

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

In the matter of an application for orders in the nature of the Restitutio in Integrum under and in terms of Article 138 of the Constitution and under Rule 31 (b) of the Court of Appeal (Appellate Procedure) Rules, 1990.

**CA Case No: RII/57/2023
HCCA Homagama No.
WP/HCCA/HO/468/2023 (F)
DC Kaduwela No. 3232/M**

Mabotuwana Jagodage Oshani De Silva
(*nee* Krishnarathne),
No. 43, Srisubhuthipura,
Battaramulla.

Plaintiff

Vs.

1. Horapola Liyanarachchige Sugandika
Upamali,
No. 22/45, Old Kesbewa Road,
Gangodawila, Nugegoda.

1st Defendant

2. Kakuluwage Don Jayantha,
No. 22/45, Old Kesbewa Road,
Gangodawila, Nugegoda.

2nd Defendant

3. Janashakthi General Insurance Limited
No. 55/72, Vauxhaul Street,
Colombo 02.

3rd Defendant

Allianz Insurance Lanka Limited,
No. 675, Dr. Danister De Silva
Mawatha,
Colombo 09.

Substituted 3rd Defendant

AND BETWEEN

1. Horapola Liyanarachchige Sugandika
Upamali,
No. 22/45, Old Kesbewa Road,
Gangodawila, Nugegoda.
2. Kakuluwage Don Jayantha,
No. 22/45, Old Kesbewa Road,
Gangodawila, Nugegoda.
3. Allianz Insurance Lanka Limited
No. 675, Dr. Danister De Silva
Mawatha,
Colombo 09.

Presently of;
Level 25-27, One Galle Face Tower,
No. 1A, Centre Road, Galle Face,
Colombo 02.

Defendant- Appellants

Vs.

Mabotuwana Jagodage Oshani De Silva
(*nee* Krishnarathne),
No. 43, Srisubhuthipura, Battaramulla.

Plaintiff- Respondent

AND NOW BETWEEN

Allianz Insurance Lanka Limited
Level 25-27, One Galle Face Tower,
No. 1A, Centre Road, Galle Face,
Colombo 02.

**3rd Defendant- Appellant-
Petitioner**

Vs.

Mabotuwana Jagodage Oshani De Silva
(*nee* Krishnarathne),
No. 43, Srisubhuthipura,
Battaramulla.

**Plaintiff- Respondent-
Respondent**

1. Horapola Liyanarachchige Sugandika
Upamali,
No. 22/45, Old Kesbewa Road,
Gangodawila, Nugegoda.
2. Kakuluwage Don Jayantha,
No. 22/45, Old Kesbewa Road,
Gangodawila, Nugegoda.

**Defendant- Appellant-
Respondents**

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

Counsel: Ronald Perera, PC with Chandimal Mendis for the Petitioner
instructed by Sanath Wijewardane.
Faiz Musthapha, PC with Chanuka Ekanayake and Keerthi
Thilakarathna for the Respondents.

Written Submissions: By the 3rd Defendant- Appellant- Petitioner – on 16.10.2024
By the Plaintiff- Respondent- Respondent– on 08.11.2024

Argued: By way of written submissions

Decided On: **21.11.2024**

JUDGMENT

M.C.B.S. Morais J.

This is an application for an order in the nature of restitutio in integrum under and in terms of article 138 of the constitution and under rule 31 (b) of the court of Appeal (Appellate Procedure) rules 1990.

This case arises from a claim for damages filed by the Plaintiff-Respondent-Respondent, seeking compensation for the alleged loss and damage suffered due to the death of her husband in a motor vehicle accident. The accident involved a vehicle bearing registration number WP CAF 9619, which was purportedly driven negligently by the 1st Defendant. The 2nd and 3rd Defendants were identified as the owners of the said vehicle and the insurer respectively.

The Plaintiff instituted proceedings before the District Court of Kaduwela, claiming damages in the sum of Rs. 200 million against the 1st, 2nd, and 3rd Defendants, jointly and severally. After the hearing, the Learned District Judge, by judgment dated 28th of April 2023, awarded the Plaintiff damages amounting to Rs. 43.1 million.

Aggrieved by this decision, the Defendants (Appellants) preferred an appeal to the Civil Appellate High Court of the Western Province, sitting at Homagama. In the course of the appellate proceedings, the Civil Appellate High Court, by an order dated 21st of August 2023, directed the Appellants to pay the required brief fees by 21st of September 2023, as a procedural requirement for the continuation of the appeal. Neither the parties nor the instructing attorney have taken any steps to make the payment within the prescribed time period. As the brief fees were not paid by either 21st of September 2023 or the 26th of October 2023, the Civil Appellate High Court of Homagama rejected the said appeal by order dated 9th of November 2023, due to the non-payment of the brief fees.

The 3rd Defendant-Appellant-Petitioner seeks to invoke the jurisdiction of this Court to set aside the aforementioned order and to reinstate the 3rd Defendant-Appellant-Petitioner, along with the 1st and 2nd Defendant-Appellants-Respondents, to their original position as it existed prior to the issuance of the order dated 9th of November 2023 on the following grounds.

