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

In the matter of an application for *Restitutio-in-Integrum/ Revision* under and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. RI 08/2020

D.C. Panadura Case No: 1614/L

Rohan Sushil Fernando
No. 06,
Vishaka Road,
Colombo 04.
PLAINTIFF-PETITIONER

-Vs-

Jacintha Patricia Saliman
No. 19, Willow Grove,
Moreton Park,
Devon EX39 3HE
United Kingdom.
DEFENDANT-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J (P/CA) &
Sobhitha Rajakaruna, J.

COUNSEL : Upul Jayasooriya, PC. with Sandamal Rajapaksha for the Plaintiff-Petitioner

The Defendant-Respondent is absent and unrepresented.

Argued on	:	21.10.2020
Decided on	:	25.11.2020

A.H.M.D. Nawaz, J. (P/CA)

The pith and substance of the questions that arise for consideration in this matter can be summarized in a nutshell. Is an order made by a District Court to serve summons and an *ex-parte* decree by courier legal and valid? Once an order for service of summons and the *ex parte* decree by courier had been made and there is subsequent proof that the service by courier has been effected, can the District Judge later rescind the order that had been made for service by courier? These are the quintessential questions that come to the fore in this case.

The Plaintiff-Petitioner (hereinafter sometimes referred to as the Plaintiff) in this case invokes the remedy of revision and *restitutio in integrum* against the orders of the District Court of *Panadura* dated 07.07.2017 and 10.07.2019. These are two orders rescinding a previous order for service by courier. Thus I am confronted with three orders in the case. The first order was for service of an *ex parte* decree by courier. There was proof before Court that the Defendant-Respondent (hereinafter sometimes referred to as the Defendant) was served with the *ex parte* decree by courier. The 2nd and 3rd orders that are challenged before this Court rescinded and revoked the 1st order for service by courier. Can this revocation take place? This is the core issue that comes up before us.

If I may set out the facts of the case in a nutshell, the Plaintiff-Petitioner (an ex husband) filed this action against the Defendant-Respondent (his former wife) for a declaration that she was holding in trust for him an undivided half share of the property described in the schedule to the plaint. He also sought an order directing the Defendant-Respondent (the former wife) to convey the said undivided half share of the property to him and the Plaintiff also sought an order that in the event the Defendant

failed to convey the undivided half share, the Registrar of the District Court be directed to convey the same.

It was during the pendency of the marriage of the Plaintiff with the Defendant that the Plaintiff had bought the land in question in their joint names. The Plaintiff (the ex-husband of the Defendant) alleged that the whole consideration for the purchase of the property was provided by him and the deed bearing No. 547 evidencing the purchase was executed on 07.02.1981. The Plaintiff alleged in the plaint that he had not intended to part with the beneficial interest in the property in favour of the Defendant and the transfer notwithstanding, he had been in possession of the property since the date of purchase. According to the Plaintiff, the Plaintiff and the Defendant had been married on 24.06.1972 and this wedlock gave rise to four children. At the time the Plaintiff went to the District Court of *Panadura* against the Defendant claiming the declaration of trust and a conveyance of the property upon proof of trust, the Plaintiff and the Defendant had divorced each other and the plaint alleged that a decree of divorce had been entered in the District Court of *Mount Lavinia* on or about 21.06.1991. The Plaintiff further alleged in his plaint that since February 1989, the Defendant had been living with one *Roger Saliman* in England and had no interest in the property in question. It was in those circumstances that the Plaintiff asserted that the Defendant held the undivided half share of the property in trust for him.

The case had been laid by for default of appearance of the Plaintiff himself for a while but he thereafter moved the District Court by way of a new proxy to have the case reinstated and summons issued on the Defendant.

On 30.03.2010, the application of the Plaintiff to serve summons by courier service was allowed and a perusal of the journal entries and document marked "X" quite clearly evidences the fact that steps were taken to serve summons by courier service and documentary proof of such service was produced by the Plaintiff to court. The journal entry dated 21.06.2010 establishes that the service of summons by courier had been accepted in London. However, since the Defendant was absent and unrepresented, an

ex parte trial was fixed against the Defendant for 18.08.2010. On 18.08.2010, the Plaintiff *Rohan Sushil Fernando* testified at the *ex parte* trial and the judgment dated 18.11.2010 shows that the Plaintiff's claim for a declaration of trust and the conveyance of half the property was granted.

The *ex parte* decree was entered accordingly on the same day as evidenced at page 29 of the proceedings and the service of the *ex parte* decree to be effected by way of courier was allowed by court. There is evidence to the effect that the service of the *ex parte* decree was made by way of courier and there is also an application to execute the writ. It is quite evident that attempts had been made thereafter by the Plaintiff, to execute the writ. There is also a journal entry to the effect that a draft deed had been put up to the Registrar to effect a fiscal conveyance and the court had been satisfied that the Plaintiff was entitled to the relief that he had sought.

