

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

In the matter of an application for Revision and/or Restitution (*restitutio-in-integrum*) in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Diathu Arachchige Lily Silva,  
No. 43, Soratha Mawatha  
Gangodawila  
Nugegoda

**PETITIONER**

**C.A. No. RII-0003-2016**

**D.C. Puttalam Case No. 2621/D**

Vs.

1. Registrar General.

Registrar General's Department,  
Pelawatta,  
Battaramulla.

2. Jayasinghe Arachchige Mary

Magilin,  
Anuradhapura Road,  
Sirambi Adiya,  
Puttalam.

3. Rosaline Rodrigo,

Anuradhapura Road,

Sirambi Adiya,  
Puttalam.

4. Maxi Rodrigo,  
Anuradhapura Road,  
Sirambi Adiya,  
Puttalam.

5. Princy Rodrigo,  
Anuradhapura Road,  
Sirambi Adiya,  
Puttalam.

6. Janet Rodrigo,  
Anuradhapura Road,  
Sirambi Adiya,  
Puttalam.

### RESPONDENTS

<b>BEFORE</b>	:	Shiran Gooneratne J. & Dr. Ruwan Fernando J.
<b>COUNSEL</b>	:	Chamath Fernando for the Petitioner Chathura Galhena for the 3 <sup>rd</sup> to 6 <sup>th</sup> Respondents

### **WRITTEN SUBMISSIONS**

:	07.08.2019 (by the Petitioner)
:	09.08.2019 (by the 3 <sup>rd</sup> to 6 <sup>th</sup> Respondents)

**ARGUED ON** : 27.02.2020

**DECIDED ON** : 23.06.2020

## **Dr. Ruwan Fernando, J.**

### **Introduction**

[1] This is an application by the Petitioner by way of Revision and/or *Restitutio in Integrum* to set aside the decree absolute entered in Case No. 2621/D by the District Court of Puttalam on 19.04.2012 after *ex parte* trial, dissolving the marriage of the Petitioner to the Phillip Joseph Anthony Rodrigo who died on 06.05.2013.

### **Background facts**

#### **The Petitioner's Application**

[2] The facts relevant to this application as set out in the Petition briefly are as follows:

- (a) The Petitioner lawfully married Philip Joseph Anthony Rodrigo on 14.01.1993 and established their matrimonial home at Sirambiadiya, Puttalam;
- (b) The said Philip Joseph Anthony Rodrigo created disputes with the Petitioner causing severe mental pain and agony to the Petitioner and he continuously quarreled with the Petitioner and refused and/or failed to perform matrimonial duties towards the Petitioner;
- (c) Disregarding all the efforts of the Petitioner to continue the marriage life, the said Philip Joseph Anthony Rodrigo continued to disrupt the harmonious and peaceful relations between the parties and on or about January 2005, the said Philip Joseph Anthony Rodrigo maliciously and in a degrading, inhuman and cruel manner forced out and/or ejected the Petitioner from the said matrimonial house;
- (d) Though the Petitioner strived hard to reconcile with the said Philip Joseph Anthony Rodrigo and continue the marriage life, all her

efforts were maliciously and inhumanely refused by the said Philip Joseph Anthony Rodrigo;

- (e) As the Petitioner did not have any place to stay from about March 2005, the Petitioner commenced residing with a friend in JayawardenaPura, Nugegoda;
- (f) On or about 06.05.2013, the Petitioner became aware that the said Philip Joseph Anthony Rodrigo had passed away and the Petitioner immediately went back to her matrimonial home in Puttalam in order to organise the funeral of her late husband and show her last respects;
- (g) During the said funeral, the Petitioner for the first time was made aware by the relations of the said Philip Joseph Anthony Rodrigo that he had divorced the Petitioner by instituting a divorce action in the District Court of Puttalam;
- (h) When the Petitioner made further inquiries with regard to the said divorce action, the Petitioner was able to discover that:
  - (i) Her late husband had instituted a divorce action against her in the District Court of Puttalam in case bearing No. 2621/D by Plaintiff dated 07.09.2009 and the Petitioner's address had been stated in the caption of the Plaintiff as "Pinwatte, Panadura";
  - (ii) Although the Panadura Fiscal had reported to Court that summons was served on the Petitioner by pointed-out service on 29.11.2010, summons was never served on her;
  - (iii) The learned District Judge had proceeded to hear the case *ex parte* and entered *decree nisi* against the Petitioner on 09.09.2011;

