

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

In the matter of an appeal

Hasini Dilshani Wijesinghe
Jayawardane
No.465/50, Nelum Place,
Jalthor, Ranala.

Minor appearing by her Next Friend

Amitha Damayanthi Konggahage
Jayawardane
No.465/50, Nelum Place,
Jalthor, Ranala.

Plaintiff

SC Appeal 207/2016
SC(HC)CALA185/16
WP/HCCA/COL/60/2010/F(A)
DCColombo 57651/MR

Vs

Pitakanda Wahumpurage Rohana
Sumith Ananda.
No.402, Himbutana Road,
Mulleriyawa, New Town.

KMD Samantha
No.467/8, Rajasinghe Mawatha,
Udumulla,
Mulleriyawa, New Town.

Wajira Sumith Udunuwara
No.406, Udumulla

Mulleriyawa, New Town

Defendants

AND

Wajira Sumith Udunuwara
No.406, Udumulla
Mulleriyawa, New Town

3rd Defendant-Petitioner-Appellant

Vs

1. Amitha Damayanthi Konggahage
Jayawardane
No.465/50, Nelum Place,
Jalthor, Ranala.

Plaintiff-Respondent

2. Pitakanda Wahumpurage Rohana
Sumith Ananda.
No.402, Himbutana Road,
Mulleriyawa, New Town.
3. KMD Samantha
No.467/8, Rajasinghe Mawatha,
Udumulla,
Mulleriyawa, New Town.

Defendant-Respondents

AND NOW

Wajira Sumith Udunuwara
No.406, Udumulla
Mulleriyawa, New Town
3rd Defendant-Petitioner-Appellant-

Petitioner-Appellant
Vs

1. Amitha Damayanthi Konggahage
Jayawardane
No.465/50, Nelum Place,
Jalthor, Ranala.

**Plaintiff-Respondent-
Respondent-Respondent**

2. Pitakanda Wahumpurage Rohana
Sumith Ananda.
No.402, Himbutana Road,
Mulleriyawa, New Town.
3. KMD Samantha
No.467/8, Rajasinghe Mawatha,
Udumulla,
Mulleriyawa, New Town.

**Defendant-Respondents-
Respondent-Respondents**

Before : Sisira J de Abrew J
LTB Dehideniya J
Murdu Fernando PC J

Counsel : S Kumaralingam for 3rd Defendant-Petitioner-Appellant-
Petitioner-Appellant
MDJ Bandara for the Plaintiff-Respondent- Respondent-Respondent

Argued on : 21.6.2018

Written Submission

Tendered on : 29.6.2018 by the 3rd Defendant-Petitioner-Appellant-
Petitioner-Appellant
19.1.2018 by the Plaintiff-Respondent-
Respondent-Respondent

Decided on : 03.12.2018

Sisira J de Abrew J

In this case the Plaintiff states that 1st to 3rd defendants did not answer the summons of the learned District judge. The learned District judge fixed the case for ex-parte trial. After serving the decree on the 2nd and 3rd Defendants, the 3rd Defendant made an application under Section 86(2) of the Civil Procedure Code to purge the default. The learned District Judge by his order dated 23.3.2010 dismissed the application to purge the default. Being aggrieved by the said order of the learned District Judge, the 3rd Defendant appealed to the Civil Appellate High Court. The Civil Appellate High Court, by its judgment dated 11.3.2016 dismissed the appeal and affirmed the judgment of the learned District Judge. Being aggrieved by the said judgment of the Civil Appellate High Court, the 3rd Defendant has appealed to this court. This court, by its order dated 1.11.2016, granted leave to appeal on questions of law stated in paragraphs 11(b) and 11(d) of the petition of appeal dated 20.4.2016 which are set out below.

1. Have the Honourable Judges of the Civil Appellate High Court erred by failing to consider that since statutory provisions apply to service of summons and unless the summons are duly served the other statutory consequences for non-appearance on serving summons would not apply on the Defendant.
2. Have the Honourable Judges of the Civil Appellate High Court erred by failing to consider the provisions of Section 62 of the Civil Procedure Code which categorically deals with substituted service and provides that service (of summons) has to be on an order of the court.

The 2nd and 3rd Defendant-Appellants both gave evidence at the inquiry. They both said that they did not receive summons in this case. The 2nd Defendant in his

evidence stated that no summons had been pasted on his door. The 3rd Defendant-Appellant in his evidence stated that no summons had been pasted on his gate. S.L Douglas Priyantha, the Process Server in his evidence stated that he pasted summons on the door of the 2nd Defendant-Appellant. He also, in his evidence, stated that he pasted summons on the gate of the 3rd Defendant-Appellant. Both Defendant-Appellants in their evidence denied this position. Section 60 of the Civil Procedure Code reads as follows.

