

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

In the matter of an application *Restitutio in Integrum* under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**CA Case No: RII/45/2023
DC Colombo Case No.
DDV/00778/16**

Nawalage Asanka Indrajith Cooray
No. 6/26, 3rd Lane,
Nawala,
Rajagiriya.

Plaintiff

Vs.

Mallika Arachchige Tereshma Rashmi
Perera,
No. 6/4, 3rd Lane,
Nawala,
Rajagiriya.

Defendant

AND BETWEEN

Mallika Arachchige Tereshma Rashmi
Perera,
No. 6/4, 3rd Lane,
Nawala,
Rajagiriya.

Defendant- Petitioner

Vs.

Nawalage Asanka Indrajith Cooray
No. 6/26, 3rd Lane,
Nawala,
Rajagiriya.

Plaintiff- Respondent

AND BETWEEN

Mallika Arachchige Tereshma Rashmi
Perera,
No. 6/4, 3rd Lane,
Nawala,
Rajagiriya.

**Defendant- Petitioner-
Appellant**

Vs.

Nawalage Asanka Indrajith Cooray
No. 6/26, 3rd Lane,
Nawala,
Rajagiriya.

**Plaintiff- Respondent -
Respondent**

AND NOW BETWEEN

Mallika Arachchige Tereshma Rashmi
Perera,
No. 6/4, 3rd Lane,
Nawala,
Rajagiriya.

**Defendant- Petitioner-
Appellant- Petitioner**

Vs.

Nawalage Asanka Indrajith Cooray
No. 6/26, 3rd Lane,
Nawala,
Rajagiriya.

**Plaintiff- Respondent-
Respondent- Respondent**

Before: **R. Gurusinghe J.**

&

M.C.B.S. Morais J.

Counsel: Chathura Amarathunga for the Defendant- Petitioner-Appellant-Petitioner.

Maura Gunawansa, PC with Isuru Siriwardhana for the Plaintiff- Respondent-Respondent- Respondent instructed by Mahesh N. Pathirana.

Written Submissions: By the Defendant- Petitioner- Appellant-Petitioner – on 09.10.2024

By the Plaintiff- Respondent- Respondent- Respondent – on 23.11.2023, 09.09.2024

Argued On: 25.07.2024

Decided On: **05.12.2024**

JUDGMENT

M.C.B.S. Morais J.

This is an application for *restitutio-in-integrum* Under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

In this case, the Defendant-Petitioner-Appellant-Petitioner (hereinafter sometimes referred to as the Petitioner) Mallika Arachchige Tereshma Rashmi Perera, is challenging the order dated 30th of January 2023 and 19th of October 2023 of District Court of Colombo Case No. DDV/778/16.

The Plaintiff-Respondent-Respondent-Respondent (hereinafter sometimes referred to as the Respondent) initiated action on 18th of October 2016, against the Petitioner seeking Divorce under the matrimonial fault of constructive malicious desertion.

Having allegedly served summons by the substitute service on 05th of April 2017 and given the Petitioner have failed to appear and was not represented, the case against the Petitioner was fixed for an *ex parte* hearing on 25th of April 2017. Accordingly, an *ex parte* hearing was held and decree *nisi* was ordered against the Petitioner. Subsequently, the Petitioner filed a Petition, under section 86(2) of the Civil Procedure Code. In response, the Respondent filed objections, and the matter was scheduled for inquiry. After the inquiry, the learned Additional District Court Judge of Colombo by his order dated 08th September 2022, has refused the application of the Petitioner sought under section 86(2) of the Civil Procedure Code and ordered to absolute the decree *nisi*. Consequently, a Petition of Appeal was made by the Petitioner on the 09th of January 2023 to the Civil Appellate High Court of Western Province, seeking to set aside the order of the District Court dated 08th September 2022. However, the Petition of Appeal was refused by the learned District Court Judge by his order dated 30th January 2023.

Further, the Petitioner filed a Petition on 03rd of April 2023, seeking to vary the order under section 839 of the Civil Procedure Code. After the inquiry by written submission, the learned Additional District Court Judge refused the application by his order dated 19th October 2023.

The learned Judge of the District Court of Colombo has determined in his order, the petition of appeal filed by the Petitioner on 9th of January 2023 is not within the time prescribed by law and the documents did not contain the official seal of the Peace Officer. Therefore, the learned Additional District Court Judge has refused the application under Section 755(3) of the Civil Procedure Code, due to lapse of time and failure to include the signature of the Peace Officer.

The section 755 of the Civil Procedure Code reads as follows,

“(1) Every notice of appeal shall be distinctly written on good and suitable paper and shall be signed by the appellant or his registered attorney and shall be duly stamped. Such notice shall also contain the following particulars:-

(a) the name of the court from which the appeal is preferred;

(b) the number of the action;

(c) the names and addresses of the parties to the action ;

(d) the names of the appellant and respondent;

(e) the nature of the relief claimed: Provided that where the appeal is lodged by the Attorney-General, no such stamps shall be necessary.

(3) Every appellant shall within sixty days from the date of the judgment or decree appealed against present to the original court a petition of appeal setting out the circumstances out of which the appeal arises and the grounds of objection to the judgment or decree appealed against, and containing the particulars required by section 758, which shall be signed by the appellant or his registered attorney. Such petition of appeal shall be exempt from stamp duty. Provided that, if such petition is not presented to the original court within sixty days from the date of the judgment or decree appealed against, the court shall refuse to receive the appeal.”

Accordingly, the law requires that the Petition of Appeal be presented to the original courts within 60 days from the date of the decree appealed against and signed by the Appellant or his registered Attorney. However, the Petitioner has not followed these mandatory requirements.

In the case of ***Wickremasinghe V. De Silva (1978) 2 SLR 65***, it was held

*“The provisions of section 755 (3) of the Civil Procedure Code which requires the petition of appeal to be filed **within sixty days from the date of judgment are mandatory. Accordingly, where a petition had been filed after sixty days had elapsed, the learned District Judge was correct in rejecting such a petition.....”***

The Original order made by the learned Additional District Court Judge dated 08th September 2022 was appealed by the Petitioner on 09th of January 2023 which was after 122 days. Therefore, it is clear that the Petition of Appeal has not been made within 60 days from the decree appealed against.

Furthermore, in the case of ***Municipal Council of Colombo V. Piyasena (1980) 2 SLR 39***,

“In the computation of the period of sixty days from the date of judgment set out in section 755 (3) of the Civil Procedure Code for filing a petition of appeal, Sundays and public holidays are not excluded and accordingly a petition filed sixty-five days after the delivery of judgment is out of time.”

Therefore, it is quite evident that the Petitioner has presented her Petition of Appeal out of time and the learned Additional District Court Judge is correct in rejecting the Petition without forwarding it to the Civil Appellate High Court of Western Province.

Accordingly, I do not see any reason to interfere by exercising the extraordinary remedy granted by Article 138 of the Constitution. Therefore this application is dismissed.

No Cost ordered.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree

Judge of the Court of Appeal