IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C.A(Revision) No. 323/2010

D.C.Embilipitiya No.1743/L

1. Wijemunige Gunatilake
   Balavinna, Pallebedda
2. Thevarapperuma Archchige
   Karunawathie
   Balavinna, Pallebedda

Plaintiffs

1. P.R. John Fernando
   Pallebedda
   1st Defendant- (decd)

1A. P.R. Simon

1B. P. R. Lucinona

1C. P. R. Indrawathie

All of Main Street, Pallebedda

Substituted-Defendants

2. M. M. Gunasekera
   Pallebedda

2nd Defendant

AND NOW BETWEEN

J.M.Leelawathie Menike

Pallebedda

Subtd.2nd Defendant-Petitioner

Vs

1. Wijemunige Gunatilake

Balavinna, Pallebedda

2. Thevarapperuma Arachchige
Karunawathie, Balavinna,
Palle Bedda

Plaintiff-Respondents

3. P.R.Simon
4. P.R.Lucinona
5. P. R. Indrawathie
All of Main Street, Pallebedda

Subtd. 1st Defendant-Respondents

BEFORE ; Deepali Wijesundera J.,

M. M. A. Gaffoor

COUNSEL : Ranil Samarasuriya with J. Jayasinghe for the subtd. 2nd Defendant Petitioner

Harsha Soza, P.C with Ranjith Perera for the Plaintiff Respondent

D.D.P. Dassanayake for the 4th Defendant Respondent

Anurudhi Dharmaratne for the subtd 5th Defendant Respondent

ARGUED : 08.09.2015

DECIDED ON: 23.02.2016

Gaffoor J.,

The 1st Plaintiff Respondent filed this action in the District Court of Embilipitiya against the 1st Defendant by plaint dated 10.01.1982 praying:

a) For the eviction of the 1st Defendant and his agent from the shop and land described in the schedule to the plaint;
b) For damages at Rs. 500/- until he receives quiet and vacant possession;
c) For a declaration that he is the owner of the aforesaid shop and land and for costs of suit;

Upon receiving summons the 1st Defendant filed answer on 29.07.1982 and subsequently the matter was fixed for trial on 18.11.1982. After several postponements the 1st Defendant moved to amend the answer, which was allowed by court. Finally the answer was filed on 21.09.1984. On 30.05.1985 the 1st Plaintiff moved court to have a commission issued to survey the land and the court allowed the same.

The commission was returned by the Surveyor on 27.07.1988 with Plan No. 1829 dated 20.07.1988 with the Report. In item 6 of the said report the commissioner states that that the Petitioner was present and made a claim to the subject matter of this action. The said commissioner did not inform the Petitioner about the pending District court Embilipitiya action No. 1743/L, but merely recorded his claim. When the Plan and documents were taken for consideration the 1st Defendant informed court that he is objecting to the said plan and report.

The court recorded the submissions of both counsels on the same day. At the end of the submission the counsel for the 1st Plaintiff informed court that as per item 6 of Report (A5), the Petitioner has to be added as a Defendant and the counsel for the 1st Defendant did not object. Thereafter the counsel for the 1st Plaintiff moved to file an amended Plaint. The amended plaint was filed on 07.02.1990 adding the Petitioner as the 2nd Defendant. On 20.06.1990 the 1st Plaintiff made an application under section 18(1) of the C.P.C to have another party added as 2nd Plaintiff. The 1st Defendant filed objections to this and the matter was fixed for inquiry for 06.02.1991.

The inquiry was conducted on written submissions and the court allowed the application and was added as 2nd Plaintiff to the action. Counsel argued that there was no application nor an order made for summons to be issued to the Petitioner, who was added as the 2nd Defendant to the action.

Journal entry No. 63 dated 5.1.1994 states that T.A. Karunawathie was added as a Plaintiff and M.M. Gunasekera (decd) was added as a Defendant. It is clear that at no instance was he served with summons, thereby depriving him of his legitimate right to submit his claim to the disputed land and contest the Plaintiff's claim.

Subsequently the matter proceeded to trial on 16.2.1995. No admissions were recorded and points of contest were raised, The 1st Plaintiff's examination in chief and cross examination commenced. Ob 24.08.1995 the evidence of the 2nd Plaintiff commenced. An officer from the Land

Reform Commission and also Grama Sevaka gave evidence. The judgment was delivered on 21.09.2000. by which he held in favour of the Plaintiffs.