- (iv) Although the Panadura Fiscal had reported to Court that the *decree nisi* was served on her on 17.01.2012, it was never served on her and as per the journal entry dated 19.04.2012, the *decree nisi* had been made absolute on 19.04.2012;
  - (v) At all times material to the said District Court Case, the Petitioner was residing in Sri Jayawardenapura, Nugegoda, and not in Pinwatte, Panadura and the documents marked P7-P11 confirm that the Petitioner was residing in Gangodawila, Nugegoda from about March 2005;
- (i) At all times material to the said District Court Case, the Petitioner was not residing in Pinwatte, Panadura and the Certificate issued by the Grama Niladari of Pinwatte, Panadura marked P6 confirms that the Petitioner's name is not included in any Electoral list in the Pinwatte area;
  - (j) The *decree nisi* and the decree absolute entered by the District Court Case No. 2621/D is ex facie arbitrary, capricious and clearly against the fundamental principles of natural justice;
  - (k) The Petitioner filed a case bearing No. 2089/L in the District Court of Puttalam in August 2013 under Section 839 of the Civil Procedure Code seeking *inter alia*, a declaration that the said order absolute entered in the District Court of Puttalam Case is void *ab initio*;
  - (l) The District Court, however on 23.05.2014 held in Case No. 2089/L that it has no jurisdiction to vacate the said decree and directed the Petitioner to seek relief from the Court of Appeal and allowed the Petitioner to amend the Plaintiff and proceed with the remaining reliefs prayed for in the said case.

## **Objections of the 2<sup>nd</sup> Respondent**

[3] The 2<sup>nd</sup> Respondent filed the statement of objections and while praying for the dismissal of the Petitioner's application on the ground that the Petitioner has no status to maintain this application, raised the following preliminary objections to the maintainability of this application:

- (a) The Petitioner cannot prefer a revision application in this Court in as much as the Petitioner has failed to explain why the same has not been preferred to the relevant Provincial High Court exercising Civil Appellate Jurisdiction;
- (b) The Petitioner has filed this application in the Court of Appeal seeking to set aside the decree absolute made by the District Court of Puttalam, without first asking for the relief from the same Court which made the order;
- (c) As the Petitioner herself has admitted in the Petition that the other party to the dissolved marriage, the said Philip Joseph Anthony Rodrigo had passed away, there is nothing to be restored by this Court;
- (d) Although the District Court of Puttalam in case No. 2089/L filed by the Petitioner refused to set aside the decree absolute in Case No. 2621/D, the Petitioner had not canvassed the said order.

## **Objections of the 3<sup>rd</sup> to 6<sup>th</sup> Respondents**

[4] The 3<sup>rd</sup> to 6<sup>th</sup> Respondents filed their objections and denied all and several averments contained in the Petition except those specifically admitted in their objections. They further raised the following preliminary objections to the maintainability of this application:

- (a) The Petitioner has failed to disclose exceptional circumstances warranting to exercise the Revision and/or *Restitutio in Integrum* jurisdiction of this Court;
- (b) The Petitioner is guilty of laches as she has filed this application after a lapse of 2 years and 7 months from the death of her former husband Philip Joseph Anthony Rodrigo;
- (c) The Petitioner has prayed for the restitution of marriage between herself and the deceased Philip Joseph Anthony Rodrigo after the lapse of 3 years and 8 months from the date of the said decree nisi being made absolute by the District Court of Puttalam;
- (d) The reliefs prayed for by the Petitioner in this application are against the deceased Philip Joseph Anthony Rodrigo and therefore, such reliefs cannot be maintained after his death; and
- (e) The Petitioner has suppressed material facts and violated the rule of *uberrimae fidei*.

[5] The 3<sup>rd</sup> to 6<sup>th</sup> Respondents further stated in their statement of objections *inter alia*, that:

- (a) The marriage between the Petitioner and Philip Joseph Anthony Rodrigo was dissolved by a Divorce action filed by the said deceased Philip Joseph Anthony Rodrigo and the Petitioner was living in separation from the said Philip Joseph Anthony Rodrigo from 2005;
- (b) The Petitioner was aware that late Philip Joseph Anthony Rodrigo had obtained a divorce decree and the marriage with the Petitioner was dissolved while the said Philip Joseph Anthony Rodrigo was living but suppressed the said fact to obtain undue advantage by abusing the process of law; and

(c) The averments contained in the petitioner's application with regard to her address are facts that are personally known to the deceased Philip Joseph Anthony Rodrigo and hence, those matters cannot be testified by anyone else other than the said deceased Philip Joseph Anthony Rodrigo.

