

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

In the matter of a final appeal from the Order of the
Learned Commercial High Court Judge on
10.06.2003 in HC (Civil) Case No. 76/2001 (1).

Consolidated Steel Industries (Pvt) Limited,
No.3, Fredrica Mawatha, Colombo 06.
And also of No. 237/4, Hekitta Road, Wattala.

Defendant-Petitioner-Appellant

SC CHC Appeal No. 02/2004
HC Civil Case No. 76/2001 (1)

-VS-

People's Bank,
No.75, Sir Chittampalam A Gardiner Mawatha,
Colombo 02.

Plaintiff-Respondent-Respondent

BEFORE:

Hon. Tilakawardene J,
Hon. Marsoof, P.C. J, and
Hon. Imam J

COUNSEL:

Shantha Jayawardena with Duleeka Imbuldeniya for
the Defendant-Petitioner-Appellant

Kushan D'Alwis P.C with Hiran Jayasuriya for the
Plaintiff-Respondent-Respondent

Argued on:

30.03.2012

Decided on:

15.02.2013

SALEEM MARSOOF J:

In this appeal from the order of the High Court of the Western Province holden in Colombo exercising civil jurisdiction and hearing commercial matters (Commercial High Court) dated 10th June 2003, the only question that arises for decision is whether the said High Court had erred in refusing to set aside the *ex parte* judgment and decree entered by it against the Appellant on 31st August 2001. No question has been raised as regards the regularity of the appellate procedure followed in this case.

At the hearing before this Court, learned Counsel for the Appellant emphasized that the Appellant, Consolidated Steel Industries (Pvt) Ltd., was a limited liability company incorporated in Sri Lanka, and that the default in appearance on the part of the Appellant had been caused by the failure to comply with the provisions of the Civil Procedure Code Ordinance No. 12 of 1895, as subsequently amended, with respect to service of process on such corporate entities. He submitted that although the factual position was that summons had not been served on the Appellant company at all, in any event, the position taken up on behalf of the Respondent Bank that summons had in fact been served by the Fiscal at the factory of the Appellant situated at No. 237/4, Hekitta Road, Wattala on 27th April 2001 would not be of any avail, as in terms of Section 59(2)(a) of the Civil Procedure Code, where the defendant to any action is a corporate body, summons is required to be delivered at the registered office of such defendant, unless the court sanctions personal or substituted service.

Learned President's Counsel for the Respondent has submitted that there is strong and compelling evidence that the summons had been duly served on the Appellant, but the Appellant had failed to appear in court on the date fixed for trial. He further submitted that since it is the Appellant who has put forward the purported 'excuse' that its non-appearance on the date of trial was occasioned by the non-service of summons, the burden of proving the purported excuse was on the Appellant, and that the said burden has not been duly discharged. He has invited the attention of Court to Section 86(2) of the Civil Procedure Code, which clearly places the onus on the party at default to show that he or it "had reasonable grounds for such default". He has also cited the decision of this Court in *David Appuhamy v Yassasi Thero* (1987) 1 SLR 253, to the effect that "an *ex parte* order made in default of appearance of a party will not be vacated if the affected party fails to give a valid excuse for his default."

Section 59 of the Civil Procedure Code enacts as follows:-

- (1) *Summons shall ordinarily be served by registered post.*
- (2) (a) *In the case of a corporation or incorporate body summons may be delivered to the registered office or if there is no registered office, the principal place of business of such corporation or body.*
- (b).....
- (c).....

Since no submissions were addressed to this Court with respect to Section 59(1) of the Civil Procedure Code, particularly in regard to the question as to whether that provision was complied with prior to service of summons through the Fiscal, it would suffice for the purposes of this appeal to consider the effect of Section 59(2)(a) of the said Code quoted above. Although learned President's Counsel has also referred us to Section 471 of the Civil Procedure Code which contains special provisions with respect to service of summons on a "company (or corporation) authorized to sue and be sued *in the name of an officer or of a trustee*" this is not such a case, and the section is of no relevance.

