

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

In the matter of an application for *Restitutio-In-Integrum* and Revision under and in terms of Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka

**Court of Appeal**

Case No: RII/0081/2024

DC Mathugama

Case No: D/890

Ranepura Hewage Cyril,  
Ranepura Goda,  
Pahala Hewesse, Mathugama

**Plaintiff**

**Vs**

Hewage Pemalin Pemalatha,  
Ranepura Goda,  
Pahala Hewesse, Mathugama

**Defendant**

**And NOW**

Hewage Pemalin Pemalatha *alias*  
Hewa Hakuruge Pemalin Pemalatha  
*alias* Pamila Ranepura,  
Ranepura Goda,  
Pahala Hewesse, Mathugama

**Defendant-Petitioner**

**Vs.**

Ranepura Hewage Cyril,  
(Deceased)  
Ranepura Goda,  
Pahala Hewesse, Mathugama

**Plaintiff-Respondent**

**AND NOW BETWEEN**

Hewage Pemalin Pemalatha *alias*  
Hewa Hakuruge Pemalin Pemalatha  
*alias* Pamila Ranepura,  
Ranepura Goda,  
Pahala Hewesse, Mathugama

**Defendant-Petitioner-Petitioner**

**Vs.**

Ranepura Hewage Cyril,  
(Deceased)  
Ranepura Goda,  
Pahala Hewesse, Mathugama

**Plaintiff-Respondent-Respondent**

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

Counsel : J.M. Wijebandara  
Instructed by A. S. Jayaweera  
**for the Defendant-Petitioner-Petitioner**

Supported on : 20-02-2025

Decided on : 03-04-2025

### **Judgment**

R. Gurusinghe

This is an application by the petitioner, by way of Revision or *Restitutio-in-Integrum*, to set aside the decree absolute, entered in case no. D/890 by the District Court of Mathugama on 30-05-1996, on the grounds that her husband has obtained the divorce by fraud, without serving the summons and the *decree nisi* on her.

The facts of the case narrated in the petition are as follows:

The petitioner married the original plaintiff, namely Ranepura Hewage Cyril, on 03-01-1983. After the marriage, the petitioner and her husband established their matrimonial home at Ranepuragoda, Pahala Hewesse, Mathugama, and spent their married life in harmony without any issue. Due to the economic difficulties they faced, the petitioner left for a foreign job in Lebanon in 1983. The petitioner had remitted her earnings to her

husband. Out of the said monies sent by the petitioner, the existing house where the parties set up their matrimonial residence was upgraded to a better condition, and both parties lived there in harmony. The petitioner had been working abroad from 1983 to 2013 during that time, she visited Sri Lanka on numerous occasions and during those visits she used to live with her husband. The petitioner's husband died on 15-04-2011, and the petitioner was prevented from attending the funeral due to her employer's refusal to grant leave. Finally, she returned to Sri Lanka in 2013 and attempted to enter her matrimonial home, which had been constructed mainly at her expense, earned from foreign employment. When she visited the matrimonial home, she found that a lady named Munigoda Hewage Amarawathie was occupying the house and the land. Amarawathie claimed that she was the legal wife of the deceased Ranepura Hewage Cyril. The Honorable Attorney-General indicted the said Amarawathie in the High Court Case bearing no. 86/22 for making a forged marriage certificate. The aforesaid Amarawathie pleaded guilty to the said charge. There was no marriage between Amarawathie and her husband.

The petitioner later came to know that her deceased husband had secretly obtained a divorce decree against her. A certified copy of the case record no D/890 of the District Court is produced, marked P2. The petitioner argues that the divorce decree is a nullity and has no legal force for the following reasons.

- i. This petitioner is the named defendant in the District Court of Mathugama case bearing number D/890. She had never been served with a summons, trial to, and/or after the *ex parte* decree was entered.

*A true copy of the Marriage Certificate marked P-2-(a) and is at page 87 of P-2, and the Original Complaint dated 25-05-1988 marked P-2-(b) part and parcel of P-2 and is at page 20*

- ii. The said District Court Case of Mathugama, bearing number D/890, appears to have been filed by that time, as this petitioner was not in Sri Lanka.

*A Photocopy set of the passport of the Petitioner marked as fm2 and filed with the Petition dated 02-10-2023 is at page 89 to 112, part and parcel of P-2.*

- iii. There, a number of attempts have been made to serve summons during which process Fiscal has reported that the defendant cannot be found in the given address.

*The Journal Entries No. 3 to 15 are at pages 2 to 7, part and parcel of P-2.*

- iv. Thereafter substituted service of summons appears to have been ordered without being satisfied that the defendant is living in the given address. Therefore, the direction to issue summons via substituted service is bad in Law.

- v. The case was abated from 25<sup>th</sup> October 1992 to 22<sup>nd</sup> February 1995 due to the fact that the plaintiff's failure to prosecute the case with due diligence.

