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

In the matter of an application for Restitutio-in-integrum under Section 753 of the Civil Procedure Code read with the Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (RII) Application No. 39/2023
NW/HCCA/KU-06/2020 (REV)
D.C. Marawila Case No.640/P

1. Rankoth Pedige Kalyanawathie

2. Wijayalath Pedige Prageeth Nalin Kumara

3. Wijayalath Pedige Ayesha Dilrukshi

4. Wijayalath Pedige Ishara Thilanka

5. Wijayalath Pedige Prasanna Neel Kumara

6. Wijayalath Pedige Prasad Madusanka

7. Wijayalath Pedige Kasun Tharaka

All of No.115C, Thamarakuliya, Dankotuwa.

PLAINTIFFS

- Vs. –

1. Muthugal Pedige Ratnawathi

1a. Wijayalath Pedige Karunawathi

2. Wijayalath Pedige Karunawathi

3. Sudath Indika Amarasinghe

   All of No.5 Nelum Uyana,
   Meti Kotuwa, Dankotuwa.

4. Wijayalath Pedige Nimal Karunathilaka alias Wijayalathge Nimal Karunathilaka

5. Wijayalath Pedige Chamila Rukshan alias Wijalathge Chamila Rukshan both of Thamarakuliya, Dankotuwa.

DEFENDANTS

AND BETWEEN

4. Wijayalath Pedige Nimal Karunathilaka alias Wijayalathge Nimal Karunathilaka, Thamarakulia, Dankotuwa.

4th DEFENDANT-PETITIONER

- **Vs. –**

1. Rankoth Pedige Kalyanawathie

2. Wijayalath Pedige Prageeth Nalin Kumara

3. Wijayalath Pedige Ayesha Dilrukshi

4. Wijayalath Pedige Ishara Thilanka

5. Wijayalath Pedige Prasanna Neel Kumara

6. Wijayalath Pedige Prasad Madusanka

7. Wijayalath Pedige Kasun Tharaka

All of No.115C, Thamarakuliya, Dankotuwa.

PLAINTIFF-RESPONDENTS

1. Muthugal Pedige Ratnawathi

1a. Wijayalath Pedige Karunawathi

2. Wijayalath Pedige Karunawathi

3. Sudath Indika Amarasinghe

All of No.5 Nelum Uyana, Meti Kotuwa, Dankotuwa.

4. Wijayalath Pedige Nimal Karunathilaka alias Wijayalathge Nimal Karunathilaka

5. Wijayalath Pedige Chamila Rukshan alias Wijalathge Chamila Rukshan both of Thamarakuliya, Dankotuwa.

DEFENDANT-RESPONDENTS

AND NOW BETWEEN

1. Rankoth Pedige Kalyanawathie

2. Wijayalath Pedige Prageeth Nalin Kumara

3. Wijayalath Pedige Ayesha Dilrukshi

4. Wijayalath Pedige Ishara Thilanka

5. Wijayalath Pedige Prasanna Neel Kumara

6. Wijayalath Pedige Prasad Madusanka

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All of No.115C, Thamarakuliya, Dankotuwa.

PLAINTIFF-RESPONDENT-PETITIONERS

- **Vs. -**

1. Muthugal Pedige Ratnawathi

1a. Wijayalath Pedige Karunawathi

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   alias Wijayalathge Nimal
   Karunathilaka

5. Wijayalath Pedige Chamila Rukshan
   alias Wijalathge Chamila Rukshan
   both of Thamarakuliya, Dankotuwa.

DEFENDANT-RESPONDENT-RESPONDENTS

Wijayalath Pedige Nimal Karunathilaka
alias Wijayalathge Nimal
Karunathilaka, Thamarakulia,
Dankotuwa.

4th DEFENDANT-PETITIONER

AND NOW BETWEEN

Wijayalath Pedige Nimal Karunathilaka
alias Wijayalathge Nimal
Karunathilaka, Thamarakulia,
Dankotuwa.

4th DEFENDANT-PETITIONER-RESPONDENT-PETITIONER

- Vs. -

1. Rankoth Pedige Kalyanawathie

2. Wijayalath Pedige Prageeth Nalin Kumara

3. Wijayalath Pedige Ayesha Dilrukshi

4. Wijayalath Pedige Ishara Thilanka

5. Wijayalath Pedige Prasanna Neel Kumara

6. Wijayalath Pedige Prasad Madusanka

7. Wijayalath Pedige Kasun Tharaka

All of No.115C, Thamarakuliya, Dankotuwa.

