

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

***In the matter of an appeal in terms of
Section 5(A) of the High Court of the
Provinces (Special Provisions) Act
No. 19 of 1990 as amended by Act
No. 54 of 2006 read with Section 755
of the Civil Procedure Code.***

Case no: SC/CHC/APPEAL/25/2015
Commercial High Court Case No:
CHC/272/2009/MR

Sampath Leasing and Facturing
Limited,
No 24A,
Ward Place,
Colombo 07.

Previous Address

No 110, Sir James Peiris Mawatha,
Colombo 02.

PLAINTIFF

vs.

1. Mohomed Thawbeer
Mohomed Haneez,
No. 142,
Himbiliyagahamadiththa,
Uwa.

2. Arpin Mohomed Hameen

No. 96,
Mihindupura,
Meepilimana,
Nuwara-Eliya

3. Wahampurage Rukman
Samaranayake,
"Happy Inn",
No. 35,
Unim View Road,
Nuwara-Eliya

DEFENDANTS

AND BETWEEN

An application under section 86(2)
of the Civil Procedure Code

1. Mohamed Thawbeer Mohamed
Haneez,
No. 142,
Himbiliyagahamadiththa,
Uwa

1st DEFENDANT-PETITIONER

Vs

Sampath Leasing and Facturing
Limited,

No. 24A,

Ward Place,

Colombo 07.

Previous Address

No. 110, Sir James Peiris Mawatha,

Colombo 02.

PLAINTIFF-RESPONDENT

AND

2. Arpin Mohamed Hameen

No. 96,

Mihindupura,

Meepilimana,

Nuwara-Eliya

3. Wahampurage Rukman

Samaranayake,

"Happy Inn",

No. 35,

Unim View Road,

Nuwara-Eliya

**DEFENDANT-
RESPONDENTS**

AND NOW BETWEEN

1. Mohamed Thawbeer Mohamed

Haneez,

No. 142,
Himbiliyagahamadiththa,
Uwa

1ST DEFENDANT-PETITIONER-

APPELLANT

Vs

Sampath Leasing and Facturing
Limited, No. 24A,

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PLAINTIFF-RESPONDENT-
RESPONDENT

AND

1. Arpin Mohamed Hameen
No. 96,
Mihindupura,
Meepilimana,
Nuwara-Eliya

2. Wahampurage Rukman
Samaranayake,
"Happy Inn",
No. 35,

Unim View Road,

Nuwara-Eliya

DEFENDANT-RESPONDENT-
RESPONDENTS

BEFORE : **S. THURAIRAJA, PC, J**
A.H.M.D. NAWAZ, J AND
K. P. FERNANDO, J

COUNSEL : M. D. J. Bandara for the 1st Defendant-Petitioner-Appellant
Kaushalya Nawaratne with Prabuddha Hettiarachchi for the Plaintiff-Respondent-Respondent

WRITTEN SUBMISSIONS : 1st Defendant-Petitioner-Appellant on 1st September 2023

ARGUED ON : 6th July 2023

DECIDED ON : 22nd September 2023

S. THURAIRAJA, PC, J.

The 1st Defendant-Petitioner-Appellant, namely Mohomed Thawbeer Mohomed Haneez, (hereinafter sometimes referred to as the "Appellant") preferred this appeal against the order of the Commercial High Court dated 10th March 2015.

The Appellant had filed his Petition of appeal on 8th May 2015 and submitted as follows:

"7) Being aggrieved by the said Order of the Honourable High Court Judge of Commercial High Court of Colombo dated 10-03-2015 the 01st Defendant-Petitioner-Appellant humbly makes this appeal against the

said Order to Your Lordship's Court on the following among other grounds that may be urged by his counsel at the hearing of this appeal.

