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

Lanka Orix Leasing Company Plc
100/1, Sri Jayawardenapura
Mwatha,
Rajagiriya.
Plaintiff

Vs.

SC (CHC) Appeal No. 23/2016

HC. (Civil) NO. 477/09/MR

1. Meera Mohideen Mohammadu Azar
No.329, Jumma Mosque,
Meerauwodai, Oddamawaddi.

2. Gopalan Kamalanathan,
Visnu Kovil Road,
Kiran.

3. Gopalan Padma Yogan,
Kumaralaya Veethi
Kiran.
Defendants

AND

2. Gopalan Kamalanathan,
Visnu Kovil Road,
Kiran.
3. Gopalan Padma Yogan,
Kumaralaya Veethi
Kiran.
2nd and 3rd Defendants-Petitioners

Vs.

Lanka Orix Leasing Company Plc
100/1, Sri Jayawardenapura
Mwatha,
Rajagiriya.
Plaintiff-Respondent

1. Meera Mohideen Mohammadu Azar
No.329, Jumma Mosque,
Meerauwodai, Oddamawaddi.

1st Defendant-Respondent

AND NOW BETWEEN

2. Gopalan Kamalanathan,
Visnu Kovil Road,
Kiran.
3. Gopalan Padma Yogan,
Kumaralaya Veethi
Kiran.
2nd and 3rd Defendant-Petitioner-Appellants

Vs.

Lanka Orix Leasing Company
Plc.
100/1, Sri Jayawardenapura
Mwatha,
Rajagiriya.
Plaintiff-Respondent-Respondent

1. Meera Mohideen Mohammadu Azar
No.329, Jumma Mosque,
Meerauwodai, Oddamawaddi.

1st Defendant-Respondent-Respondent

BEFORE : **PRIYANTHA JAYAWARDENA, PC.J.**

A.H.M.D. NAWAZ, J.

ACHALA WENGAPPULI, J.

COUNSEL : Senaka de Silva for the 2nd & 3rd Defendant-Petitioner-Appellants.

Shanaka De Livera with Miss. Devni Yasara Abeygunawardana, AAL instructed by De Livera Associates for the Plaintiff-Respondent-Respondent.

No appearance for the 1st Defendant-Respondent-Respondent

ARGUED ON : 07th June, 2023

DECIDED ON : 27th February, 2024

ACHALA WENGAPPULI, J.

This is a direct appeal preferred by the 2nd and 3rd Defendant-Petitioner-Appellants (hereinafter referred to as the "1st and 2nd Appellants" respectively) seeking to set aside an order pronounced by the Commercial High Court on 13.05.2016. With the pronouncement of the said order, the Commercial High Court dismissed their application under Section 86(2) of the Civil Procedure Code, by which they sought to set aside the *ex parte* decree that had been served on them.

The 1st Defendant-Respondent-Respondent entered into an agreement with the Plaintiff-Respondent-Respondent Company (hereinafter referred to as the "Respondent Company") in September 2008, to purchase a vehicle morefully described in the schedule A to the plaint and to pay its value in 48

instalments of Rs. 51,611.00, at the interest rate calculated at 31% per *annum*. The two Appellants stood as the guarantors for the said 1st Defendant-Respondent-Respondent. The 1st Defendant-Respondent-Respondent, after payment of a sum of Rs. 103,642.00, had fallen into arrears. The said agreement was terminated on 20.12.2008. The Respondent Company had thereupon instituted the instant action on 22.09.2009, seeking to recover its dues from the three defendants. It also sought to recover possession of the said vehicle.

With institution of the instant action before the Commercial High Court, the Respondent Company moved that summonses be served on the three defendants by way of registered post as well as through the Fiscal of the District Court of *Batticaloa,* since they are resident in that jurisdiction. Upon an order of Court made to that effect, the Registrar of the Commercial High Court, by way of a Precept, conveyed the said order of Court to the Fiscal of the District Court of *Batticaloa*.

The entry made on 25.11.2009 in the case record by the Registrar of the Commercial High Court indicated that the Fiscal of *Batticaloa* Court had reported back of the confirmation of personal service of summonses on the 1st and 2nd Appellants on 16.11.2009. This factor was then brought to the notice of Court by Journal Entry No. 2 of the same date. He further reported that the summons issued on the 1st Defendant-Respondent-Respondent could not be served as he was not found in the given address. However, the 1st and 2nd Appellants did not present themselves before the original Court on that day (02.12.2009) nor did they file answer through an Attorney-at- Law. The Court had thereupon decided to proceed with the trial against the Appellants *ex parte*. Court directed the Respondent Company to take necessary steps on the

1st Defendant-Respondent-Respondent, on whom summons could not be served.

