

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

In the matter of an appeal from the judgment dated 29<sup>th</sup> October 2010 judge of the High Court of Western Province (in the exercise of its Civil Commercial jurisdiction) holden in Colombo (Commercial High Court) in case No 86/2001(1), especially in Terms of the Civil Procedure Code and Sections 88 and 754 Thereof, and the High court of the Provinces Special Provinces (Special Provisions) Act No. 10 of 1996 and Sections 5 and 6 thereof.

Selliah Ponnusamy  
105, Manning Place, Colombo 6

**Defendant-Petitioner-Appellant**

SC CHC 01/2011  
HC HC (Civil)86/2001(01)

Vs

People's Bank  
75, Chittampalam A Gardiner Mawatha  
Colombo 2.

**Plaintiff-Respondent-Respondent**

Before : Priyasath Dep PC, J  
Buwaneka Aluwihare PC, J  
Sisira J De Abrew J

Counsel : Suren Fernando for the Defendant-Petitioner-Appellant.  
Rasika Dissanayke for the Plaintiff-Respondent-Respondent

Argued on : 1.3.2016  
Decided on : 22.6.2016

**Sisira J De Abrew J.**

Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) instituted action against the Defendant-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) to recover a sum of Rs.12,000,000/- from Defendant-Appellant. The journal entry dated 13.9.2001 indicates that summons had been served on the Defendant-Appellant. On 13.9.2001, the Defendant-Appellant failed to make appearance in court and as such the case was fixed ex-parte against the Defendant-Appellant. After ex-parte trial, the decree was served on the Defendant-Appellant but he failed to appear in court. Subsequently notice of writ was served on the Defendant-Appellant. Upon notice of writ being served on the Defendant-Appellant, he filed petition and affidavit in court moving, inter alia, to set aside the ex-parte judgment and the decree. At the inquiry he stated, in evidence, that he did not receive summons nor did he receive the ex-parte decree. He however admitted that notice of writ had been handed over to his domestic helper.

The Plaintiff-Respondent, at the inquiry, called Amarasinghelage Gamini a clerk attached to the Commercial High Court as a witness and produced Process Server's reports marked V1 to V4 but failed to call the Process Server as a witness. The learned High Court Judge, by judgment dated 29.10.2010, dismissed the application of the Defendant-Appellant to set aside the ex-parte judgment and the decree. Being aggrieved by the said judgment of the learned High Court Judge, the Defendant-Appellant has appealed to this court. The most important question that must be decided in this case is whether the Defendant-Appellant received summons and/or the ex-parte decree. If this question is answered in the affirmative, the appeal of the Defendant-Appellant should fail. But if this question cannot be

answered in the affirmative or is answered in the negative, the appeal of the Defendant-Appellant should be allowed. I now advert to this question. The Defendant-Appellant, in his evidence, stated that he did not receive summons and/or the ex-parte decree. The Plaintiff-Respondent through a clerk of the Commercial High Court produced the Process Server's reports marked V1 to V4. According to V2, the Process Server had handed over summons to the Defendant-Appellant on 3.7.2001. According to V3, he had handed over the decree to the Defendant-Appellant on 9.1.2002. The Process Server did not give evidence. As against these two documents the Defendant-Appellant under oath stated that he did not receive summons and/or the ex-parte decree. He further stated that he had four other civil cases in court; that he had retained lawyers in those cases and paid 38 million to the bank; and that he had no reasons to keep away from this case if he received summons. Can the court reject this evidence? Learned counsel for the Plaintiff-Respondent contended that the Defendant-Appellant should have called his wife and the domestic helper to corroborate his evidence. I now advert to this contention. The Process Server, in his reports, states that he handed over summons and the ex-parte decree to the Defendant-Appellant. The Defendant-Appellant, in his evidence, denied the said fact. Even if the wife and domestic helper of the Defendant-Appellant were called as witnesses, can they corroborate the evidence of the Defendant-Appellant? No one can assume that the wife and domestic helper are always within the seeing range of the Defendant-Appellant. Therefore in my view, failure to call them as witnesses has not weakened the position taken up by the Defendant-Appellant. For the above reasons, I reject the above contention of learned counsel for the Plaintiff-Respondent. I have gone through the evidence of the Defendant-Appellant and see no reasons to reject his evidence. After considering the evidence led at the trial, I hold the view that the Defendant-

Appellant has established the fact that he did not receive summons and/or ex-parte decree. In a case of this nature once the defendant established the fact that he did not receive summons and/or the ex-parte decree, the burden shifts to the Plaintiff to rebut the said position. How does he discharge this burden? This can be done by leading the evidence of the Process Server. This view is supported by the judicial decision in Wimalawathi Vs Thotamune [1998] 3 SLR 1 wherein Justice Ranaraja observed thus: “ The affidavit filed by the Process Server is prima facie evidence of the fact that summons was duly served on the defendants mentioned therein and there is a presumption that summons was duly served. Accordingly, the burden shifts on to the defendants to prove that no summons had been served. The defendants have to begin leading evidence. Once the defendants lead evidence to prove that summons had not been served on them and establish that fact, burden shifts back on to the plaintiffs to rebut that evidence. This can be done by calling the Process Server to give evidence that he had served summons on the defendants”

Did the Plaintiff-Respondent, at the inquiry, call the Process Server? He did not do so. Learned counsel for the Plaintiff-Respondent contended that it was not necessary for the Plaintiff-Respondent to have called the Process Server as his reports V1 and V4 had been produced without objection. In my view although they were produced without objections there was a duty on the Plaintiff-Respondent to call the Process Server when the Defendant-Appellant, in his evidence, took up the position that he did not receive summons and/or the ex-parte decree. The Plaintiff-Respondent in the present case did not rebut the evidence of the Defendant-Appellant that summons or ex-parte decree was not served on him (the Defendant-Appellant) by calling the Process Server when he (the Defendant-Appellant), in his

evidence, took up the above position. The learned High Court Judge has failed to consider the above matters and arrived at a wrong conclusion.

On the evidence led at the inquiry, I hold that the Defendant-Appellant had established that he had not received summons and/or the ex-parte decree.

For the above reasons, I set aside the judgment of the Commercial High Court dated 29.10.2010, ex-parte judgment dated 20.8.2001 and the ex-parte decree of the learned High Court Judge. I direct the learned High Court Judge to permit the Defendant-Appellant to file his answer and thereafter proceed with the case.

Judge of the Supreme Court.

Priyasath Dep PC, J

I agree.

Judge of the Supreme Court.

Buwaneka Aluwihare PC, J

I agree.

Judge of the Supreme Court.