The 1st Defendant appealed against this Judgment. On 16.09.2001 the Plaintiffs filed papers for the execution of the decree, pending appeal. The 1st Defendant objections and the matter was fixed for inquiry. After giving evidence the 1st Defendant died and the legal representatives of the 1st Defendant were appointed.

The District Judge held in favour of the Plaintiffs by his order dated 20.05.2004.

It is to be noted that the 1st Plaintiff had tendered summons to be issued to the Petitioner, the said motion had never been minuted and hence there is no order to issue summons. The Petitioner upon seeing the notices marked A17 and A18 made an application to the District Court of Embilipitiya praying inter alia :

a) To set aside the judgment delivered on 21.09.2000, without summons being issued to the Petitioner;
b) For declaration that all Orders and Judgments delivered by the court without summons being issued to the Petitioner be declared void ab initio;
c) To issue summons to the Petitioner and re-start the trial;

The application of the Petitioner was dismissed on 07.01.2009.

The Petitioner has come before this court in Revision seeking to revise the said judgment dated 21.09.2000, and moves in *restitutio in integrum* praying for

the restoration of the case to the stage prior to the commencement of the trial in order for the Petitioner to file his answer and contest the Plaintiff's claim.

At the hearing of this case before this court the Counsel s submitted inter alia :

i) Violation of the principles of natural justice, in adding the Petitioner as the 2nd Defendant without serving summons on him;

ii) Irremediable loss caused to the Petitioner in being not able to establish his claim against the claim of the Plaintiffs;

iii) The entire procedure adopted by the Embilipitiya District Court is void from the time it failed to issue summons on the Petitioner consequent to the acceptable of the 2nd amended plaint;

iv) Although the Plaintiffs may not have claimed any relief against the Petitioner, the very fact that they sought a declaration of title in their favour directly affects the rights of the Petitioner and thereby causing a need to establish his adverse title;

Section 55(1) of the Civil Procedure Code clearly sets out the requirement of order for summons on Defendant in the Form 16 in the 1st schedule to the Civil Procedure Code, to issue, signed by the Registrar of Court, requiring the Defendant to answer the plaint. Further, it provides in sections 59 and 60 the ways of serving of summons and section 61 provides provision for proof of service. Section 63 provides that *"when there are more Defendants than one, service of the summons shall be made on each defendant."*

Once the procedure is clearly stipulated in the Civil Procedure Code, there should not be any deviation from the trial court in the issues of "service of summons". Once the Petitioner in this case has been made a party to the case as 2nd Defendant by amended Plaint filed on 07.02.1990 in the District Court and further keeping him as a party (as the 2nd Defendant) in the subsequent amended plaint filed on 06.01.1993, it is the duty cast upon the trial court to satisfy that the provisions of Sections 55, 59,60 and 63 has been duly complied with and then to proceed with the case accordingly. Even though the Plaintiff has tendered summons by a notion dated 28.05.1990 to be issued to the Petitioner. such motion has not been minuted and therefore summons has not been issued on the Petitioner. Petitioner has also brought it to the notice of this court that the said motion , summons and fiscal's precepts are still attached and bound to the record in the said case No. 1743/L, which has been marked as a19, A20 and A21. This is a fatal error which goes into the root of the case and which is capable of invalidating the proceedings. Thereafter and the judgment entered into thereafter.

This fundamental issue has been previously dealt with by our courts and in Perera vs Commissioner of National Housing – it has been clearly held that the consequence of non-service of summons are explained in detail and in this judgment it was held that 'where summons has not been served at all, an *ex parte* judgment against the Defendant is *void ab initio* and the Defendant can challenge its validity at any time when the judgment so obtained is sought to be used against him either in the same proceedings or collaterally provided always that he has not by subsequent conduct stopped himself by acquiescence, waiver or inaction'. Also in the case of James vs Dochinona,

And in the case of Mohamadu Cassim vs Perianan 14 NLR page 385 – in this case the chief Justice Lascelles said *"the power of a Judge to inquire into the validity of a judgment debt where there is evidence that the judgment has been obtained by fraud or collusion or that there has been some miscarriage of justice is unquestionable. In an action brought after the dissolution of a co-partnership against the former partner's nomination, service of summons on one of the Defendants is not a good service on the others, a judgment is null and void, and cannot be executed against a person who is not served with summons.*

Therefore it I not a new legal concept or legal perspective to decide that the non-service of summons on a Defendant is a fatal error which invalidates the judgment entered upon in such a case.

