

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 terms of Article 138 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

CA Case No: RII/51/2023
District Court - Kalutara
Case No. 534/RE

Beligahamullage Peiris Irosh Kavinda,
Galhena Road,
Welipitiya,
Dharga Nagar.

Plaintiff

Vs.

1. Nakandalage Don Sureka Srimali,
No. 68, Horawala Road, Dharga Nagar.

AND

Koswattegoda, Dharga Nagar.

2. Nakandalage Don Amila Eranda
Weerasinghe,
No. 68, Horawala Road,
Dharga Nagar.

AND

Koswattegoda, Dharga Nagar.

3. Nakandalage Don Ajantha
Pushpakumara,
No. 70, Horawala Road,
Dharga Nagar.

AND

Koswattegoda, Dharga Nagar.

4. Nakandalage Don Thilak Shantha,
No. 70, Horawala Road,
Dharga Nagar.

AND

Koswattegodā, Dharga Nagar.

5. Denagama Liyanage Gihan Sampath,
No. 68C, Horawala Road,
Dharga Nagar.

AND

Koswattegodā, Dharga Nagar.

6. Benthara Mahakumarage Madhava
Sampath Mahakumara,
'Prasad', Kuttiweligoda,
Dharga Nagar.

Defendants

AND NOW

Beligahamullage Peiris Irosh Kavinda,
Galhena Road,
Welipitiya,
Dharga Nagar.

Plaintiff- Petitioner

Vs.

1. Nakandalage Don Sureka Srimali,
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Sampath Mahakumara,
'Prasad', Kuttiweligoda,
Dharga Nagar.

Defendant- Respondents

Before: **R. Gurusinghe J.**
&
M.C.B.S. Morais J.

Counsel: Harith de Mel with Sahiru Jayasinghe and Dulani Peiris
instructed by Chamali Ranatunge for the Plaintiff-Petitioner.

Anuradha N. Ponnampereuma instructed by Savanthi Diluka
Ponnampereuma for the 6th Defendant- Respondent.

Written Submissions: By the Plaintiff- Petitioner – on 08.12.2023, 19.01.2024,
25.11.2024, 20.12.2024

By the 6th Defendant- Respondent on 18.01.2024, 26.11.2024

Argued on: 02.12.2024

Decided On: 28.03.2025

JUDGMENT

M.C.B.S. Morais J.

This is an application for *Restitutio in Integrum* coupled with revision, filed under Article 138 of the constitution of the Democratic Socialist Republic of Sri Lanka against the order of the learned District Court of Kalutara dated 16th of November 2023.

The Action RE/534 was initiated by Belingahamullage Peiris Irosh Kavinda (hereinafter sometimes will be referred to as the Petitioner) against 1st – 5th Respondents (hereinafter sometimes will be referred to as the Respondents) on 8th November 2018 in respect of the property more fully described in the schedule to the Complaint dated 8th November 2018 which has a commercial value of Rs.35,000,000. Accordingly, the Petitioner has prayed for the following:

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- I. *Issue Notice on the 1st, 3rd, 4th and 6th Defendant-Respondents and the 2nd and 5th Respondents if Your Lordships Court pleases;*
- II. *Act in Revision and set aside the Order dated 16th November 2023; of the Learned District Judge of Kalutara*
- III. *Exercise the powers of Restitutio in Intergrum and restore the Plaintiff Petitioner to the status quo he had been as at the 15th November 2023 in respect of the property to the Schedule of the Complaint;*
- IV. *Grant an Interim Order suspending the operation of the Order of the Learned District Judge of Kalutara dated 16th November 2023;*
- V. *Grant an Interim Order against the Defendant Respondents to maintain the status quo as at 15th November 2023 in respect of the property to the schedule to the Complaint;*

- VI. *Grant an Interim Order reinstating the Interim Injunctions granted by the District Court of Kalutara in terms prayers (a), (b) and (c) to the Plaint of the Plaintiff-Petitioner;*
- VII. *Act in Revision and make Order directing the District Court of Kalutara to hear the trial in 534/RE from the point of dismissal;*
- VIII. *Grant costs;*
- IX. *Grant such other and further relief as Your Lordships Court deem fit.”*

An enjoining order was granted on 21st of November 2018 at the first instance and an interim injunction was granted subsequently on 16th of January 2019 in respect of the property described in the plaint, preventing the Respondents from carrying out business in the said property. Due to the absence of the 2nd and 5th Respondents in the trial, the matter was fixed ex parte against the 2nd and 5th Respondents. The matter was refixed for trial on the 8th of August 2023 and the Petitioner was required to file his affidavit Evidence-in-Chief one month before the commencement of the trial. However, the Petitioner had filed the affidavit Evidence-in-Chief on 3rd August 2023, less than a week before the trial. Therefore, when the matter was taken up for trial on the 8th of August 2023, the learned District Court Judge of Kalutara considered the following; the delay in filing the affidavit, certain defects in the Affidavit, negligence of the Attorney-at-law for the Petitioner. Consequently, the Petitioner was ordered to pay a sum of Rs. 25000 for 1st, 3rd, 4th, and 6th Respondents. Respecting the said order the Petitioner has made the payment for the 1st, 3rd and 4th Respondents by bank transfer and cash for the 6th Respondent in open court.

