

LEELAWATHIE
v.
JAYANERIS AND OTHERS

COURT OF APPEAL
WIGNESWARAN J.
C.A. 901/93(F)
D.C. AVISSAWELLA 481/L
JUNE 23RD, 1999.
AUGUST 31ST, 1999.
NOVEMBER 5TH, 1999.

Civil Procedure Code - Amendment No. 20 of 1977 - S.55(1) Non service of summons - Exparte order - Is it bad in Law ?

Held :

- (i) Unless summons in form 16 in the 1st schedule to the C.P.C. issues, signed by the Registrar requiring the Defendant to answer the Plaintiff, on or before a day specified in the summons and is duly served on the Defendant, there cannot be due service of summons.
- (ii) Unless summons were served, all the consequences of default in appearance would not apply to them.
- (iii) It was the service of notice of the application for interim injunction that had been served on the 1-3 Defendants. Interim Injunction had been properly entered against them. But an exparte trial on the substantial matters referred to in the amended plaintiff could not have been ordered without due service of summons.

Wigneswaran J.,

“There is no question of implying or presuming that the Defendants were aware of the case filed, since statutory provisions apply to service of summons and unless the summons are duly served, the other statutory consequences for non appearance on serving of summons, would not apply to Defendants.”

Appeal from the Judgment of the District Court of Avissawella.

Case referred to :

1. Ameer vs. Raji (S.C. Appeal 88/94 - SCM 3.11.1994)

Nimal Jayasinghe for 1st Defendant Appellant.

Bimal Rajapakse with Ajith Anawaratne for Plaintiff Respondent.

Cur. adv. vult.

May 26, 2000

WIGNESWARAN, J.

Plaintiff-Respondents filed this action on 05.10.1988 for declaration of title to the land described in the schedule to the plaint damages, and costs. They also prayed for an enjoining order and interim injunction by filing plaint with affidavit.

After support by Counsel on 07.10.1988 notice of application for interim injunction issued on the Defendants for 11.10.1988. It was reissued again for 12.12.1988. On that day it was reported that the Fiscal had served summons on the 1st, 2nd and 3rd Defendants. But in fact there was no order to issue summons nor were the draft summons tendered to Court on 05.10.1988 with the plaint issued for service (page 107 of the Record) nor summons served in fact. What was served was the notice of the application for interim injunction tendered to Court on 07.10.1988 (page 109 of the Record) plus probably a copy of the plaint and affidavit also tendered to Court on 07.10.1988. Unfortunately the Fiscal Process Server had used the printed affidavit form used for the service of summons and sent in his report as if summons had been served. This fact is brought out by the following facts:-

- (1) The case was filed on 05.10.1988 and a date for support was given for 07.10.1988 as stated above. But no order was made to issue summons on 05.10.1988 since the relevant part of the printed journal sheet remains blank.
- (2) The order made on 07.10.1988 was to issue notice of application for interim injunction. There was no order made to issue summons. (Vide Journal Entry 2).

- (3) The summons tendered on 05.10.1988 with copies of plaint and affidavit are still in the original record. The precept tendered still remains unsigned by the Registrar. (Vide pages 179 to 210 of the Record.)
- (4) The side entry under Journal Entry 2 also refers to the issue of notice only to the Avissawella Fiscal. There is no mention of the issue of summons to the Fiscal.
- (5) The return to the Precept issued to Fiscal refers only to "notice" and not summons. The Precept regarding summons is still in the record.

Thus Journal Entry 4 on 12.12.1988 had erroneously referred to the service of summons and the Court had concluded that summons had been served whereas only notice of the application for interim injunction had been served probably with a copy of the plaint and affidavit.

The Journal Entry 4 does not state whether 1st to 3rd Defendants were present in Court on 12.12.1988. A calling date was given for 19.06.1989. On that day the proxy of the 1st Defendant only was filed and a date (17.07.1989) was given to file objections to the application for interim injunction. The 2nd and 3rd Defendants were absent. Interim injunction was therefore granted against them. A date was also obtained for amended plaint viz. 17.09.1989. Thus two dates were given. One for the filing of objections to the only process served on the 1st Defendant (17.07.1989) and the other for the filing of amended plaint (17.09.1989). There is nothing on the record to show that summons with a copy of the original plaint and affidavit was served on the Defendants. In fact they are still in the record.

The case was not called on 17.07.1989.

17.09.1989 being a Sunday the case was called on 18.09.1989. (Vide Journal Entry 6). Amended plaint was filed on that date. The amended plaint sought to include two other

Defendants viz. 4th and 5th Defendants. Summons was issued on them for 27.11.1989. Inquiry into the application for interim injunction was also fixed for the same date, the 1st Defendant having filed petition and affidavit in objection to the issue of the interim injunction.

Summons returnable date for the 4th and 5th Defendants and the inquiry date was postponed for 26.03.1990. But interim injunction was granted on that day since the 1st Defendant was not present.

Though summons was served on the 4th Defendant he was absent on 26.03.1990 and therefore ex-parte trial was fixed against him for 08.10.1990. Reissue of summons was ordered against the 5th Defendant on his proper address being furnished. (Vide Journal Entry 8). The name of the 5th Defendant was corrected and summons was reissued on him. (Vide Journal Entry 9). Again summons on the 5th Defendant was reissued for 10.12.1990. Substituted service of summons was authorised on the same date (08.10.1990 - Vide Journal Entry 10). The 5th Defendant, after substituted service, was absent on 10.12.1990. (Vide Journal Entry 12). The case was scheduled to be called on 20.02.1991 to fix it for trial.

