

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST  
REPUBLIC OF SRI LANKA**

**SC CHC No. 25/2001**

In the matter of an application made  
In accordance with Chapter LVIII of the Civil  
Procedure Code read together with  
Sections 5 and 6 of the High Court of the  
Provinces (Special Provisions) Act No. 10 of  
1996.

Kulanthan Palaniyandy,

**Carrying on business under the name style  
and firm of** Paramount exporters, No. 151,  
Old Moor Street, Colombo 12.

**Defendant-Petitioner-Appellant**

HC (Civil) 73/99 (1)

**-Vs-**

G. Premjee Limited,  
7<sup>th</sup> Floor, Cathay House, No. 8/30, North  
Sathorn Road, Bangkok 10501, Thailand.

**Plaintiff-Respondent-Respondent**

**BEFORE**                    :     **SHIRANEE TILAKAWARDANE, J.**  
**K. SRIPAVAN, J.**  
**RATNAYAKE, J.**

COUNSEL : Kushan D' Alwis with chamila Wickramanayake  
instructed by Sinnadurai Sundaralingam and  
Balendra for Defendant-Petitioner-Appellant.

Plaintiff-Respondent-Respondent is absent and  
unrepresented.

ARGUED &  
DECIDED ON : 02.07.2010

.....

**SHIRANEE TILAKAWARDANE, J.**

During their submissions, both Counsel conceded that the only question of law which is urged before this Court is whether the service of summons on the Appellant by way of substituted service was duly served under Section 60 (2) of the Civil Procedure Code and whether the order of the learned High Court Judge refusing to vacate *ex-parte* judgment and decree was erroneous.

The Defendant-Petitioner-Appellant (hereinafter referred to as the Appellant) had preferred this appeal to set aside the order of the Commercial High Court (Civil) of the Western Province dated 05.10.2001, whereby the application to set aside the *ex parte* decree, consequent to the default in the appearance of the Appellant, was refused.

Plaint in this case was filed on 19/07/99, and summons was issued thereafter and sent for service through one Hemachandra , a fiscal officer of the Court. This fiscal officer's report dated 15/9/99 (marked as X1) was filed with the Petition of Appeal dated 26<sup>th</sup> November, 2001. In his report the fiscal officer had noted that summons could not be served in person as the Appellant was avoiding the service of summons. Service of summon was re-issued and reserved on three separate occasions namely, 16/8/99, 18/8/99 and 21/8/99.

The fiscal officer in giving evidence before the Court at the inquiry stated that on all three occasions the business premises had been open, and though the office was working that he had been informed that the Appellant was not in and therefore summons could not be served

The fiscal officer Hemachandra further stated that it was his considered opinion that the Appellant was deliberately seeking to evade the receipt of summons.

Counsel for the Appellant sought to assail the evidence led at that inquiry, but which side the entrance was or other such matters of fact were admittedly not raised at the inquiry, and had this been done during the cross examination, the

fiscal officer would have had the opportunity to explain and clarify these matters of fact.

There is a presumption under Section 114 of the Evidence Ordinance that all acts performed as official acts of the Court are regularly performed and the burden to rebut this presumption in law is solely on the Appellant.

Due to the opinion of the Court that summons had been deliberately refused and service of the summons evaded by the Appellant order for *ex parte* trial was made on 03/12/99 and subsequently *ex parte* decree was admittedly served on the Appellant and report was filed marked as X2, by the same fiscal officer who confirmed this through his affidavit dated 25/10/99.

It is noted by this Court that this *ex parte* decree was served on the Appellant whilst he was at the same residential address referred to in X1, the fiscal report of Hemachandra.

The Appellant had failed to give adequate evidence to rebut the presumption and /or to satisfy the Court that he had a pertinent and genuine reason why summons

could not be served on him originally. There is also the evidence of the fiscal officer to disclose that reasonable due diligence had been exercised to serve the original summons by substituted service which was sought to be served on 11/10/99. According to the fiscal officer's evidence, this too had not been successful due to the deliberate evasive tactics of the Appellant.

Therefore, we see no reason to interfere with the order dated 05/10/2001 made by the Judge of the Civil Appellate Court. Accordingly, the appeal is dismissed.

No costs.

Registrar is directed to send the original case record and the judgment of this Court to the original Court for the expeditious conclusion of the case.

**JUDGE OF THE SUPREME COURT**

**K. SRIPAVAN, J.**

I agree.

**JUDGE OF THE SUPREME COURT**

**RATNAYAKE, J.**

I agree.

**JUDGE OF THE SUPREME COURT**