

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

In the matter of an application for revision and/or
restitutio in integrum made under Article 138 of the
Constitution.

C.A. Case No.250/2015 (Rev)

D.C. Colombo Case No.DDV
00054/2008

Dharman Sathanath Jayasinghe

No.8/5, Panasalhena Road,
Kolonnawa.

PLAINTIFF

-Vs-

Don Bandumali Jayasinghe *nec* Welikala

No.49/19, Longden Place,
Colombo 07.

DEFENDANT

AND NOW BETWEEN

Don Bandumali Jayasinghe *nec* Welikala

No.49/19, Longden Place,
Colombo 07.

DEFENDANT-PETITIONER

-Vs-

Hee Jung Kim *alias* Kim Hee Jung

No.51A-23/2-23rd Floor,

Empire Tower,
Braybrook Place, Colombo 02.
And now No.47, Alexandra Place,
Colombo 07.

RESPONDENT

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Ikram Mohamed, PC with Thisath
Wijegunawardena PC instructed by Sanath
Weeraratne for the Defendant-Petitioner
Kuvera de Zoysa, PC with Piume Kulatilake
instructed by Sanjaya Fonseka for the Respondent

Decided on : 05.08.2019

A.H.M.D. Nawaz, J.

This application for Revision and/or *restitutio in integrum* filed by the Defendant Petitioner on 11th June, 2015 is to set aside the order absolute entered on 30th January, 2009 in the Divorce proceedings in Case No.DDV00054/2008 in the District Court of Colombo, where there was a divorce dissolving the marriage between Dharman Sathanath Jayasinghe (the Plaintiff, now deceased) and Don Bandumali Jayasinghe (nee Welikala) the Defendant-Petitioner abovenamed.

The position of the Defendant-Petitioner (hereinafter sometimes referred to as “the Petitioner”) is that she and the Plaintiff above-named married on 07.04.1983 and out of this wedlock they were blessed with two sons, namely, Hiran Jayasinghe and Ashan Jayasinghe, who are both now deceased. The first son died in a car accident and the second committed suicide.

The Defendant-Petitioner pleads that they started a construction business under the name *Dinu Constructions (Private) Ltd.*, on a small scale and it later developed into a massive income originating business with unlimited cash flow and new avenues of income. The Plaintiff, in the meanwhile, had developed an affair with a Korean woman, who is the Respondent abovenamed in this Application. Later, there were disagreements that developed between the Plaintiff and the Defendant which resulted in both agreeing to an amicable divorce.

Before going for a divorce, the parties entered into two agreements (R28) in respect of the property owned by the Plaintiff and the Defendant and a deed of gift in favour of their second son. There was also an agreement reached on disbursement of money, upon which the Defendant agreed to obtain Rs.25 million from the Plaintiff, *i.e.*, Rs.12.5 million before the divorce and another Rs.12.5 million after the divorce. As part of the said agreement, the Defendant had resigned from the position of a Director of the company, and they were living in separate abodes-*vide* pages 1849 and 1850 of the Brief.

Subsequently, the Plaintiff instituted the divorce action against the Defendant on 1st February, 2008 in the District Court of *Colombo* on the ground of constructive malicious desertion on the part of the Defendant. The Petitioner, on summons being served on her, filed her proxy and answer on 15th May 2008 through her Attorney-at-Law Niduk Perera (*Vide* paragraphs 8(a) and (b) of her Petition). It must be noted that in her answer, she too had made a counter claim for dissolution of their marriage on the ground of constructive malicious desertion on the part of the Plaintiff. Therefore, it is crystal clear that though the Defendant later had taken a different position that she was still Mrs. Jayasinghe, quite contrary to this position she too had wanted a divorce from the Plaintiff. Her answer filed in the Divorce action attests to this fact.

At this stage it must be noted that the Defendant made a complaint dated 21.01.2014 to the Supreme Court, against her Attorney-at-Law Niduk Perera for professional misconduct *etc.*, which the Supreme Court referred to the Bar Association for an inquiry and the Bar Association appointed a Panel of Inquiry. The findings of the Panel of Inquiry

dated 27.01.2015 that has been filed of record marked (X14) are totally against the Defendant and the Defendant has been branded as an untruthful witness by the said Panel and recommended to the Supreme Court to be arraigned on contempt proceedings for making a false statement to the Supreme Court. Her Senior Counsel realizing that the Defendant was not a truthful witness, apologized to the Attorney-at-law at the inquiry and withdrew from the inquiry-(*vide* proceedings of the Inquiry Panel filed of record). Under these circumstances, through fear of serious repercussions, one finds the Defendant withdraw the complaint made to the Supreme Court against Niduk Perera by her letter dated 26.01.2015 (one day prior to the findings of the Panel of Inquiry). She withdrew the complaint against the Attorney-at-law after a fully drawn out inquiry was over. Needless to say, the fact that she withdrew the complaint against Niduk Perera a day before the findings before the Panel of Inquiry were made known deserves serious consideration about the bona fides of this application.

