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**RAMANATHAN AND ANOTHER**  
**vs.**  
**SATHYASEELAN AND OTHERS**

COURT OF APPEAL.  
SOMAWANSA J (P/CA).  
WIMALACHANDRA. J.  
CALA 323/2004.  
DC MT. LAVINIA 751/03/SPL.  
MAY 18, 2005.

*Civil Procedure Code - Section 60(2)-Substituted service of summons-When is it available? - Is it possible to serve summons by way of newspaper publication?*

After several unsuccessful attempts to serve summons on the 4th defendant, Court on the application of the plaintiff made order for substituted service of summons on the door of the premises. The fiscal reported that the defendant was not living at the given address. The Court refused to fix the case for *ex parte* trial against the defendant.

On leave being sought -

**HELD:**

- (1) According to section 60 (2) it is only when personal service of summons cannot be effected, that substituted service should be allowed.
- (2) Substituted service should not be allowed unless the fiscal has reported that he is unable to effect personal service and the Court is satisfied on evidence that the defendant, is within the island.

*Per Wimalachandra J :*

“The order made by Court allowing the plaintiff’s application to serve summons on the 4th respondent by way of substituted service was incorrect without proof that the 4th defendant was in the island”

- (3) Substituted service is available where a defendant is avoiding summons and not when the defendant is not living at the given address. The District Judge was correct in refusing to fix the matter for *ex-parte* trial.

- (4) There is no provision in the Code to serve summons by way of newspaper publication.

**APPLICATION** for leave to appeal from an order of the District Court of Mt. Lavinia.

**Cases referred to :**

1. *Fernando vs. Fernando and Others* 9 NLR 325
2. *Palaniappa Chetty vs. Arnolis Hamy* 22 NLR 368
3. *National Bank of India Ltd. vs. Fernando* 3 Brown's 120

*S. Mandaleswaran with P. Peramunagama* for plaintiff-petitioners.  
*Manohara R. de Silva* for 1st defendant - respondent.

May 25, 2006.

**WIMALACHANDRA, J.**

This is an application for leave to appeal from the order of the District Judge of Mount Lavinia dated 18.08.2004. By that order the District Judge refused to fix the case for *ex parte* trial against the 4th defendant.

After several unsuccessful attempts to serve summons on the 4th defendant, the Court, on the application of the plaintiff made an order for substituted service of summons on the door of the premises in suit namely, No. 3 Fareed Place, Colombo. On 18. 08. 2004 the learned counsel appearing for the plaintiff informed Court that summons has been served on the 4th defendant by substituted service (*Vide* - J. E. No. 10 dated. 9. 01. 2004 ) The Court observed that according to the fiscal's report, the 4th defendant is not living at the given address. The court then pointed out that it was the duty of the plaintiff to find the correct address of the 4th defendant and to furnish it to Court. The Court refused to fix the case for *ex parte* trial against the 4th defendant. It is against this order the appellant has filed this appeal.

On an earlier occasion upon an application made by the appellant, the Court made order to serve summons on the 4th defendant by publication in a newspaper. The appellant furnished the proof of publication on

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18. 08.2004. On the same day the learned judge observed that there is no provision to serve summons by way of publication in a newspaper. In my view this position of the learned judge is correct as there is no provision in the Civil Procedure Code to serve summons by way of newspaper publication.

On 22.01.2004 the 1st defendant filed a motion and informed the Court that the 2nd and 3rd defendants are dead and that the 4th defendant had left the given address.

According to section 60 (2) of the Civil Procedure Code it is only when personal service of summons cannot be effected, the substituted service should be allowed. It was held in the case of *Fernando Vs. Fernando*<sup>(1)</sup> that substituted service should not be allowed unless the fiscal has reported that he is unable, although reasonable exertion has been made by him to do so, to effect personal service and the Court is satisfied on evidence that the defendant, against whom substituted service is applied for, is within the Island.

In the instant case the Fiscal submitted a report dated 01.09.2003, stating that the defendants were not to be found at the given address. Thereupon, an application was made for substituted service by affixing the summons on the premises. Whereupon the District Judge made an order to issue the summons by substituted service.

The fiscal reported to that precept by swearing an affidavit that he had affixed a copy of the summons on the door of the premises at No. 3, Fareed Place Colombo 3, on 6. 01. 2004.

The plaintiff on the strength of this return made an application to fix the case against the 4th defendant *ex-parte*. However, the learned judge refused to fix the case for *ex-parte* trial as against the 4th defendant, and directed the plaintiff to furnish to the Court the new address of the 4th defendant.

In the instant case, it appears that the learned Judge took no evidence to satisfy herself that the 4th defendant was in the Island, especially when the 1st defendant had brought to the notice of Court that the 4th defendant had left the Island.

There was no evidence placed before Court to show that the 4th defendant was in the Island. Since the 1st defendant had brought to the notice of court that the 4th defendant had left the island it is imperative for the court to satisfy itself that the 4th defendant. was in fact in the Island. The order made by the court allowing the plaintiff's application to serve summons on the 4th defendant by way of substituted service was incorrect without proof that the 4th defendant was in the island.

In *Palaniappa Chetty vs. Arnolis Hamy*<sup>(2)</sup> objections were taken to an order for substituted service of summons on three grounds, that it was made without a report that the Fiscal was unable to effect personal service, and without proof that the defendant was in the island, and without directing at what spot summons was to be served as substituted service. It was held that all grounds of objection were good and that the order for substituted service was bad.

The substituted service of summons is available where a defendant is avoiding summons and not when the defendant is not living at the given address. It would be unreasonable to serve summons by way of substituted service by affixing a copy of the summons on a premises on which he is not living. In this case before us there was no material before the Court as to the last known place of abode of the 4th defendant apart from the description of the defendant in the plaint that he is residing at the given address.

It was laid down in the case of *National Bank of India Ltd. vs. Fernando*,<sup>(3)</sup> that in cases where personal service is not effected and a decree is sought against a man in his absence, it is necessary that the greatest care should be used in every step of procedure, and that the orders of the Court should be strictly conformed to.

It seems to me that substituted service of summons is available where a defendant is avoiding personal service of summons and not when the defendant is not living at the given address. Therefore in my view the learned District Judge is correct in refusing to fix the matter for *ex-parte* trial.

For these reasons I affirm the order of the Additional District Judge dated 18. 08.2004. Accordingly the application for leave to appeal from the aforesaid order of the Additional District Judge of Mount Lavinia is refused with costs.

**SOMAWANSA, J. (P/CA) — I agree.**

*Application dismissed.*