- vi. As at the date of pronouncing *ex-parte* judgement and *ex-parte* hearing of the evidence, the court has satisfied erroneously on the substituted service of summons in the absence of any evidence whatsoever to satisfy that the defendant is in fact residing in the address.

*A Certified copy of the relevant fiscal report marked P-2-(c) part and parcel of hereof.*

- vii. Even the *ex-parte* decree appears to have been served through Fiscal service to an address where the defendant was not residing.

*A Certified copy of the relevant fiscal report marked P-2-(d) part and parcel hereof.*

- viii. This petitioner further states that the decree in this case had been entered without serving summons on the defendant. Therefore, the validity of the *ex-parte* judgment is liable to be challenged with the same proceedings and/or collaterally.

The petitioner filed an application before the District Court of Mathugama, seeking to set aside the divorce decree on the grounds that an *ex-parte* judgment had been obtained without serving summons on her, thereby violating due process of Law. However, the Learned District Judge of Mathugama decided that the petitioner could not obtain relief from the District Court because, at that time, the plaintiff was deceased. Thereafter, the petitioner filed this application before this court.

The petitioner testified under oath and proved in the District Court that on the date when the process server purportedly served the decree nisi on the defendant-petitioner, the defendant-petitioner was not in Sri Lanka. The petitioner produced her passport and called a witness from the Immigration and Emigration Department to prove that fact. The petitioner further testified that she did not receive summons from the Court, even though the process server's report stated that the summons was served on the petitioner on 02-03-1995. It is the same process server in his report stated that on 26-02-1996, the *decree nisi* was served on the petitioner. The petitioner proved that the *decree nisi* allowing the divorce was made absolute without it being served on her. In the above circumstances, the Court can satisfy that the summons had not been served on the petitioner before the case was fixed for *ex-parte* trial against the petitioner.

In Kusumawathie vs. Wijesinghe [2001] 3 Sri LR 128, the Court of Appeal set aside the *ex-parte* divorce decree, which was fraudulently obtained without the knowledge or notice to the Defendant by the Plaintiff, who was deceased at the time of the *Restitutio-in-Integrum* application.

In that case Jayasinghe J. at pages 244 and 245 stated:

*Mr. Suraweera's main contention was the action by the deceased Plaintiff against the Defendant-Petitioner was a personal action and therefore since the deceased Plaintiff is unable to refute the allegation against him this Court ought not to interfere with the findings of the District Judge. I am unable to subscribe to this point of view. 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. I am of the view this is an appropriate case for this Court to step in.*

In the case of Ittepana vs. Hemawathie [1981] 1 Sri LR 476, Sharvananda J(as he then was) 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 decree obtained by the deceased Plaintiff, the husband of the petitioner, is a nullity as it was obtained without serving summons on the petitioner.

In Paulis vs Joseph and Others [2005] 3 Sri LR 162, the Court of Appeal held that,

*"Where one of the parties to the divorce action was dead, and if it is shown by the surviving spouse that divorce was obtained fraudulently without service of summons and by abuse and misuse of legal process the Court of Appeal has the power to grant Restitutio - in- Intergrum as well as act in revision and set aside the divorce."*

In the present case, the petitioner made an application before the District Court seeking to set aside the decree of divorce in terms of Section 839 of the Civil Procedure Code and Section 44 of the Evidence Ordinance as amended by Act No. 10 of 1988. The District Court held that it lacked jurisdiction as the plaintiff was deceased. In the above circumstances, the only remedy available for the petitioner was to file an application by way of *Restitutio-in-Intergrum* under Article 138 of the Constitution.

Since the petitioner has proved that the *ex-parte* decree of divorce was obtained by fraud or collusion, it resulted in a miscarriage of justice, and thereby, the petitioner, the surviving spouse, suffers direct legal consequences, including the loss of her proprietary rights. In these circumstances, the petitioner is entitled to maintain this application for setting aside the *ex parte* divorce decree obtained by her husband.

In Diathu Arachchige Lily Silva vs Registrar General and others decided on 23.06.2020, Dr. Ruwan Fernando J in paragraph 40 held as follows;

*I hold that where the ex parte decree of divorce had been obtained by fraud or collusion resulting from a failure or miscarriage of justice, a surviving spouse who suffers from direct legal consequences flowing from such adverse ex parte decree of divorce is entitled to maintain an application by way of Restitutio-in-Intergrum for setting aside such an ex*

*parte decree in a fit and proper case, even though the husband might have died after obtaining such decree.*

For these reasons, I grant relief to the petitioner and set aside the *ex-parte* decree dated May 30, 1996, in the District Court of Mathugama, in the case bearing No. D/890. I also grant the relief sought in paragraphs (b) and (e) of the prayer to the petitioner.

This application is allowed.

Judge of the Court of Appeal.

M.C.B.S. Morais J.  
I agree.

Judge of the Court of Appeal.