Since the allegations against the Attorney-at-Law Niduk Perera were not established, the Panel of Inquiry recommended that no further action shall be taken against the Attorney-at-law on the complaint of the Defendant and thus she was exonerated from the allegations. This inquiry proceedings are relevant to the facts stated in the petition filed in this application and the reliefs claimed by the Defendant therein. When the Defendant withdrew her allegations of professional misconduct made against her registered Attorney in the said divorce case, leave alone failing to establish her accusations made in her petition to the Supreme Court, it would follow that the Defendant has no legs to stand in this application. However, I wish to go further and see whether the Defendant's reliefs could be granted on its own merit.

The Defendant prays in paragraph (b) of the prayers of the Petition asking this Court "to exercise the extraordinary jurisdiction of Revision and/or *restitutio in integrum* of this Court and set aside the order dated 30.01.2009 making the order *nisi* absolute in Case No.DDV 00054/08 in the District Court of *Colombo* and/or to restore the Petitioner to the *status quo* prior to the said Order dated 30.01.2009"; and she further prays in paragraph (c) "to grant

a declaration that the Petitioner is the lawful widow of the deceased Plaintiff abovenamed as their marriage had not been lawfully dissolved in the said Case No.DDV 00054/08”.

As prayed for as above, the Defendant’s only grievance is that the order dated 30.01.2009 making the decree *nisi* absolute be vacated and that she be declared as the widow of the Plaintiff. There is no complaint about the Court entering the decree *nisi* on 03.07.2008. She says that it is only the entering of the decree absolute that was wrong, and that it should be vacated.

The Defendant has admitted that summons was served on her and her proxy and answer were filed on 15.05.2008, and the case was transferred to Court No.7 to be called on 28.05.2008, on which day the case was fixed for trial on 03.07.2008. According to Niduk Perera, every step taken in the progress of the case was reported to the Defendant but the Defendant never took serious note of the case. On 03.07.2008, Niduk Perera had stated to Court that the Defendant was not contesting the case and it was re-fixed for trial on 29.08.2008. But on 03.07.2008 itself, the *ex parte* trial had been taken and decree *nisi* was entered. The entering of the decree *nisi* on 03.07.2008 might have been due to the reason that the Defendant was not a contesting party and therefore the Court may have dispensed with notice on her and taken up the *ex parte* trial. Section 84 of the Civil Procedure Code provides, “in the event of the default of the Defendant as stated therein, for the Court to proceed to hear the case *ex parte* forthwith, or on such other day as the court may fix”. The *ex parte* judgment itself states the circumstances in which the *ex parte* trial was held.

The fact that the Petitioner was not interested in contesting the divorce is also brought out by the fact that she herself counterclaimed for divorce which is quite evident in her answer dated 15th May 2008.

Since the Defendant has not taken up the question of decree *nisi* in her petition, I need not go further on this issue.

As regards the decree absolute the position taken by the Registered Attorney Niduk Perera was that she appeared in court on 10.10.2008 (the decree returnable date) and took notice

of the decree *nisi* and this was done on instructions from the Petitioner. Niduk Perera categorically states that she later informed the Defendant about taking notice of the decree *nisi*. (This is further to service of the decree *nisi* by registered post by court-see page 1779 of the Brief). It has to be noted that the decree *nisi* sent by registered post had not returned undelivered.

The case was postponed for 30.01.2009, on which date the Registered Attorney, Niduk Perera appeared and the decree *nisi* was made absolute. The Attorney-at-law states in her affidavit that she obtained the copies and handed over to the Defendant.

When the Defendant became aware, through her Registered Attorney of the decree *nisi* being made absolute, without following the correct procedure, on 30.01.2009, she should have filed proper papers in the District Court to vacate the same, but she did not take any step. Instead, she had been conducting herself as if it made no difference to her. This is consistent with the conduct of a person who wanted an expeditious divorce.