However, despite these steps and the order dated 20.03.2014 that the Plaintiff was entitled to obtain the relief, another turn of events occurred on 07.07.2017 when the learned District Judge of *Panadura* made order that since the summons had not been properly served on the Defendant, the Petitioner should notice the Defendant-Respondent again before his application for a fiscal conveyance could be considered; *vide* the order of the learned District Judge dated 07.07.2017 which appears at page 27 of the annex "X". Another attempt by the Plaintiff-Petitioner to have the District Court Registrar place his signature on the deed to convey the undivided half share to the Plaintiff met with another order of the learned District Judge dated 10.07.2019 to the effect that the Plaintiff should take steps in pursuance of the previous order dated 07.07.2017. It is against these two orders dated 07.07.2017 and 10.07.2019 that the Plaintiff-Petitioner has preferred this application for revision and *restitutio in integrum.* As I said before, these two orders entail a revocation of the 1st order that directed the service of summons by courier.

It is as plain as a pikestaff that the Defendant-Respondent was served with both the summons and the *ex parte* decree. There is no scintilla of doubt that both the summons and the *ex parte* decree have been served on the Defendant-Respondent, but by courier service. Both these facts are undeniably established having regard to the journal entries in the case but the crux of the issue happens to be the complaint on the part of the learned District Judge that the service has been effected by courier. It has to be noted that it is the District Court itself that permitted the service of summons on the absent Defendant-Respondent by way of courier. It does not lie in the mouth of another District Judge to call in question this procedure that has been adopted by the District Court itself.

A court can act once and once only. Having made an initial order that the Plaintiff can serve summons as well as the *ex parte* decree by way of courier, the self-same court cannot now order the Plaintiff to serve summons in a manner which is inconsistent with its previous order. Once an order has been made, the power to act in regard to the same matter is exhausted. But I would sound a caveat. Only if the first order to serve summons by courier is legal and valid, the court would become *functus officio* to make a second order inconsistent with the 1st order. I would thus use the *functus officio* doctrine to invalidate the 2nd and 3rd orders provided the 1st order to serve summons by courier is permissible by dint of the local municipal law namely the Civil Procedure Code.

Thus the first question before this Court is whether the first order made by the District Court of *Panadura* to order service of summons on the Defendant by courier was legal and effectual.

Here was a defendant who was resident overseas. In ***Miller v Murray*** 47 C.L.W 51; 54 N.L.R 25, Sir Alan Edward Percival Rose, K.C., C.J (with E.H.T. Gunasekera, J. agreeing) held on July 10, 1952:

> *"Under section 9 of the Civil Procedure Code an action may be instituted in Ceylon against a defendant who is resident abroad and is not domiciled in Ceylon. The jurisdiction of a Court of*

any particular State depends upon the local municipal law and is unaffected by the consideration as to whether a judgment once obtained is enforceable in the Courts of a foreign State."

Section 69 of the local municipal law namely the Civil Procedure Code prescribes that an application must be made for leave to serve summons on the defendant who is overseas, by a motion supported by affidavit or other evidence showing where such defendant may be found and the grounds on which the application is made. More particularly, Section 70 of the Civil Procedure Code is to the effect that every order granting leave to effect service of summons out of Sri Lanka shall direct **the mode** by which such service shall be effected, and also direct that the defendant shall on or before the date specified in the summons, such date being not later than six months from the date of the order for service outside Sri Lanka, file answer and comply with the other requirements of section 55.

So it is the import of Section 70 that repays an interpretation in the case before us. Does it accommodate within its remit service of summons by courier?

Dr. U.L. Abdul Majeed in his "*A Commentary on Civil Procedure Code and Civil Law in Sri Lanka*" makes the following observation at page 351 (Volume 1, 2nd Edition, 2017).

"In the case of a defendant who lives out of Sri Lanka, service could be effected now by ***'courier service'****. In this regard the Precept should be in Form 18 in the First Schedule. The registered Attorney must file a motion together with the summons, Precept, a copy of the Plaint and an affidavit of the plaintiff giving details of the place and the country where the defendant can be found and the ground on which such application was made, and move Court to allow the service through 'courier service'. Once the application is allowed by court, the registered Attorney must collect all the papers from the Registrar, duly signed by him and rubber stamped, (and put them in an envelope) and hand them over to the relevant courier service for service and report. This procedure has been adopted by some courts, where the service of summons on defendant who*

lives out of the country is necessary. Once the summons is served on the defendant, the 'courier service' will submit a report on the service to court."

I would *though* adopt a different reasoning to sanction the courier service of processes. Service of process is one area in the civil litigation process that particularly requires the infusion of speed and dispatch including technology. Over-reliance on personal service on the defendant is vulnerable to delays and backlogs affecting the progress of the case in circumstances where the defendant cannot be located by means of personal service, has no permanent address, and has not authorized anyone to accept service of process for him or her. At the same time, the increase of the usage of courier service to serve processes has even resulted in legislative amendments to accommodate such services. A comparative survey across the Palk Strait reveals this legislative tendency.

