

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

In the matter of an application for
restitutio in integrum in terms of
Article 138 of the Constitution

Sanjiwani Surangika Yapa
Abeywardena,
No. 1107/04,
Dharmashoka Mawatha,
Malabe.
Defendant-Petitioner

CASE NO: CA/RI/19/2018

DC KADUWELA CASE NO: 1663/D

Vs.

Prabath Manjula Halwinnage,
No. 771,
Storfield,
Gampola.
Plaintiff-Respondent

Before: Mahinda Samayawardhena, J.

Counsel: S.N. Vijithsingh for the Defendant-Petitioner.

Decided on: 08.10.2018

Samayawardhena, J.

This is a divorce action filed by the plaintiff-respondent against the defendant-petitioner in the District Court of Kaduwela.

The petitioner filed this application before this Court for *restitutio in integrum* seeking to set aside: (a) the *ex parte* order made on 04.08.2015 allowing service of summons on the petitioner by courier service; (b) the *ex parte* order made on 19.02.2016 fixing the case for *ex parte* trial against her on the basis that summons was served; and (c) the *ex parte* Judgment dated 24.03.2016 entered against her.

Learned counsel for the petitioner submits that the *ex parte* order to serve summons by private courier service is bad in law; and in any event, the petitioner was never served with summons by courier service or otherwise; and therefore the *ex parte* Judgment entered against the petitioner shall be vacated.

Whether or not summons was in fact served is a question of fact and not of law, which has to be decided after an inquiry at which evidence would ordinarily be led. Therefore, the appropriate forum to hold such an inquiry is not this Court, but the District Court. That is the settled law.

In *Andradie v. Jayasekera Perera*¹, like in the instant case, a decree entered in a divorce suit was sought to be set aside by way of an application for revision and/or *restitutio in integrum* on the ground that summons was never served on the petitioner. Upholding the preliminary objection taken on behalf of the

¹ [1985] 2 Sri LR 204

respondent and dismissing the application *in limine* Justice Siva Selliah citing a spate of earlier authorities held:

The practice has grown and almost hardened into a rule that where a decree has been entered ex parte in a District Court and is sought to be set aside on any ground, application must in the first instance be made to that very Court and that it is only where the finding of the District Court on such application is not consistent with reason or the proper exercise of the Judge's discretion or where he has misdirected himself on the facts or law that the Court of Appeal will grant the extraordinary relief by way of Revision or Restitutio in Integrum.

This is good law and stands to reason.

This law is not only applicable to *ex parte* divorce judgments, but also to any *ex parte* judgment or *ex parte* order of the District Court.

In *Hotel Galaxy (Pvt) Ltd v. Mercantile Hotels Management Ltd*², the Supreme Court citing *Loku Menika v. Selenduhamy*³, *Habibu Lebbe v. Punchi Etana*⁴, *Caldera v. Santiagopulle*⁵, *Weeratne v. Secretary, D.C. Badulla*⁶, *Dingirihamy v. Don Bastian*⁷, *Bank of Ceylon v. Liverpool Marine & General Insurance Co Ltd*⁸, *Nagappan v. Lankabarana Estates Ltd* held that:

² [1987] 1 Sri LR 5

³ (1947) 48 NLR 353

⁴ (1894) 3 CLR 85

⁵ (1920) 22 NLR 155 at 158

⁶ (1920) 2 CL Rec 180

⁷ (1962) 65 NLR 549

⁸ (1962) 66 NLR 472

A party seeking to canvass an order entered ex-parte against him must apply in the first instance to the court which made it. This is a rule of practice which has become deeply ingrained in our legal system.

If I may cite a few more recent cases, in *Jana Shakthi Insurance v. Dasanayake*⁹ Justice Wimalachandra stated:

It is settled law that a party affected by an order of which he had no notice must apply in the first instance to the Court which made the order. The petitioner must first file the necessary papers in the original Court and initiate an inquiry into the allegations made by him. After such inquiry, if the petitioner is dissatisfied with the order made by the District Court, he can thereafter raise the matter before the Court of Appeal. The Court of Appeal then would be in a position to make an order on the issues after taking into consideration the order made by the District Court.

In *Penchi v. Sirisena*¹⁰ also Justice Wimalachandra took the same view.

Then it is quite clear that the petitioner cannot straightaway come before this Court against the *ex parte* orders and *ex parte* Judgment made against her by the District Court.

The *ex parte* Decree Nisi has not been made absolute yet. The petitioner states that the District Court has now ordered *ex parte* Decree Nisi to be served on her through the Foreign Ministry on the basis that she is living abroad, but she is presently in Sri

⁹ [2005] 1 Sri LR 299 at 303

¹⁰ [2012] 1 Sri LR 402 at 408

Lanka. There is no purpose in informing those matters to this Court.

In the above circumstances, I refuse to issue notice on the respondent.

Notice refused.

Judge of the Court of Appeal