# RANASINGHE & OTHERS
# VS
# L. B. FINANCE LTD.,

COURT OF APPEAL
WIMALACHANDRA J
CA (REV) 534/03
D. C. COLOMBO 42974/MHP
JANUARY 28, 2005
FEBRUARY 3, 2005

*Civil Procedure Code-Sections 85, 839-ex-parte Judgement-Summons not served ? Application under Section 839-Dismissed on the ground that Court has no jurisdiction-Leave to Appeal refused-Special Leave to Appeal Application rejected-Revision application-Could it be entertained ? – Validity ?*

The Defendant-Petitioners made an application to the District Court to have the Ex-parte decree vacated on the ground of non-service of summons under Section 839 of the Code. This application was rejected on the basis that the Court has no jurisdiction to entertain the application. The leave to appeal application against this Order was refused by the Court of Appeal. The Supreme Court refused special Leave to Appeal. The Petitioner thereafter filed an application in Revision to set aside the Order of the Trial Judge which dismissed the application made by the Defendant Petitioners to have the *ex-parte* Judgment vacated.

**HELD:**

(i) An Inquiry on an application to set aside an exparte decree is not regulated by any specific provision in the Code. Such inquiries must be conducted consistently with the principles of natural justice and the requirements of fairness. Section 839 of the Code recognises the inherent power of the Court to make any order as may be necessary to meet the ends of justice.

(ii) It is the duty of the District Judge to hold an Inquiry into the question of non service of summons-failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the Defendant-a Judgment so entered is a nullity.

(iii) Refusing to hold an Inquiry into the application made on the basis of non-service of summons for the sole reason that the Court has no jurisdiction to hold an Inquiry, is demonstrably and manifestly wrong.

(iv) The reason for the dismissal of the leave to the appeal application is the non-appearance of the Defendants and their Counsel on the date of Inquiry. The Supreme Court upheld the Order of dismissal of the Court of Appeal. When the Defendants appealed to the Supreme Court from the Order of the Court of Appeal, the Defendants did not seek to question the impugned order of the District Judge. The Court of Appeal as well as the Supreme Court did not affirm the impugned order, both Courts did not go into the merits of the application.

(v) The impugned order is based upon a misapprehension that the Court has no jurisdiction to inquire into an application to set aside an exparte decree on the basis of non-service of summons, is manifestly erroneous.

Per Wimalachandra J.,

> "In the circumstances, I am of the view that a miscarriage of justice has occurred by the said Order, due to the violation of the fundamental rule of procedure and the powers of Revision are wide enough to embrace a case of this nature, it is my further view that non interference by this Court will cause a denial of justice and irremediable harm to the Defendant.

(vi) If the impugned order is manifestly erroneous and is likely to cause great injustice, Court should not reject the application on the ground of delay alone.

Application in Revision from an Order made by the District Court of Colombo.

**CASES REFERRED TO :**

1. *De Fonseka vs Dharmawardena* 1994 3 Sri LR 49
2. Ittepane vs Hemawathie 1981 1 Sri LR 476 at 485
3. *Sitthi Maleeha* and another vs *Nihal Ignatius Perera* and others 1994 3 Sri LR 770
4. *Sinnathangam* vs *Meera Mohideen* 60 NLR 394

5. *Abdul Cader* vs *Sittnisa-*
6. *Katiramanthamby* vs *Lebbethamby Hadjiar* 75 NLR 228
7. Mrs. *Sirimavo Bandaranayake* vs Times of Ceylon Ltd. 1995 1 Sri LR 22
8. *Soysa* vs *Silva*-2000 2 Sri LR 235
9. *Biso Menika* vs *Cyril De Alwis*-1982 1 Sri LR 368 at 379

*Peter Jayasekera* for Defendant - Petitioner
*Sanjeewa Jayawardena* for Plaintiff - Respondent

March 1, 2005
**Wimalachandra, J**

This is an application in revision filed by the 1st, 2nd and 3rd defendants-petitioners (1st, 2nd & 3rd defendants) from the order of the learned Additional District Judge of Colombo dated 13.03.2001. By that order the Learned Additional. District judge had dismissed the application made by the defendants to have the *ex-parte* judgment entered against them vacated.