The *ex parte* trial against the Appellants commenced and concluded on 26.07.2012. During the said *ex parte* trial, the Respondent Company presented evidence and marked documents P1 to P11 in support of its case. The Commercial High Court thereupon delivered its judgment in favour of the Respondent Company on 06.11.2016. The *ex parte* decree was served on the 1st and 2nd Appellants on 07.02.2013, once again through the Fiscal of the District Court of *Batticaloa*. The Appellants, by their application under Section 86(2) of the Civil Procedure Code dated 20.02.2013, moved Court to set aside the said *ex parte* decree.

At the conclusion of the ensuing inquiry, the Commercial High Court, decided to dismiss the Appellant's application with costs by its order pronounced on 13.05.2016. Being aggrieved by the said order, the Appellants preferred the instant appeal and sought to challenge the validity of the order of the High Court on a total of eleven grounds of appeal, as set out in paragraph 23 of their petition of appeal.

With the presentation of the notice of appeal as well as the Petition of Appeal to the original Court, the Court Record was transmitted to the Registry of this Court for the preparation of appeal briefs. The Appellants have paid brief fees on 13.02.2019 and collected their copies on 05.01.2022 but were not represented when this appeal was mentioned in open Court on 01.10.2021 for the first time. The Court made no order. Thereupon, the Appellants, by way of a motion on 18.05.2022, moved Court that their appeal be restored back to the hearing list. A Counsel, representing the Appellants, supported the said motion on 21.06.2022 and the appeal was accordingly restored and was set down for hearing on 28.11.2022, with consent of the

parties. The Appellants tendered written submissions to Court with a motion dated 20.10.2022.

However, on that day, an application was made on behalf of the Appellants, by which they sought to reschedule the hearing of their appeal on the basis that their Counsel had returned the brief and they have retained a new Counsel recently. The Court considered the application of the Appellants favourably and granted a postponement. The appeal was fixed for hearing once more on 07.06.2023, as it was a convenient date for the said newly retained Counsel for the Appellants. When the appeal was taken up for hearing on 07.06.2023, the Appellants made a similar application for postponement of the hearing, but this time the Court was not inclined to grant any further postponements for hearing of the instant appeal, which had been filed in the year 2016, and decided to take the matter up for hearing.

The oral submissions of the Respondent Company were concluded on 07.06.2023. Although the Appellants have already tendered their written submissions, this Court afforded another opportunity for the parties to tender written submissions, if they so wished. A four-week time period, commencing from the date of hearing, was granted to the parties. Only the Respondent Company availed of this opportunity.

It must be noted at the outset of this judgement that, in spite of setting out several grounds of appeal in paragraph 23 of their petition of appeal, the Appellants have confined themselves into following three grounds of appeal in their written submissions;

a. The Commercial High Court failed to consider that no evidence was led to show that summonses were served on the two Appellants,
b. The Commercial High Court failed to consider that Section 60 of the Civil Procedure Code empowers only a Fiscal Officer or a *Grama*

Niladhari to serve summons on a defendant and the witness who claims to have served summons is a process server of the Court, who is not authorised to serve summons on a defendant,

c. The Commercial High Court erred in admitting evidence of the said process server, who claims to have served summons without any authority.

These three grounds of appeal are considered in this judgment in that order.

In support of their first ground of appeal, the Appellants submitted to Court that the Commercial High Court had fallen into grave error in its failure to consider that the assumption of jurisdiction over two Appellants is made only upon summons being duly served on them. Since the evidence presented by the Respondent Company was insufficient to establish that the summonses were served on the Appellants, they contend that not serving summons is a failure that goes to the root of the jurisdiction of the Commercial High Court to hear and determine the action instituted against them by the Respondent Company. Therefore, the Appellants submit that the *ex parte* judgment is a *nullity* and, in the absence of a valid judgment against them, there was no necessity to move Court to vacate a non-existing *ex parte* decree.