PLAINTIFF-RESPONDENT-PETITIONER-RESPONDENTS

1. Muthugal Pedige Ratnawathi

1a. Wijayalath Pedige Karunawathi

2. Wijayalath Pedige Karunawathi

3. Sudath Indika Amarasinghe

All of No.5 Nelum Uyana,
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Karunathilaka

5. Wijayalath Pedige Chamila Rukshan
alias Wijalathge Chamila Rukshan
both of Thamarakuliya, Dankotuwa.

DEFENDANT-RESPONDENT-RESPONDENT-RESPONDENTS

Before: R. Gurusinghe J.

&

Dr. S. Premachandra J.

Counsel: S. T. De Zoysa for the 4th Defendant-Petitioner-Respondent-Petitioner.

Nadeesha Fernando instructed by Sudarshani Coorey for the 1a and 2nd Defendant-Respondent-Respondent-Respondents.

Thilakshana Rajapakse instructed by Shaminda Silva for the 1st to 7th Plaintiff-Respondent-Petitioner-Respondents.

Written Submissions: not filed

Argued On: **04/04/2025.**

Judgment On: **12/06/2025.**

Dr. S. Premachandra J.

1] This is an application for Restitutio-in-integrum filed by the 4th Defendant, now is the Petitioner, under Article 138 of the Constitution of Sri Lanka. When the matter was supported before the previous bench, on consideration, the court had ordered a stay of proceedings of District Court of Marawila case bearing No. 640/P.

2] Now, the Petitioner sought to set aside the judgment dated 4th November 2022 of the Civil Appellate High Court of Kurunegala, which reversed an earlier order by the Learned Additional District Judge in DC Marawila Case No. 640/P. The original partition action sought to partition the land "*Kahatagahahena*," the Petitioner claims that the 4th and 5th Defendants were not served summons, and proceedings were carried out in their absence. The 4th Defendant (now, the Petitioner) alleges that the Plaintiffs, acting in collusion with the 1st to 3rd Defendants, (now, the Respondents) deliberately excluded them and obtained final decree unjustly.

3] Upon the application of the Petitioner, under the section 48 of the Partition Law of 1977, the Additional learned District Judge of Marawila, set aside the previous decrees and permitted the 4th Defendant to file a statement of claim, while restraining further changes to the property.

4] Being aggrieved to the said decision, the Plaintiffs (now Respondents) challenged the said order by revision application, which was filed in the Civil Appellate High Court, case bearing No. NW/HCCA/KU-06/2020 (REV). After consideration the learned High Court Judges of the Civil Appeal High Court allowed the Plaintiffs' application and set aside the order of leaned District Judge. The 4th Defendant, (the Petitioner) now seeks *restitutio in integrum*, asserting that the Civil Appeal High Court erred in law and failed to consider

that he was not served, his non-consent to the settlement at the trial and the improper identification of the corpus. The Petitioner argues that the revision application should not have been entertained as the, Plaintiff Respondents had failed to file leave to appeal in the Civil Appellate High Court and that these conditions constitute exceptional circumstances warranting the jurisdiction of this court to set aside said decision.

5] The Plaintiff-Respondents strongly oppose the 4th Defendant-Petitioner's application for *restitutio in integrum*, arguing that it is legally misconceived and constitutes an abuse of judicial process. They allege that the Petitioner misrepresented facts, suppressed material evidence, and failed to produce full certified copies of the case record. Further, the Plaintiffs maintain that the Petitioner did not exercise the available statutory remedy of seeking leave to appeal to the Supreme Court and he is also guilty of laches. Moreover, they assert that proper legal procedures were followed by them throughout the partition action, including valid service of summons and lawful conduct of the trial, which culminated in a judgment on 15th December 2015 and subsequent entry of the Interlocutory and Final Decrees.

6] The Plaintiffs say that the proceedings were not *per incuriam* and that the 4th Defendant-Petitioner was fully aware of the case and failed to appear in the lower court. The 1st to 3rd Defendant-Respondents also affirm that proper service was carried out as per Partition Law No. 21 of 1977, with summons issued on the 4th Defendant and served on 7th June 2011, as evidenced by journal entries, which were marked and tendered as 2R1 and 2R2. They say thereafter the 4th and 5th Defendants were declared as defaulted parties under Section 25(2) of the Partition Law. However, they pointed out that the Learned District Judge nevertheless awarded a 12/72 share to the 4th Defendant, although, the Petitioner was made default, in the judgment dated 15th December 2015 (marked as X8).