On 20.02.1991 the 1st to 5th Defendants were absent. Ex-parte trial was therefore fixed for 08.03.1991.

Ex-parte trial took place on 08.03.1991. Order was made on 27.03.1991 entering judgment as prayed for by the Plaintiff. Copy of the decree was ordered to be served on the Defendants for 08.05.1991. Further date was given for 11.09.1991.

On 11.09.1991 it was reported that copy of the decree had been served on 1st, 3rd and 4th Defendants. It was not served on 2nd and 5th Defendants. Therefore their copies of decree were reissued for 14.10.1991 and thereafter for 16.03.1992.

On 11.09.1991 the 1st and 4th Defendants moved for a date to file objections. They filed their objections on 17.09.1991 with a motion prior to the next date (viz. 14.10.1991).

Copies of decree were not served even on 16.03.1992. Substituted service was therefore ordered (Vide Journal Entry 25) for 13.07.1992 and again for 30.11.1992. Service by substituted means having been effected and the 2nd and 5th Defendants not being present on 30.11.1992 the decree was confirmed against them. Inquiry into the objections filed by the 1st and 4th Defendants was fixed for 25.01.1993. Written submissions were thereafter filed and order dated 09.03.1993 was made by the Additional District Judge, Avissawella refusing the application of the 1st and 4th Defendants to set aside the ex-parte order made against them.

This is an appeal against the said order dated 09.03.1993.

Mr. Nimal Jayasinghe on behalf of the 1st Defendant-Appellant has submitted as follows:-

- (1) The ex-parte was fixed because answer was not filed. (Vide order dated 27.03.1991 at page 108 of the Brief). But objections to the issue of interim injunction had been filed. In this case application for interim injunction was through plaint and affidavit and not by separate petition and affidavit.
- (2) In *Ameer Vs. Raji*⁽¹⁾ it was held that the statement of objections filed in that case could be taken to have been substantially an answer. In this case too the salient features of an answer were contained in the statement of objections filed.

He moved for the vacation by this Court, using its revisionary powers of the orders dated 09.03.1993 and 27.03.1991.

Mr. Bimal Rajapakse appearing for the Plaintiff-Respondents has countered as follows:-

1. Ex-parte was fixed since even the Attorney-at-Law for the 1st Defendant was absent on 20.02.1991. None of the Defendants were present.

2. The case of Ameer Vs. Raji (Supra) can be distinguished since the objections filed has not sought the dismissal of the action brought.
3. It was incumbent on the part of the 1st Defendant-Appellant to have filed answer in terms of Section 55(1) of the Civil Procedure Code in existence then.

These submissions of both Counsel would presently be examined.

Section 55(1) of the Civil Procedure Code as amended by Law No. 20 of 1977 read as follows:-

“55(1) Upon the plaint being filed and the copies or concise statements required by Section 49 presented, the court shall order summons in the form No. 16 in the First Schedule to issue, signed by the Registrar of the court, requiring the defendant to answer the plaint on or before a day to be specified in the summons. The summons, together with such copy or concise statement each translated into the language of the defendant where his language is not the language of the court, attached thereto, shall be delivered under a precept from the court in the form No. 17 in the said Schedule, or to the like effect, to the Fiscal of the court or to the Fiscal of a court of like jurisdiction within the local limits of whose jurisdiction the defendant resides, who shall cause the same to be duly served on the defendant, or on each defendant, if more than one, and shall as hereinafter provided, return the same and the execution thereof to the court, duly verified by the officer to whom the actual service thereof has been entrusted.”

Unless summons in the Form No. 16 in the 1st Schedule to the Civil Procedure Code issues, signed by the Registrar requiring the Defendant to answer the plaint on or before a day

specified in the summons and is duly served on the Defendant there cannot be due service of summons. In this case the original summons with attached copies of plaint and affidavit tendered with the original plaint dated 05.10.1988 to be issued against the 1st - 3rd Defendants are still in the Record unsigned by the Registrar. (Vide pages 179 to 209). They had been duly tendered on 05.10.1988 with the original plaint as per Court Seal of that date. What had been served on 1st - 3rd Defendant were notices that issued under the hand of the Registrar on 07.10.1988. Hence there had been no service of summons on the 1st - 3rd Defendants. Unless summons were served on them, all the consequences of default in appearance would not apply to them. There is no question of implying or presuming that the Defendants were aware of the case filed, since statutory provisions apply to service of summons and unless the summons are duly served the other statutory consequences for non-appearance on serving of summons, would not apply to Defendants.

As for the 4th and 5th Defendants the summons appear to have been served (Vide pages 159 - 164). The latter had been served by substituted service.

After service of notice, the 2nd and 3rd Defendants were absent on 12.12.1988. Therefore interim injunction had been entered against them. Since the 1st Defendant having filed objections to the issue of interim injunction was absent on 26.03.1990, interim injunction had been entered against him too.

Thus it was the service of notice of the application for interim injunction that had been served on the 1st to 3rd Defendants. Interim injunction had been properly entered against them. But an ex-parte trial on the substantial matters referred to in the amended plaint could not have been ordered without due service of summons.

I therefore set aside the ex-parte order made against the 1st to 3rd Defendants on 27.03.1991 and the subsequent order

dated 09.03.1993 refusing to set aside the ex-parte order. Judgment entered against the 4th and 5th Defendants will remain unaffected.

The Court shall now issue summons against the 1st to 3rd Defendants and give them an opportunity to file their answer and proceed according to law therefrom.

Parties shall bear their own costs.

Appeal allowed.

District Court directed to issue summons against the 1 - 3rd defendants and give them an opportunity to file answer and proceed according to law therefrom.