In view of the Appellants' contention that the *ex parte* decree impugned in these proceedings is a *nullity*, it is important to consider the legal effect of an *ex parte* judgment, that had been entered against them without first serving summons. This Court had consistently taken the view that if a defendant, on whom an *ex parte* judgment and decree were entered against, was not served with summons, both the judgment and decree would be considered to be a *nullity*. A series of judgments, commencing with the judgment of Mohammadu ***Cassim v Perianan Chetty*** (1911) 14 NLR 385 accept this

position. *Lascelles* CJ stated in the said judgment that (at p. 388) "*[A] judgment is null and void, and cannot be executed against a person who is not served with summons*", after following a Queen's Bench decision in ***Wigram v Cox, Sons, Buckley & Co*** (1894) 1 QBD 795.

Thus, if the Appellants could establish before the Commercial High Court that the summonses were not served on them, that factor would undoubtedly render the judgment, upon which the *ex parte* decree was issued, a *nullity*.

The Appellants are perfectly right in their submissions that the legal validity of the *ex parte* judgment and decree of the original Court depends on the fact that the procedure laid down in law for the service of summons was duly complied with. They also contend there was no "evidence" placed before the trial Court by the Respondent Company to establish that the summonses were served on them. In view of the said contention, this is a convenient point to consider whether there was "evidence" before the Commercial High Court confirming service of summonses on each of the Appellants.

The Commercial High Court, in its impugned order, considered the evidence of the Appellants as well as of the Respondent Company, presented before it during the inquiry under Section 86(2). The Court preferred to accept the evidence of the witness for the Respondent Company over the evidence of the two Appellants on the footing that it is "… *totally worthy of credit*" and concluded that the Appellants "… *have not discharged the onus of proving that the summons were not served on them*."

Although the Commercial High Court found that the Appellants have failed to discharge their onus of proving that the summonses were not served on them, they, in presenting their contention before this Court, submitted that

there was no evidence placed before the original Court by the Respondent Company that it had personally served summons on them. Thus, it appears that the Appellants' challenge the validity of the determination made by the Commercial High Court that it was their burden is to establish summonses were not served. It appears that the Appellants dispute on whom the burden lies in an application under Section 86(2). In the circumstances, it is helpful, if a brief reference to the applicable statutory provisions are made on the question whether there was "evidence" presented before the trial Court as to the service of summons, before I venture into determine on whom the burden lies to establish that particular factor.

The Commercial High Court, before making an order under Section 84, to proceed against the Appellants *ex parte*, was satisfied that the Appellants were served with summons and they did not file answer on the summons returnable date. Then the question is on what evidence did the Court satisfy itself that the summonses were served on the Appellants?

The answer to that question could be found upon a consideration of the statutory provisions contained in Section 61 of the Civil Procedure Code. The Civil Procedure Code (Amendment) Act No. 14 of 1997, by Section 3 of that Act, repealed Sections 59, 60 and 61 of the principal enactment and substituted same with new Sections. After the said amendment, Section 61 reads as follows;

> *"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, and 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."

The first part of the Section refers to a situation where the summons served by registered post. It then proceeds to deal with the situation "*where the summons is served in any other manner."* In the instant appeal, the Summonses were served by a process server and therefore such service could clearly be taken as an instance where the summons served "*in any other manner".* The remaining part of the said Section provides for how the service of summons could be established. The applicable part of the Section in this regard reads "*… 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 shall be sufficient evidence of the service of the summons."*

The "evidence" before the trial Court which confirm the service of summonses on the Appellant was therefore the affidavit of the process server who affirmed to the fact. The affidavit of the process server was marked as V1 and was annexed to the report prepared by the Fiscal of the District Court of *Batticaloa* addressed to the Commercial High Court. Thus, the contents of that affidavit "*shall be sufficient evidence of the service of the summons".* The contents of the affidavit of the process server, confirming personal service of summons on the defendants named in them accordingly provided a legally valid admissible evidence to the original Court, facilitating it to determine that the summonses were personally served on each of the Appellants. Similar view taken by *Somawansa J* (P/CA) in ***Chandrasena v Malkanthi*** (2005) 3 Sri L.R. 286, where his Lordship observed;

"*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.*

Thus, the order of the Court made on 02.12.2009 determining to proceed to try the two Appellants *ex parte* was made on legally admissible direct evidence as to the fact of personal service of summons. This reasoning provide answer to the Appellants' contention that the Respondent Company did not place "*evidence*" to establish on personal service of summons.

In turning to the question on whom the burden lies to establish that the summonses were served, the Commercial High Court held that the Appellants "… *have not discharged the onus of proving that the summons were not served on them*." The Court had thereby imposed the burden of establishment of the fact of not serving summons on the Appellants, which they say is erroneous.

