CHANDRASENA

vs

MALKANTHI

COURT OF APPEAL.

SOMAWANSA, J. (P/CA).

WIMALACHANDRA, J.

CA 1300/2004 (REV).

DC MT. LAVINIA 2711/D.

AUGUST 1, 2005.

Civil Procedure Code, sections 59(1), 60(1), 61 and 839 — Summons to be issued by registered post — Is it mandatory ? – Summons served through fiscal — Non appearance — Ex-parte *— Purpose of issuing summons ?-Affidavit of fiscal — Is it sufficient evidence of service of summons ? – Prima facie evidence of the fact that summons was served ?*

The plaintiff respondent petitioner instituted action against the defendant petitioner respondent and, summons being served by the fiscal the respondent failed to appear and, trial was taken *ex-parte*. Subsequently the *decree nisi* was made absolute. The defendant respondent filed papers under section 839 alleging that neither the summons nor the decree was served on her, and sought to set aside all proceedings. The District Judge allowed the application. The plaintiff petitioner moved in Revision. The defendent respondent contended that Court-had not-complied with the mandatory provisions of S 59(1).

HELD:

Per Somawansa, J. (P/CA) :

"Service of summons through the fiscal personally is certainly the better mode of service whereby the Court could be satisfied that summons/decree is served on the defendant".

(1) The affidavit of the fiscal could establish this fact and the court could then safely act on this evidence on an affidavit.

(2) The affidavit tendered by the fiscal in proof of service would bring in the provisions contained in section 61 for it is provided that an affidavit of such service shall be sufficient evidence of service of summons, and of the date of such service and shall be admissible in evidence and the statement contained therein shall be deemed to be correct unless and until the contrary is proved.

Held further :

(3) It is incumbent on the respondent to lead evidence in order to controvert and contradict the affidavit, the affidavit is *prima facie* evidence of the fact that summons was duly served.

(4) The respondent had waived her right to place evidence to disprove the prima facie evidence of the fiscal's affidavit.

(5) As there was no material placed before the District Judge to establish that summons/decree was not served on the respondent, the District Judge could not have allowed the application of the defendant-respondent-respondent.

"The order shocks the Conscience of Court"

APPLICATION in revision from an order of the District Court of Mt. Lavinia.

Cases referred to :

1. *Babun Nona* vs. *Ariyasena* — 58 L 575
2. *Wimalawathie and Others* vs. *Thotamuna and Others* 1998 3 Sri LR 1

Resmi Wimalaratne with *Sarath Weerakone* for plaintiff — respondent - petitioner.
Asoka Serasinghe for defendant–petitioner-respondent.

Cur.adv.vult.

November 03, 2005.

ANDREW SOMAWANSA, J. (P/CA)

This is an application in revision to revise and set aside the order of the learned District Judge of Mt. Lavinia dated 19.04.2004 and all consequential orders thereto and for a direction to the learned District Judge to hold a proper inquiry with regard to the application made by the defendant-petitioner-respondent and make an order thereon and to restore the plaintiff-petitioner to the status prior to the said order.

When the matter was taken up for hearing both parties agreed to tender written submissions and accordingly both parties have tendered their written submissions.

Before I consider the submission made by parties it would be interesting to consider the sequence of events that took place in the original Court. The plaintiff-respondent-petitioner (hereinafter referred to as the petitioner) instituted the instant action against the defendant-petitioner-respondent (hereinafter referred to as the respondent) and summons being served by the Fiscal the respondent failed to appear in Court and the trial was taken up *ex-parte* and the decree *nisi* was also served on the respondent by the Fiscal. As the respondent did not take any step to purge the default the decree *nisi* was made absolute.

The respondent filed papers in the District Court alleging that neither the summons nor the decree nisi was served on her at any time and moved Court in terms of section 839 of the Civil Procedure Code to exercise its inherent powers and to set aside all proceedings had. Both parties having agreed, tendered written submissions at the inquiry and the learned District Judge by her order dated 19.04.2004 allowed the application of the respondent. I am at a loss as to how the learned District Judge arrived at this finding without any evidence placed before her and in view of the affidavit filed of record affirmed by the Fiscal establishing that both summons and the *ex-parte* decree was served on the respondent.

It is the contention of counsel for the petitioner that compliance with the provisions contained in section 59(1) is mandatory and that in the instant action summons have been issued through the Fiscal. However he submits that before summons could be issued through the Fiscal it is imperative that in terms of section 60(1) summons should be served in compliance with section 59(1) by registered post.

Section 59(1) of the Civil Procedure Code reads as follows :

"59(1) Summons shall ordinarily be served by registered post"

In the case of *Babun Nona* vs. *Ariyasena*[1] it was held :
"The provisions of section 59 of the Civil Procedure Code regarding service of summons on a defendant are imperative and can be satisfied only if the summons is delivered or tendered to the defendant personally."

