

DE MEL
v.
NETTASINGHE

SUPREME COURT.
AMERASINGHE, J.
PERERA, J. AND
WIJETUNGE, J.
S.C. APPEAL NO. 68/92.
C.A. APPEAL NO. 1232/86.
D.C. GAMPAHA – 27299/L.
JULY 08, 1993.

Landlord and tenant – Service of summons on being pointed out – Requirement of affidavit of proof of service – Civil Procedure Code ss. 55 and 60.

Although there is no provision in the Civil Procedure Code making this imperative, where summons is served on a party on his being pointed out it is a salutary practice that an affidavit should be filed verifying the service so as to make the alleged service valid in law.

Cases referred to :

1. *Babun Nona v. Ariyasena* 58 NLR 575.
2. *Mohottihamy v. Podisinno* 7 CWR 17.

APPEAL from the judgment of the Court of Appeal.

A. A. de Silva with R. L. Goonewardena for plaintiff - petitioner - appellant.

D. H. Siriwardena for defendant - respondent respondent.

Cur. adv. vult.

September 02, 1993.

PERERA J.

The Plaintiff - Petitioner - Appellant (herein after referred to as the Plaintiff - Appellant) instituted action in the District Court of Gampaha on 19.11.84 for ejection of the Defendant - Respondent - Respondent (hereinafter referred to as the Defendant - Respondent) and for recovery of arrears of rent in respect of premises No 267, Ganemoli Mawatha, Mabile, Kadawatha. Summons was issued on the Defendant returnable on 23.05.85. According to the journal entry dated 17.05.85 the Fiscal has reported to court that summons were served on the Defendant on his being pointed out by the Plaintiff. On the summons returnable date the Defendant - Respondent was absent and unrepresented and the learned District Judge fixed the case for Ex - Parte trial on 21.07.85. The Ex-Parte trial was held on 21.07.85 at which the evidence of the Plaintiff - Appellant was recorded and the learned trial judge entered judgement ex parte for the Plaintiff - Appellant as prayed for in the plaint. (Vide 'D') There after the fiscal reported to court that the decree was served on the Defendant - Respondent. Writ of execution was then obtained and the same was executed on 08.04.86 and vacant possession was handed over to the Plaintiff - Appellant.

In the meantime the Defendant - Respondent filed proxy, petition and affidavit on 25.04.86 with notice to the Plaintiff - Appellant and moved that the same be called on 2nd May 1986 in open court for support.

On the 2nd May 1986 the Plaintiff - Appellant was not present due to illness. But both parties were represented by counsel. Legal submissions were made by both Counsel. It was the contention of Counsel for the Defendant - Respondent that his client has filed an affidavit stating inter alia that he had not been served with summons in this case. Further that according to the journal entry of 17th May 1985 the fiscal has reported to court that summons was served on the Defendant - Respondent on his being pointed out to the fiscal by the Plaintiff - Appellant. Counsel invited the attention of the court

to the fact that the Plaintiff - Appellant had failed to file an affidavit in support of this fact. In the circumstances Counsel moved that the Ex-Parte judgement entered in the case be vacated as there was no material to satisfy the court that summons had been duly served on his client.

Counsel for the Plaintiff - Appellant however submitted that there was no provision in law which warranted the filing of an affidavit verifying this fact by either the fiscal or by the Plaintiff as contended for by counsel for the Defendant - Respondent.

Having heard the submissions of both counsel the learned District Judge vacated the Ex-Parte judgement entered against the Defendant - Respondent dated 25.07.85. The District Judge held that as the Plaintiff had not filed an affidavit stating that he had pointed out the Defendant to the fiscal for the purpose of serving summons, the summons had not been duly served on the Defendant - Respondent.

The Plaintiff - Appellant appealed against this order to the Court of Appeal. The Court of Appeal dismissed the Plaintiff - Appellant's appeal on 20.07.92. The present appeal is from that judgement of the Court of Appeal.