- a. The Civil Appellate High Court of the Western Province (Holden in Homagama) failed to appreciate whether the 1st and/or 2nd Defendant Appellant have received notice prior to rejecting the Appeal,
- b. The Civil Appellate High Court of the Western Province (Holden in Homagama) failed to appreciate that the Registered Attorney made payment though belatedly;
- c. The Civil Appellate High Court of the Western Province (Holden in Homagama) failed to appreciate that the matter could have been fixed for re-listing and for the Appellants to show cause,
- d. The Civil Appellate High Court of the Western Province (Holden in Homagama) failed to appreciate that there is no prejudice caused to the Parties if the brief fee had been accepted. On the other hand grave and irreparable loss and damage and grave prejudice to the legal rights of the 1st to the 3rd Defendant- Appellants would be affected when the appeal was rejected.

According to the document submitted as X3

(01)21.08.2023

This case record has been prepared and sent by the District Court Kaduwela. Notices are to be issued to the parties to deposit the money for briefs in the court.

Order

1. *Issue notice to the appellant by requesting the Registrar to prepare the appeal briefs and to pay the due fees before 21.09.2023.*
2. ***Issue a notice stating that if appeal fees are not paid before that date, the appeal will be rejected.***

According to the 'X2' document dated 05th of October 2023,

“.....යුෂ්මතා විසින් ඉදිරිපත් කර ඇති අභියාචනයට අදාළව අභියාචනා ගොනු සකස් කිරීම සඳහා ඉල්ලීමක් ඉදිරිපත් කරන ලෙසටත්, එකී අභියාචනා ගොනු සකස් කිරීම සඳහා නියමිත ගාස්තුව රු. 11520/- ක මුදලක් 2023.10.26 දිනට ප්‍රථම මෙම අධිකරණ කාර්යාලයට ගෙවන ලෙසටත් මෙයින් විධාන කරනු ලබන අතර එසේ ක්‍රියා කිරීමට අපොහොසත් වුවහොත් ඉහත කී රීති මාලාවේ 13 වන රීතියේ විධි විධාන පරිදි යුෂ්මතා විසින් ඉදිරිපත් කර ඇති අභියාචනය ප්‍රතික්ෂේප

කිරීමට ගරු අධිකරණය ක්‍රියා කරන බවට අධිකරණයේ අණ පරිදි මෙයින් වැඩිදුරටත් විධාන කරනු ලැබේ.”

According to the ‘X3’,

2023.11.09

Despite the notices were dispatched to appellant and his registered AAL under registered post. The appellant failed to deposit brief fees. Hence under the rule No. 13(b) of the Supreme Court rules the appeal is dismissed without cost.....

According to the **13(b)** of the **S.C. (Court of Appeal – Appellate Procedure copies of Records Rules) 1978,**

13(b) where the appellant fails to pay the fees due under these rules,

The Court of Appeal may direct the appellant to comply with such directions as the Court may think fit to give, and may reject such appeal if the appellant fails to comply with such directions.

The documents submitted before this Court clearly indicate that notices concerning the payment of appeal brief fees were issued to the appellants and their instructing attorney on or around 5th of October 2023 which is evident from the document ‘X2’. Thereby, that notices were duly sent to all three Defendant-Appellants and their Registered Attorney. Therefore, I do not see any merit in the contention that the 3rd Defendant-Appellant-Petitioner did not receive any notice. In any event when considered together it is easily assumed that sufficient notice has been given for the payment of brief fees. Furthermore, it is evident that despite the issuance of notices on two separate occasions, no action has been taken by either the appellants or their instructing attorney to comply with the requirement to make the payment within the prescribed time frame. This failure to act demonstrates a lack of diligence and adherence to procedural obligations, which are fundamental to the proper conduct of appellate proceedings. Such inaction not only undermines the efficiency of the judicial process but also reflects a disregard for the directions of the court.

Therefore, it can be assumed without much doubt that the Petitioners have been willfully negligent in asserting their rights and have failed to act with due diligence in protecting them. By their own inaction, they have allowed the situation to persist and now seek relief from the

court without the necessary equity required of those who invoke judicial intervention. According to the equitable maxim '*leges vigilantibus non dormientibus subserviunt*' the law assists only those who are vigilant and not those who sleep over their rights.

It is apparent from the perusal of the record that, subsequent to the order made on 09th of November 2023, by the Civil Appellate High Court of Homagama, the Petitioners have failed to file a relisting application before the said High Court or to make an application before the Supreme Court against the said order as the law provides.

It must be emphasized that the invocation of the extraordinary jurisdiction of '*Restitutio in Integrum*' is reserved for exceptional circumstances. This jurisdiction should not be engaged unless the order in question is ex-facie contrary to accepted legal principles, leaves the Petitioner without any other remedy, is manifestly erroneous on its face, or is of such a nature that it shocks the conscience of this court. Therefore, in the absence of these stringent conditions, we must refrain from utilizing this extraordinary measure, adhering instead to the ordinary legal processes and remedies available within the framework of civil litigation.

In the light of the above, this application is refused and dismissed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree

Judge of the Court of Appeal