However, on the other hand the 5th substituted Defendant Respondent has submitted that failure to serve summons is a ground to set aside the judgment and proceedings in a case only where the said judgment has been entered against the person on whom summons has not been served. The instant case is not such a case.

Accordingly it is also the contention of the 5th substituted Defendant Respondent that failure to serve summons is a fatal error and on that ground a judgment can be set aside. Further their contention is that "only if the judgment has been entered against such party to whom summons have not been served, the said judgment can be set aside."

However, according to the journal entry of the District Court case dated 15.03.1989 stipulates that the 1st Plaintiff was allowed to file an amended plaint and on 07.02.1990 the said amended plaint has been filed making the Petitioner

of this case as the 2nd defendant to the case (subsequently another amended plaint has also been filed on 16.01.1993 keeping the Petitioner as the 2nd Defendant.

Once such amended plaint is accepted the Petitioner of this instant case has become a party to the said District Court action and it is manifestly clear that the judgment entered thereafter also binds upon the Petitioner as well. The basis for allowing the application to file an amended plaint happened to be the item No. 6 of the commission Report executed by Mr. M. S. Diyagama, Licensed surveyor on 27.07.1988 with his Plan No. 1829 dated 20.07.1988, which indicates that the Petitioner in the instant case has made a claim to the disputed subject matter. However, the fact that the Petitioner has not been given an opportunity to file an answer and to prosecute his claim cannot be wrongly interpreted as "there is no any judgment against the Petitioner." Obviously that is his grievance and therefore according to the contention of the 5th substituted-defendant-Respondents, also it is manifestly clear that the judgment entered by the learned District Judge can be set aside upon the ground of non-service of summons to the Petitioner as specifically stipulated in the Civil Procedure Code.

The 5th sub-defendant Respondent has raised another objection that the Petitioner has failed to disclose any exceptional circumstances, which warrant the intervention of the court in a revision application. It is settled law in or legal system that, unlike in an appeal the existence of exceptional circumstances is essential to invoke the revisionary jurisdiction. Therefore it is important to consider whether the Petitioner has averred any exceptional circumstances in presenting his petition to this court. It is our considered view that in the light of

the facts that has been analyzed in the preceding paragraphs of this judgment, the petition filed in that court based on an exceptional circumstance, where the learned District Judge has failed to observe the fundamental steps that has been clearly and specifically spelt out in the provisions of Sections 55, 59, 60 and 63 of the Civil Procedure Code, with regard to the service of summons. Therefore it is our considered view that the Petitioner has not failed in his part in presenting his Petition with exceptional circumstances.

Further the 5th Defendant Respondent has submitted that the Petition has been filed with inordinate delay and it has to be a ground to dismiss the Petition filed by the Petitioner. According to our jurisprudence, it is a widely accepted fundamental principal of our law that a Revision application has to be filed without any undue delay in order for it to be eligible to be considered by the court. But according to the facts and circumstances of this case, revisionary power being the discretionary power, this court I not inclined to apply the said principal in a blind manner for the mere reason of interest of justice. In this case the complaint of the Petitioner is that the District court has failed to observe the fundamental steps in a trial before that court and this court is therefore decline to suppress a party from seeking justice upon the fact that there is a delay in filing the revision Petition. Therefore this court was inclined to hear the merits of the case and to dispose it for the facts and reasons applicable to this case set out in the preceding paragraph.

Therefore it is the considered view that the learned District Judge has failed to follow the compulsory provisions stipulated in the Civil Procedure Code with

regard to service of summons after filing of an amended plaint, which brought the Petitioner into the said District Court case as a new party (i,e the 2nd Defendant).

The judgment of the District Court dated 21.09.2000 and all trial proceedings are set aside as being void ab initio due to the non service of the summons on the 2nd Defendant Petitioner and the case is sent back for trial de novo. Petitioner is entitled to costs in a sum of Rs. 5000/-.

JUDGE OF THE COURT OF APPEAL

Wijesundera J.,

I agree.

JUDGE OF THE COURT OF APPEAL.