unchallenged evidence of the defendant that no summons had been served on her. He declared void and of no effect all steps taken against the defendant. He set aside the decree *nisi* and decree absolute and granted the defendant an opportunity to file answer.

The plaintiff thereafter by his revision application dated 25th September 1979 moved the Court of Appeal to have the order of the District Judge set aside on the ground that the District Judge had no jurisdiction to vacate his own order even if it was established that summons had not been served on the defendant-respondent. By its order dated 28.7.80, the Court of Appeal dismissed the application with costs. The plaintiff has preferred this appeal from that order.

Principles of natural justice are the basis of our laws 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.

At the hearing before us, Counsel for plaintiff-appellant accepted that a decree entered against a defendant who has had no

notice of the action because of non-service of summons on him is a nullity. But he argued that the District Court which entered the decree had no jurisdiction to vacate its own order or judgment. He submitted that in that event relief should be sought from the Court of Appeal by way of revision or restitution integrum. He urged that it is competent only for the superior Court to vacate such judgment and decree of the District Court, even though it is, in law, a nullity. He contended that on entering a decree, the District Judge becomes functus and had no further jurisdiction to go into the question whether summons had been served or not. He, however, qualified his proposition by the concession that though the Judge cannot enter into a judicial inquiry to determine whether summons was served or not, he could, without taking any independent evidence, peruse the record to check whether summons had been served or not, and if the record disclosed that there had been no service of summons, he could declare the decree a nullity. His submission was that the jurisdiction of the District Court was confined to ascertainment of a fact that did not involve a finding by judicial inquiry in a contentious matter. He said that if there was a contentious matter between the parties, such as whether summons had been served or not and the court is called upon to address its judicial mind to that question, the Court cannot embark on a judicial inquiry but is bound by the decree already entered. In support of his submission, he relied on the case of *Ramasamy Pulle v. de Silva* [1]; *Silva v. Silva*[2]; *Van Twest v. Gunewardene*[3] *and Paulusz v. Perera* [4]. He wound up by saying that once an order or decree is entered, the Court becomes functus officio and cannot set aside or alter the order or decree except in the limited circumstances specified in section 189 of the Civil Procedure Code. The rationale of his contention was that the District Court had no inherent power to set aside a judgment which it had delivered without jurisdiction. He was referred to the following observation of Lord Green M. R. in *Craig v. Kanssen* [5].

> "Those cases appear to me to establish that a person who is affected by an order, if it can properly be described as a nullity, is entitled *ex debito justitiae* to have it set aside. As far as procedure is concerned, it seems to me that the Court in its inherent jurisdiction can set aside its own order and it is not necessary to appeal from it."

which has been approved by the Privy Council.— *vide Kofi Forfie v. Seifah*[6] *Macfoy v. United Africa Co. Ltd.* [7]. His reply was that this observation is correct as far as English law is concerned, but does not represent the legal position in Sri Lanka. According

to him, the inherent powers of our original Courts are deficient to grant relief in such an instance. It is to be noted that this salutary principle enunciated by Lord Greene has often been invoked and acted upon by our Courts. – *vide Sirinivasa Thero v. Sudassi Thero* [8]; *Hewage v. Bandaranayake* [9]; *Perera v. Commissioner of National Housing* [10]; *Albert v. Veeriahpillai* [11]

In *Ramasamy Pulle v. de Silva* [1], no question of nullity was involved. The Court had made order annulling adjudication under section 140 of the Insolvency Ordinance after only one meeting of creditors, whereas there should have been two meetings before such an order was made. When the District Court became aware of this irregularity, it set aside its earlier order. On appeal, the Supreme Court held that the District Court had, in the circumstances, no jurisdiction to set aside or review its earlier order which had been made irregularly in the exercise of its jurisdiction.