Section 86(2) provides an opportunity for a defendant, who had been served with an *ex parte* decree, to have that *ex parte* judgment and decree set aside by making an application within a stipulated time period to Court. The said Section further imposes a duty on such a defendant to "*satisfy*" Court that "*he had reasonable grounds for such default*", if he was to successfully move Court to set aside the *ex parte* judgment and decree. What the Appellants have urged before the Commercial High Court to purge their default was that the summonses of the action were not served on them, either by post or personally. Undoubtedly, this is a reasonable ground for the trial Court to set

aside its *ex parte* judgment and decree entered against the two Appellants, provided they "*satisfied*" the Court of the existence of the said reasonable ground in terms of Section 86(2).

The use of the word "*satisfy*" in Section 86(2), instead of the word "proof" in terms of Section 3 of the Evidence Ordinance, signifies that the required degree of proof is not beyond reasonable doubt or even the balance of probabilities, but clearly of a lesser degree. This Court even recommended adopting a "liberal approach" as opposed to rigid standard of proof, in satisfying a Court of the reasonableness of the grounds urged by a defaulting defendant (vide judgment of ***Sanicoch Group of Companies by its Attorney Denham Oswald Dawson v Kala Traders (Pvt) Ltd and Others*** 2016 Vol. XXII, 44, at p. 48).

In this context, it is important to note that Section 84, which empowers a Court to proceed to trial *ex pare* of the defendant, provided for several situations to be taken as instances of default. Not only if a defendant fails to file his answer on or before the day fixed for answer is taken as a default, even if he fails to file answer on a subsequent date fixed for answer or even fails to appear on the day fixed for hearing of the action are also be taken as instances of default. In purging default, a defendant is entitled under section 86(2) to adduce evidence to prove that he was prevented from appearing in Court by reason of accident or misfortune or not having received due information of the proceedings about the case. Since the circumstances that would be urged by a defendant to purge his default may vary in relation to each situation, each of these situations would have to be considered by Courts on case by case basis to satisfy itself, whether the particular set of circumstances urged by a defendant could be considered as reasonable. Hence, the adoption of a

liberal approach is generally recommended in determining what a reasonable ground is; in terms of Section 86(2).

However, adoption of such a liberal approach could not be taken as an universal approach that could be applicable in all situations. This aspect was noted in ***Abdul Wadood v Ahamed Lebbe*** (SC Appeal No. 153/2014 – decided on 10.06.2016) when the Court stated that "*[A] liberal approach is possible where a Court has to decide on the reasonableness of default, but not as regards stringent procedure pertaining to a jurisdictional issue which could be described as a patent want of jurisdiction which is not curable for non-objection/acquiescence or waiver.*" Similarly, if there is a specific legislative provision which sets out the degree to which such a defendant should satisfy Court of the reasonableness of the ground he had relied upon to purge his default, then in such a situation too, a defendant should comply with the statutorily imposed degree of proof.

In this context, a clear distinction could be made in respect of a defendant who, in an application to purge default under Section 86(2), claims that he was not duly served with summons from a defendant, who relied on any other ground he may have chosen to urge before Court, to purge his default.

When a defaulting defendant takes up the position that he was never served with summons as a reasonable ground and thereby seeking to set aside an *ex parte* judgment and decree, the nature of the burden imposed on such a defendant had already been considered by superior Courts. It has been consistently held that it was for the defaulting defendant to establish the fact that summons was not served. In the judgment of ***Sangarapillai and Brothers v Kathiravelu*** (*Sriskantha's* Law Reports, Vol II, p. 99) *Siva Selliah J* held (at. P.106) that "… *the burden squarely lay on the defendant who asserted that no summons was served on him to establish that fact …".* The underlying rationale

for imposition of such a burden of proof on a defendant is due to the deeming provisions contained in Section 61. Relevant part of the Section 61 which states that the affidavit containing that the summons was duly served should be taken as correct "*unless and until the contrary is proved*". Thereby the said Section imposed a heavier burden on such a defendant to prove the contrary to what stated in the affidavit of the process server. In the amended Section 61, the relevant part reads "… *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***" (emphasis added).

In Civil Procedure Code, the word "*prove*" can be found, in addition to Section 61, in Sections 114(1), 159,161,162 and 163. Section 114(1) provides for the documents to be placed on the record. The Section however, limits those documents to the ones that are "*proved*" or admitted. Section 159(1) deals with how a signature of a person is "*proved*" while Section 160 deals with the "*proving*" of signature of an illiterate person. Section 161 deals with old documents of which actual execution need not be "*proved*". Section 162 provides for "*proving*" of a copy of an absent original and, finally, Section 163 states that each party to "*prove*" its case with oral and documentary evidence.

