

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

Chandima Jayamani  
Wikramasinghe,  
No. 181,  
"Field View",  
Kalahe,  
Wanchawala.  
Defendant-Petitioner

**CASE NO: CA/8/2018/RI**  
**DC KURUNEGALA CASE NO: 5906/D**

Vs.

Herath Mudiyanseage Gamini  
Bandara,  
Ihalagedara,  
Kandepola,  
Buluwala Postal.  
Plaintiff-Respondent

Before: Mahinda Samayawardhena, J.

Counsel: Niranjan de Silva for the Defendant-Petitioner.

Written Submissions on: 05.07.2018

Decided on: 17.07.2018

Samayawardhena, J.

The defendant-petitioner filed this application for *restitutio in integrum* and revision seeking to set aside the judgment, decree *nisi* and decree absolute entered against her by the District Court of Kurunagala in case No. 5906/D in the year 2002 on the basis that the plaintiff-respondent-her husband has obtained the divorce judgment *ex parte* by fraud without serving summons on her.

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.

*Andradie v. Jayasekera Perera*<sup>1</sup> is to the point. In that case 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 of fraud committed by (a) service of summons on being pointed out without verification by affidavit of the person pointing out, (b) false pleadings and evidence and (c) getting an imposter to be present in Court in response to alleged service of notice of decree *nisi*. Upholding the preliminary objection and dismissing the application *in limine* Justice Siva Selliah reviving the 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*

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<sup>1</sup> [1985] 2 Sri LR 204

*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.

In *Kusumawathie v. Wijesinghe*<sup>2</sup> and *Paulis v. Joseph*<sup>3</sup>—the two cases strongly relied upon by counsel for the petitioner—the above mentioned approach could not be adopted as the husbands by whom *ex parte* judgments had been obtained were dead when the revision and/or *restitutio in integrum* applications seeking to set aside *ex parte* decrees were filed before this Court. This clear from the following observation of Justice Jayasinghe at page 245 of the former case: "*I do not see any purpose of sending back the case for inquiry/re-trial as the Plaintiff is dead. Hence on the material tendered to this Court I am satisfied that the decree for divorce had been obtained without the knowledge or notice to the Defendant-Petitioner.*"; and the following observation of Justice Imam at page 167 in the latter case: "*Although the position of the 1st Respondent is that the Petitioner should have gone to the District Court as it has original jurisdiction and where a due inquiry would be held. However there is no merit in this submission, as the Plaintiff (Petitioner's husband) is now dead and she obviously cannot go to the District Court.*" In contrast, in the instant case both parties are alive. Hence those two cases are clearly distinguishable.

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<sup>2</sup> [2001] 3 Sri LR 238

<sup>3</sup> [2005] 3 Sri LR 162

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 *Jana Shakthi Insurance v. Dasanayake*<sup>4</sup> 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.*

Under what provision of the law such an application to the District Court could be made? It is clear that such an application cannot be made under section 86(2) of the Civil Procedure Code as 14 day period from the alleged service of the decree has as always long lapsed by the time the applicant becomes aware of the *ex parte* decree. The answer to that question is found in the dicta of Justice S.N. Silva (as His Lordship then was) in *Sitthi Maleeha v. Nihal Ignatius Perera*<sup>5</sup>.

*In this case the defendant is seeking to set aside the decree on the basis that summons was not served on him. In Ittepana v. Hemawathie*<sup>6</sup>, it was held by the Supreme Court that the

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<sup>4</sup> [2005] 1 Sri LR 299 at 303

<sup>5</sup> [1994] 3 Sri LR 270 at 275

<sup>6</sup> [1981] 1 Sri LR 476

*failure to serve summons is one which goes to the root of the jurisdiction of the Court. That, if a defendant is not served with summons or otherwise notified of the proceedings against him, the judgment entered in such circumstances is a nullity and the person affected by the proceedings can apply to have them set aside ex debito justitiae. It was specifically held that the District Court has inherent jurisdiction in terms of section 839 of the Civil Procedure Code to inquire into the question of non-service of summons.*

Then the next question is what procedure to be followed at such an inquiry? The answer to that question is found in the dicta of Justice S.N. Silva (as His Lordship then was) in *De Fonseka v. Dharmawardena*<sup>7</sup>.

*An inquiry on an application to set aside an ex parte decree is not regulated by any specific provision of the Civil Procedure Code. Such inquiries must be conducted consistently with the principles of natural justice and the requirement of fairness. Section 839 of the Civil Procedure Code recognizes the inherent power of the court to make an order as may be necessary for the ends of justice.*

I refuse to issue notice on the respondent. Let the petitioner go before the proper forum and make the application.

Application is dismissed.

Judge of the Court of Appeal

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<sup>7</sup> [1994] 3 Sri LR 49