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 to set aside the ex parte Judgment and decree of divorce entered in case No:16279/D in District Court of Colombo in terms of Article 138(1) of the Constitution of the said Republic.

CA/RI/14/2018

DC of Colombo
Case No: 16279/D

Kurukulasooriya Pearl Benita Perera
No: 368/91, Ganemulla Road,
Hapugoda, Kandana.

Petitioner

Vs.

Horanakkara Hemasinghelage Manel Ashoka,
No: 94/01,
Pulinathalarama Road, Magammana,
Ragama

Respondent

Before : **D.N. Samarakoon, J.**
B. Sasi Mahendran, J.

Counsel : Newille Abeyratne, PC with Kaushalya Abeyratne Dias for the Petitioner
Pathum Navaratne Bandara for the Respondent

Written Submissions On : 19.07.2022 (by the Petitioner)
20.05.2020 (by the Respondent)

Argued On : 25.05.2022

Decided On : 05.08.2022

B. Sasi Mahendran, J.

The Petitioner, by Petition dated 01st August 2018, is seeking to invoke this Court's restitutionary jurisdiction in terms of Article 138 of the Constitution, to set aside the ex parte judgment of the District Court of Colombo in Case No. 16279/D, the decree nisi dated 7th December 1993, and the decree absolute dated 30th June 1994 of the same.

The question before this Court is whether summons had been duly served on the Petitioner in the Divorce case filed by her late husband. If it is found that summons had not been duly served, the consequence of such a failure which goes to the root of the jurisdiction of the Court will warrant this Court having to set aside the entire proceedings of the divorce case.

The Petitioner married the late Francis Luxshman Perera on the 06th of October 1980. On 07th January 1993, the late Francis Luxshman Perera presented a plaint to the District Court of Colombo praying for his marriage to be dissolved on the ground of adultery and/or malicious desertion and seeking custody of their three children. Subsequent to the decree nisi being made absolute, the late Francis Luxshman Perera married the Respondent on the 03rd of August 1995. The late Francis Luxshman Perera passed away on 08th February 2016. The clash over succession to his estate commenced when the Petitioner filed a testamentary action in the District Court of Negombo on 05th May 2016 to administer the intestate estate of the deceased and the Respondent filed a testamentary action in the District Court of Gampaha on 07th June 2016 to obtain probate of the Last Will of the said Francis Luxshman Perera and duly administer the estate as per the provisions of his Last Will.

It must be noted that the inquiry on the creation and validity of the Last Will, which was purportedly made on the 22nd of January 2016, is ongoing in the District Court of Gampaha. Thus, it must be stressed that this judgment does not make any finding or determination as to the validity of the Last Will and Testament of the deceased. This judgment is solely concerned with determining the lawfulness of the divorce proceedings between the Petitioner and her late husband.

The Petitioner contends that their divorce was not lawful because summons had not been duly served on her. This is because as evidenced by her passport she had been in the United Arab Emirates from 28th May 1993 to September 1996 (marked "P7"). The Petitioner alleges that her late husband gave false information in the divorce proceedings and obtained an ex parte judgment and divorce decree.

It is seen that the original address of the Petitioner in the Divorce plaint is No. 175, Dippitigoda Road, Kelaniya. The Fiscal Report states that the Petitioner was not to be found at that address. By a motion dated 3rd August 1993 Court was informed by her late husband's Attorney that the Petitioner was residing at A5/F1, Bloemendhal Road, Kotahena, Colombo 13. The Petitioner denies the same and states that she was residing at No. 94/1 Pulinathalarama Road, Magammana, Ragama before she left abroad and that her late husband had misled the court by giving wrong addresses.

However, the Fiscal Report states that summons had been served to the Petitioner on the 23rd of August 1993 and the decree nisi was served on 22nd March 1994, both during the period in which the Petitioner was abroad.

His Lordship Sansoni C.J. in Siriwardena v. Jayasumana 59 NLR 400 found that due service of summons on a party is an essential step. His Lordship quoted the following dictum of Lord Greene M.R. in Craig v. Kanseen (1943) 1 AER 108:

"Failure to serve process where service of process is required is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has no intimation of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity and not something

which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained "

In Ittepana v. Hemawathie [1981] 1 SLR 476, his Lordship Sharvananda J. (as he then was) famously held:

"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 is otherwise notified of the proceedings against him, judgment entered against him in those circumstances is a nullity. And when the Court is made aware of this defect in its jurisdiction, the question of rescinding or otherwise altering the judgment by the Court does not arise since the judgment concerned is a nullity. Where there is no act, there can be no question of the power to revoke or rescind. One cannot alter that which does not exist. The exercise of power to declare such proceedings or judgment a nullity is in fact an original exercise of the power of the Court and not an exercise of the power of revocation or alteration. 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."