- a. The said order is contrary to Law and against the weight of facts and circumstances in this case.*
- b. The Honourable High Court Judge has failed to consider the real Issues placed by the Appellant*
- c. The Honourable High Court Judge has failed to consider the fact that the Respondent has failed to prove that the summons have been properly served only Appellant by the Fiscal.*
- d. The Learned High Court Judge has failed to consider the legal entitlement of the Respondent and his order is totally contrary to the doctrine of undue enrichment.*

(Reproduced as it is) [sic]

This Court observes that there is no specific pleading of Questions of Law hence the Court inquired for the Counsel to submit his questions of law. After submissions, the Counsel submitted that he will be continuing his argument on paragraph 7(c) of the Petition and moves to accept the same as questions of law and grounds of application. The Counsel stated that he is not relying on (a), (b) and (d) of paragraph 7 as they are wide and uncertain. Accordingly, the Court will be considering the following question of law:

"c. The Honourable High Court Judge has failed to consider the fact that the Respondent has failed to prove that the summons have been properly served only Appellant by the Fiscal."

(Reproduced as it is) [sic]

This Court reluctantly observes and places on record that none of the Parties have filed written submissions. This was brought to the notice of both Counsel and they pleaded

that they be permitted to make submissions and the written submissions will be filed within two weeks, i.e. 20th July 2023. Unfortunately, up until 28th August 2023, neither party has filed the written submissions. The Counsel for the 1st Defendant-Petitioner-Appellant only filed his written submissions on 1st September 2023, more than a month after the written submissions were due to be filed. This Court is compelled to rely on their oral submissions and the materials available in the appeal brief.

To have a better understanding it will be preferable to have the facts of the case.

The Facts

1st Defendant-Petitioner-Appellant had obtained leasing facilities via Leasing agreement bearing No. V/0885/24/NUW dated 24th May 2006 from Plaintiff-Respondent-Respondent Company (hereinafter sometimes referred to as the "Plaintiff") to lease a Mitsubishi FE516BD Motor Lorry. In the said leasing agreement (**P2**), the 1st Defendant was to pay sixty monthly instalments of Rs. 61,056.74 to the Plaintiff-Respondent-Respondent. Two guarantors Arpin Mohamed Hameen (2nd Defendant) and Wahampurage Rukman Samaranayake (3rd Defendant) entered into Guarantee Agreement with the Plaintiff Company dated 24th May 2006 and guaranteed *inter alia* that the 1st Defendant-Petitioner-Appellant would make punctual payment of all rentals and all sums due and owing to the Plaintiff in terms of the said Lease Agreement.

The Appellant failed to pay the monthly Lease Rentals as stated in the agreement. The Plaintiff therefore issued Notice of Failure. As the 1st Defendant failed to remedy the substantial failure, the Plaintiff set out to terminate the Lease Agreement by letter dated 20th March 2007. Letters of demand were sent to 1st, 2nd and 3rd Defendants to pay the sum of Rs. 3,088,679.28 which was owed to the Plaintiff. Since there was no response, the Plaintiff Company filed an action at the Commercial High Court to recover the due amount. Summons were served on 3rd Defendant. He had appeared and filed his proxy and answer on or about 11th October 2009. It was reported that the

2nd Defendant has died during the pendency of the case in the Commercial High Court of Colombo.

Plaintiff Company claims that they have sent notices via Registered post and since there is no response, they have served notice through the Fiscal.

In the fiscal report dated 30th July 2009, the person who served summons affirmed and stated that

"සිතාසි බාරදෙන්නා වන M. සේල්වම් නමැති මා... 2009 07 මය 21 වැනි දින 1, 2 වින්තිකරුවන් සාමාන්‍යයෙන් පදිංචිව සිටින මාස්තොට, මිපිලිමාන පිහිටි මුහුගේ ගෙදරට ම ගිය බවත් 1, වන වින්තිකරු වැළිමඩ ප්‍රදේශයේ සිටින බවත් 2 වන වින්තිකරු මියගෙයේ ඇති බවත් ගරු අධිකරණයට වාර්තා කරමි"

The unofficial translation of the above is given below for ease of reference.

"I, summons server, M. Selvam, inform the Honourable Court that on 21st July 2009, I went to his house at Magasthota, Mipilimana where the 1st and 2nd Defendants usually reside, and I am being informed that the 1st Defendant is residing in Welimada area and the 2nd Defendant is now deceased."

On the application made by the Plaintiff Company the Court ordered to serve the summons through substituted service, the same was effected by the fiscal on the given address i.e. No. 42/12, Gajabapura, Magastota, Nuwara Eliya.