The plaintiff-respondent (plaintiff) filed action upon a lease agreement against the 1st to 3rd defendants. The defendants defaulted in appearing on the summons returnable date and the learned Judge fixed the case for *ex-parte*. The Court directed the Fiscal to serve the decree on the defendants. Thereafter the defendants made an application to Court to have the *ex-parte* decree vacated on the ground of non-service of summons and also sought an interim order that the writ of execution of the decree be stayed until this application to set aside the *ex-parte* decree is determined.

However, it appears that (vide journal entry dated 07.10.1997 of the District Court case record) the 1st defendant had appeared on the summons returnable date. In the said journal entry it is clearly recorded that the 2nd and 3rd defendants were absent. It is the position of the 1st defendant that he was not present in Court on the summons returnable date as summons was not served on him. In any event this could only be decided at the inquiry into the application made by the defendants to set aside the decree on the ground of non-service of summons. All three defendants made the application to have the *ex-parte* decree vacated under section 839 of the Civil Procedure Code. The learned Additional District Judge fixed the matter for inquiry. When the matter was taken up on 13.03.2001 the learned

Additional District Judge, after hearing the submissions made by counsel, dismissed the application made by the respondent on the ground that the Court has no jurisdiction to entertain their application.

**When a defendant complains that summons had not been duly served on him, the Court must hold a proper inquiry. The affected party must be allowed to prove that the summons was not served on him.**

An inquiry on an application to set aside an *ex-parte* decree cannot be limited to oral submissions. Since the onus is on the defendants to prove that the summons were not served on them, they should have been allowed to lead evidence and call witnesses to prove that summons were infact not served on them. In the instant case what the learned Judge had done was, after listening to the submissions made by the counsel, summarily dismissed the defendants' application without giving them an opportunity to prove, by calling evidence that summons were not served on them. That is, the learned Judge had dismissed the application of the defendants without holding a proper inquiry.

In the case of ***De Fonseka Vs. Dharmawardena***[1] the Court of Appeal held that an inquiry on an application to set aside an *ex-parte* decree is not regulated by any specific provision in the Civil Procedure Code. Such inquiries must be conducted consistently with the principles of natural justice and the requirements of fairness. Section 839 of the Civil Procedure Code recognizes the inherent power of the Court to make an order as may be necessary to meet the ends of justice.

In the case of **Ittepana Vs. Hemawathie**[2] at 485 Sharvananda, J. (as he then was) stated :

> **"Thus, when a complaint is made to Court that injustice has been caused by the default of the Court in not serving summons, it is the duty of the Court to institute a judicial inquiry into the complaint and ascertain whether summons had been served or not, even going out side the record and admitting extrinsic evidence and if it finds that summons had not been served, it should declare its *ex-parte* order null and void and vacate it."**

In the instance case the defendants have taken the position that summons were not served on them personally, in that they are challenging the report and the affidavit of the Fiscal. In this situation the Fiscal's evidence is essential and the defendants are entitled to cross-examine him to test the veracity of his evidence.

In this regard it is apt to refer to the observations made by S. N. Silva, J. /CA (as he then was) in **De Fonseka Vs. Dharmawardena** (Supra) at 53

> **"In the face of the evidence of the defendant that summons was not served on him personally, the report and the affidavit of the Fiscal is challenged. Therefore, the report and affidavit of the Fiscal should be tested in the evidence. This evidence is an essential component of an inquiry into an application of a defendant to set aside an *ex-parte* decree on the basis of non-service of summons."**

It is clear from these decisions that it is the duty of the District Judge to hold an inquiry into the question of non-service of summons. Sharvananda, J. (as he then was) in ***Ittepana Vs. Hemawathie (supra)*** said that the failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant. If a defendant is not served with summons or otherwise notified of the proceedings against him, the judgment entered against him is a nullity.

The same position was taken in the case of **Sitthi Maleeha and another Vs. Nihal Ignatius Perera and others**[3] where it was held *inter alia* that the failure to serve summons goes to the root of the jurisdiction of the Court. If a defendant is not served with summons or otherwise notified of the proceedings against him, the judgment entered in such circumstances is a nullity and the persons affected by the proceedings can apply to have them set aside *ex-debito justitiae*. The District Court has inherent jurisdiction in terms of section 839 of the Civil Procedure Code to inquire into the question of non-service of summons.