Subsequent Conduct of the Defendant

1. The Defendant filed a testamentary action No.DTS 134/2012 in respect of the properties left by her second son Ashan Jayasinghe, who committed suicide on 28.01.2011. In order file this action she had obtained legal advice from the legal firm "Varners". In this case, the Defendant has claimed an undivided $\frac{1}{2}$ share only and the other $\frac{1}{2}$ share she had left it to the Plaintiff's estate.

When the Plaintiff died on 15.03.2012, he had left movable and immovable properties exceeding the administrable value. If the Defendant claims that she is yet the widow of the deceased Plaintiff, she should have filed a testamentary action. Whereas she did not take this step, it was the Respondent to this application who filed a Testamentary action No.151/12/DTS, in which the Defendant filed papers to intervene, which action was yet pending.

Together with the affidavit filed in the Testamentary case, the Defendant filed a copy of the Decree absolute entered in the Divorce action No.DDV/00054/08 stating that the marriage between the Defendant and late Dharman Jayasinghe (the

Deceased Plaintiff in the divorce action) had been dissolved. It is evidence before the BASL inquiry that the Defendant represented herself and acted as a divorced wife of the deceased Plaintiff.

2. She also made a complaint (R25) to the Police about the death of her second son wherein she mentioned that she knew the Respondent as the deceased Plaintiff's second wife.
3. A lease Agreement (R42) bearing No.3284 and dated 04.07.2012 in respect of Ashan Jayasighe's Apartment 'Empire' was leased out to Colombo International Container Terminals Ltd by both the Defendant and Respondent, which act depicts that the Defendant knew of the divorce and she acted *qua* a divorcee.
4. Again the same apartment 'Empire' was leased out to the same lessee for a further period by a Lease Agreement bearing No.3541 and dated 18.06.2013 by both the Defendant and the Respondent where the 2nd, 3rd, and 4th recitals of the Lease Agreement clearly state that the Defendant was aware of the divorce and she acted as a divorcee-*see* page 1783 of the record.

All the above acts of the Defendant clearly indicate that the Defendant had been well aware of the decree absolute entered in the said Divorce action No.DDV/00054/08 and the marriage between the Defendant and the deceased Plaintiff had long been dissolved, and she conducted herself as a divorcee.

Having acted above as a divorcee, the Defendant cannot now say that the decree *nisi* was made decree absolute without a copy being served on her. Though the Process server of *Pugoda* informed court that the copy of the decree *nisi* could not be served on her, the incontrovertible fact remains that the copy sent to her by registered post never returned undelivered. This affirms the presumption that the copy of the decree *nisi* had reached her. Her subsequent acts and conduct further affirm that it was received by her.

Having failed to take immediate steps to vacate the decree absolute entered in the Divorce action No.DDV/00054/12 under the provisions of Chapter XII of the Civil Procedure Code, the Petitioner took a belated step under Section 839 of the Civil Procedure Code, to set

aside the decree absolute and stated several averments which are nothing but fabrications of truth. Later, when she realized that she could not maintain the application filed under Section 839, she filed this application invoking the jurisdiction of this Court for revision and/or *restitutio in integrum*.

The primary object of the remedy under *restitutio in integrum* is to undo a wrong that has occurred in the order of the original Court and to restore the party affected by that order in the position he had before the order. Further, this remedy cannot be granted unless the order was given by fraud. The Supreme Court has held that the power of the Court to grant relief by way of *restitutio in integrum* in respect of judgments of original courts, is a matter of grace and discretion, and such relief may be sought only when there is fraud, false evidence, non-disclosure of material facts, deception, mistake, fear and minority-see The remedy of *restitutio* has been invoked in early Ceylon to set aside such decrees as those obtained by fraud, *Obeysekera vs. Gunaseker*¹, *Buyzer vs. Eckert*,² *Jayasuriya vs. Kotalawala*,³ entered by mistake, *Perera vs. Ekanayake*,⁴ *Sinnatamby vs. Nallatamby*,⁵ consented to under threat of dismissal of the action by the judge, *Sabapathy vs. Dunlop*,⁶ or embodying a compromise by a proctor acting contrary to his client's instructions, *Silva vs. Fonseka*,⁷ *Narayan Chetty vs. Azeez*,⁸

Relief from the effect of judgments is granted on similar principles as in the cases contracts as aforesaid, but regard must be had as well to the following additional factors:-

1. No other remedy such as appeal or review should be available for the purpose obtaining redress. *Abeyesekera vs. Harmanis Appu*,⁹
2. Only to a party to legal proceedings may in general claim such relief.