It is the contention of the Petitioner that when the matter was called up for trial on 16th of November 2023, the particular matter was not called in the trial roll and the file was not available in the court. Further, the Petitioner contends that the learned District Court Judge has acted injudiciously by making crude remarks addressing the Registered Attorney-at-law for the Petitioner in the open court. When the matter was taken up later, the Petitioner has submitted a fresh copy of the Affidavit on 30th of October 2023, by rectifying the defect as the place of signing was not mentioned previously. However, the Respondents have contended to re-fix the matter for cross examination as the Affidavit has only been filed before two weeks. Subsequently, the learned District Court Judge has dismissed the action subject to cost by the order dated 16th November 2023. It is the contention of the Petitioner

that the learned District Court Judge has acted *ex mere motu*, as the dismissal was not requested by either party.

The Respondent contends that the Attorney-at-law for the Petitioner has acted negligently by not exercising due diligence before submitting the documents to the court. Furthermore, the learned District Court Judge of Kalutara in her order dated 16th of November 2023, has highlighted that the Attorney-at-law for the Petitioner has submitted defective documents in more than one instance despite the orders of the court. The Affidavit which was filed on the 3rd of August 2023 did not contain the *Jurat*, therefore the Petitioner was allowed to file another affidavit. The Subsequent Affidavit which was submitted on the 12th of October 2023, also contained a defect as the place of signature was not mentioned. Finally, another affidavit was presented to the court on 30th of October 2023, without obtaining the permission of the court. It is the view of the learned District Court Judge that the Attorney-at-law has acted grossly negligent and the affidavit of Plaintiffs evidence-in-chief submitted in the case RE/534 has not been filed within the prescribed time as per the Civil Procedure Code and the learned District Court Judge of Kalutara has dismissed the claim on the premise that the Petitioner is not prepared for the trial.

Though in fact the final/proper affidavit is filed on the 30th of October 2023, which is not before a month from the trial date which was fixed for 16th of November 2023, the issue is whether it warrants a dismissal of the Petitioner's case? It should be noted that on this instance, filing of evidence (examination in chief) was allowed on the request of the Petitioner's counsel, for the convenience of court. It is apparent as for the proceedings, that on 16th of November 2023 none of the contesting Respondents have either moved for a dismissal of the action or has seriously objected to the said affidavit filed on 30th of October 2023 being accepted due to delay. The 6th Respondent's main contention was that it was filed without having obtained prior permission from the court, which surely is a curable defect. Another issue would be whether the delay in filing the evidence as directed, should affect the ex-parte trials which were fixed against the 2nd and 5th Defendants as well?

However, we should consider that even if the Petitioner has failed on his undertaking, since the matter has already been fixed for trial on that day, should not the learned trial judge have called the Petitioner to produce evidence, orally? As for the proceedings on the 16th of November 2023, the Petitioner was present in court and was ready to give evidence. Would

such circumstances justify a dismissal of the Petitioner's case? In my view, having called to produce the evidence, if the Petitioner failed to do so only, the court should conclude that the Petitioner is not ready for the trial, which may have warranted a dismissal.

Though it is contended by the Petitioner that the learned trial Judge was biased in her conduct, such contention lacks any material proof. As pointed out by His Lordship Dr. A.R.B. Amerasinghe in his book "***Judicial Conduct Ethics and Responsibilities***" (2002) pg 524.

"Since the issue is not whether the Judge was biased but whether a person in the applicant's position, and conversant with the facts, might reasonably apprehend that the judge was biased....."

Further, In the case of **Rex V. Sussex Justices. Ex Parte Mccarthy** [1923] 1 KB 256 Lord Hewart C.J. held that;

"..... a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

Therefore, as I have observed above, it seems that the conduct of the learned trial Judge may attract suspicion of bias in a fair-minded person, and justice is not manifestly and undoubtedly seen to be done. Further, upon reviewing all the facts and materials presented to this court, it is evident that the learned District Court Judge has failed to provide the Petitioner with a fair hearing, thereby seeming to have acted injudiciously. Moreover, the right to a fair hearing is a fundamental principle of natural justice, and it must be upheld.

Therefore, it is my considered view that the learned District Court Judge has acted injudiciously by dismissing the claim of the Petitioner without any legal ground valid in law.

For the aforesaid reasons, I allow this application and set aside the order delivered by the learned District Court Judge of Kalutara dated 16th of November 2023 in the action RE/534 and the case is restituted back to the time immediately prior to the impugned dismissal.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree

Judge of the Court of Appeal