At the hearing of the present appeal learned Counsel for the Plaintiff - Appellant strenuously urged that there was no provision in the Civil Procedure Code which required the Plaintiff to file affidavit in support, where service of summons had been effected by the fiscal on the Defendant on being pointed out by the Plaintiff. Counsel invited the attention of court to Section 55 (1) of the Civil Procedure Code and submitted that this provision did not require the filing of such an affidavit. It was his submission that the words in the section only required the Fiscal to "cause the same to be duly served on the Defendant or on each Defendant if more than one and return the same and the execution there of to the court duly verified by him".

Counsel also in support of his argument adverted to Form No : 17 which was the form of precept to the fiscal to serve summons, and urged that the precept only required the fiscal to certify to court in what manner he has executed the precept returning the summons attached to his certificate as an exhibit. It was Counsel's submission

therefore that there was no specific requirement in the Civil Procedure Code for either the fiscal or the plaintiff to file such an affidavit. Counsel urged that the learned District Judge was therefore in error when he set aside the Ex - Parte judgement on the ground that there had been a failure on the part of the Plaintiff to file an affidavit to the effect that he had pointed out the Defendant to the fiscal to enable the latter to serve summons on him. It was Counsel's submission that the report of the Fiscal to court that summons had been served, sufficed to satisfy the court that summons had been duly served on the Defendant.

Counsel for the Plaintiff - Appellant further submitted that the learned District Judge had also misdirected himself when he vacated the Ex - Parte judgement on the notice returnable date without an inquiry and satisfying himself that the summons had not been duly served on the Defendant.

I have given careful consideration to Counsel's submissions and I agree that there is no specific provision in law which requires the filing of an affidavit by a Plaintiff who claims to have pointed out a Defendant to the fiscal for the purpose of serving summons on him. The court has however to be mindful of the fact that the objective of service of summons on a Defendant is to give notice to the party on whom it is served of a pending suit against him, so that he might be aware of and be able to resist such suit, if he wishes so to do. The Court must therefore be perfectly satisfied that summons has been duly served on the Defendant. As in the instant case where summons has been served by the fiscal on a person unknown to him but on being pointed out, it is imperative that the court should act with even a greater degree of care and caution. In the present case there was no proof whatsoever that the correct person had been pointed out to the Fiscal for service of summons. In other words there was no material before the court that summons had been served on the Defendant-Respondent in person as required by Section 60 of the Civil Procedure Code. In the circumstances the subsequent steps taken in this case could not be justified on any legal basis. In *Babun Nona v. Ariyasena* ⁽¹⁾ the Supreme Court has held that the provisions of Section 60 of the Civil Procedure Code regarding service of summons on a Defendant are imperative and can be satisfied only if the summons is delivered or handed to the Defendant personally.

In the case before us an affidavit has been filed by the Defendent stating inter alia that neither the summons nor the decree has been served on him. In his affidavit the Defendent -Respondent has set out several facts which lend credibility to this statement. In such a situation it is prudent, although there is no specific legal requirement, for the person who pointed out the Defendent to the fiscal, to file an affidavit identifying him as the correct person. In *Mohottihamy v. Podisinho* ⁽²⁾ De Sampayo J has observed that "the practice of the court is and ought to be that when a person is being served with summons on being pointed out by a party there should be an affidavit verifying that fact, so as to make the alleged service valid in law". I am very much in agreement with this view expressed by De Sampayo J. and I hold that this is a very salutary practice which must necessarily be followed in such a situation in the interests of justice."

On the question raised by counsel in regard to the failure on the part of the learned District Judge to hold an inquiry into this matter I wish to observe that Counsel who appeared for the Plaintiff - Appellant on 2nd May 1986 has not made any application to court to fix this matter for inquiry but was content to make a legal submission on which an order was made by the learned District Judge. Counsel merely made the submission that there was no requirement in law for the Plaintiff to file such an affidavit. Having regard to the uncontroverted material set out in the affidavit of the Defendent - Respondent, I am of the view that the failure on the part of the District Judge to hold an inquiry has in no way caused prejudice to the Plaintiff - Appellant.

There is thus no justification to interfere with the order of the learned District Judge for the reasons set out above I affirm the order of the Court of Appeal. The order of the District Judge dated 25.07.85 vacating the ex parte judgement will therefore stand.

The appeal is dismissed with costs.

AMERASINGHE J – I agree

WIJETUNGA J – I agree

Appeal dismissed.