Thus, the Section 61 too, by adopting the same standard of proof, imposes a similar burden on a defendant to "*prove*" the contrary of what the process server states in his affidavit regarding service of summons. This has been the standard of proof consistently applied by Courts in such situations, as indicative from the judgment of this Court in ***ABN-Amro Bank NV v Conmix (Private) Limited and Others*** (supra) where *Mark Fernando* J, stated (at p. 12) thus;

> "*If there has been no due service of summons (or due notice), but the Court nevertheless mistakenly orders an ex parte trial, then for that breach of natural justice, Section 86 (2) provides a remedy: a defendant's default can be excused* ***if it is established*** *that there were reasonable grounds for such default, and one such ground would be the failure to serve summons*" (emphasis added).

What it means to "*prove*", a verb used in legal proceedings, was described in relation to Section 3 of the Evidence Ordinance by *Coomaraswamy,* in his treatise titled *Law of Evidence,* Vol 1, at p. 117. Learned author states "*[A] fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon a supposition that it exists."* He further adds "*[A] fact is said not to be proved when it is neither proved nor disproved"* following the judgment of ***Emperor v Shafi Ahamad*** (1929) 31 Bom. L.R. 515.

Thus, the resultant position would be that a defendant, who seeks to purge his default by claiming that summons was not served on him, should "*satisfy*" Court by "*proving*" that claim, in terms of Section 61. In these circumstances, the question this Court must answer in relation to the ground of appeal is did the Appellants prove that summonses were not served on them either by post or by personally?

In their application under Section 86(2) the Appellants stated that a person claiming to be the Fiscal of District Court of *Batticaloa* had served an *ex parte* decree on them on 07.02.2013 and despite the reference made in the said *ex parte* decree that summonses were duly served on them, they were never served with summons either by post or by personal service.

In this regard, it must be noted that, after an inquiry in to the Appellants application under Section 86(2), the Commercial High Court preferred to accept the evidence presented by the Respondent Company through its witness as "*worthy of credit*" and rejected the Appellant's application. The Court, after citing ***David Appuhamy v Yasassi Thero*** (1987) 1 Sri L.R. 253, acted on the *dicta* of that judgment i.e., an *ex parte* order made in default of appearance will not be vacated if the affected party fails to give a valid excuse for his default, and concluded that the Appellants "have *not discharged the onus of proving that the summons were not served on them*". In other words, the Court held that the Appellants failed to prove that they were not served with summonses.

Significantly, during the inquiry under Section 86(2), both Appellants were content with merely stating in their evidence that they did not receive summons either by post or personally. No specific reference was made to the events of the date referred to in the affidavit of the process server indicating as the date on which the summonses were personally served on the two Appellants. Instead they chose to explain the circumstances under which they signed on the agreement, upon which they were sued. In the end, there were no sufficient material placed before Court by the Appellants in this regard. Accordingly, the evidence presented by the Appellants confine to an isolated verbal assertion that they were not served with summons, which claim the Court decided to reject in its totality.

On the other hand, the record itself indicated that summonses were issued on the Appellants both by post and through the Fiscal of the District Court of *Batticaloa*. The entry in the record signifies the return filed by the said Fiscal, who reported to Court that summonses were served on the two Appellants but not on the 1st Defendant-Respondent-Respondent. A specific

date is mentioned in the entry as the date on which personal service of summons had taken place. Journal Entry No. 2 of 02.12.2009 informs the Court that summonses on the two Appellants were served on 16.11.2009. The two Appellants were neither present in Court nor were represented.

During the inquiry the witness called by the Respondent Company stated that he functioned as the process server ("සිතාසි බෙදන්නා") of the District Court of *Batticaloa* and, in relation to the instant matter, he did personally serve summons on the two Appellants on 13th November 2009 by visiting their places of dwelling, as per the given addresses in the *Precept*. He reported of the confirmation of service of summons by an affidavit, marked as V1.

The Journal Entry No. 2, being a contemporaneous record of the claim that summonses were served on the Appellants, taken together with the contents of the affidavit of the process server, there was sufficient evidence before the Commercial High Court to conclude that the summonses were served on the Appellants, as claimed by the Respondent Company. Section 61 is specific on this aspect as it states the affidavit of the process server being sufficient admissible evidence of the facts it stated. More importantly the Section also stated that, "… *the statements contained therein shall be deemed to be correct* ***unless and until the contrary is proved***" (emphasis added).