In the instant case it appears that the impugned order made by the learned District Judge in refusing to hold an inquiry into the application made by the defendants on the basis of non-service of summons, for the sole reason that the Court has no jurisdiction to hold an inquiry, is

demonstrably and manifestly wrong. The Supreme Court and the Court of Appeal has held in several cases (supra) that the District Court has inherent jurisdiction in terms of section 839 of the Civil Procedure Code to inquire into the question of non-service of summons.

In the instant case, before making the present application in revision, the defendants had filed an application for leave to appeal against the aforesaid impugned order made by the learned Judge in refusing the application made by the defendants to vacate the *ex-parte* judgment entered against them on the ground that the District Court has no jurisdiction to inquire into it. The Court of Appeal dismissed the said application for want of due prosecution and lack of due diligence as the petitioner was absent and unrepresented on the date of the inquiry on 9.7.2001. Thereafter the petitioners filed an application to re-list this matter. The Court directed to support that application on 2.5.2002. However the said application was dismissed as well, as the petitioner was absent and unrepresented on 2.5.2002. The petitioners then filed an application for special leave to appeal from the order of the Court of Appeal to the Supreme Court. The Supreme Court after hearing both parties upheld the order of the Court of Appeal and dismissed the defendants' application on 18.11.2002.

The defendants thereafter filed this application in revision in the Court of Appeal on 31.03.2003 to have the said impugned order of the District Judge dated 13.03.2001 set aside.

The plaintiff-respondent objected to this application mainly on the following two grounds :

(i) The defendants cannot be permitted in law to file this application in revision in view of the dismissal of the previous leave to appeal application by the Court of Appeal and the dismissal of the special leave to appeal application therefrom by the Supreme Court.

(ii) The defendants' application in revision should be dismissed due to laches.

An inquiry on an application to set aside an *ex-parte* decree on the basis of non service of summons is not regulated by any specific provision of the Civil Procedure Code. The Court has the inherent power to conduct

such inquiries in terms of section 839 of the Civil Procedure Code to vacate an order made *ex-parte* where it was made not due to a fault of that party.

With regard to the dismissal of the leave to appeal application filed in the Court of Appeal, the reason for the dismissal is the non appearance of the defendants and their counsel on the date of inquiry. In terms of Rule 34 of the Supreme Court Rules 1990 published in the Gazette (extraordinary) No. 665/32, 7.6.1991, where an appellant or a petitioner who has obtained leave to appeal fails to show due diligence in taking all necessary steps for the purpose of prosecuting an appeal or application, the Court may, on an application on that behalf by a respondent, or of its own motion, on such notice to the parties as it shall think reasonable in the circumstances, declare the appeal or application to stand dismissed for non prosecution. Thus it will be seen that the Court of Appeal has not gone into the merits of the application. The defendants sought special leave to appeal from the said order of dismissal by the Court of Appeal to the Supreme Court. The Supreme Court upheld the order of dismissal of the Court of appeal and consequently dismissed the defendant's application.

The question that arises for consideration is whether the defendants can pursue this application in revision in view of the aforesaid judgments of the Court of Appeal and of the Supreme Court. It is to be noted that in this instance both the Court of Appeal and the Supreme Court have not gone into the merits of the defendants' application.

It is to be observed that when the Court of Appeal dismissed the defendants' application for leave to appeal from the order of the District Judge refusing the defendants' application to vacate the *ex-parte* order, the Court of Appeal did not consider the legality or correctness of the impugned order on merits. Similarly when the Supreme Court dismissed the application for special leave to appeal from the order of the Court of Appeal, the Supreme Court did not consider the legality or propriety of the said order of the District Court. When the defendants appealed to the Supreme Court from the Order of the Court of Appeal, the defendants did not seek to question the impugned order of the District Judge. It is to be further noted that both the Court of Appeal and the Supreme Court did not affirm the impugned order of the learned District Judge.