In *Silva v. Silva* [2], on a dispute between the appellant and the respondent as to who was entitled to 1/16th share of the land sought to be partitioned, the District Judge held that the appellant was entitled to that share. Preliminary decree for partition was drawn up in accordance with the judgment. There was no appeal against the decree. Subsequently, another District Judge made order amending the preliminary decree by taking away the 1/16th share from the appellant and adding it to the respondent's share. The Supreme Court held that the District Judge had no power to modify or amend the preliminary decree even if he was of the opinion that the former decision was mistaken in fact or law. Here again there was no question of the original preliminary decree being a nullity, in the sense that the District Court had no jurisdiction to enter the decree.

In *Van Twest v. Gunewardene* [3] judgment was entered of consent in pursuance of the warrant of attorney to confess judgment. Later it was contended that the decree was wrongly entered as the warrant of attorney was bad. It was held that the District Court had no jurisdiction to set aside its own decree. Here again there was no question of the consent order being a nullity. Summons had been duly served upon the Proctor as provided in the warrant of attorney and the Proctor had wrongly consented to judgment.

In *Paulusz v. Perera* [4], the District Judge had dismissed the partition action on the grounds: (a) that the deeds produced before him were copies and not the originals, and (b) that some of the documents that had been tendered in evidence had not been filed. After the order of dismissal had been made, it was brought to the notice of the Court that the documents had been tendered

to the clerk in charge of the record who had omitted to send them with the record. After a consideration of the documents, the District Judge was of the opinion that he would not have made the earlier order if the documents had been before him; he set aside his earlier order dismissing the partition action and entered decree on the basis of those documents. The Supreme Court held that the District Judge had, in the circumstances, no jurisdiction to vacate his own decree, and that having dismissed the partition action, could not subsequently set aside his own order. Here again, there was no question of absence of jurisdiction to make the original order in question. It was a case of the District Judge improperly dismissing the plaintiff's action. The Supreme Court alone was entitled to vacate such order in the exercise of its appellate or revisionary jurisdiction.

In contradistinction to the above cases, the case of *Thambirajah v. Sinnamma*(12) brings out the distinction. In this case, after final partition decree had been entered, the 1st defendant applied to have the decree set aside on the ground that she had not been served with summons. The lower Court held that it had no jurisdiction to set aside the interlocutory and the final decrees entered in the case. On appeal, Maartensz J. following "the trend of authority" held 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. He sent the case back to the Commissioner of Requests to determine whether the 1st defendant had been served with summons and to vacate the interlocutory and final decrees if he found that summons had not been served on the 1st defendant.

In the case of *James v. Dochinona*(13) an *ex-parte* judgment had been entered against the defendant in the Court of Requests. Three days after judgment being so entered, the defendant moved the Court to have the judgment vacated on the ground that he was not served with summons. The Supreme Court held that the Court had acted without jurisdiction in entering judgment against the defendant when he had not been served with summons. The judgment of the Supreme Court proceeded on the basis that the Court of Requests had jurisdiction to inquire into the question whether summons had been served or not, and that if it came to a finding that there was no service, it had the power to vacate the earlier *ex-parte* judgment.

In *Perera v. Commissioner of National Housing* (10) an *ex-parte* judgment for ejectment of the defendant had been entered against the defendant in the Court of Requests and the defendant

was summarily ejected under writ of possession issued by the Court. The defendant thereafter filed petition and affidavit and moved that the judgment and decree entered *ex-parte* against her be vacated as there was no service of summons on her. After inquiry, the Commissioner of Requests found the Fiscal's officer who gave evidence to be unworthy of credit and held that no summons had been served nor any substituted service effected on the defendant; he made order vacating the default judgment. However, the Commissioner made no consequential order to see that the defendant was restored to possession of the premises. It was held by the Supreme Court that "the inherent powers of the Court are wide enough to have enabled the Court to order the plaintiff to vacate the premises and restore possession to the defendant". In the course of his judgment, Tennekoon C. J. stated that "where there was neither personal service nor substituted service of summons on the defendant ....., the Court was without competence to proceed with the action. A judgment entered under such circumstances is void and can be challenged both in the very Court and in the proceedings in which it was had and also collaterally and it also follows that where such attack is made on a judgment, if the lack of jurisdiction or competence of the Court is not apparent in the record, extrinsic evidence would be admissible to show that, in fact, the Court did not, at the time it gave judgment, have jurisdiction to do so — even to the extent of contradicting the record."