The Appellants, upon being cross examined by the Respondent Company, conceded that they were residing in the given addresses both on 13th and 16th November 2009 (the dates on which summonses were served on each of them) and there was no reason for them not to receive any letter, sent by post and delivered to their respective addresses. Of course, both Appellants denied that they were personally served with summons by the same process server, who at a subsequent point of time, had personally delivered the *ex parte* decree on them as well.

The evidence before Court is indicative of the fact that the Appellants were served with summons by way of registered post as well as personally. There is no material to indicate that the registered articles were returned undelivered. None of the Appellants specifically deny not receiving them by post either. However, the Respondent Company did not tender delivery advices or the endorsements of service as evidence before Court, in relation to the fact that summonses were also served through post. However, the affidavit of the process server confirming personal service of summons and the report of the Registrar of District Court of *Batticaloa* addressed to the Registrar of the Commercial High Court, resulting in the making of the Journal Entry No. 2 of 02.12.2009, which conveyed to Court that the summonses were duly served on the two defendants, taken together, is sufficient proof of the completion of the formal process of service of summons. Since, the affidavit V1, in terms of Section 81, *"shall be sufficient evidence of the service of the summons and of the date of such service and shall be admissible in evidence" the* statements contained therein shall be deemed to be correct, until and unless the Appellants prove the contrary.

Once the affidavit of the process server is received by Court providing evidence of proof of service, the burden shifts on to the Appellants to prove that they were not served with summonses. They could have discharged their burden by leading credible evidence to contradict the contents of the affidavit, which are deemed to be taken as correct by operation of law. If they could establish that fact, then the burden shifts back on to the Respondent Company to rebut that evidence by calling the relevant process server who personally delivered summons on them.

When the trial Court decided to treat the evidence of the process server as worthy of credit over the evidence presented by the Appellants to the contrary, it is an indication itself that they have collectively failed in the discharge of their burden, imposed by Section 61. It is also an indication that the statements contained in the affidavit of the process server, coupled with his oral evidence, tested with cross examination, were accepted by the Commercial High Court as credible and reliable evidence reflecting the correct factual position. Despite the unconvincing evidence presented by the Appellant, the Respondent Company did call the process server, who affirmed in V1 and in his oral testimony that the summonses were duly served. That evidence effectively rebutted the Appellant's weak denial. The Commercial High Court, in its impugned order, rightly concluded that the Appellants have failed to successfully discharge the onus of "*proving*" that the summonses were not served on them.

In view of the reasoning contained in the preceding paragraphs, it is my considered view that the first ground of appeal urged by the Appellants is devoid of any merit.

The second and third grounds of appeal urged by the Appellants alleging that the Commercial High Court erred in its failure to consider that the summonses were not duly served on them, as they were not served by the Fiscal or *Grama Niladhari* and that the said Court erred in admitting evidence of the process server, who served summons on them without any authority, should be considered now for merits.

The Appellants, in support of the said grounds of appeal, submitted that the original Court, in reaching the conclusion that the summonses were duly served on the Appellants had erroneously acted upon the irrelevant and inadmissible evidence of a "*process server*", who is not a competent officer of

Court to serve summons. They relied on Section 60(1) of the Civil Procedure Code, in support of that contention, where the provisions conceding to the position that only a Fiscal or *a Grama Niladhari* could duly serve summons on a defendant, and not a process server, who had no such conferment of authority by law. These two grounds of appeal were urged by the Appellants based on the evidence of the witness called by the Respondent Company to give evidence on their behalf to establish the summons and the *ex parte* decree were served upon the two Appellants, who described his job description as "සිතාසි බෙදන්නා" (Server of Summons).

It cannot be helped not to notice the obvious conflict between the first ground of appeal and the other two grounds of appeal, urged by the Appellants. In the first ground of appeal, the Appellant take up the position that summonses were never served on them. In placing reliance on the second and third grounds of appeal, the Appellants tacitly admit that summonses were served, but for want of proper authority conferred on the process server to serve summons, they were not "*duly*" served. Despite the inherent contradiction between these grounds of appeal, it must be acknowledged that this contention relates to an important procedural step in civil litigation. In the circumstances, I propose to deal with these two grounds of appeal in a more descriptive manner. Since the role of the process server in the service of summons is placed under close scrutiny, it is necessary to trace the origins of the term "*process server*", in civil litigation process.