The phrase "registered office" that occurs in Section 59(2)(a) of the Civil Procedure Code has not been defined in that Code, but the concept of "registered office" is well known to company law. In *Bandaranike vs. Times of Ceylon Ltd.*, (1984) 1 SLR 178 at page 183, Neville Samarakoon CJ., (with whom Wanasundere J and Colin Thome J., concurred), referring to Section 91 of the Companies Ordinance No. 51 of 1938, which required every company to have a registered office and to give public notice of the situation of the registered office, observed that:-

A registered office gives the Company a domicile and residence. Service of summons at this office is equivalent to personal service on a person under section 59 of the Civil Procedure Code. One of the objects of section 91 is to safeguard the interests of the public. The law fixes the Company's habitat so that the process of law can reach it and the members of the public who have dealings with it can find it. The respondent has represented to the public that its registered office was at No. 3, Bristol Street, and if any member of the public acted on the faith of it the respondent cannot be heard to deny it.

Similar provisions were included in the Companies Act No. 17 of 1982, and in the current Companies Act No. 7 of 2007, there are several provisions that relate to the registered office of a company, and in particular Section 9(1)(b) requires public notice be given of the registered address of a company. Part VII of the Act, which deals with "management and administration" commences with Section 113(1) which specifically provides that "Every company shall have a registered office in Sri Lanka to which all communications and notices may be addressed."

In this connection it is relevant to note that in the plaint filed by the Respondent Bank in the High Court of the Western Province holden in Colombo against the Appellant, the Appellant was described in paragraph 2 as "a company duly incorporated in terms of the laws of Sri Lanka with the ability to sue and be sued in its name and having its registered office and/or principal place of business at the abovementioned address". It is also significant to note that in the caption to the plaint, two addresses of the Appellant have been provided by the Respondent, namely, No.3, Fredrica Road, Colombo 6 and No. 237/4, Hekitta Road, Wattala, without specifying which of

them is alleged to be the registered office of the Appellant. This must be contrasted with paragraph 1(a) of the plaint in which the Respondent Bank is described as “a banking Corporation incorporated and/or duly established under the People’s Bank Act No. 29 of 1961 as amended, with the ability to sue or be sued in its corporation name and having its principal place of business and/or *registered office* at the abovementioned address and having branches throughout Sri Lanka.”

Such a comparison reveals that this is an action by one corporate body against another such body and that while the Respondent as plaintiff has named one single address for its “principal place of business and/or registered office”, it has specified two addresses as the “principal place of business and/or registered office” of the defendant. Can it be said that the Respondent has complied with Section 40(c) of Civil Procedure Code which requires the plaint to contain particulars of “the name, description, and the place of residence of the defendant so far as the same can be ascertained”? I am of the opinion that as a responsible State Bank, the Respondent should have stated with greater precision which of those two addresses was the registered office of the Appellant, a fact which could easily have been verified, if there was any doubt in that regard, from the Registrar of Companies. I wish to add in passing that where the registered office of the defendant is not clearly set out in the plaint as in this case, quite apart from issues as to jurisdiction that could arise (See for instance, *The Bank of Chettinad Ltd. v Thambiah et al* 35 NLR 190, the court may in terms of Section 46(2)(a) of the Civil Procedure Code refuse to entertain the plaint and return the same for amendment with a direction to specify the registered office of the Appellant with clarity. Such a step would facilitate the process of serving summons at the correct address.

While in view of its default in appearance, the Appellant did not have the opportunity of filing an answer and clarifying where its registered office was situated, in the caption to the application made by the Appellant in terms of Section 86(2) of the Civil Procedure Code, reference is made only to the address of the Appellant at Fredrica Road, Colombo 6. Furthermore, the Managing Director of the Appellant, who testified at the inquiry held on 9th July 2002 in the Commercial High Court pursuant to the said application filed by the Appellant in terms of Section 86(2) of the Civil Procedure Code, has asserted that the registered office of the Appellant company was situated at No. 3 Fredrica Road, Colombo 6 and that summons had not been served at either address of the Appellant set out in the caption to the plaint. It is significant that no effort was made on behalf of the Respondent Bank to contradict the testimony of the Managing Director of the Appellant with respect to the address of the registered office of the Appellant company, and on the contrary, learned Counsel for the Bank proceeded to mark in cross-examination as PR1 and PR1(a), the office copy and original, respectively, of a letter dated 31st August 1991 sent by the Appellant to the Respondent which in its letterhead clearly sets out the Wattala address as that of the factory and the Colombo 6 address as that of the office of the Appellant company.

