

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

*In the matter of an application for
Restitutio in Integrum/Revision in terms of
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.*

Sampath Bank PLC,
Carrying out its Registered Office at
No. 110,
James Peiris Mawatha,
Colombo 2.

And carrying out a branch officer at
No. 192,
Kesbewa Road,
Borelesgamuwa.

Plaintiff

Vs.

Court of Appeal Application
No. **CA/RII/16/2022**

DC Nugegoda Case No.
M 2703/2017

1. Abeywardane Distributors (pvt) Ltd
No. 101/C,
Katuwawala,
Borelesgamuwa.
2. Nimal Abeywardane,
No. 101/C,
Katuwawala,
Borelesgamuwa.
3. Isuru Uthpala Abeywardane,
No. 105/E,
Ehelape Road,
Katuwawala,
Borelesgamuwa.

4. Udawaththe Arachchilage Sherine
Jasinta Sharmaleen Perera,
No. 283/A,
Thalawathugoda Road,
Mirihana,
Kotte.

Defendants

AND NOW BETWEEN

Isuru Uthpala Abeywardane,
No. 115/C,
Katuwawala,
Borelesgamuwa.

3rd Defendant-Petitioner

Vs.

Sampath Bank PLC,
Carrying out its Registered Office at
No. 110,
James Peiris Mawatha,
Colombo 2.

And carrying out a branch officer at
No. 192,
Kesbewa Road,
Borelesgamuwa.

Plaintiff –Respondent

1. Abeywardane Distributors (pvt) Ltd
No. 101/C,
Katuwawala,
Borelesgamuwa.

2. Nimal Abeywardane,
No. 101/C,
Katuwawala,
Borelesgamuwa.

3. Udawaththe Arachchilage Sherine
Jasinta Sharmaleen Perera,
No. 283/A,
Thalawathugoda Road,
Mirihana,
Kotte.

**1st, 2nd and 4th Defendant-
Respondents**

BEFORE

: D.N.Samarakoon J
Neil Iddawala J

COUNSEL

: Chathura Galhena for the 3rd Defendant -
Petitioner

Chandaka Jayasundara P.C with Vishmi
Fernando for the respondent instructed
by Sanath Hewavithana

Argued on

: 18.05.2023

Decided on

: 10.07.2023

Iddawala – J

This is a revisionary/restitutio in integrum (RII) application by the 3rd defendant-petitioner (*hereinafter referred to as 'the petitioner'*) which seeks to set aside the *ex-parte* judgment dated 22/01/2019 and to set aside the order of the learned District Judge of Nugegoda dated 16/05/2018.

The facts of the case are as follows. The petitioner has been named as the 3rd defendant in the District Court of Nugegoda in the case bearing No. M2703/2017 and the plaintiff-respondent (*hereinafter referred to as 'the plaintiff'*) in the instant application was the plaintiff in the said DC case No. M 2703/2017. The petitioner claims that around 03/02/2022 he was informed by the Grama Niladari in the area that there is a document received from court in his name. The petitioner found that the said document was an *ex-parte* decree of the case bearing No. M 2703/2017. The petitioner states he was totally unaware of the existence of the said case and thereafter requested a certified copy of the case record from the registry of the Nugegoda district court. He further emphasized that there was a delay in obtaining the records due to the extended power cuts in the country. Petitioner states that due to the above reason he was not able to make a purge default application as per Section 86(2) of the Civil Procedure Code (CPC). The petitioner also claims that he was not served summons for the said District Court case and further that the documents considered by the learned District Judge (*P9 and P10*) are contrary to each other and thereby claims that the *ex-parte* judgment is bad in law. Thereby the petitioner through this RII application claims to set aside the *ex-parte* judgment dated 22/01/2019 and to set aside the order of the learned District Judge dated 16/05/2018.

During the submissions made by the learned Counsel for the petitioner, his main arguments were relied on the facts that he did not receive summons for the case No. M 2703/2017 and that the *ex-parte* judgment by the learned District Judge was relied on two contradicting documents marked *P9* and *P10*. However, the petitioner admitted that he received the final *ex-parte* decree through the Grama Niladari. Yet it is evident and admitted that the petitioner has not filed purge default applications to the District Court. The learned President's Counsel for the respondents stated that

both summons and *ex-parte* decree were served yet the petitioner had not taken any appropriate action to vacate the order.

The attention was brought forward to emphasize on the fact that the petitioner filed an application to this Court seeking a revision/ *restitutio in integrum* instead of filing an application at the District Court.

The Court of Appeal holds a discretionary jurisdiction over revision/ *restitutio in integrum* matters, and the court is only deemed to use the discretionary power in exceptional circumstances when there are no other alternative remedies available for the parties.