In this respect it is also useful to consider the provisions contained in Section 60(1) and Section 61 of the Civil Procedure Code which reads as follows :

"60(1) the court shall, where it is reported that summons could not be effected by registered post or where the summons having been served and the defendant fails to appear, direct that such summons be served personally

on the defendant by delivering or tendering to him the said summons through the Fiscal or the Grama Niladhari within whose division the defendant resides or in any case where the plaintiff is a lending institution within the meaning the Debt Recovery (Special Provisions) Act No. 2 of 1990, through the Fiscal or other officer authorized by court, accompanied by a precept in form No. 17 of the First Schedule. In the case of a corporation summons may be served personally by delivering or tendering it to the secretary or like officer or a director or the person in-charge of the principal place of business of such corporation".

"61. "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, and where the summons is served in any other manner, an affidavit of such service shall be sufficient evidence of the service of the 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".

In the instant application objection is taken by the respondent that the Court has not complied with the mandatory provisions of section 59(1) by issuing summons by registered post. In this regard one should not forget the fact that the main or only purpose of issuing summons to be served on the defendant is to inform the defendant or make the defendant aware that an action has been instituted against the defendant and if the defendant so desires to appear and defend the action instituted against him. My considered view is that what was intended by the legislature in service of summons was to make aware or give notice of the action instituted against the defendant which is the essence of issuing summons either by registered post, through the Fiscal or the Grama Niladari or even the Police.

It appears that it is to this end that the provisions in section 60(1) of the Civil Procedure Code has been brought in. In the light of the provisions contained in section 60(1) service of summons through the Fiscal personally is certainly the better mode of service whereby the Court could be satisfied that summons or the decree is served on the defendant for the affidavit of the Fiscal establish this fact and the Court could safely act on

this evidence on a affidavit. If the defendant canvasses this evidence then the burden is on the defendant to establish the contrary by disproving the affidavit filed by the Fiscal, an officer of Court.

It is to be noted that the affidavits tendered by the Fiscal in proof of service of summons as well as the decree would bring in the provisions contained in section 61 of the Civil Procedure Code for it is provided in the said section that an affidavit of such service shall be sufficient evidence of the service of summons and of the date of such service and shall be admissible in evidence and the statement contained therein shall be deemed to be correct unless and until the contrary is proved. Accordingly if the respondent wishes to contradict the facts stated in those affidavits, it is incumbent on the respondent to lead evidence in order to controvert and or contradict the affidavit. In the inquiry held by the learned District Judge no evidence whatsoever was led to establish non service of summons or decree. In this respect I would refer to the decision in *Wimalawathie and Others* vs. *Thotamune and Others*[2] where it was held :

"ii. The affidavit of the process server is *prima facie* evidence of the fact that summons was duly served and there is a presumption that summons were duly served.

Accordingly the burden shifts onto the defendants-petitioners to prove that summons was not served.

iii. The defendant-petitioners have to begin leading evidence and once the defendants-petitioners lead evidence to prove that summons had not been served on them and establish that fact, the burden shifts back on to the plaintiffs to rebut such evidence.

This can be done by calling the process server.

iv. What has to be decided by court essentially is a question of fact".

It appears that the respondent had waived her right to place evidence before Court to disprove the *prime facie* evidence of the Fiscal's affidavit.

Accordingly there was no evidence before the learned District Judge to reject the two affidavits. This is demonstrated by her observations in her order which reads as follows :

"..... මෙහිදී බැලූ බැල්මට පෙනී යන්නේ පිස්කල් විසින් සිතාසි සහ නින්දු ප්‍රකාශය හාර දුන්නා යයි සඳහන් වුවද මෙම විත්තිකාර පෙත්සම්කාරියට එවැන්නක් බාරදී නැති බවත් ඇය එම නින්දු ප්‍රකාශය හාර දුන්නා යයි කියන දිනට වසර 2ක් පමණ ගත වීමෙන් ඇතැකුරුව මේ සම්බන්ධයෙන් දැන ගැනීමට ලැබී ඇති අතර විත්තිකාරියට නියමිත ආකාරයට සිතාසි හාර නොදී මූලික වශයෙන් අධිකරණයෙන් ලබා ගත්තා ලද නින්දුව කිසිදු වලංගුතාවයක් නොමැති බව ....."

I would say the affidavit of the Fiscal filed of record is a stumbling block to the objection taken by the respondent and there is no material whatsoever placed before the learned District Judge to establish that summons or the decree was not served on the respondent. As stated above, I am at a loss as to how the learned District Judge arrived at her decision purely on the written submissions tendered by the respondent and I would say the order made by the learned District Judge is *per se* erroneous.

In view of the aforesaid circumstances I would hold that exceptional circumstances do exist for the petitioner to invoke the extraordinary jurisdiction of this Court. Accordingly I have no hesitation in exercising the extraordinary jurisdiction of revision, for the order challenged has occasioned a failure of justice and is manifestly erroneous which goes beyond any error or defect or irregularity. **I would say the order complained of is of such a nature which shocks the conscience of this Court.**

While allowing the revisionary application of the petitioner with costs fixed at Rs. 20,000 I set aside the order of the learned District Judge dated 19.04.2004.

WIMALACHANDRA, J. — *I agree.*

Application allowed.