It is in these circumstances that it becomes vital for the purpose of this appeal to determine whether summons had in fact been delivered as mandated by Section 59(2)(a) of the Civil Procedure Code at the registered office of the Appellant. At the inquiry held under Section 86(2) of the Civil Procedure Code, apart from the Appellant's Managing Director, the Additional Registrar of the Commercial High Court, was called to give evidence on behalf of the Appellant. In his testimony, he produced the records in H.C. Civil Case No. 43/2001, H.C. Civil Case No. 91/2001 and H.C. Civil Case No. 146/2001, which were all actions at that time pending between the Respondent and the Appellant. He has testified by referring to fiscal reports filed in these cases that in all such cases summons had been served at the address of the factory of the Appellant situated at Wattala either on the Manager or the Accountant of the Appellant.

The only witness called on behalf of the Appellant at the said inquiry was the Fiscal Officer of the Commercial High Court holden in Colombo. He has testified that he did serve summons on the Appellant, and produced in evidence marked PR2, his fiscal report filed in the case, and marked PR3 and PR3(a) his diary notes, in regard to the service of summons. However, while in the fiscal report marked PR2, which consisted of an affidavit pertaining to the service of process, it is expressly stated that summons was delivered on the Manager of Consolidated Steel Industries (Pvt) Ltd at the address of the Appellant at No. 3 Fredrica Road, Colombo 6 on 27th April, 2001, in the notes made on the diary maintained by the Fiscal Officer, marked PR3 and PR3(a) it is stated that summons was delivered at the factory of the Appellant at No. 237/4, Hekitta Road, Wattala also on 27th April 2001. The Fiscal Officer confirmed in the course of his testimony in court that summons was not delivered at the Fredrica Road address on or about 27th April, 2001. He attempted to clarify in the course of his testimony that in fact summons was delivered on the Manager of the Appellant at the factory situated in Wattala, as the several attempts made by him to do so at the Fredrica Road address had failed as the said address was a residence and the gate was closed. He also sought to explain that he had not mentioned about those failed attempts in his diary due to lack of space, and that he later proceeded to the factory situated at Wattala where he succeeded in delivering summons on the Manager of the Appellant, which fact he noted in his diary. This is however, contrary to what has been reported to court by the relevant Fiscal Officer in his Fiscal Report, marked PR2, wherein he has affirmed to serving summons at the Fredrica Road address on 27th April, 2001.

It is clear from the foregoing that while it is manifest that summons was never delivered at the registered office of the Appellant, the testimony of the Fiscal Officer gives rise to considerable doubt in regard to the question whether summons was served on the Manager or some such officer of the Appellant at the factory premises in Wattala as contended by the Respondent. However, what a defendant who seeks to purge his or its default in appearance in terms of Section 86(2) of the Civil Procedure Code is required to satisfy court is that "he had reasonable grounds for such default", and in my opinion a company such as the Appellant is entitled to show for this purpose that its default was caused by the omission on the part of the Respondent to deliver summons at its registered office, which omission itself was occasioned by the failure of

the Respondent to set out clearly in the plaint the address of the registered office of the Appellant. It is not open to a leading State bank which parts with a large amount of money by way of loan to say that it was unaware of the address of the registered office of the borrower, which it knew or ought to know, was a limited liability company.

In this context, it may be of some relevance to refer to Section 60 (1) of the Civil Procedure Code which is quoted below:

The court shall, where it is reported that summons could not be effected by registered post or where the summons having been served and the defendant fails to appear, direct that the summons be served personally on the defendant by delivering or tendering to him the said summons through the Fiscal or the Grama Niladhari within whose division the defendant resides.....In the case of a corporation summons may be served personally by delivering or tendering it to the secretary or like officer or director.

As learned Counsel for the Appellant has contended, while it is incumbent in terms of Section 59(2)(a) of the Civil Procedure Code for summons on a company or other corporate body to be delivered at its registered office, or where there is no such registered office, at its principal place of business, if the company or other corporate body fails to appear, personal service may thereafter be made, as directed by court as contemplated by Section 60(1) of the Code, by delivering or tendering summons to “the secretary or like officer or director” of such company or corporate body. In the instant case, it appears that a personal service as contemplated by Section 60(1) of the Civil Procedure Code has been attempted by the Fiscal without any direction of court as required by that section. When the Fiscal officer was questioned about this in cross-examination, the witness responded to this question as follows:-

Q: Witness, on whose instructions did you attempt to serve summons at No. 237/4, Hekitta Road, Wattala?