It is settled law that the superior Courts have the power to revise an order made by an original Court even where an appeal has been taken

against the order if the application discloses exceptional circumstances. It was held in the case of **Sinnathangam Vs. Meera Mohideen**[2] that the Supreme Court possesses the power to set aside in revision an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated on the ground of non compliance with some of the technical requirements in respect of the notice of security. In this case T. S. Fernando, J. at 395 made the following observation :

> **"The sole argument upon which the petitioner's counsel relies is that the judgment is manifestly erroneous in law, and that this error in law has resulted in a denial of the petitioner's right to have the action instituted against him dismissed. He refers us to two fairly recent decisions where this Court has exercised its powers to revise decisions reached in District Courts in somewhat similar circumstances. The first of these is the case of *Abdul Cader V. Sittinisa* where this Court, notwithstanding that an appeal had abated, heard the appellant by way of revision observing that it did so as a matter of indulgence and interfered with the judgment appealed from on a point of law. The other is a more recent and hitherto unreported decision-S. C. 309/D. C. Colombo 36064/M – S. C. Minutes of 17th March 1958-in which this Court while rejecting an appeal for noncompliance with the provisions of sections 755 and 756 of the Civil Procedure Code stated that it would be prepared to deal with the questions raised by way of revisions as important questions of law arose on the appeal. We do not entertain any doubt that this Court possesses the power to set right an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated. It only remains therefore for us to examine whether there is a substantial question of law involved here and whether this is an appropriate case for us to exercise the powers of revision vested in this Court by section 753 of the Civil Procedure Code."**

An appeal to the Supreme Court was decided against the respondent parties, although it would not have been so decided if the Court had been invited by the respondent to exercise its powers of revision in their favor. Within a few weeks of the decision of the appeal, the respondent sought

relief by way of an application in revision. It was held in the case of ***Katiramanthamby vs. Lebbethamby Hadjia***[6] that the Supreme Court had the power, acting in revision, to set aside the order that had been made in the appeal.

In the case of ***Mrs. Sirimavo Bandaranaike Vs. Times of Ceylon Limited***[7] the question of law that came up for decision in the appeal was whether the Court of Appeal had jurisdiction, in revision, to reverse or vary an *ex-parte* judgment entered against a defendant upon default of appearance. It was held in this case *inter alia* that the revisionary jurisdiction of the Court Appeal in terms of Article 138 of the Constitution extends to revising or varying an *ex-parte* judgment against the defendant upon default of appearance on the ground of manifest error or perversity or the like. A default judgment can be canvassed on its merits in the Court of Appeal in revision, though not in appeal and not in the District Court itself.

As stated above, the impugned order of the District Judge is based upon a misapprehension that the Court has no jurisdiction to inquire into an application to set aside an *ex-parte* decree on the basis of non-service of summons, which is manifestly erroneous.

In the circumstances I am of the view that a miscarriage of justice has occurred by the said order of the District Judge due to the violation of a fundamental rule of procedure, and the powers of revision of the Court of Appeal are wide enough to embrace a case of this nature. It is my further view that non-interference by this Court will cause a denial of justice and irremediable harm to the defendants. Therefore, there are special circumstances for this Court to exercise its powers of revision.

It was held in the case of ***Soysa Vs. Silva***[8] that the power given to a superior Court by way of revision is wide enough to give it the right to revise any order made by an original Court. Its object is the due administration of justice and the correction of errors sometimes committed by the Court it self, in order to avoid miscarriage of justice.

The next matter to be decided is whether the defendants are guilty of laches. The question whether delay is fatal to an application in revision depends on the facts and circumstances of the case. If the impugned

order is manifestly erroneous and is likely to cause great injustice, the Court should not reject the application on the ground of delay alone.

In the case of ***Biso Menike Vs. Cyril de Alwis***[9] Sharvananda, J. at 379 observed :

> **"When the Court has examined the record and is satisfied the Order complained of is manifestly erroneous or without jurisdiction the Court would be loathe to allow the mischief of the Order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically."**

For these reasons, I hold that the District Judge erred in dismissing the application made by the defendants to set aside the *ex-parte* decree on the basis that summons were not served on them. Accordingly, I set aside the order of the learned Additional District Judge dated 13.03.2001. The learned Additional District Judge is directed to proceed with the inquiry into the application to set aside the *ex-parte* decree entered in the District Court against the defendants. Accordingly, the application in revision is allowed. I make no order as to the costs of this application.

The Registrar is directed to return the District Court record with this order forthwith.

**Application allowed.**

*District Judge directed to proceed with the Inquiry into the application to set aside the ex-parte decree entered.*