

BANDARANAIKE
v.
TIMES OF CEYLON LTD.

SUPREME COURT

SAMARAKOON, C.J., WANASUNDERA, J. AND COLIN-THOME, J.

S C No. 56/82 - C.A.L.A. No. 59/82 (S.C.) - C.A.L.A. No. 36/82 - D.C. COLOMBO
No. 81692/M

FEBRUARY 1, 1984.

Service of summons on Company - Section 471 of the Civil Procedure Code - Sections 91 and 357 of the Companies Ordinance.

The plaintiff-appellant sued the respondent-company (Times of Ceylon Ltd.) for damages. Summons was issued on the defendant and was reported to have been served by the fiscal at the registered address namely No. 3, Bristol Street, Colombo by handing it over to a person described as the Manager who really was an officer of the Business Undertaking of the Times of Ceylon Ltd.

As the defendant did not appear, ex parte trial was held and judgment and decree were entered. Subsequently an application for execution of writ was made. At the time of the service of summons, at the time of the judgment after ex parte hearing and at the date of the decree and application for issue of writ of execution the registered address of the respondent-Company was No. 3, Bristol Street, Colombo.

On April 10, 1981, the respondent-company prayed that the judgment and decree be set aside and that permission be granted to it to appear and defend the action. The grounds adduced were that the Business Undertaking of the respondent-company had been vested in the State by Order dated August 2, 1977, and after 3rd August, 1977, the respondent-company had ceased to carry on business at No. 3, Bristol Street, Colombo. Although this was the registered address, its address in fact was No. 9, Castle Street, Colombo. Further by resolution of 5th March, 1981, the respondent-company went into voluntary liquidation. The respondent-company alleged that neither summons nor decree had been served on it. The District Court upheld the objections and the appellant appealed unsuccessfully to the Court of Appeal.

Held -

(1) All that matters is that the summons reached the registered office of the Company and was received by an officer working at the office even though he may not have been an employee of the respondent. The law is only concerned with the address registered in the Books of the Registrar of Companies and not with the address in fact.

Per Samarakoon, C.J.—

"The law fixes the Company's habitat so that the process of law can reach it and the members of the public who have dealings with it can find it. The Respondent had represented to the public that its registered office was at No. 3, Bristol Street, and if any member of the public acted on the faith of it the Respondent cannot be heard to deny it".

Hence summons and decree had been served as required by law.

(2) Even though the respondent-company had ceased to do any business after the vesting order there was no evidence as to whether it had any movable or immovable assets or as to whether the company was now an empty shell. Further despite the voluntary liquidation of the respondent-company its corporate character continued.

Cases referred to

(1) *Mendis v. The Independent Publishing Co. Ltd.* 10 C.L.W. 145.

(2) *A/S Cathrineholm v. Nonequipment Trading Ltd.* (1978) 2 OB 314, 322 (C.A.) [1972] 2 All. E.R. 538, 542 (C.A.).

APPEAL to the Supreme Court from the order of the Court of Appeal

Nmal Senanayake, S.A., with Kithsiri P. Gunaratne, Saliya Mathew and Mohamed Ghazzale for plaintiff-appellant.

N. Sinnathamby with K. S. Ratnavale for respondent.

Cur. adv. vult.

March 8, 1984.

SAMARAKOON, C.J.

The appellant instituted this action on the 18th September, 1978, against the respondent for recovery of damages in the total sum of Rs. 750,000 upon two causes of action. The appellant alleged that the respondent had published two news items in the newspaper, "Sunday Times" of the 4th December, 1977. The address of the respondent set out in the caption to the plaint was No. 3, Bristol Street. Summons was issued on the defendant and was reported to have been served by the fiscal at that address. The returnable date was the 17th November, 1978. The respondent did not appear on this date and the case was fixed for *ex parte* trial on 10th January, 1979. *Ex parte* evidence was led on the 10th January, 1979, and judgment was delivered on 29th January, 1979. Decree is stated to have been entered of record on the 17th

April, 1979. I presume that this was Decree Nisi. Application for execution of writ was subsequently made. At the time of the issue of service of summons, at the time of judgment after *ex parte* hearing, and at the date of decree and application for issue of Writ of Execution the registered address of the respondent with the Registrar of Companies was and remained No. 3, Bristol Street, Colombo.

The respondent filed objections on the 10th April, 1981, and prayed that the judgment and decree entered of record be set aside and that the respondent be permitted to enter an appearance, file answer and defend the action. The reasons adduced are—

1. That its Business Undertaking had vested in the State by Order dated 2nd August, 1977, made under the Business Undertakings (Acquisition) Act. No. 35 of 1972.
2. That on the 3rd August, 1977, the respondent ceased to carry on business and ceased to have a business office at No. 3, Bristol Street, as those premises were also vested in the State by the said vesting order.
3. That the summons and decree were not served on the respondent.
4. That by a resolution dated 5th March, 1981, the respondent went into Voluntary Liquidation.