For those reasons, the 3<sup>rd</sup> to 6<sup>th</sup> Respondents prayed for the dismissal of the Petitioner's application.

### Decision

#### **Extraordinary Relief by way of *Restitutio in Integrum***

[6] Before considering the preliminary objections and the substantive issues, it is necessary to deal with the nature and role of *restitutio in integrum* as a mode of relief of our Courts.

[7] The Latin phrase “*restitutio in integrum*” translated literally, means restoration to a former condition or state. (Lewis and Short's Latin Dictionary & Oxford Latin Dictionary). Percival Gane, The Selective Voet, 4.1 (Translator's note) translates the phrase as "restoration to entirety". According to Sohm's Institutes of Roman Law, s. 56, 111, Burge, 2nd ed. Vol. 4, Chap. 1, “in Roman Law, the *restitutio in integrum* was the removal of a disadvantage in law which had legally occurred. It was a protection against injustice (as distinguished from an action against injustice) which was rendered necessary on account of the practical impossibility of taking legally, in advance, all the circumstances that in reality may occur”. (see-also *Abeysekera v. Haramanis Appu* 14 NLR 353).

[8] The remedy was received into Roman Dutch law in wider form, where *restitutio in integrum* was primarily intended for relief from contracts on the ground of minority, error, fraud and duress (*Abeysekera v. Haramanis Appu*, supra). Relief by way of *restitutio in integrum* will also be granted

from the effect of an order in judicial proceedings where the legality of such order is questioned (*Phipps v. Bracegyrdle* 35 NLR 302).

[9] Voet describes *restitutio in integrum* as follows:

*"It is an action for the making whole again of a matter or cause.... It is otherwise described (insofar as it is granted by the magistracy) as a resetting and restoration of a transaction to its original state; or a making whole again of a cause which has been lost. It is an extraordinary remedy by which the praetor in virtue of his office and jurisdiction, taking the line of natural fairness, puts back injured or cheated persons for just cause into their original state, just as if no damaging transaction had taken place, or at least orders them to be indemnified." Voet, Commentarius, 4.1.1.).*

[10] Voet also says "The effect of *restitutio in integrum* is that all things are put back into their original condition, and that indeed in a single judicial proceeding." Voet, Commentarius, 4.1.21; quoted and followed in the South African case of *Davidson v. Bonafede* 1981 (2) SA 501 C at 509 F.).  
Hosten *et al.* describe an order of *restitutio in integrum* thus:

"This is an extraordinary remedy in terms of which a court orders the former position to be restored; in other words, each party must return to the other whatever he has received in terms of the contract." (Hosten *et. al.*, Introduction to South African Law, p 293).

[11] According to Van der Linden, the cases in which this relief may, be obtained under two heads: (i) relief relating to the original matter itself (substantial relief) relieving a party from any act or conduct and replacing him in his former situation is granted on the ground of his having been induced **through fear, fraud, minority, error or other sufficient reasons** to do the act against which he prays relief; (ii) relief relating merely to some omission or error in the process or pleadings (judicial relief) (*Dember v. Abdul Hafeel* 49 NLR 62, pp. 64-65).

[12] In Sri Lanka, the remedy of *restitutio in integrum* has taken deep root in the practice and procedure of our Courts (*Abeysekera v. Haramanis Appu*). Cases in which application for relief by way of restitution in respect of judgments of original courts have been made can be broadly classified under two heads: (a) where a judgment has been obtained by fraud or where there has been a discovery of fresh evidence; (b) where a judgment has been entered of consent and there has been an absence of a real consent such as in cases of fraud, fear, excess of authority and mistake (*Dember v. Abdul Hafeel*, supra, p. 66).