In terms of section 27 of the Indian Civil Procedure Code, 1908 summons are defined to be instruments which may be issued by the court to a party to appear and answer the claim and maybe served in a manner prescribed on the given date of the proceedings. Order V Rule 9 of the Civil Procedure Code, 1908 provides that the summons maybe delivered to a party in such manner as the court may direct. The said provision includes the transmission of summons through electronic media as well. This provision has been interpreted in a number of cases and the slew of cases is as follows:

- *Tata Sons Limited and Others v John Doe(s) and Others* CS (COMM) 1601/2016 – In the said case, Delhi High Court, permitted affidavit of service through text message, Whatsapp or by email.
- *Kross Television India Pvt Ltd & Another v Vikhyat Chitra Production & Others* SUIT (L) NO. 162 of 2017- For the said matter the Bombay High Court considered the copies of the plaint, Notice of Motion to be served and received via WhatsApp after the same was responded to by the Defendant.

In these cases the courts have stated that since blue ticks on Whatsapp are indicative of the fact that the documents served via Whatsapp have been read by the recipients, it imposes a responsibility on such recipients accordingly so as to prevent any adverse action befalling her or him.

In the modern age, technology makes information available just at the click of a button. All major services are readily rendered in the electronic media. The increasing digitalization has not left the judicial system untouched. The legal contours of judicial activities such as filing of petitions, applications, intellectual properties, availability of judgments and orders are now being increasingly made in the online platform. As courts have globally accepted newer modes of communication, from the newspaper to telex, fax, email and finally social media, implicit in this "shift" is that the acceptance is still within the framework of an attempt to serve notice at a place where the defendant can habitually be said to be found and reasonably calculated to have been given notice and opportunity to respond.

In the same way service of summons by courier provides an effective mode of service and I take the view that section 70 of the Civil Procedure Code would accommodate within the meaning of the word **mode** service of summons by courier. When section 70 of the Civil Procedure Code mandates the District Court to direct the mode by which service of summons shall be effected the legislature must have taken to have authorized the service of summons by way of a courier. It is in these circumstances that the application of the Plaintiff to serve summons by courier service on the Defendant resident in the United Kingdom must be understood and when that application was allowed by the learned District Judge of *Panadura* I hold that this was a valid and effectual order. There was subsequent proof furnished to court that the service of summons by courier had been accepted in London but the Defendant was absent from court and the *ex parte* trial ensued against the Defendant. Even the service of the *ex parte* decree was effected by way of courier and these valid and effectual orders made by one District Judge cannot be overturned by another District Judge but the learned District

Judge of *Panadura* who succeeded the previous District Judge has effectively rescinded the previous order made by his predecessor by ordering fresh orders of service on the Defendant and these orders dated 07.07.2017 and 10.07.2019 have been erroneously made. Once the preceding District Judge had made the initial orders of service by courier which are valid and effectual, a succeeding judge cannot act differently and rescind those orders for a court can act only once.

The court had become *functus officio.* In other words, the court cannot ask the Plaintiff to act in an inconsistent manner. If the court permits the Plaintiff to do something in a particular way which is authorized by law, it cannot later order him to act in a different way. It is for this reason that I hold that a court can act once and once only. In the concept of *functus officio*, the personalities who make orders qua judicial officers do not matter. When the holder of the office has once discharged his duty, the duty has come to an end. Therefore the order made by the learned District Judge on 07.07.2017 is invalid and ineffectual.

When an order is made at a point of time when the duty of the holder of the office had come to an end upon the making of a previous order, the subsequent order annulling the first order becomes null and void. In consequence, the order made on 10.07.2019 emphasizing the previous order of 07.07.2017 is also null and void as the learned District Judge had no legal competence or jurisdiction to make the orders as he did on 07.07.2017 and 10.07.2019. The fact that judges had changed is immaterial. Once the first District Judge made his order permitting the service of summons and the *ex parte* decree by way of courier service, he had become *functus officio* and a second order could not be made revoking the order permitting the service of summons and the *ex parte* decree by courier.

There is another reason as to why I take this view. If a succeeding District Judge is permitted to make orders annulling the previous orders that are legal, there will be no *finis* to the number of orders that could be made and a court cannot and should not act

in vain-see the House of Lords decision of *Malloch v Aberdeen Corporation* (No 1) (1971) 1 WLR 1578 which said at p 1595 that a court does not act in vain. The truism that a court should not act in vain and should command nothing in vain has been reiterated by our courts-*see* H.N.G. Fernando, C.J in *P.A. Anthony Naide v The Ceylon Tea Plantation Co. Ltd of London* 68 N.L.R. 558 at 569; G.P.S. De Silva, C.J in *George Payne & Co (Ceylon) Ltd v International Exports (PVT) LTD* 1998 1 Sri.LR 250; U.De.Z. Gunawardana, J. in *Najimdeen and Others v Nageshwari and Others* (1999) 3 Sri.LR 123.

In the circumstances, I proceed to set aside the orders dated 07.07.2017 and 10.07.2019 and direct the learned District Judge to allow the fiscal conveyance to take place and permit the plaintiff to enjoy the fruits of his decree.

PRESIDENT OF THE COURT OF APPEAL

Sobhitha Rajakaruna, J.

I agree.

JUDGE OF THE COURT OF APPEAL