A: I went to the first address given in the plaint to serve summons but summons could not be served because the gate was closed. Thereafter, I went to the second address.

Indeed, delivery of summons as required by Section 59(2)(a) of the Civil Procedure Code, or personal service as contemplated by Section 60(1) of the said Code is necessary in such circumstances, to acquire jurisdiction over a corporate body. The grave dangers of failing to serve summons on a defendant were emphasized by Sharvananda, J. (with Ismail J and Weeraratne J concurring) in *Ittepana v Hemawathie* (1981) 1 SLR 476 at 484 in the following manner:-

Failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant. It is only by service of summons on

the defendant that the Court gets jurisdiction over the defendant. If a defendant is not served with summons or is otherwise notified of the proceedings against him, judgment entered against him in those circumstances is a nullity.

Learned President's Counsel for the Respondent has invited our attention to Section 61 of the Civil Procedure Code and Section 114 (d) of the Evidence Ordinance, but it must be said at the outset that Section 61 of the Code has no relevance of the facts of this case in which no question has been raised in regard to service of summons by registered post. Section 114(d) of the Evidence Ordinance provides that "the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case, that judicial and official acts have been regularly performed". In my opinion, the clear evidence of failure to comply with the imperative provisions of Section 59(2)(a) and 60(1) of the Civil Procedure Code are sufficient to displace the effect of the said presumption.

As P.R.P. Perera, J. (with whom Dr. Amarasinghe J. and Wejathunge J. concurred) in *L.M. Gladwin D. Mel v J. A. Neethasinghe* [1994] Vol. V Part II BALR 24 observed at page 25:-

The court has to be mindful of the fact that the objective of service of summons on a defendant is to give notice to 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 to do so. The court must therefore be perfectly satisfied that summons has been duly served on the defendant.

It is necessary to mention that the main thrust of the Appellant's case as presented in the Commercial High Court was that no summons had been served on the Appellant either at the address of its registered office or at the factory premises situated in Wattala. The Learned Judge of the Commercial High Court was not inclined to believe the evidence of the Managing Director of the Appellant that the business of the Appellant had been closed down in the year 1996, as there was clear evidence that the factory had been in operation even on 27th April 2001, on which day the Fiscal claimed that he had served summons on the Manager of the factory. However, in my view it is also necessary to consider the fact that the Appellant's registered office was situated at No. 3 Fredrica Road, Colombo 6, which position has not been denied or disputed by the Respondent, and the infirmities in the testimony of the Fiscal Officer in regard to the service of summons. It seems extremely unlikely that the Appellant company, which also had several other cases pending before the Commercial High Court, would have deliberately refrained from making an appearance, if it had in fact been served with summons, particularly because according to the *ex parte* judgment and decree, the amount sought to be recovered by the Respondent in the action is Rs.38,285,060.13, which along with interest at 30% per annum from the date of the plaint to the date of the judgment amounts to Rs. 52,173,730.84, subject to further legal interest till it is paid in full.

In all the circumstances of this case, I am satisfied that the Appellant has discharged the burden placed on it by Section 86(2) of the Civil Procedure Code, and I am of the view that the Appellant should not be deprived of the opportunity of making an appearance. In my opinion, the interests of justice will be best served if the Appellant is given the opportunity to purge its default to enable it to appear and defend the action filed against it by the Respondent.

I would therefore, allow the appeal and set aside the order dated 10th June 2003 and the *ex parte* judgment and decree dated 31st August 2001 of the High Court of the Western Province holden in Colombo exercising civil jurisdiction and hearing commercial matters (Commercial High Court), and direct the said court to permit the Appellant to file answer and defend the action instituted by the Respondent.

I do not make any order for costs in the circumstances of this case.

JUDGE OF THE SUPREME COURT

TILAKAWARDENE J

JUDGE OF THE SUPREME COURT

IMAM J

JUDGE OF THE SUPREME COURT