The address of the respondent set out in the caption to the objections is No. 9, Castle Street, Colombo 8. The District Judge held that summons had not been served on the respondent and ordered that the decree be set aside. The Court of Appeal upheld this Order but gave different reasons. The Appellant has filed an appeal in this Court with the leave of the Court of Appeal which has asked for a decision of this Court on three matters. I will deal with them in their order.

The first question posed by the Court of Appeal is as follows :—

- (a) Was the Court of Appeal wrong in law in holding that there has been no valid service of summons in this case on the defendant-respondent Company as required by the provisions of section 471 of the Civil Procedure Code read with sections 91 and 357 of the Companies Ordinance ?”

I fail to see the relevance of section 357 of the Companies Ordinance in this case. That section deals with the service of documents on a Company and there are no doubt many documents referred to in the Companies Ordinance that could be served on the Company. Perhaps it could be utilised for the service of summons issued by a Court of Law but I do not need to consider that aspect of it because we are concerned here with a summons issued by a Court of Law and its form and the manner of its service governed by the Civil Procedure Code in terms of which it is issued. The cardinal rule of the Civil Procedure Code is that there must be proof of personal service (Vide section 59). All summons, as in the case of all processes of court, unless otherwise directed, shall be issued to the fiscal accompanied by a precept in Form 17 of the Civil Procedure Code (section 356 and section 364 of the Civil Procedure Code). The fiscal's return to the precept must be in the manner required by the provisions of section 371 of the Civil Procedure Code. The Civil Procedure Code takes cognizance of the fact that in the case of juristic persons such personal service is impractical. Therefore it made special provision in section 471 as follows :-

"When the action is against a corporation, or against a board or other public body, or a company authorised to sue and be sued in the name of an officer or of a trustee, except in cases where a particular mode of service is directed by law, the summons may be served—

- (a) by leaving it at the registered office (if any) of the corporation, board, public body, or company ; or
- (b) by giving it to the secretary or other principal officer of the corporation, board, public body, or company :

and the court may in such summons or by special order require the personal appearance of such secretary or other principal officer of the corporation, board, public body, or company who may be able to answer material questions relating to the action."

No doubt section 357 (a) of the Companies Ordinance provides for "leaving" a document at the registered office as does section 471 (a) of the Civil Procedure Code but this is no reason for saying that section 357 can be utilised for the service of summons of Court

The fiscal repaired to premises No. 3, Bristol Street, Colombo, and there served it on the "Manager on behalf of the Times of Ceylon Ltd." That this summons was so served and received is not denied. An entry in hand made on the original of the summons (which was subsequently returned to Court and now appears in the record) shows that it was received on 09.11.78 at 4.10 p.m. At the same time a minute has been made on it, directed to an officer referred to as "P & AM" as follows :-

"P & AM

- (1) Pl. ask Editor DM & ST. Mr. E. P. de Silva to see me with the pp in question to discuss case with the A.G.
- (2) We have to show this to CA when he is in his office."

We were informed that the letters "DM" and "ST" stood for "Daily Mirror" and "Sunday Times" respectively which were two newspapers, the letters "CA" stood for "Competent Authority" who ran the business for the State and that the letters "AG" stood for Attorney-General. On the 10th January, 1979, the General Manager wrote to the Registrar of the District Court of Colombo stating that the summons in question had been delivered in error "at this office" which we were told was a reference to the Times Building, No. 3, Bristol Street. He also added that the defendant mentioned in the summons does not maintain an office in those premises. It is quite clear that at the time the Manager received the summons he did so in the *bona fide* belief that it was one receivable by him as Manager. It is equally clear that some months later (perhaps after consultation with the Law Officers of the State) it dawned on him that this summons was not meant for the Business Undertaking of the State and was wrongly accepted by him. He therefore returned the summons to Court and the receipt of his letter together with the original summons is minuted in journal entry (4) under date 15.01.79 / 19.01.79.

The registered office of the respondent was No. 3, Bristol Street, Colombo, and there is no evidence that it had any other registered office until it registered the new address at No. 9, Castle Street, Borella. This registration was done in compliance with a duty cast on it by the provisions of section 91 (1) of the Companies.

Ordinance. Notice of any change had also to be given within 28 days. Failure in either obligation constitutes an offence. A registered office gives the Company a domicile and residence. Service of summons at this office is equivalent to personal service on a person under section 59 of the Civil Procedure Code. One of the objects of section 91 is to safeguard the interests of the public. The law fixes the Company's habitat so that the process of law can reach it and the members of the public who have dealings with it can find it. The respondent has represented to the public that its registered office was at No. 3, Bristol Street, and if any member of the public acted on the faith of it the respondent cannot be heard to deny it. The appellant has done what the law allowed her to do and she is entitled to the benefit of an act lawfully done.