[13] Article 138 (1) of the Constitution has vested this Court with the sole and exclusive jurisdiction to grant relief by way of *restitution in integrum*. Article 138 (1) reads thus:

*(1) The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and *restitutio in integrum*, of all causes, suits, actions, prosecutions, matters and things of which such High Court, Court of First instance, tribunal or other institution may have taken cognizance.*

*Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.*

[14] The Petitioner in the instant case is inviting this Court to exercise the jurisdiction vested in this Court by way of revision and/or *restitutio in integrum* and to set aside the decree absolute entered in Case No. 2621/D by the District Court of Puttalam on the ground that her husband had

obtained the divorce by fraud, without serving the summons and decree nisi on her. The Petitioner has complained that the *ex parte* decree of divorce obtained by a misuse of the legal process and in violation of fundamental principles of natural justice is a nullity that has caused a miscarriage of justice.

### **Preliminary Objections**

**A-Decree of divorce entered in favour of the plaintiff, Philip Joseph Anthony Rodrigo by the District Court cannot be set aside after his death**

**B-The Petitioner has failed to invoke the Jurisdiction of the District Court in the first instance**

[15] I shall now consider in detail the following two connected preliminary objections raised by the Respondents to the maintainability of this application.

1. As the said Philip Joseph Anthony Rodrigo is now dead, the divorce decree entered by the District Court cannot be set aside after his death as the deceased husband is no longer in a position to defend himself or rebut the allegations made against him;

(2) Failure of the Petitioner to invoke the inherent power of the District Court in the first instance in terms of section 839 of the Civil Procedure Code before seeking the extraordinary relief by way of revision or *restitutio in integrum*;

**A- Can the decree of divorce entered in favour of the plaintiff by the District Court be set aside after his death?**

[16] At the hearing, the learned Counsel for the 3<sup>rd</sup> to 6<sup>th</sup> Respondents, Mr. Galhena submitted that the relief sought by the Petitioner to set aside the dissolution of marriage between the Petitioner and the deceased Phillip Joseph Anthony Rodrigo cannot be granted after his death as it would

affect the rights of a deceased party who cannot be brought before Court. His submission in short was that the divorce proceedings in the District Court represented a personal cause of action both for the husband as well as for the wife and consequently, the right to sue had not survived for challenging the *ex parte* decree after the death of the decree-holder husband. He argued that this Court ought not to interfere with the decree of divorce since it is against the rules of natural justice, more specifically, the rule of *audi alterem partem* as the husband is no longer in a position to defend himself or rebut the allegations made against him.

[17] This takes me to the consideration of the contention canvassed by the learned Counsel for the Respondents that an *ex parte* decree of divorce entered by the District Court in favour of one of the parties to the proceedings cannot be set aside after his death on an application made by the surviving spouse on the principle of "*action personalis moritur cum persona*", i.e. a personal cause of action dies with the person.

[18] It is true that a divorce action before a District Court represented a personal action based on matrimonial fault on the part of one of the parties to the marriage and thus, if either of the spouses in such proceedings dies before any decree of divorce is passed, the personal cause of action would die with his death on the principle of "*actio personalis moritur cum persona*." However, the situation is different where, once one of the parties to the divorce proceedings, who obtained an *ex parte* decree of divorce without the knowledge or notice to the other spouse, expires and direct legal consequences affecting the status and proprietary rights of the other surviving party flow from such adverse *ex parte* decree of divorce.

[19] If the surviving wife is prevented from making any application for setting aside the *ex parte* decree of divorce obtained by the husband

without her knowledge and notice to her, the wife would lose her marital status and proprietary right in the deceased husband's property. In such circumstances, the aggrieved surviving wife would suffer serious legal damage and injury without getting any opportunity to get such as *ex parte* decree set aside while her deceased husband and his legal heirs would benefit from such *ex parte* decree of divorce obtained by the fraud practiced on his wife.

[20] Thus, any *ex parte* decree will have a direct impact on the status of the wife and her right to the estate of the deceased husband and no Court in such circumstances, would helplessly watch and allow the surviving wife to suffer from such legal consequences flowing from such *ex parte* decree of divorce obtained by fraud. The maxim "*actio personalis moritur cum persona*" would not apply where one spouse to the divorce proceedings having obtained an *ex parte* decree of divorce against the other spouse dies and the surviving spouse is able to show that the *ex parte* divorce was obtained without the knowledge or notice to that party.

[21] A similar submission was made in *Kusumawathie v. Wijesinghe* (2001) 3 Sri LR 128 that the divorce action before the District Court is a personal action and with the death of the husband, the action was brought to a close and hence, the Petitioner is prevented from making allegations against the deceased husband who is no longer in a position to defend himself or rebut the allegations made against him.

[22] The Court of Appeal, however, held that the Court of Appeal would interfere with the *ex parte* decree of divorce entered by the District Court when one of the parties to the proceedings is dead where the fraud had been practiced on a party to the action and a miscarriage of justice or failure of justice has occurred by fraudulently obtaining a decree of divorce

without the knowledge or notice to the Defendant. 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 perpetrated. 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 that this is an appropriate case for this Court to step in."*

[23] Where a surviving aggrieved spouse who suffers from pernicious legal consequences of an *ex parte* decree of divorce complains that her deceased husband had obtained a decree of divorce without her knowledge or notice to her, she is entitled to make an application for setting aside the *ex parte* decree through the assistance of the Court. In such an exercise, all other legal heirs of the deceased spouse who are interested in supporting the decree of divorce passed against the surviving spouse are entitled to be joined as necessary parties as it has happened in the present case.

[24] For those reasons, I hold that there is no substance in the argument that the Petitioner is prevented from making any application for setting aside the *ex parte* decree of divorce with the death of the husband, Philip Joseph Anthony Rodrigo. For those reasons, the aforesaid preliminary objection raised by the learned Counsel for the Respondents is rejected.

**B-Failure to invoke the Jurisdiction of the District Court in the first instance before seeking relief by way of *restitutio in integrum***

[25] At the hearing of this application, Mr. Galhena submitted that the Fiscal had certified in his affidavits that the summons and the decree nisi had been duly served on the Petitioner and therefore the presumption under section 114(e) of the Evidence Ordinance that summons and decree nisi were duly served on the Petitioner applies. He submitted that in such circumstance, the burden shifts on to the Petitioner to rebut the said presumption and prove that no summons and decree nisi were served on her.

[26] He further submitted that where the decree of divorce has been entered *ex parte* in the District Court and is sought to be set aside on any ground, the application must, in the first instance be made to the very court that entered decree absolute. His contention was that the Petitioner could not succeed in this application without invoking the inherent powers of the District Court first, in terms of section 839 of the Civil Procedure Code to set aside the *ex parte* decree by leading evidence to establish that the decree of divorce was obtained without the knowledge or notice to her.

[27] He cited the decisions in *Perera v. Ekanayake* 3 NLR 21, *Karolis Appuhamy v. Singho Appu* 5 NLR 75 and *Ittepana v. Hemawathie* (1981) 1 Sri LR 476 and submitted that these decisions have clearly held that the Petitioner must first seek her remedy in the District Court before coming to this Court and therefore, this application must fail.

[28] In *Perera v. Ekanayake* (supra), it was held that a judgment obtained by fraud or passed under a mistake may be set aside either by a regular action or possibly, by application by way of summary procedure as regulated by the Civil Procedure Code. In *Karolis Appuhamy v. Singho Appu* (supra), it was held that the District Court has power to open or rescind any order made *ex parte*, on being satisfied that it was prejudicial to a party through no fault of his. Again, in *Ittepana v. Hemawathie* (supra), it

was held that if a defendant is not served with summons or otherwise notified of the proceedings against him, the judgment entered against him in those circumstances is a nullity and the proceedings being void, the person affected by them can apply to have them set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court which is saved by section 839 of the Civil Procedure Code.

[29] Furthermore, in *Andradie v. Jayasekera Perera* (1985) 2 Sri LR 204, Siva Selliah, J. stated at page 209 that:

*"the practice has grown and almost hardened into a rule that where a decree has been entered ex parte in the District Court and is sought to be set aside on any ground, application must in the first instance be made to that very court and that it is only where the finding of the District Court on such application is not consistent with reason or the proper exercise of the judge's discretion or where he has misdirected himself on the facts or law will this Court grant extraordinary relief by way of Revision or Restitutio in integrum which are extraordinary remedies".*

[30] The above-mentioned judicial authorities make it very clear that where the defendant is not served with summons or otherwise noticed of the proceedings against him, the judgment entered against him in those circumstances is a nullity. In such circumstances, the general practice for a party or a person against whom an *ex parte* decree has been made is, in the first instance, to move the court which made the order to set it aside upon proof that summons or notice of the proceedings against such party had not been served, before this Court can be invited to grant extraordinary remedy by way of *restitutio in integrum*.