7] The above is the backdrop and contentions of the parties. I now consider the merits of this case. The application is filed against the judgment of the Civil Appellate High Court of Kurunegala dated 4th November 2022. In that, the learned judges of the Civil Appeal High Court had held that the District Court's

order to vacate judgment is invalid and they confirmed the original interlocutory decree and final decree which was entered.

8] The 4th Defendant Petitioner made the application to vacate the interlocutory decree under the provisions of section 48 of the Partition Law. It says;

"48 (1) Save as provided in subsection (5) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, and in the case of an interlocutory decree, subject also to the provisions of subsection (4) of this section, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decree relates and ***notwithstanding any omission or defect of procedure*** *or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.* ***In this subsection " omission or defect of procedure" shall include an omission or failure****-*

(a) ***to serve summons on any party****; or*

(b) to substitute the heirs or legal representatives of a party who dies pending the action or to appoint a person to represent the estate of the deceased party for the purposes of the action; or

(c) to appoint a guardian ad litem of a party who is a minor or a person of unsound mind.

In this subsection and in the next subsection " encumbrance" means any mortgage, lease, usufruct, servitude, life interest, trust, or any interest whatsoever

howsoever arising except a constructive or charitable trust, a lease at will or for a period not exceeding one month.

(2) Where in pursuance of the interlocutory decree a land or any lot thereof is sold, the certificate of sale entered in favour of the purchaser shall be conclusive evidence of the purchaser's title to the land or lot as at the date of the confirmation of sale, free from all encumbrances whatsoever except any servitude which is expressly specified in such interlocutory decree and a lease at will or for a period not exceeding one month.

(3) The interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by subsection (1) of this section notwithstanding the provisions of section 44 of the Evidence Ordinance, and accordingly such provisions shall not apply to such decrees.
The powers of the Supreme Court by way of revision and restitutio in integrum shall not be affected by the provisions of this subsection.

(4) (a) Whenever a party to a partition action-

(i) ***has not been served with summons****, or*

(ii) being a minor or a person of unsound mind, has not been duly

represented by a guardian ad litem, or

Paragraph

(iii) Repealed by [21, 17 of 1997]

(iv) being a party who has duly filed his statement of claim and registered his address, fails to appear at the trial,

and in consequence thereof the right, title or interest of such party to or in the land which forms the subject-matter of the interlocutory decree entered in such action has been extinguished or such party has been otherwise prejudiced by the interlocutory decree, such party or where such party is a minor or a person of unsound mind, a person appointed as guardian and item of such party may, on

or before the date fixed for the consideration of the scheme of partition under section 35 or at any time not later than thirty days after the return of the person responsible for the sale under section 42 is received by court, apply to the court for special leave to establish the right, title or interest of such party to or in the said land notwithstanding the interlocutory decree already entered.

48(4)(c)

If upon inquiry into such application, after prior notice to the parties to the action deriving any interest under the interlocutory decree, the court is satisfied-

(i) ***that the party affected had no notice whatsoever of the said partition action prior to the date of the interlocutory decree*** *or having duly filed his statement of claim and registered his address, failed to appear at the trial owing to accident, misfortune or other un-avoidable cause, and*
(ii) that such party had a prima facie right, title or interest to or in the said land, and
(iii) that such right, title or interest has been extinguished or such party has been otherwise prejudicially affected, by the said inter-locutory decree,
the court shall upon such terms and conditions as the court in its discretion may impose, which may include an order for payment of costs as well as an order for security for costs, grant special leave to the applicant." [Emphasis is added]

9] The 4th Defendant Petitioner's sole argument is based on that he was not served summons. Thus, it is clear, that it falls under section 48 of Partition Law as *"omission or defect of procedure"*. The Petitioner says by acting in collusion of Respondents that he was not served. In ***Ramasamy Pulle V De Silva*** 12 NLR 298, it was held that a court has an inherent right to vacate an order or decree into which it has been taken by fraud, collusion, or mistake of fact, it was further held that a court has no jurisdiction to vacate or alter an order after it has been passed, other than the amendments allowed by section 189 of the Civil Procedure Code.