It is argued that delivery of the summons to the "Manager of the Business Undertaking of the State" is not a valid delivery in law to the respondent as he was not an employee of the respondent. The decision of Keuneman, J. in *Mendis v. The Independent Publishing Co. Ltd.* (1) has been cited for the proposition. The dispute in that case was whether one Fernando who accepted the summons was a responsible officer. He was characterised as a cashier. Keuneman, J. held that he was not a cashier but a very responsible officer of the Company. This decision is not authority for the proposition that service by leaving it at the registered office can only be done by giving it into the hands of a responsible officer. In fact he added "very much less formality would probably have achieved the purpose of the section". All that need be proved is that the summons reached the registered office of the Company and was there left with some human agency. It cannot just be left on some table or thrown into the office. On the other hand the fiscal cannot be expected to inquire into and decide on the status of the individual accepting the summons. In this case there is no doubt that the summons reached the registered office of the Company and was taken by a person who claimed to be the Manager. The Fiscal was not made aware of the nice distinction between the "Times of Ceylon Ltd" and the "Business Undertaking of the Times of Ceylon Ltd." If any confusion arose it was the direct result of the default of the respondent. All that matters is that the summons reached the registered office of the Company and was received by an officer working at the office even though he may not have been

an employee of the respondent. In normal circumstances that summons would have been acted upon. The predicament that the respondent now finds itself is entirely its own fault. "They did not enter the change of address on the register as they should have done" – per Denning, M. R. in *A/S Cathrineholm v. Nonequipment Trading Ltd* (2). The dispute in this case hinged on the service of writ by post. The plaintiff sent the writ by post on July 21, 1971, in a prepaid envelope to the registered address of the defendant which was at 34-35, Norfolk Street, London W.C.2. It was not delivered there. It was not however returned by the postal authorities through the dead letter office. The plaintiff rightly acted on the presumption that in the normal course of post it would have been delivered on July 22, 1971, and obtained judgment in default of appearance. It was subsequently established that the defendant had vacated the premises on June 24, 1971, and on July 5, 1971, the building was handed over to a contractor for demolition. The new office of the defendant was at 23, Ridgmount Street, W.C. 1, which address was not registered. When the postman arrived with the letter on July 21 the building was a derelict, the letter-box had been removed and a pneumatic drill was working outside the door. No delivery could be made but there was no evidence to show what the postman did with the letter thereafter. In any event the Court held that the letter must be deemed to have been delivered and the judgment obtained by the plaintiff was regular. Roakill, J. summed up the position thus—

"What happened in this case was entirely the fault of the defendants. They changed their registered office from 34-35, Norfolk Street to 23, Ridgmount Street ; they did not give notice as they should have done under section 107 (2) of the Companies Act, 1948. The plaintiffs did what the law entitled them to do : they posted the writ to the registered office in Norfolk Street. The building was then apparently little more than an abandoned shell. There was nothing else that the plaintiffs could do if they intended to serve the defendants by post, and any misfortune of the defendants is through their own fault."

For the reasons given above I would answer the first question in the affirmative.

The next question posed is as follows :

- (b) Does the view expressed by the Court of Appeal that at the relevant time 'merely the empty shell of the Company remained' constitute a misdirection in regard to the effect of the provisions of the Business Acquisition Act, No. 35 of 1971.

The Vesting Order (A2) has vested the business undertaking of "Times of Ceylon Ltd." and its registered office No. 3, Bristol Street. In paragraph 3 of the objections the respondent states that since then it had ceased to have any business. There is no evidence to indicate whether or not it has any other movable or immovable assets. Its corporate capacity continued and still exists in spite of the voluntary liquidation (Vide section 219 of the Companies Ordinance). In the absence of further evidence it is not possible to state whether the vesting under the Business Acquisition Act left the Company an empty shell.

The last question posed is as follows :-

- (c) Did the Court of Appeal misdirect itself in holding that the District Court had been informed that No. 3 Bristol Street, Colombo 1, was no longer the 'registered office' of the Company?

The letter dated 10th January, 1979 (marked A), does not state that No. 3, Bristol Street is no longer the "registered office". It merely states that the defendant "no longer maintains an office" in the premises. In any event this is a statement of a third party and the Court was under no obligation to act upon it. My answer to this question is in the affirmative.

The Court of Appeal has held that "though No. 3, Bristol Street, Fort was nominally the registered office in the books of the Registrar of Companies, in reality it was not". By this I understand the Court to mean that though in law it was the registered office, in fact it was not the registered office. The law is only concerned with what is registered in the Books of the Registrar of Companies and the law must take its course. It was open to the respondent to make reality conform to the law but it failed to do so. The only reason given by the respondent in its petition is that summons was not served on it. There is no other reason given.

The appeal is allowed and the Orders of the Court of Appeal and the District Court are set aside. The appellant will be entitled to costs here and in the Court of Appeal.

WAÑASUNDERA, J.—I agree.

COLIN-THOME', J.—I agree.

Appeal allowed.

Orders of the Court of Appeal and District Court set aside.
