

WIMALAWATHIE AND OTHERS
v.
THOTAMUNA AND OTHERS

COURT OF APPEAL
RANARAJA, J.,
C.A. NO. 20/96 (F)
D.C. COLOMBO NO. 16239/L
MARCH 04TH, 1997

Ex-parte trial against the defendants – Allegation that the Process Server filed a fraudulent affidavit – on whom lies the burden of proof – Civil Procedure Code – S. 84, 86, 88.

Held:

1. Applications to set aside ex-parte decree are proceedings incidental to and not a trial proper. The inquiry must be conducted on principles of fairness.
2. The affidavit of the Process Server is *prima facie* evidence of the fact that summons was duly served and there is a presumption that summons was duly served.

Accordingly the burden shifts onto the defendant to prove that no summons had been served.

3. The defendants have to begin leading evidence and once the defendant's lead evidence to prove that summons had not been served on them and establish that fact, burden shifts back onto the plaintiffs to rebut the evidence.

This can be done by calling the Process Server.

4. What has to be decided by court is essentially a question of fact.

APPEAL from the judgment of the District Court of Colombo.

Case referred to:

1. *Sangarapillai v. Kathiravelly* – Sri Kantha Law Reports Vol. II page 99.

A. K. Premadasa PC with Gamini Tillekeratne for plaintiff-appellant.

Wijedasa Rajapakse with Dhammika Abeygunawardena and Kuvera de Soysa for the defendant respondent.

March 04, 1997.

DR. RANARAJA, J.

This is an appeal from the order of the learned Additional District Judge dated 22. 2. 96. By that order the Additional District Judge set aside the *ex-parte* decree entered against 1st and 2nd defendants.

The learned counsel for the 3rd plaintiff–appellant submitted that the learned Additional District Judge was in error in accepting (1) the evidence of the 1st and 2nd defendants despite the contradictions in their evidence, (2) the documents marked XI and X2, produced by the 1st and 2nd defendants.

The plaint against the defendants was filed on 9. 5. 93. Court made order directing summons to issue on the defendants. On 28. 7. 93, the fiscal reported that summons had been served on 1st, 2nd, 3rd and 6th defendants. Accordingly, court directed the trial against the 1st and 2nd defendants be taken *ex-parte*. On 28. 9. 93, the 1st and 2nd defendants filed petition and affidavit stating that the Process Server had submitted a fraudulent affidavit to the effect that summons had been served on them and the matter be inquired into. On 10. 12. 93 court made order directing that the petition of the 1st and 2nd defendants against the Process Server be inquired into after the application to set aside the *ex-parte* judgment. It is to be noted, that the Court had directed notice to issue on the Process Server and on his failure to appear in Court, a warrant has been issued on him.

It was the case of the 1st and 2nd defendants that they had left for Kataragama on 30. 6. 94 and returned on 3. 7. 94. Therefore it was submitted the Process Server could not have served summons on them, as reported on 2. 7. 93. They also submitted that they lived at No. 40, Stafford Avenue, Colombo 6, outside the jurisdiction of the District Court of Colombo and therefore the Process Server had acted beyond his powers in serving summons on the defendants. In support of the fact that they were away from Colombo on the relevant date, they produced documents marked XI and X2 and called an employee of Palm Paradise Cabana Hotel, Tangalle, to prove those documents. The learned District Judge having considered the evidence led by the 1st and 2nd defendants had decided to set aside the *ex-parte* judgment entered against them.

Where a defendant seeks to have an *ex-parte* decree entered against him set aside, the burden of proof that no summons was served, lies squarely on him, (Vide **Sangarapillai v. Kathiravelly**⁽¹⁾) It is relevant to note that applications to set aside *ex-parte* decree are proceedings incidental to and not a trial proper. No specific procedure is laid down in the Civil Procedure Code as to how such inquiries should be conducted. However they must be conducted on principles of fairness. 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.

In the instant case, the plaintiffs had instituted action against the defendants. There was a report to the effect that summons had been served on them. However soon after the matter was fixed for *ex-parte* trial against the defendants, they had sought contempt proceedings against the Process Server. In those circumstances there was a duty cast on the plaintiffs to call the Process Server to establish, as reported in his affidavit filed of record, that he had served summons on the defendants and it was done within the jurisdiction of the District Court of Colombo. The plaintiffs have failed to do so.

What has been decided by the learned Additional District Judge was essentially a question of fact. The 1st and 2nd defendants themselves gave evidence. The plaintiffs have neither given evidence nor led any evidence in rebuttal. In the circumstances, the learned Additional District Judge was entitled to hold that the defendant had satisfied Court that there were reasonable grounds for default and set aside the *ex-parte* decree. Accordingly I see no error in the order of the learned Additional District Judge which is affirmed. The appeal is dismissed with costs fixed at Rs. 2,500/-.

Appeal dismissed.