

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

Undugoda Pathirennhelage Vijitha  
Ranjini,  
No. 16/19,  
Amunukumbura,  
Wathurugama.  
Defendant-Petitioner

**CASE NO: CA/RI/254/2015**

**DC COLOMBO CASE NO: DDV/00319/2009**

Vs.

Nilantha Prinil Kumudu  
Jayawardana,  
No. 190,  
Gangaboda Road,  
Kelanimulla,  
Angoda.  
Plaintiff-Respondent  
(now deceased)  
Thilani Jayawardana,  
No. 34B/45,  
Rukmalgama,  
Kottawa,  
Pannipitiya.  
Respondent

Before: Mahinda Samayawardhena, J.

Counsel: S.A.D.S. Suraweera for the Defendant-Petitioner.

Respondent is absent and unrepresented.

Decided on: 01.02.2019

Samayawardhena, J.

The defendant-petitioner filed this application in 2015 for *restitutio in integrum* seeking to set aside the decree of divorce entered against her by the District Court in 2010 on the basis that her deceased husband had obtained the said decree of divorce fraudulently without serving summons on her. She states that she came to know about the divorce when the uncle of her deceased husband showed her the decree of divorce when she went to obtain income generated from the coconut estate belonged to her deceased husband. The petitioner has produced a number of documents to convince Court that she and her deceased husband lived together in harmony until his death. However the husband is not there to contradict these assertions.

The learned counsel for the defendant-petitioner draws the attention of this Court to *Kusumawathie v. Wijesinghe [2001] 3 Sri LR 238* in support of this application. However, the learned counsel candidly admits that “*there is a slight variation in the said case where there had been no proxy filed on behalf of the defendant in the trial Court*” as has been done in this case (which the defendant-petitioner now denies and disowns). In my view, that is not “a slight variation” but goes to the root of the matter.

A copy of the District Court case record has been tendered marked X4. According to the Journal Entry No.1, summons on the defendant-petitioner had been issued both by registered post and through fiscal returnable on 30.07.2009. Summons sent by registered post has not been returned undelivered, but the fiscal has reported to Court that summons could not be served on the defendant-petitioner personally as the house was closed, and not as the address was insufficient or incorrect. However on the summons returnable date, the proxy of the defendant-petitioner had been filed by Mr. Shirley Gurugalgoda, an Attorney-at-Law, who is a practicing lawyer in hultsdrop even to date.

There is no suspicion whatsoever about that proxy (which is at page 19 of X4). The defendant-petitioner's correct name, address, National Identity Card number and her signature—everything is there, and the Attorney-at-Law has *inter alia* particularly recorded in it that the defendant-petitioner placed her signature before him. This is a requirement made necessary under section 59(5) of the Civil Procedure Code (introduced by Civil Procedure Code (Amendment) Act, No. 14 of 1997) to avert this kind of applications.

It is significant to note that the defendant-petitioner in the petition and the corresponding affidavit does not particularly state that the details stated in the proxy of her are incorrect and the signature appearing in the proxy is forged or that it is not her signature. What she *inter alia* says is that "*The proxy filed on my behalf was done so fraudulently and surreptitiously without my knowledge and that I had no notice whatsoever of the above said proceedings commenced against me*".

It is also relevant to note that, according to the proceedings of the District Court (at page 12 of X4), Mr. Gurugaloda, the registered Attorney of the defendant-petitioner, has appeared for her at the trial date to inform the Court that the defendant-petitioner was not contesting the case. This he has informed when he tendered the proxy on the summons returnable date as well.

The petitioner in the petition and the corresponding affidavit says that she made a complaint to the Fraud Bureau against Mr. Gurugaloda "*who by fraudulent means filed proxy on her behalf without her consent.*" Whatever it is worth, she has not tendered a copy of the said complaint with the petition for perusal of Court.

In the said backdrop, can this Court hold with the defendant-petitioner without Mr. Gurugaloda being heard? The answer to that question is invariably in the negative. Mr. Gurugaloda is not a party to this application.

The thrust of the argument of the learned counsel for the defendant-petitioner is that summons has not been served through fiscal according to the fiscal's report marked X4(a). This not necessary. In terms of section 59(1) of the Civil Procedure Code "*Summons shall ordinarily be served by registered post*". This shall never be understood as an inferior way of serving summons. As I stated earlier, the District Court has issued summons on the defendant-petitioner both by registered post and through fiscal at once and summons sent by registered post was not returned undelivered. In terms of section 60(1) of the Civil Procedure Code "*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 such summons be served personally on the defendant*". Here on the summons

returnable date the proxy of the defendant was filed and therefore there was no necessity to serve summons again by personal service. Hence I am unable accept that argument in the circumstances of this case.

This is not a fit and proper case to allow the application for restitution. Application of the petitioner is dismissed.

Judge of the Court of Appeal