The Fiscal of Nuwara Eliya reported with an affidavit stating that the notice was pasted on the doors of the given address and substituted service was duly complied with. Thereafter it was informed to Court that he is living elsewhere, namely, No. 142, Himiliyagahamadiththa, Uwaparanagama.

Once again, the notice was sent to the new address but the 1st Defendant-Petitioner-Appellant was not available and evading of receiving the notice. Once again it was served through substituted service and a report was filed in the Court.

A timeline of the events and the actions taken by the fiscals and the reports filed by them can be found below.

Fiscal report/affidavit of person who served summons dated 22nd June 2010 (**10B**) stated as follows:

“සිතාසි බාරදෙන්නා වන එම් කළුබන්ඩා නමැති මා... මෙහි නම් සඳහන් 1 විත්තිකරු මොහමධි තවත් මොහමධි හතිස් නමැති ... 2010-05-31 සහ 2010-06-08 09 දි සිතාසියේ සඳහන් ලිපිනයේ දී සෙවු බවත් සෞයාගත නොහැකි වූ බවත් ය.”

An unofficial translation of the above can be found below.

“I, summons server M. Kalubanda, searched for the defendant Mohamed Thawbeer Mohomed Haneez ... on 31-05-2010, 08-06-2006 and 09-06-2010 at the address mentioned in the summons but could not find him.”

On the same report it was written that he went to the given new address to find the 1st Defendant in this case, (for 3 days), but then came to know that this Defendant is not available, absconding and evading the service of notice. Therefore, he reported to the Court that the summons cannot be served.

“මෙම නඩුවේ 1 විත්තිකරු සෞයා, දී ඇති නව ලිපිනයට මා ගිය නමුන් (දින 3කී), මෙම විත්තිකරු සැහෙවන බව මා හට දැන ගැනීමට හැකි විය. එබැවින් සිතාසිය භාර නොකැල හැකි ලා බව ගරු අධිකරණයට වාර්තා කර සිටිමි.”

An unofficial translation of the above can be found below.

“I am reporting to this Honourable Court that; I went in search of the defendant in this case for three days to the given new address. I understand that he is hiding hence I am unable to serve the summons on him

On 15th November 2010, the Fiscal for the Welimada District Court reported as below:

“සිතාසි භාර දෙන්නා වන පියදාස නමුත් මා... මෙහි නම කර ඇති සිතාසිය/ දැන්වීම එහි දෙවන පිටපතක් වර්ෂ 2010 නොවැම්බර මස 8 වැනි දින උප පරාගම දී හතීස් වින්ති ආදේශ ක්‍රමයට තිබූස් ඉදිරි දෙරේ සිතාසි වාර්තාව අල්වන ලදී”

An unofficial translation of the above can be found below.

“I, summons server Piyadasa, am hereby reporting that on 8th November 2010, I went to 1st Defendant Haneez address given in the notice/ summons at Uwaparanagama, served the notice on substituted service by pasting the notice on the front door of the house.”

On 25th May 2012, the fiscal report states as follows:

“සිතාසි භාර දෙන්නා වන S. Rajapakse නමුත් මා 2012 මැයි මස 08 වැනි දින මොහොමඩ් තවධීර් මොහොමඩ් හතීස් සාමන්‍යයෙන් පදිංචිව සිටින අංක 42/12, ගජබාපුර, මාගස්තොට, නුවරඑළියේ පිහිටි මහුගේ ගෙදරට මා ගිය බවත් වින්තිකරු වැලිමඩ් ප්‍රදේශයේ සිටින බවත් මොහොමඩ් හරිස් පවසයි. එබැවින් සිතාසිය දෙන්න බැරුවූ බව ගරු අධිකරණයට වාර්තා කරමි.”

An unofficial translation of the above can be found below.

I, summons server S. Rajapakse, hereby report to the Honourable Court that on 8th May 2012 went to Mohomed Thawbeer Mohomed Haneez usual residence at 42/12, Gajabapura, Magasthota, Nuwara Eliya. He was not there and I was informed by Mohamad Harif that he is residing at Welimada.