The case of ***Andradie V Jayasekara Perera*** 1985 (2) S.L.R. 204 states that the practice has grown and almost hardened into a rule that where a decree has been entered *ex-parte* in a District Court and it sought to be set aside on any ground, application must in the first instance be made 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 is not consistent with reason or the proper exercise of the Judge's discretion or where he has misdirected himself on the facts of law that the Court of Appeal will grant the extraordinary relief by way of Revision or Restitution in Integrum.

In ***Rustom V Hapangama*** 1978/79 (2) S.L.R. 225 it was held that an appellate court will not exercise its discretion and grant relief by way of revision, where there is an alternative remedy available unless in exceptional circumstances or there was something illegal about the order made by the trial Judge which deprived that party urging the relief by way of revision.

The learned Counsel for the petitioner further reiterated that the reason for not being able to file purge default papers is due to the crisis in the country at the given time, he stated that the delay on the part of the Nugegoda District Court Registrar in issuing the case record of No. M 2703/2017 was due to the continuous power cuts which prevailed in the country.

Nevertheless, replying to the above point of the petitioner, the learned President's Counsel for the respondents claimed that the said delay was during the outbreak of the Covid – 19 pandemic, and the Coronavirus Disease 2019 (COVID -19) (Temporary

Provisions) Act No. 17 of 2021 was in operation for two years commencing from the 1st of March 2020. Thereby the learned President's Counsel points out to state that the petitioners could have used this to validate their argument with regards to the delay in filing purge default papers to the District Court which is a more binding and suitable argument.

The learned President's Counsel further stated that the most appropriate procedure for relief would have been to follow the procedure stated in Section 86(2) of the CPC. The way in which the applications are to be presented to purge the default and the manner, such an application should be considered is stipulated in Section 86(2) of CPC.

The said section reads: "*Where, within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff makes application to and thereafter satisfies court, that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear proper.*"

In fact, there are many case laws that substantiate the fact that an aggrieved party to an *ex-parte* judgment must first file purge default application to the court that made the order. In **Gargial V Somasunderam Chetty** 9 N.L.R. 26 it was stated that a party aggrieved by an *ex-parte* order should not appeal but should move the court which passed the order to vacate it. Similarly in the case of **Loku Menika V Selenduhamy** 48 N.L.R. 353 held where an order is made *ex-parte* the proper procedure to be adopted by the person against whom that order has been made is, in the first instance, to move the court which made the order to set it aside. In the case of **Dingihamy V Don Bastian** 65 N.L.R. 549 it further states that a party affected by an *ex-parte* order of which he had no notice must apply in the first instance to the court, which made the order to rescind the order.

If the petitioner claims that he has not been served with summons he is responsible for proving his case to satisfy the courts. The petitioner repeatedly argued about the fact that in the caption of the plaint to the District Court he had been named as the 3rd defendant and his address had been mentioned as No. 105/E, Ehelape Road, Katuwawala, Borelesgamuwa. However, he strongly emphasized that he had never

lived at the above-mentioned address and that his residential address is No. 115/C, Katuwawala, Borelesgamuwa; which he claims is certainly two separate addresses. Thus, on this ground the petitioner claims that he had not been served with summons for case No. M 2703/2017.

According to the document marked X1, the side note of the journal entry number 02-B dated 28/06/2017 it states: “1,3 වින්නිකරුවන්ට භාරදුන් බව නුගේ. පීස්. වාර්ථා කර ඇත.”

Correspondingly in the document marked X1 journal entry 03 dated 24/08/2017 it states:

(ii) “1,3,4 වි/ සිනාසි නුගේ. පීස්. මගින් නි/ කර ඇත.

(iii) 1,3 වි/සිනාසි 1,3 වි/ සිනාසි භාරදුන් බවත් 4 වි/ සිනාසි භාරදීමට දී ඇති ලිපිනයේදී සෞඛ්‍ය බවත් මෙම ලිපිනය පෙර පාසලක් අති බවත් වින්නිකරු එම ගොඩනැගිල්ලේ අයිතිකරු බවත් දැනට විදේශගත වී ඇති බවත් එහි සිටි අය පැවසූ බව නුගේ. පීස්. වාර්ථා කර ඇත.”

Furthermore, the learned District Judge by the order dated 16/05/2018 marked X2 page 3 states “එසේම කාර්ය සටහන් අංක 3 අනුව එදින වනවිට 1 සහ 3 වින්නිකරුවන්ගේ අතටම සිනාසි භාර දී ඇති බවටද පීස්කල් වාර්තාවක් ගොනු වී තිබේ.” (Emphasis added)

Thus, stating the above the learned District Judge on 16/05/2018 had fixed an *ex-parte* order against the 1,2,3 defendants.

Nevertheless, this Court has no evident proof to verify that the summons had been served to the hand of the petitioner itself or even to the address provided as the Fiscal Report has not been included in the appeal brief. Yet the learned District Judge in his order states that the fiscal has served summons and the judge is satisfied, thus this Court as per Section 114 (d) of the Evidence Ordinance could presume that the learned District Judge would have performed the duty of cautiously inspecting the evidence before stating that summons have been served on the defendant. And further this Court could also presume that the Fiscal has performed his ordinary course of duty in serving summons, unless proven otherwise.

Section 114 of the Evidence Ordinance reads as below:

“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....

(d) that judicial and official acts have been regularly performed...”

If the petitioner wants to rebut the above claim and state that summons was not served on him, the burden of proof lies on the petitioner himself. This is substantiated through the case of **Sangarapillai V Kathiravelu** Sri Kantha Law Report Vol. II page 99 where it declares that the onus is on the defendant to prove that the summons was not served on him.

However, if the petitioner successfully satisfies to the courts on a balance of probability that summons had not been served on him the order would be null and void. There are many case authorities that support this claim. In **Mohammadu Cassim V Perianam Chetty** 14 N.L.R. 385 it stated that a judgement is null and void and cannot be executed against a person who is not served with summons.

Where summons has not been served at all, an *ex-parte* judgement 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 proceeding or collaterally, provided always that he has not by subsequent conduct estopped himself by acquiescence, waiver or inaction.

Further in the case of **Peter Singho V Wydaman** 1983 (2) S.L.R. 238 it was highlighted that when a defendant complains that summons had not been served on him and nevertheless a decree had been entered against him, he challenges the foundation of the default decree. When a defendant attempts to satisfy courts that the decree against him for “default” is not based on valid evidence for the finding that summons was not served on him, he falls within the ambit of section 86(2) of the CPC.

As suitably pointed out by the learned President’s Counsel for the respondent, this court too believes that the petitioner should have relied on section 86(2) of the CPC as it is the most appropriate alternative remedy for the petitioner rather than challenging the matter in this court. This could be further substantiated through the

sound argument of the learned President's Counsel for the respondent, where the learned President's Counsel correctly stated that the petitioner could have filed the purge default application to the District Court by relying on the special act Coronavirus Disease 2019 (COVID -19) (Temporary Provisions) Act No. 17 of 2021 which was in operation at the time of the matter, rather than moving to this Court stating that the delay was due to the continuous power cuts prevailed in the country. Thus, the learned President's Counsel claims that the petitioner has not exercised the alternative statutory remedies available for the petitioner and thereby the petitioner is not entitled to any relief in the nature of an application for restitutio in integrum.

Apart from the argument that summons had not been served on the petitioner, the petitioner challenged the learned District Judge's order on the ground that the order had been delivered based on two contradicting documents marked P9 and P10.

It was stated and admitted by the petitioner that there was a transaction between the plaintiff-respondent; the Bank and the 1st defendant-respondent and the petitioner was the guarantor for the transaction (*Document marked P8*). Nevertheless, the petitioner argued that there is a contradiction between *P9* and *P10* and thereby stated that the fact the order of the learned District Judge relying on contrary documents caused substantial miscarriage of justice to the petitioner. Yet the learned President's Counsel during his argument stated that they deny the averment of the petitioner and states that there is no discrepancy between the documents.

In accordance with ordinary business practices, the respondent Banker maintains the account ledgers for *P9* and *P10* documents. The learned District Judge has acknowledged and accepted these uncontested documents and thus there is no sufficient justification for the argument of the petitioner to satisfy to courts that the documents are contrary to each other. Apparently, the *P9* and *P10* are based on the entries of the respondent plaintiff's (Banker's) books. Thus, the Section 90C of the Evidence Ordinance subject to the provisions in Chapter VI of the Ordinance, enables that a certified copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions, and accounts therein recorded in every case

where, and to the same extent as the original entry itself is now by law admissible, but not further or otherwise.

Based on the foregoing, it is evident that the petitioner has failed to challenge the aforementioned order within the prescribed timeframe and through the appropriate forum. Thus, this Court discerns no manifest illegality or impropriety in the order issued by the learned District Judge. Hence, this court perceives no ground for intervening with the District Court's order dated 16/05/2018 and the *ex-parte* judgment dated 22/01/2019.

The application is hereby dismissed.

Neil Iddawala

JUDGE OF THE COURT OF APPEAL

D.N. Samarakoon J

I agree.

JUDGE OF THE COURT OF APPEAL