Section 60 of the said Civil Procedure Code (Chapter 86 – Legislative Enactments of Ceylon - Revised Edition 1938) states "… *the service of summons shall be made on the defendant in person; but if, after reasonable exertion, the Fiscal is unable to effect personal service, he shall report such inability to the Court …".* This Section specifies that the service of summons on a defendant should be made

by the Fiscal. However, in proof of service, the term "*process server*" appears in Section 85 of the said Code, instead of "*Fiscal*" as it states "… *if the Court is satisfied by affidavit of the process server, stating the facts and circumstances of the service, or otherwise, that the defendant has been duly served with summons*, …".

The Fiscals Ordinance of 1867 (Chapter 8 – Legislative Enactments of Ceylon - Revised Edition 1938), created a *Fiscal's Department* and the Governor General had power to appoint a Fiscal and Deputy Fiscals for the provinces and districts. Section 4 of the said Ordinance empowered a Deputy Fiscal, who was appointed to a particular district, could license as many process servers for the service and execution of process issued by Courts within that district. The term "*process*" was defined in Section 17 of the said Ordinance to mean "all *citations, monitions, summonses, mandates, subpoenas, notices, rules, orders, writs, warrants and commands issued by Court*."

In view of the said legislative arrangement, Section 85 of the said Code provided statutory recognition to the contents of an affidavit presented by a process server, who could assert that the defendant had duly been served with summons.

The transformation of the service of summons and processes under different enactments over the past two centuries was considered *in* ***Leechman & Company Ltd v Rangalle Consolidated Ltd*** **(**1981) 2 Sri L.R. 373, by Soza J. His Lordship observed (at p. 378);

> *"The Fiscal and his deputy are officials who earlier functioned under the provisions of the Fiscals Ordinance No. 4 of 1867 as amended from time to time (Cap. 11 L.E.C. - 1956 Revision). Under Section 4 of the Fiscals Ordinance it was lawful for the Fiscal or Deputy Fiscal to appoint by writing under his hand any person to execute process in any particular case and process by that ordinance included all citations, monitions,*

summonses, mandates, subpoenas, notices, writs, orders, warrants and commands issued by the Court. The Administration of Justice Law No. 44 of 1973 came into force 1st January 1974 and by its Section 3 Chapter 1, the Fiscals Ordinance was repealed. By virtue of section 39(l) of the Administration of Justice Law, to each court established under the new laws provision was made for the appointment of a Registrar, Fiscal and such other officers as may be necessary for the administration of such Court and the performance of its duties including the service of process and the execution of decrees and other orders. It is a matter of common knowledge that the Registrar of every Court was invariably appointed as Fiscal. Under section 62 of the Judicature Act No. 2 of 1978, Chapter 1 of the Administration of Justice Laws was repealed but of course this did not bring the Fiscals Ordinance back to life. Section 52 of the Judicature Act like section 39 (1) of the Administration of Justice Law before it, provided for the appointment of Registrars, Fiscals and other officers the administration of every Court and the performance of its duties including the service of its process and execution of its decrees and orders. The old practice was adhered to and every Registrar was appointed Fiscal."

A new Constitution was adopted in 1978. In addition, Judicature Act No. 2 of 1978 was enacted. Section 3 of the Civil Courts Procedure (Special Provisions) Law No. 19 of 1979 brought the provisions of the Civil Procedure Code (Ordinance No. 2 of 1889, Cap. 101, Legislative Enactments of Ceylon, Revised Edition 1956) as amended from time to time and was in force on 31st December 1973, back into operation, governing civil Courts and its procedure and thereby replacing the provisions of Administration of Justice Law No. 44 of 1973.

Presently, the Judicial Service Commission, in the exercise of powers conferred under Article 111H (1) of the 1978 Constitution and Section 52(1) of the Judicature Act No. 2 of 1978, appoints Scheduled Public Officers as Registrars/Deputy Fiscals to Courts. Section 52(1) of the Judicature Act No. 2 of 1978 (as amended) empowers the appointment of a Registrar, Deputy Fiscal and "*such other officers*" as may be necessary for the administration and for the due execution of the powers and the performance of the duties of such Courts including the service of process and the execution of decrees of Court and other orders enforceable under any written law. Inclusion of the phrase "service of process "in the said Section is significant in the present context.

Section 5 of the present Civil Procedure Code states the term "Fiscal" includes a Deputy Fiscal. Section 52(3) of the Judicature Act imposes on such a Deputy Fiscal that he "… *shall be responsible for the service of process issued by that Court and the execution of decrees and orders made by that Court …*".