'Jurisdiction' may be defined to the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it. When the jurisdiction of a Court is challenged, the Court is competent to determine the question of jurisdiction. An inquiry whether the Court has jurisdiction in a particular case is not an exercise of jurisdiction over the case itself. It is really an investigation as to whether the conditions of cognizance are satisfied. Therefore, a Court is always clothed with jurisdiction to see whether it has jurisdiction to try the cause submitted to it.

> "Jurisdiction naturally divides itself into three heads. In order to the validity of a judgment, the Court must have jurisdiction of the persons, of the subject matter and of the particular question which it assumes to decide. It cannot act upon persons who are not legally before it, upon one who is not a party to the suit ...., upon a defendant who has nerver been notified of the proceedings. If the Court has no jurisdiction, it is of no consequence that the proceedings had been formally conducted, for they are *coram non judice.* A judgment entered by such Court is void and a mere nullity." (Black on Judgments - P.261)

Failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant. It is only by service of summons on the defendant that the Court gets jurisdiction over the defendant. If a defendant is not served with summons or is otherwise notified of the proceedings against him, judgment entered against him in those circumstances is a nullity. And when the Court is made aware of this defect in its jurisdiction, the question of rescinding or otherwise altering the judgment by the Court does not arise since the judgment concerned is a nullity. Where there is no act, there can be no question of the power to revoke or rescind. One cannot alter that which does not exist. The exercise of power to declare such proceedings or judgment a nullity is in fact an original exercise of the power of the Court and not an exercise of the power of revocation or alteration. The proceedings being void, the person affected by them can apply to have them set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the Court. Nagalingam J. in *Marjan v. Burah* (14) stated the legal position thus:

> "It was however urged that the District Court had no inherent power to vacate its own decree or order in the same proceedings and that the only jurisdiction it possesses in regard to such matters is what is conferred upon it by the Civil Procedure Code and no other. But this is a principle that is applicable only where the Court is called upon to set aside its decree. It does not extend to cases where it is sought to prove that the decree was obtained by fraud, collusion and therefore a nullity — a right expressly granted by section 44 of the Evidence Ordinance." (Section 44 adds 'incompetency of Court' as another ground rendering the decree a nullity)

In *Anisminic v. Foreigh Compensation Commission* (15), the House of Lords held that an ouster clause did not operate on decisions outside the permitted jurisdiction because they are a nullity, and that the Courts, when they decree that a decision is nullity, are not disregarding the preclusive clause. The principle of the decision is that the ouster clause would not prevent a determination of the tribunal being set aside by Court if it was outside the tribunal's jurisdiction. Nullity is the consequence of all kinds of jurisdictional errors, e.g. breach of natural justice. As Lord Reid observed at p. 213:

> "There are many cases where although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature

that its decision is a nullity. It may have given its decision in bad faith; it may have made a decision which it had no power to make; it would have failed in the course of the inquiry to comply with the requirements of natural justice."

Every Court, in the absence of express provision in the Civil Procedure Code for that purpose, possesses, as inherent in its very constitution, all such powers as are necessary to undo a wrong in the course of the administration of justice.

Section 839 of the Code preserves the inherent power of the Court "to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court". This section embodies a legislative recognition of the inherent power of the Court to make such orders as may be necessary for the ends of justice. The inherent power is exercised *ex debito justitiae* to do that real and substantial justice for the administration of which alone Courts exist.