Abdul Majeed in his treatise 'A Commentary on Civil Procedure Code and Civil Law in Sri Lanka' (Volume 1 Revised Second Edition) at p. 337 states that:

"The purpose of issuing and serving summons on the defendant is to give him notice of the action filed against him and to call upon him to answer the plaint. Until the summons is served on the defendant, the Court cannot exercise its jurisdiction on the defendant. Until summons is served on the defendant he is not expected to know a pending case against him. It is, therefore, imperative to serve summons on the defendant in a case".

In Leelawathie v. Jayaneris [2001] 2 SLR 231 his Lordship Wigneswaran J. held:

"Unless summons were served on them, all the consequences of default in appearance would not apply to them. There is no question of implying or presuming that the Defendants were aware of the case filed, since statutory provisions apply to service of

summons and unless the summons are duly served the other statutory consequences for non-appearance on serving of summons, would not apply to Defendants."

The question arises whether the Petitioner can invoke this Court's restitutionary jurisdiction without having first applied to the District Court concerned to purge that default?

In the instant action, had the Plaintiff been alive then invoking this Court's restitutionary jurisdiction in the absence of an application to the District Court to set aside the decree nisi and decree absolute would not be permitted.

This was discussed in Andradie v. Jayasekera Perera 1985 2 SLR 204. His Lordship Siva Selliah J. held:

"All these are questions of fact as is the question of fraud on which evidence will appear necessary and the petitioner herself should be made available for cross-examination and consequently the judge must make his findings on questions of fact before this court can be invited on inferences and conduct to hold that there has been fraud. I am also of the view on the long line of cases quoted by the learned counsel for respondent that the practice has grown and almost hardened into a rule that where a decree has been entered ex parte in the 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 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 will this court grant extraordinary relief by way of Revision or Restitutio in Integrum which are extraordinary remedies."

However, as the Plaintiff in the divorce action is now deceased the only method of remedying this injustice is an application to this Court to exercise its restitutionary jurisdiction.

Recently, his Lordship Samayawardhena J. in CA RI 12/2016 decided on 29.05.2019 on an analysis on the authorities held:

"The cases cited by the learned counsel for the respondent, including Andradie v. Jayasekera Perera, to say that the petitioner shall first make the application in the District Court divorce action itself to have the ex parte decree vacated, are inapplicable and distinguishable, because in those cases, unlike in the instant case, the plaintiffs were alive when the defendants straightaway came before this Court to get the ex parte decrees vacated on fraud."

The Respondent has objected to this application on the ground that the Petitioner had delayed in filing the instant action. The decree was made absolute on 30th June 1994.

We cannot accept this contention because when a fraud has been committed it cannot be said that the Petitioner is guilty of laches in instituting an application.

In Biso Menika v. Cyril de Alwis [1982] 1 SLR 368, his Lordship Sharvananda J. (as he then was) held:

"When the Court has examined the record and is satisfied the Order complained of is manifestly erroneous or without jurisdiction the Court would be loathe to allow the mischief of the Order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction."

In Kusumawathie v. Wijesinghe [2001] 3 SLR 128 his Lordship Jayasinghe J. held:

"Where a party appears before Court and complains that she has been wronged by process of law this Court would not helplessly watch and allow the fraud practiced on that party to be perpetuated. Restitutio - In - Integrum provides this Court the necessary apparatus to step in and rectify any miscarriage or 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 has happened to her."

In view of the fact that the Petitioner was abroad during the relevant time, we hold that the decree of divorce obtained by the Petitioner's late husband by fraud without summons being served on the Petitioner is a nullity.

We are of the view that she is entitled to succeed in this application. The following reliefs prayed for will be granted:

(a) Order dated 14th October 1993 fixing to hear the case ex-parte

(b) Ex-parte judgment and decree nisi dated 07th December 1993

(c) Decree absolute dated 30th June 1994

We make no order as to costs.

JUDGE OF THE COURT OF APPEAL

D. N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL