

**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 under and in
in terms of Article 138(1) of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.*

Upali Mervin Senerath Dassanayake,
Giriulla Road,
Pannala.

Plaintiff

Vs.

Case No. **CA/RII/12/23**

DC Nugegoda Case No.
D/1555/12

M.D. Kamani Manimekala Rajakaruna
Saparamadu nee Dassanayake,
No. 19/10 Quarry Road,
Pitakotte.

Defendant

AND BETWEEN

*In the matter of an application under and
in terms of Section 839 of the Civil
Procedure Code.*

M.D. Kamani Manimekala Rajakaruna
Dassanayake nee Saparamadu,
No. 19/10,
Quarry Road,
Pitakotte.

Defendant-Petitioner

AND NOW BETWEEN

M.D. Kamani Manimekala Rajakaruna
Dassanayake (nee Saparamadu),
No. 11,
Francis Road,
Colombo 06

Defendant-Petitioner-Petitioner

Vs.

M.M. Sumithra Kumari Senerath
Dassanayake,
No. 22,
Negombo -Giriulla Road,
Pannala (NWP)

Respondent

BEFORE : D.N.Samarakoon J
Neil Iddawala J

COUNSEL : Charaka Jayaratne with Pasinduni
Fernando and M.N.F. Nifla instructed by
Mayomi Ranawaka for the Defendant-
Petitioner-Petitioner.

Rohan Sahabandu P.C. with Chathurika
Elvitigala for the Respondent.

Supported on : 26.07.2023

Written Submissions on : 28.08.2023

Decided on : 07.09.2023

Iddawala – J

This is an application of revision and *restitutio in integrum* submitted by the Defendant-Petitioner-Petitioner (*hereinafter referred to as petitioner*) to set aside the Judgment and Decree Nisi dated 04.04.2013 and Decree Absolute dated 24.02.2014 in the case bearing No. D/1555/2012 entered by the District Court of Nugegoda.

The case bearing No. D/1555/2012 was a divorce action instituted before the District Court of Nugegoda by the petitioner's deceased husband (*Namely, the late Upali Mervin Senerath Dassanayake*).

The salient facts of the case are as follows. The petitioner states that the petitioner and the late Upali Dassanayake entered matrimony on 02.01.1976. The petitioner claims they gave birth to a son and daughter on 12.11.1977 and 28.04.1981 respectively. The petitioner also claimed the late Upali Dassanayake had engaged in numerous extramarital affairs which led to the petitioner leaving the matrimonial home around 1995 yet had contact with the late husband for the sake of children. However, the late Upali Dassanayake passed away from decompensated cirrhosis on 05.01.2021. And upon the death of the late Upali Dassanayake the petitioner states she exercised legal rights to claim his pension payment as a Member of Parliament from 1987 – 1993. Upon claiming for the payment of pension the petitioner was informed that the payment had already been claimed by the respondent who claimed to be the late Upali Dassanayake's legal wife. Subsequent to the above information the petitioner states she became aware that the late estranged husband Upali Dassanayake had filed a divorce action and had obtained a decree of *vinculo matrimonii* against her (*case bearing No. D/1555/2012*). The petitioner states that she was unaware about the proceedings of the above case and the plaintiff of the case bearing No. D/1555/2012 who is the late husband of the petitioner has deliberately misdirected the courts to issue summons to an address where the petitioner does not reside.

Upon consideration of the facts and submissions made on 26.07.2023 by the counsel for the petitioner, this Court has already ordered formal notice to

respondents. Furthermore, while the counsel for the petitioner was supporting the case he reiterated and requested the court to grant an interim order (*Prayer 'f' of the petition*) staying the operation of the judgment dated 04.04.2013 and/or the Decree Absolute dated 24.02.2014 entered in the Divorce case bearing No. D/1555/2012 until the final hearing and determination of this application.

It is prima facie evident that the Decree Nisi and the Decree Absolute has been entered, far back in 04.04.2013 and 24.02.2014 respectively. And thereby the matter of concern at this juncture is to ascertain whether or not this Court should grant the stay order.

According to the submissions made by both parties on 26.07.2023 there are two ongoing testamentary cases. One testamentary case was filed by the petitioner and deceased's daughter at the District Court of Colombo (Case Bearing No. 165/2021/DTS) seeking a Letter of Administration concerning the properties of the said deceased Upali Dassanayake. Another testamentary case was filed by the respondent of the instant application at the District Court of Kuliyaipitiya (Case Bearing No. 812/T) seeking letter of Probate based on a Last Will bearing No.3921 dated 30.07.2020 attested by K. Sumanasuriya N.P.

However, this Court holds the view that the inheritance or succession of Late Dissanayake's estate shall be determined upon the conclusion of the aforementioned testamentary action/s.

Furthermore, another concern was raised over which party is entitled to claim and benefit from the pension of the late Upali Dassanayake. During the submissions made by the counsel for the petitioner it was stated that upon the death of late Upali Dassanayake, the petitioner had exercised her legal rights to claim the pension payment of the late Upali Dassanayake who served as a Member of Parliament from 1987 - 1993. However, upon the application made to the parliament, the petitioner states that she was informed that the pension payment is already being claimed by the respondent of the instant application who claims to state she is the legal wife of the late Upali Dassanayake. And further conceded that the respondent is enjoying the benefit up to date.

Nevertheless, when examining the documents provided to the instant application it is evident the petitioner has not submitted any relevant documentation to prove the refusal by the parliament with regard to the pension payment she claimed.

When the instant application was supported by the counsel for the petitioner, it was reiterated that there are two main prayers for the case. Requesting the issue of formal notice and granting of interim relief. Since the court already ordered to issue notice to respondents, the current concern is whether the courts will grant an interim order staying the proceedings of the case bearing No. D/1555/2012. When an application is filed before the court, it is the duty of the courts to consider various factors prior to the issuance of interim relief.

Inter alia:

- Balance of convenience: The court should consider the balance of convenience between the petitioner and the respondent. It will weigh the potential harm to the petitioner if the stay order does not stay the proceedings of the divorce case bearing No. D/1555/2012 against any harm the stay order may cause the respondents if the stay order is granted and stays the proceedings.
- Irreparable damage: The court should assess whether allowing judgment of the case bearing No. D/1555/2012 to proceed would cause irreparable damage to the petitioners. This damage should be substantial and difficult to compensate for, if the petitioner ultimately succeed in her arguments.

It is evident that if the interim relief is not granted the respondent will continue to claim and benefit from the pension and on the other hand even if the interim relief is granted then the petitioner is not able to claim for the pension payment. This would also thereby mean that if the stay order is granted the respondent will not be able to claim for the pension she has been drawing for since the death of late Upali Dassanayake in January 2021. As such, when applying the principles mentioned above, even though the petitioner has managed to establish a *prima facie* case, she has not demonstrated that the burden of proving the existence of irreparable damage or the balance of

convenience rests with her to warrant granting interim relief. Consequently, at this juncture, this court declines to grant interim relief.

The above contention is well supported by a plethora of authorities reported in the English Courts and in the Supreme Court and the Court of Appeal as well. In **American Cyanamid Co v Ethicon Ltd** [1975] AC 396: This landmark case established the American Cyanamid guidelines for granting interim injunctions in judicial review cases. It emphasized the need for a "prima facie" case, balancing the potential harm to the parties involved and the overall public interest. This case recognized that the court may refuse to grant an interim order even if the petitioner demonstrates a prima facie case.

In, **R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs** (No. 3) [2008] UKHL 61: In this case, the House of Lords refused to grant an interim order to suspend the implementation of a government decision despite the petitioner demonstrating a *prima facie* case of illegality. The court weighed the balance of convenience and the public interest in the government's decision.

In a recent judgment of the Court of Appeal, **CA/WRIT/354/2022** decided on 14.10.2022, Sobhitha Rajakaruna J. stated "The Judges exercising the jurisdiction in judicial review have enlarged the scope of granting interim orders by following stringent principles and also sometimes taking lenient approach to issue or not issue interim reliefs. In many instances the review Judge has refused to issue interim orders even after being satisfied that the Petitioner has submitted a *prima facie* case. His lordship further goes on and quote an Indian authority of **Assistant Collector, C.E., Chandan Nagar vs. Dunlop India Ltd.**, AIR 985 SC 330, where the Supreme Court of India has observed; '..... it is of utmost importance to realize that interim orders ought not to be granted merely because a *prima facie* case has been shown. More is required. The balance of convenience must be clearly in favour of making an interim order and there should not be the slightest indication of a likelihood of prejudice to the public interest.'"

Another contention that was brought forward by the counsel for the petitioner was the legality of the decree obtained at the District Court in the case bearing No. D/1555/2012. However, through the submissions made by the

President's Counsel for the respondent it was stated that there is *prima facie* evidence (*R2 – Marriage Certificate*) to prove that the respondent is legally married on the 16.04.2014 to the late Upali Dassanayake subsequent to the divorce proceedings of the petitioner and the late Upali Dassanayake. Whether he had a capacity to enter into a legal marriage is to be considered after conclusion of the main arguments of this case.

Thereby this Court sees no reasonable ground for the granting of interim relief. Since formal notice has already been issued to the respondent, this Court is of the view that the objections can be filed within a short period of time and subsequently the matter can be concluded expeditiously.

Refuse to grant interim relief.

JUDGE OF THE COURT OF APPEAL

D.N.Samarakoon J

I agree.

JUDGE OF THE COURT OF APPEAL