(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 of 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.

(2) If the service referred to in the preceding provisions of this section cannot by the exercise of due diligence be effected, the Fiscal or Grama Niladhari shall affix the summons to some conspicuous part of the house in which the defendant ordinarily resides or in the case of a corporation or unincorporated body, to the usual place of business or office of such corporation or such body and in every such case the summon shall be deemed to have been duly served on the defendant.

In terms of Section 60(2) of the Civil Procedure Code, the Fiscal has the right to affix the summons on a conspicuous part of the house. There is no dispute on this point. In an inquiry to purge the default it is the burden of the defendant to establish that summons had not been served on him. In *Windawath Vs thopman*

[1998] 3 SLR 1 Court of Appeal held thus “The defendants have to begin leading evidence and once the defendant's lead evidence to prove that summons had not been served on them and establish that fact, burden shifts back onto the plaintiffs to rebut the evidence.”

The 2nd and 3rd Defendant-Appellants have stated in their evidence that they did not receive summons. Douglas Priyantha, the Process Server in his evidence stated that when he went to the 2nd Defendant's house, the wife of the 2nd Defendant was sweeping the house and he affixed the summons on the door. If this evidence is true it is very strange as to why the 2nd Defendant did not appear in court. In these circumstances the question that arises is whether the Process Server's evidence could be accepted as true evidence. Douglas Priyantha, the Process Server in his evidence stated that when he went to the 3rd Defendant's house, his house was closed; that he made inquiries from the person who is living in front of the 3rd Defendant's house; and that he learnt that the 3rd Defendant would return in a short while. If that is so, question that arises is as to why he did not wait to meet the 3rd Defendant. Thus the question arises whether his evidence satisfies the test of probability. Douglas Priyantha, the Process Server in his evidence states that he normally takes down notes with regard to the details of the people from he makes inquiries when he goes to serve summons. But in the present case he had not done so. According to Douglas Priyantha, the Process Server, summons was pasted on the gate of the 3rd Defendant on 17.4.2018 and he knocked on the gate. The 3rd Defendant categorically states in his evidence that he was present at home on 17.4.2018. When I consider the evidence of Douglas Priyantha, the Process Server, I feel that I am unable to accept his evidence as true evidence. When I consider the evidence led at the trial and the judgment of the learned District Judge, I feel that the learned District Judge has not analyzed the evidence properly. If he had properly analyzed the evidence of the Process Server, he would have realized the

improbability of the situation narrated by the Process Server. In the case of De Silva and others Vs Seneviratne and others [1981] 2 SLR 7 Ranasinghe J at page 16 made the following observation.

“H.N.G. Fernando, J. (as His Lordship the Chief Justice then was) in the case of Mahawithana vs. Commissioner of Inland Revenue 64 NLR 217 where in dealing with the question as to when an appellate Court would interfere with the findings of a tribunal on the primary questions of fact, at page 223, it was stated that it was open to an appellate Court to reconsider such findings of fact only:

- (a) If that inference has been drawn on a consideration of inadmissible evidence or after excluding admissible and relevant evidence,
- (b) If the inference was a conclusion of fact drawn by the Board but unsupported by legal evidence, or
- (c) If the conclusion drawn from relevant facts is not rationally possible, and is perverse and should therefore be set aside.”

In the present case also the stand taken up by the Process Server is impossible and therefore I hold that the order of the learned District Judge is perverse

For the above reasons, I cannot permit to stand the order of the learned District Judge dated 23.3.2010. The Civil Appellate High Court affirmed the said order of the learned District Judge. For the above reasons, I set aside the order of the learned District Judge dated 23.3.2010 and the judgment of the Civil Appellate High Court dated 11.3.2016. In view of the conclusion reached above, the 1st question of law is answered as follows:

The learned Judges of the Civil Appellate High Court have failed to evaluate the evidence led at the trial. The 2nd question of law does not arise for consideration.

When the order of the learned District Judge dated 23.3.2010 is set aside, the 2nd Defendant too becomes entitled to file his answer. I direct the learned District

Judge to give an opportunity to the 2nd and 3rd Defendant-Appellants to file their answer. The learned District Judge is directed to conclude this case without any delay.

Judge of the Supreme Court.

L.T.B. Dehideniya

I agree.

Judge of the Supreme Court.

Murdu Fernando PC J

I agree.

Judge of the Supreme Court.