10] In ***Wimal Weerawansa vs Ravindra Sandresh Karunanayake***, SC/Appeal No. 59A/2006, Decided on: 29.07.2020, His Lordship E.A.G.R. Amarasekara, J. considered altering a judgment as;

> *"Even if the Court thinks that a genuine mistake can be considered to give relief to meet the ends of justice, what could have been avoided by due diligence cannot be considered as a mistake as it falls within the ambit of one's negligence."*

11] In ***Perera and Others V Adline and Others*** [2000] 3 Sri L R page 93 the court upheld a preliminary objection that a party to a partition action is estopped from denying the validity of the Interlocutory Decree and His Lordship Jayawickrema, J. held;

> *"Although in an appropriate case this Court has jurisdiction to act in Revision and restitutio-in-integrum, but where a party has deliberately not shown due diligence even after he was notified by the Surveyor to appear in Court and fails to apply to be added as a party, this Court will not exercise its jurisdiction in his favour."*
>
> *"I According to Section 48(5) of the Partition Act the interlocutory decree or the final decree of partition entered in a partition action shall not have the final and conclusive effect given to it by Section 48(1) as against a person who, "not having been a party to the partition action, claims any such right, title or interest to or any land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree if, but only if, he proves that the decree has been entered by a Court without competent jurisdiction. According to the Provisions of the Partition Act, a partition decree could not be challenged even on the grounds of fraud or collusion."*

12]The case in hand relates to non-service of summons. His Lordship Sansoni C J in ***Siriwardena Vs. Jayasumana*** 59 NLR 400 stressed that the importance of serving summons, having quoted the following statement of Greene M R in the case of Craig Vs. Kanseen. [1943 (1) A E R 108] states as follows:

"Failure to serve process, the service of process is required as a failure which goes to the root of our conceptions of the correct procedure in legislation. To say that an order of that kind is to be treated as a merely irregularity and not something affected as fundamental rise is in my opinion that cannot be sustained. This failure also adds to many failures in this case."

13] The plethora of apex court cases have held failing of service of summons violates rules of natural justice and it falls under category of not according to the law. Authorities particularly, ***Mononmani v. Velupillai*** 50 NLR 289., ***Iththapana v. Hemawathie*** [1981]1 SLR 476, ***Perera v. Commissioner of National Housing***, 77 NLR 361, ***H. L. SIRIWARDENE et al, Appellants, Vs M. A. T. JAUASUMANA*** 59 NLR 400, ***Somawathie v. Madawala*** [1983] 2 SLR 15 and ***UMMA v. ZUBAIR AND ANOTHER,*** [2002] 3 SLR 169 are some of cases which were held that the failure to notice the parties falls not in accordance with the law.

14] In ***Mononmani v. Velupillai*** 50 NLR 289, His Lordship CANEKERATNE J. held that a decree against a defendant on whom summons has not been served is void and no rights can pass to a purchaser at an execution sale under such decree even if such purchase was *bona fide* and without notice.

15] In ***Iththapana v. Hemawathie*** [1981]1 SLR 476, His Lordship Sharvananda J (As he then was) held that 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 otherwise notified of the proceedings against him, the judgment entered against him in those circumstances is a nullity. The proceedings being void, the person affected by them can apply to have them set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court which is saved by S. 839 of the Civil Procedure Code. Hence the District Judge acted within his jurisdiction in inquiring into the question of non-service of summons, in this case.

16] In ***Perera v. Commissioner of National Housing***, 77 NLR 361, His Lordship TENNEKOON, C. J. held that where summons has not been served at all, an exparte 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 estopped himself by acquiescence, waiver or inaction.

16] In ***H. L. SIRIWARDENE et al, Appellants, Vs M. A. T. JAUASUMANA*** 59 NLR 400, His Lordship SANSONI, J. (As he then was) held that the " final and conclusive " effect given to an interlocutory or final decree by section 48 (1) of the Partition Act, No. 16 of 1951, was not intended to deprive a party who had not been duly served with summons of the right to claim that the decree had not been properly entered, and should therefore be vacated, in order that his claim might be investigated.

17] In ***Somawathie v. Madawala*** [1983] 2 SLR 15, His Lordship Soza, J. observed, inter alia, that:

> *"The immunity given to a partition decree from being assailed on the ground of omissions and defects of procedure as now broadly defined and failure to make persons concerned parties to the action should not be interpreted as license to flout the provisions of the partition law.* ***This Court will not hesitate to use reversionary powers and give relief where a miscarriage of justice has occurred resulting from non-conformity with the specific provisions of the Partition Act."*** [Emphasis is added]

18] In ***UMMA v. ZUBAIR AND ANOTHER,*** [2002] 3 SLR 169, His Lordship, UDALAGAMA, J. held**:**

> *(1)* ***Section 48 (4) could not bar a court from holding that in the event summons had not been even issued from coming to a finding that such non-issue was improper or that the court had no jurisdiction to proceed****. Section 48 (4) could not suppress the rights of parties to claim their due rights in partition actions which are decrees in rem.*