The Precept to Fiscal to serve dated 17th May 2013 reads as follows:

“1 වින්තිකරුගේ නව ලිපිනයට තීන්දු ප්‍රකාශය නොතිස් ආදේශ ක්‍රමයට නව ලිපිනයට භාර දී වාර්තා කරන්න”

An unofficial translation of the above can be found below.

"Serve the notice and judgement on the 1st Defendant's new address and report."

The Fiscal Report dates 30th May 2013

"සිතාසි භාර දෙන්න වන හෙවිලෙවා නමැති මා ... මෙහි නම සඳහන් මොජාමඩ් නවීන් මොජාමඩ් හනීස් නමැති අංක 142, හිංබිලාස්ගාහමාධිත්ත, උඩ 2013.05.27 දී සෙවු බවත් සොයා ගත නොහැකි වූ බවත්ය. වින්තිකරු කොළඹ සිටින බව වින්තිකරුගේ පියා කියා සිටි ගරු අධිකරණයට වාර්තා කරමි"

An unofficial translation of the above can be found below.

I, summons server Hettihewa, on 27th May 2013, hereby report to the Honourable Court that I searched for the defendant named Mohomed Thawbeer Mohomed Haneez at the address given as 142, Himbilyasgahamadiththa, Uwa, but he could not be found. Father of the defendant said that he is in Colombo.

The Fiscal report dated 28th June 2013 states as follows:

"සිතාසි භාර දෙන්නා වන හෙවිලෙවා නමැති මා ... මෙම නම කර ඇති සිතාසිය/දැන්වීම එහි දෙවන පිටපතක් වර්ෂ 2013 06 මස 19 වැනි දින ලිපිනයේ ද තීන්දු ප්‍රකාශය ඉදිරිපස දාරේ අලවා භාර දෙන ලදී පිස්කල් අන කර එය ලිපිනයට ගොස් ආදේශ ක්‍රමයට ඉදිරිපස දාරේ අලවා තීන්දු ප්‍රකාශය භාර දෙන ලදී"

An unofficial translation of the above can be found below.

"I, summons server Hettihewa on 19th June 2013 served the herein numbered second copy of the Notice/ summons by pasting the same on the front door.

I served the fiscal order via substituted service by pasting the judgment on the front door."

On 9th October 2013 the Plaintiff Company changed its name, and this was informed to the lawyers of the 1st and 3rd Defendants via registered post.

The Commercial High Court of Western Province being convinced of the service of summons, heard the case ex parte against the 1st Defendant and ordered in favour of the Company (Plaintiff-Respondent) on 16th December 2011.

When the company tried to proceed against the 3rd Defendant, the 1st Defendant-Petitioner-Appellant made an application under Section 86 (2) of the Civil Procedure Code to vacate the order. Section 86 (2) of the Civil Procedure Code has been reproduced below.

"Where, within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff makes application to and thereafter satisfies court, that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear proper."

The Commercial High Court after hearing both sides, dismissed the application to vacate the ex parte order. Being aggrieved with the order of the Commercial High Court, 1st Defendant-Petitioner-Appellant preferred an appeal to this Court.

Analysis

It is to be noted that the written submissions, motions and petitions submitted by the parties have variations with regard to the names of the parties. Therefore, we will be referring to the Petition filed in this Court regarding the same.

The main issue raised by the Appellant is that the Commercial High Court Judge has failed to consider the fact that the Plaintiff-Respondent-Respondent Company has

failed to prove that the summons have been properly served on the Appellant by the Fiscal.

In **Wimalawathie and Others vs Thotamuna and Others (1998) 3 Sri LR 1**, Dr. Ranaraja, J held that

"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."

(Emphasis added)

As affidavits have been filed by the process/summons servers, the 1st Defendant must present evidence to prove that no summons had been served, however, there has been no satisfactory evidence to prove the stance of the 1st Defendant. He keeps insisting that the Plaintiff-Respondent-Respondent Company has to prove the summons were served on him, although vide Dr. Ranaraja, J's judgement in the above mentioned case, once an affidavit has been signed, the burden of proof shifts to the 1st Defendant.