A grave injustice would be caused to the defendant-respondent if she has been divorced without any knowledge of the proceedings against her. Her status and right of maintenance have been affected. The Court possesses inherent power to rectify such injustice on the principle *actus neminem gravabit* (an act of the Court shall prejudice no person). This principle has been stated by Lord Cairns in *Rodge v. Comptoir D'Escompte de Paris* (16) to be:

"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, and when the expression 'the act of the Court' is used, it does not mean merely the act of the primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is a duty of the aggregate of those tribunals, if I may use the expression to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."

Thus, when a complaint is made to Court that injustice has been caused by the default of the Court in not serving summons, it is the duty of the Court to institute a judicial inquiry into the complaint and ascertain whether summons had been served or not, even going outside the record and admitting extrinsic evidence, and if it finds that summons had not been served, it should declare its ex-parte order null and void and vacate it. The contention of

Counsel for the appellant fetters or impedes the Court from performing this paramount duty.

Counsel for the plaintiff-appellant referred us to *Mcpherson v. Mcpherson*[17] where the fact of re-marriage was treated as a decisive factor against *ex parte* proceedings being set aside. The facts in that case were. the wife had due notice but made no answer and a decree *nisi* was pronounced, which was later made absolute. some time after the period of appeal had expired, the husband re-married, the wife then commenced an action against her former husband to set aside the decrees on the ground that he had committed perjury, she later alleged that the trial of the divorce action was a nullity, not being a trial in open Court. It was with the latter point only that the Privy Council was concerned. The Privy Council held that the decrees were voidable, but not void. Apart from the alleged exclusion of the public, the proceedings were regular, and the wife, if so minded, could have filed answer and contested the petition. Where there was a defect in procedure which had not caused a failure of natural justice, the resulting order is only voidable. The Court held on the facts of that case. that "the order absolute cannot be touched after the time for appeal therefrom has passed and a new status has been acquired, or, as in this case, after the respondent having re-married is entitled to the protection afforded by section 57 of the Matrimonial Causes Act, 1857. It follows in Their Lordships' judgment that the appeal fails. the order absolute, although originally voidable, having become unassailable by the time the appellant's claim was made". It was too late, and by herself re-marrying, the wife had adopted the decree. If a party waives or acquiesces in the irregularity, he cannot afterwards complain of it. In my view, the same conclusion would not have been reached by the Judicial Committee if the facts had been that the proceedings had never been brought to the notice of the wife, as in the case we are considering.

It is to be noted that it was never the position of the plaintiff that even though the defendant had not been served with summons, she had become otherwise aware of the proceedings against her and had acquiesced in or waived the irregularity or failure, in which event there would not have been any failure of natural justice.

Mr. Jayawardene addresses us also on the facts and stated that the Court below has not paid sufficient consideration to the statutory presumption created by section 404 of the Administration of Justice (Amendment) Law, No. 25 of 1975.

Section 400(1) of that Law provides that "summons shall ordinarily be served by registered post" and section 404 provides that "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, shall be sufficient evidence of the service of 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".

The copy of the summons alleged to have been served on the defendant gives the address as "575/12, Baseline Road, Colombo". The advice of delivery exhibits a signature "W. Hemawathie", alleged to be the signature of the addressee. The defendant Hemawathie has stated on oath that she did not receive the summons. She was not cross-examined on her denial and no effort has been made to prove that the signature appearing on the advice of delivery is that of the defendant, and no evidence has been led to show that the address referred to in the aforesaid copy of the summons was the correct address of the defendant at the time. The advice of delivery further does not carry the name of the road nor the number of the premises. In the circumstances, the presumption under section 404 cannot be drawn. In any event, the defendant by her sworn testimony has deposed that she had not been served with summons. She has not been contradicted.

For the reasons stated above, the appeal fails and is dismissed with costs.

Ismail, J. I agree.
Weeraratne, J. I agree.

Appeal dismissed.