1931 *Present:* **Garvin S.P.J. and Drieberg J.**

KARUPPEN CHETTY *v.* WICKREMASINGHA.

426—D. C. Matara, 5,375.

Summons—Substituted service—Last known place of abode—Civil Procedure Code, s. 60.

An order directing substituted service of summons under section 60 of the Civil Procedure Code must specify the last known place of abode of the defendant at which such service is to be effected.

APPEAL from an order of the District Judge of Matara. The facts appear from the judgment.

Navaratnam, for defendant, appellant.

Weerasooria, for plaintiff, respondent.

October 28, 1931. GARVIN S.P.J.—

This is an appeal from a refusal to set aside a decree. The action was instituted under the provisions of Chapter LIII. of the Civil Procedure Code. The plaintiff obtained summons and upon the return to the summons made by the Fiscal to the effect that the defendant was not to be found in the village, an application was made to the Court for substituted service supported by the usual affidavit. The application was for substituted service by affixing the summons to the defendant's last known place of abode. The Court made order allowing the motion. The summons was then reissued with the direction that it should be affixed on the last known place of abode of the defendant. In due course the Fiscal reported that this had been done, and on the returnable date in the absence of the defendant decree was entered for the plaintiff. Execution proceedings were then taken. While these were pending the defendant appeared in Court and applied to the Court to set aside its decree upon the ground that he had had no notice of the proceedings. Some evidence was taken at which an endeavour was made to prove that the summons had in fact been affixed on the last known place of abode of the defendant. Thereafter the learned District Judge held that substituted service had been effected in accordance with the order of the Court and dismissed the defendant's application expressing, however, the opinion that if the defendant made an application under the provisions of section 707 of the Civil Procedure Code he should " be given a chance to defend himself on reasonable terms ".

The defendant has appealed and it has been urged on his behalf apart from the general ground that he had no notice of the proceedings that (*a*) the order for substituted service was irregular upon the ground that the order did not specify the particular house or the particular spot to which the summons was to be affixed, and (*b*) that in any event the evidence adduced at the inquiry has failed to prove that it was as a matter of fact affixed to what has been shown to be the defendant's last known place of abode.

The first of these two arguments is strongly supported by two judgments of this Court. The earliest of these is the case of *Fernando v. Fernando*[1], in which the Court laid emphasis upon the necessity for prescribing with care and accuracy the particular form of service which in the judgment of the Court may be substituted for the ordinary requirement of personal service, and in the course of his judgment, Layard C.J. said: "To enable the Court to so prescribe there must be material before the Court as to the last known place of abode of the defendant." This manifestly is a reference to the case in which the form of substituted service directed by the Court is the affixing of the summons on the last known place of residence of the defendant, and Wendt J., the other member of the Court, in dealing with the same aspect said: "Before substituted service by affixing the process to some place of abode is prescribed the Court must be satisfied that the defendant is within the Island and that after reasonable exertion in that behalf that place is the last place of abode of the defendant that has been discovered."

Now, in the case before us there was no information before the Court as to the last known place of abode of the defendant, nothing in short beyond the description of the defendant in the plaint as a resident of the village of Kongala.

The next case to which we were referred in the course of the argument is the case of *Palaniappa Chetty v. Arnolishamy*[2]. This is also a judgment of a Bench of Two Judges in which when dealing with the objection that the Court did not direct at what spot the summons was to be served as substituted service, Shaw J. upheld it citing the case of *Fernando v. Fernando* (*supra*) and made the following comment:—

"There the Judge took no evidence to satisfy himself that the defendant was in the Colony and there the Judge also left it to the Fiscal to decide at what spot he should serve the substituted summons as being the last known place of abode of the defendant. All these are rendered necessary by section 60 of the Civil Procedure Code and the non-observance of all those particulars was held to be fatal to the service in the case I have referred to."

These two cases strongly support the contention of Counsel for the appellant, and it seems to me that the objection based upon the ground that no place was specified in the order for substituted service as the last known place of abode of the defendant is well founded. Counsel for the respondent, however, invited our attention to the case of *The National Bank of India, Ltd. v. A. T. Fernando*[3], which he thought was an authority for the proposition that a general direction by the Court when making an order for substituted service that it should be made by affixing the summons to the defendant's last known place of residence was a sufficient compliance with the requirements of the Law. If this be right, then inasmuch as the case I have referred to is a judgment of the Full Bench it will be binding on us and we should have to admit his contention. But it is quite clear from a careful perusal of the judgment of Bonser C.J. that this point was neither considered nor decided. The service in that

[1] *(1903) N. L. R. 325.* [2] *(1920) 22 N. L. R. 368.*
[3] *3 Browne's Reports 120.*

case was attacked for certain specified reasons, one of them being the insufficiency of the process server's affidavit that the original summons had been served, and the other being that as a matter of fact substituted service had not been effected at the defendant's last known place of residence. Indeed, the learned Chief Justice clearly indicates a strong doubt as to whether in the circumstances of the case substituted service should have been issued at all. The very doubts to which learned Counsel referred themselves indicate that, far from affirming the proposition for which he contends, the view taken by the Court was that, even if the order for substituted service which, as I have said before, the Judges appear to think was wrongly made, be treated as correctly and properly made, the evidence failed to show that it had been complied with in fact.

For the reasons given I think this appeal must be allowed. It is unnecessary therefore to consider at length the second point taken by Counsel which, in my opinion, is also well founded.

The appellant will be entitled to the costs of this appeal and of his application in the Court below.

DRIEBERG J.—I agree.

Appeal allowed.