(2)… *…*

(3) Notwithstanding section 48, ***the District Court is not precluded from giving effect to an unlawfully obtained interlocutory decree causing a grave miscarriage of justice****"* [Emphasis is added]

19] Thus, though the interlocutory decree was entered it could be vacated on the ground of a grave miscarriage of justice on non-service of summons as proceedings are *ab intio void.*

20] Now, only question is to be decided here is whether, 4th Defendant (the Petitioner) was properly served or not? In this regard journal entry 13, dated 30/06/2011 is vital. In that, it indicates;

"4 විත්ති වෙත 2011/06/07 දින සිතාසි භාරදී ඇත.

…

4 විත්ති පෙනී නොසිටී. එක පාක්ෂික විභාගයට නියම කරමි" [Vide appeal brief page 214, marked as P2d, 2R2]

21] Thus, it is apparent, that after serving summons to the 4th Defendant, the ex parte trial was fixed and held. This default was based on the report of fiscal officer, the process server. His affidavit is tendered for perusal to this court as "2R3". In that, Fiscal Officer, W.P.T. Anthony Titus Fernando affirms as follows;

"වෂර් 2011 ජුනි මස 07 වැනි දින දී ඇති ලිපිනයේදී 4 වන විත්තිකරු වෙත විත්ති සිතාසිය සහ පැමිණිල්ලේ පිටපත අතටම දීමෙන් මා විසින් බාර දෙන ලදී."

22] This affidavit of process server, was an official act of a government officer which creates a rebuttable presumption under section 114(d) of the Evidence Ordinance. Unless contrary is proved, the facts of the affidavit deemed to be truth that the 4th Defendant was duly served. The section says;

"114*. 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".*

23] The illustration of 114(d) of the Evidence Ordinance says *"(d) the judicial and official acts have been regularly performed".* Thus, journal entry 13 and affidavit marked as 2R2 should be presumed as true facts. Thus, if 4th Defendant-Petitioner says that he was not served summons, he should prove that those facts are false and he was not truly served.

24] This position was considered in ***WIMALAWATHIE AND OTHERS v. THOTAMUNA AND OTHERS,*** [1998] 3 SLR 01, by His Lordship DR. RANARAJA, J. as follows;

> *"1. Applications to set aside ex-parte decree are proceedings incidental to and not a trial proper. The inquiry must be conducted on principles of fairness.*
>
> *2.**The affidavit of the Process Server is prima facie evidence of the fact that summons was duly served and there is a presumption that summons was duly served**. **Accordingly, the burden shifts onto the defendant to prove that no summons had been served.***
>
> *3.The defendants have to begin leading evidence and once the defendant's lead evidence to prove that summons had not been served on them and establish that fact, burden shifts back onto the plaintiffs to rebut the evidence. This can be done by calling the Process Server."* [Emphasis is added]

25] The trial started on 04/08/2015. When I go through the proceedings, it is seen that the learned trial judge was satisfied with that 4th Defendant was duly served and that he had failed to file statement of claim. Thus, findings of the learned trial with regard to fixing ex parte cannot be found fault with.

26] In the case in hand, I hold that the 4th Defendant Petitioner had failed to prove that he was not served summons. Thus, I am of the view this application has no substances. Moreover, if 4th Defendant claims prescriptive title to entire land, he should prove overact to terminate the common ownership. If he were truly possessed the entire land when the survey done for preliminary plan, he

could have known and aware that there is a case pending for the land and court commission is being held. If so, he has deliberately evaded the proceedings and cannot be allowed to agitate prescriptive title afresh. When perusing interlocutory decree, I can see that due share 12/72 had been allotted to him (to the Petitioner) and no sinister being done by the interlocutory decree. On top of that, this Restitutio-in-integrum application was filed when special leave to appeal was given to the 4th Defendant Petitioner under statutory provision. When there was a statutory remedy was given, no Restitutio-in-integrum relief is granted. (Vide ***Perera Et Al. v. Wijewickreme Et Al*** [15 NLR 411]). The Petitioner has not satisfied this court why he failed to exercise the statutory remedy.

27] For the foregoing reasons, I affirm the judgment dated 04/11/2022 of the Civil Appellate High Court of Kurunegala. The application for restitutio-in-integrum/revision is hereby dismissed with costs.

Dr. Sumudu Premachandra

Judge of the Court of Appeal

I agree.

R. Gurusinghe

Judge of the Court of Appeal