I discussed earlier that the Appellant was evading notice and not residing in the address stated on the Lease Agreement. As seen in the Commercial High Court Journal Entry No.10B, the Fiscal has got to know that the Appellant was "hiding/evading" from receiving summons. Journal Entry No. 14 dated 06th September 2010 states that the summons was pasted on the door of the previous address given on the Lease Agreement.

Now I draw my attention to the above mentioned lease agreement bearing No. V/0885/24/NUW dated 24th May 2006.

The address given by the Appellant was No. 42/12 Gajabapura, Magastota, Nuwara Eliya. If a party changes their address, it is mandatory for them to inform the other side

of their change of address. But if the party has a reasonable explanation for not doing so within a reasonable time, it can be considered according to the situation subjectively. In the given matter, the summons server got to know that the 1st Defendant was not residing in the address given in the lease agreement only after he went to serve summons on separate days. Even after the summons were served on the second address, the 1st Defendant was not present at the second address either. It was the 1st Defendant's father who informed the summons server that his son (the 1st Defendant) was residing in Colombo at the time. It must be highlighted that none of these address changes were informed to the Plaintiff-Respondent-Respondent Company at any point. The 1st Defendant has moved around the country but has not informed the Plaintiffs of his changes in addresses even at one instance. This is a clear evasion of receiving summons.

Further, I draw my attention to Article 30 of the lease agreement above mentioned which provides for service of notice. It says as follows:

"Article 30: Service of Notice"

*Any notice summons or demand to be sent or given by either party or their duly authorised representative or their Attorneys-At-Law or by any Court or any Tribunal or any Arbitrator/s to the other **may be sent by registered post to the address of the other party as appearing herein or such other address as such party may from time to time have duly communicated to the other** and if so sent shall be **deemed to be served on the day following the date of posting**. In proving service of any notice, summons, demand or Arbitral award it shall be **sufficient to show that the letter containing the notice, summons, demand or Arbitral Award was properly addressed, stamped and posted under registered cover, or has been served to the address of the other party***

as appearing herein or such other address as such party may have from time to time duly communicated to the other party.

It is hereby agreed by and between the parties hereto that a notice, summons, demand or Arbitral Award so sent and/or served in terms of the foregoing by one party is deemed to have been received by the other party and no objection on grounds of non-receipt of notice can be taken by the party to where such notice, summons, demand or Arbitral Award was sent.

(Emphasis added)

It is clear that there is a contractual obligation between these two parties regarding service of notice. If a notice is sent to the given address, as per the above provisions of the contract, it will be sufficient.

In the present case however, the company had not only served notices to the given address through registered post but also served notices via Fiscal and substituted service. It had also informed the Defendants of change in the name of the Company. The Company and the fiscals have gone above and beyond their duty to serve the summons on the 1st Defendant. He therefore cannot rely on his evasion to claim that he did not receive summons and claim that the Learned Commercial High Court Judge erred in his judgement.

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."

(Emphasis added)

It is the Appellant's contention that the summons has not been served properly by the Fiscal. However, as per Section 60 (2) above, it is seen that if personal service has not been successful, then the Fiscal has the authority to fix the summons to some conspicuous part of the house in which the defendant ordinarily resides in, which is known as substituted service of summons. As evidenced by the Journal Entry No. 14 dated 06th September 2010, the summons was pasted on the door of the address given on the Lease Agreement, completing the substituted service of summons.

The summons and judgements have been served on the address mentioned in the lease agreement, and later at the second address. The 1st Defendant has not been present at any of the two addresses on the dates that the summons were served by the summons server. As proved by the journal entries and the fiscal reports mentioned above, it is safe to assume that the Defendant is within the country, although he has moved from place to place constantly.

Decision

Considering all above material before us, I turn to answer the question of law considered by this Court, as to whether the High Court Judge has failed to prove that summons have been properly served on the Appellant by the Fiscal. I answer in the negative and find that the learned High Court judge has **not** failed to consider the fact that the summons have been properly served on the Appellant by the Fiscal.

I state that the learned High Court Judge has made the correct order. There is no reason for us to interfere with said order. Accordingly, I dismiss this appeal with cost.

Appeal Dismissed with cost.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ, J

I agree.

JUDGE OF THE SUPREME COURT

K. P. FERNANDO, J

I agree.

JUDGE OF THE SUPREME COURT