

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

G.A. Micheal Stanly Silva,
No. 185,
Samanala Mawatha,
K.C. de Silva Puraya,
Thimbirigaskatuwa.
Petitioner

CASE NO: CA/28/2017/RI

Vs.

W. Seebert Silva,
No. 189,
Baseline Road,
K.C. de Silva Puraya,
Thimbirigaskatuwa.
Respondent

Before: Mahinda Samayawardhena, J.

Counsel: N.M. Reyaz for the Petitioner.

Written submissions on: 26.06.2018

Decided on: 29.06.2018

Samayawardhena, J.

The plaintiff-respondent (respondent) filed action against the defendant-petitioner (petitioner) in the District Court of Negombo seeking declaration of title to and ejectment from the land in suit. Summons was served on the petitioner by pointed out service, but the petitioner returned the summons to Court stating that the name and address is not accurate—vide the letter at page 132 of the District Court Brief marked P1. The District Court fixed the case for *ex parte* trial and delivered Judgment for the respondent. *Ex parte* decree was served on the petitioner in the same name and address and the petitioner made an application (under section 86(2) of the Civil Procedure Code) to purge default within time. However on the date fixed for support of that application, the petitioner was neither present nor represented and the Court according to the petitioner “affirmed the *ex parte* order” vide—paragraph 7 of the written submissions of the petitioner. After the lapse of several months, on the application of the respondent writ was issued and thereafter the petitioner made another application to stay execution of the writ. This was disallowed by the District Judge by order dated 23.01.2009 and the writ was executed and he was dispossessed.

The petitioner appealed against that order to the Civil Appeal High Court of Gampaha and that Court dismissed the said appeal by Judgment dated 06.10.2016.

The petitioner did not appeal to the Supreme Court against that Judgment. Instead he filed this application on 22.11.2017 for *restitutio in integrum* seeking (a) a declaration that all proceedings in the District Court from the date the case was fixed for *ex parte*

trial are null and void and (b) to set aside the Judgement of the Civil Appeal High Court.

I must straightaway state that this Court has no jurisdiction to set aside the Judgment of the Civil Appeal High Court and only the Supreme Court has jurisdiction to do so—vide the express provision contained in section 5C of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 introduced by section 2 of the High Court of the Provinces (Special Provinces) (Amendment) Act, No. 54 of 2006.

Let me now consider why the petitioner says that all proceedings in the District Court from the date the case was fixed for *ex parte* trial are null and void. That is on the ground that summons was not properly served on him. Why he says summons was not properly served on him? That is because name and address is not accurate in that in the summons his name and address is stated as "*P.K. Stanly Micheal Silva, No.189/2, Samanala Mawatha, K.C. de Silva Puraya, Thibirigaskatuwa*" but his correct name and address is "*G.A. Stanly Micheal Silva, No.185, Samanala Mawatha, K.C. de Silva Puraya, Thibirigaskatuwa*".

The petitioner in paragraph 20 of his written submissions says that as he (the petitioner) and the respondent were living in one land, the respondent would have known his correct name and address.

Then it is abundantly clear that the respondent has pointed out the correct defendant to the fiscal irrespective of the fact that there is a slight difference regarding initials and assessment number of the house.

This slight difference regarding name and address is completely beside the point and can be corrected as long as the correct person to whom summons shall be served has been correctly identified and summons served. The reason is that "*Names are used only to designate persons, and the suit is not against names but against persons designated thereby*". (*Parsons v. Abdul Cader*¹, *W.M. Mendis & Co v. Excise Commissioner*², *Mohinudeen v. Lanka Bankuwa, York Street, Colombo* 1³) In *Parsons* case (supra) it was held that "*Where judgment is entered in a case against a person under a wrong name, the Court has inherent power to substitute the right name in the caption of a plaint even after the decree.*"

The remedy by way of *restitutio in integrum* is an extraordinary remedy and is given only under very exceptional circumstances. (*Halib Abdul Cader Ameer v. Danny Perera*⁴, *Sri Lanka Insurance Corporation Ltd v. Shanmugam*⁵) No such circumstances are to be found in the present case. I refuse to issue notice on the respondent.

Application is dismissed.

Judge of the Court of Appeal

¹ (1941) 42 NLR 383

² [1999] 1 Sri LR 351

³ [2001] 1 Sri LR 290

⁴ [1998] 2 Sri LR 321

⁵ [1995] 1 Sri LR 55