¹ (1884) 6 S.C.C. 102

² (1910) 13 N.L.R. 371

³ (1922) 23 N.L.R. 511

⁴ (1897) 3 N.L.R. 21

⁵ (1908) 7 N.L.R. 139 (F.B.)

⁶ (1935) 37 N.L.R. 113

⁷ (1922) 23 N.L.R. 447

⁸ (1921) 23 N.L.R. 477

⁹ (1911) 14 N.L.R. 353

3. Relief will not be granted on grounds of error to a party who has failed to place before the court matter which was at his command if reasonable diligence had been exercised. *Phipps vs. Bracegyrdle*,¹⁰ *Mapalathan vs. Elayavan*,¹¹

In the case of *Kusumawathie vs. Wijesinghe*,¹² the Petitioner alleged that she was married to one Wijesinghe and they lived as husband and wife. Wijesinghe died on 24.07.1996 while living with her at the matrimonial home. After the death of Wijesinghe, she applied to the Department of Pensions, for her dues, where she was shown an *ex parte* decree obtained by Wijesinghe dissolving the marriage. The Petitioner contended that there was no such divorce and was unaware of the *ex parte* decree and sought relief by way of *Restitutio in integrum* to remedy the injustice caused to her by abuse and misuse of the legal process.

It was held that relief by way of *restitutio in integrum* of judgment of original courts may be sought where the judgments had been obtained by fraud by the production of false evidence, non-disclosing of material facts or by force.

Per Jayasinghe J., “When a party appears and complains that she has been wronged by a process of law, this Court would not helplessly watch and allow the fraud practised on that party to be perpetuated. *Restitutio in integrum* provides this Court the necessary apparatus to step in and rectify any miscarriage of and failure of justice. If this is not the case then there is a serious vacuum in the law, which can be made use of by designing individuals as the Petitioner alleges had happened to her.”

The above judgment was followed in a similar case of *Paulis vs. Joseph and Others*,¹³ in which too, a divorce had been obtained by fraud, but the Court of Appeal granted restitution. (*ibid*).

¹⁰ (1933) 35 N.L.R. 302

¹¹ 41 N.L.R. 115

¹² 2001 (3) Sri L.R. 238

¹³ 2005 (3) Sri L.R. 162

In this application none of the above factors that led to rescission in those cases have been established.

It must be noted that the deceased Plaintiff and the Defendant mutually agreed to go for a divorce and entered into a few pre-divorce agreements. No allegation of fraud or any other misdeeds are alleged against the Plaintiff in prosecuting the divorce action. After the decree absolute was entered only, the Plaintiff contracted his second marriage with the Respondent.

In the divorce action, summons was duly served on the Defendant and an Attorney-at-Law filed a proxy and answer and in the answer the Defendant also stated that she wanted a divorce. The position of the registered Attorney Niduk Perera was that she had consistently informed the Defendant of the progress of the action and she acted as instructed by the Defendant.

Nevertheless, the Defendant made a complaint against her Attorney to the Supreme Court, which she later withdrew. The Inquiry Panel also exonerated the Attorney from the allegation made against her. The Defendant's conduct subsequent to the Decree Absolute confirms that she was aware of the Decree Absolute and did not want to take any action against it. She acted at all times as a divorcee. Her application to the District Court invoking the inherent power of that court under Section 839 was also abandoned as it could not be maintained. All these events unmistakably show that the Defendant has herself to blame for all these infractions.

In the present application the remedy prayed for can be given only when the Defendant was unlawfully prejudiced by the order of the District Court in the Divorce action No.DDV/00054/12. But no such prejudice has been established. This application is belated and the Defendant is guilty of laches, and in my view this application bears no merit. Considering all the matters mentioned above, I take the view that the Defendant-Petitioner is not entitled to the relief prayed for.

I am of the opinion that the Decree *Nisi* and the Decree Absolute in the Divorce action No.DDV/00054/12 have been entered correctly and cannot be vacated. I therefore hold that

the this Court should not allow its powers of revision and/or *restitutio in integrum* to be invoked in respect of such orders as have been made in this case except in the exceptional cases I have enumerated. This case falls outside the pale of those exceptional cases.

In the circumstances, the application is dismissed with costs.

JUDGE OF THE COURT OF APPEAL