The post of process server that existed and functioned under the Fiscals Ordinance, too was transformed into an appointment under the Public Service Commission with a formal title of "සිතාසි හා ඇස්කිසි ක්‍රියාත්මක කරන්නා" . They are appointed by the Secretary to the Ministry of Justice, acting under the authority of Public Service Commission, according to a Scheme of Recruitment formulated for that post and placed in the salary scale PL 2 - 2016. Once appointed, they are assigned to a specific area within the geographical jurisdiction of a Court to which they are attached to by the judicial officer, who preside over that Court. In the absence of a formal nomenclature for the post of "සිතාසි හා ඇස්කිසි ක්‍රියාත්මක කරන්නා" in English, the more popular description of "*process server*" is used in this judgment.

Thus, the appointment of a process server, who could be considered as *"such other officer"* for the purpose of service of process and execution of decrees, is accordingly sanctioned by Section 52(1) of the Judicature Act.

Once a Court orders that summons be served on a defendant who resides outside of its jurisdiction, the Registrar/Deputy Fiscal of the original Court, by addressing a *Precept to Fiscal to Serve*, would convey the summons issued by that Court to the relevant Registrar/Deputy Fiscal, whose area in which the defendant resides. Section 357 of the Civil Procedure Code made it a duty of every Fiscal, who receives a *Precept to Fiscal to Serve,* execute same either by himself by his officers.

The Registrar/Deputy Fiscal, accordingly assigns the task of serving summons on that defendant to the process server *(සිතාසි හා ඇස්කිසි ක්‍රියාත්මක කරන්නා)",* with the said precept as authorized by Section 357. The process server should report back to his Court by way of an affidavit (Section 371), whether the summons was served personally on the defendant or not for the reasons stated therein. In the instant appeal, since the action was instituted in the Commercial High Court in *Colombo* and the Appellants are residents of *Batticaloa*, the High Court directed its Registrar/Deputy Fiscal to serve summons on the defendants through the Registrar/Deputy Fiscal of the District Court of *Batticaloa*.

The evidence of *Kadiravelu Nallaratne,* who served as the process server of that Court, revealed that the summonses issued on the two Appellants and sent by the Commercial High Court of *Colombo* to his Court were assigned to him for service. The witness being the process server of that Court, after making entries in the relevant Register, had taken steps to serve the summonses personally on the two Appellants. He confirmed that the summonses were duly served on the two appellants in his returns to the

Court. The legally prescribed process of serving summons was therefore complied with by the Deputy Fiscal of the District Court of *Batticaloa* and by the "සිතාසි බෙදන්නා" who acted on his precept.

The Appellants objection to the legality of service of summons by a "සිතාසි බෙදන්නා" and not by the Fiscal or a *Grama Niladhari* is based on the specific reference made to the two officers in that Section. Clearly the Appellants contend that summons could be served properly either by Fiscal or *Grama Niladhari* and no other. In view of the statutory provisions referred to in the preceding paragraphs, it is my view that the mere absence of a specific reference to a process server *(සිතාසි හා ඇස්කිසි ක්‍රියාත්මක කරන්නා)* in Section 60, does not make it illegal for a Court to satisfy itself of the fact that summons was served, (a necessary pre requisite in Section 84 to proceed *ex parte*,) upon the "*affidavit of such service*" as it is a course of action made permissible by provisions of Section 61.

In the absence of any specific words confining the said affidavit only to a Fiscal or a *Grama Niladhari* in Section 84 and since Section 61, makes an affidavit of a "සිතාසි බෙදන්නා/ සිතාසි හා ඇස්කිසි ක්‍රියාත්මක කරන්නා" shall be sufficient evidence of the service of summons, and the contents of the said affidavit of the" සිතාසි බෙදන්නා/ සිතාසි හා ඇස්කිසි ක්‍රියාත්මක කරන්නා" of the District Court of *Batticaloa* is deemed to be correct unless and until the contrary is proved by the Appellants, it is my considered view that the Commercial High Court had rightly relied on the affidavit V1 as well as the oral evidence of the process server to hold that there was due service of summonses on them.

In view of the forgoing, I am of the view that the second and third grounds of appeal of the Appellants are also devoid of any merit. Accordingly, the order of the Commercial High Court dated 13.05.2016,

dismissing the application of the Appellants under Section 86(2) and imposition of costs, is hereby affirmed.

The joint appeal of the Appellants is dismissed with costs.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, PC.J.

I agree.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ, J.

I agree.

JUDGE OF THE SUPREME COURT