[31] I do not, however, think that the cases cited by the learned Counsel for the Respondents, including *Andradie v. Jayasekera Perera* (supra) apply to the facts of the present case. In *Ittepana v. Hemawathie* (supra), the

defendant wife complained that she had not been served with summons and denied having filed proxy and filed papers in the District Court making the living husband as the Respondent to have the divorce decree annulled on the ground of non-service of summons.

[32] Similarly, in *Andradie v. Jayasekera Perera* (supra), the Petitioner who was the wife of the Respondent sought by way of revision and/or *restitutio in integrum* to revise and set aside the *ex parte* decree of divorce obtained by her husband who was living at that time on the ground that such *ex parte* decree was obtained by fraud. The application was dismissed as the Petitioner in that case failed, in the first instance, to make an application to that very court before invoking the powers of revision and/or *restitutio in integrum* in the Court of Appeal.

[33] In the present case, however, the said Phillip Joshep Anthony Rodrigo, who obtained the *ex parte* decree of divorce against the Petitioner was dead by the time the Petitioner filed the application in the District Court. Accordingly, the facts of the cases cited by the learned Counsel for the Respondents will not apply to the present case.

[34] Mr. Chamath Fernando, the learned Counsel for the Petitioner cited the case of *Kusumawathie v. Wijesinghe* (supra) and *Paulis v. Joseph and Others* (2005) 3 Sri LR 162 in support of his contention that in a situation where one of the parties to the divorce action is dead, all what is required for the surviving spouse in an application by way of *restitutio in integrum* is to satisfy the Court of Appeal on the available evidence that the *ex parte* decree of divorce was obtained fraudulently by the deceased spouse by abuse and misuse of legal process.

[35] The facts of the case in *Kusumawathie v. Wijesinghe* (supra) are identical to the facts of the present case. In that case, the wife filed an

application in the District Court to set aside the *ex parte* divorce decree after the death of her husband who was the Plaintiff in the District Court case. The District Court, like in the present case, held that it has no jurisdiction to vacate the said decree as the Plaintiff was dead and observed that the Petitioner should have sought relief from the Court of Appeal. The Court of Appeal held that where one of the parties to the divorce action was dead subsequent to the entering of the *ex parte* decree for divorce, relief by way of *restitutio in integrum* may be sought if it is satisfied by the surviving spouse that the decree for divorce had been obtained by fraud or without the knowledge or notice to the Defendant. The Court of Appeal, however, refused to send back the case for inquiry as the Plaintiff was dead at that time.

[36] Further, the facts of the case in *Paulis v. Joseph and Others* (supra) almost bear a similarity to the facts of the present case and that of the *Kusumawathie v. Wijesinghe* (supra). In the said case, the 1<sup>st</sup> Respondent took up the position that as the relief by way of *restitutio in integrum* is an extraordinary remedy, it should only be granted in exceptional circumstances and the party who complains of non-service summons must first go before the District Court exercising original jurisdiction, as the issue of summons is a matter between District Court and the Officer concerned. The 1<sup>st</sup> Respondent's position was that the District Court remedy has to be exhausted first, before resorting to *restitutio in integrum*. While rejecting the position taken up by the 1<sup>st</sup> Respondent, Imam J. observed at page 167:

*"Although the position of the 1st Respondent is that the Petitioner should have gone to the District Court as it has original jurisdiction and where a due inquiry would be held. However, there is no merit in this submission, as the Plaintiff (Petitioner's husband) is now dead and she obviously cannot go to the District Court."*

[37] In the present case, the Petitioner first went before the District Court seeking to set aside the decree of divorce in terms of section 839 of the Civil Procedure Code. The District Court however, held that it has no jurisdiction as the Plaintiff is dead and the proper forum is either the Court of Appeal or the Civil Appellate High Court. Thus, there is no substance in the argument that the Petitioner had failed to go before the District Court first, seeking to set aside the *ex parte* decree of divorce entered by the District Court.

[38] The present application has been filed by the aggrieved wife by way of *restitutio in integrum* under Article 138 of the Constitution after the District Court refused to entertain her complaint on the ground that the husband is now dead. In this application other legal heirs of the deceased husband had been brought on record as respondents by the aggrieved spouse and they are seeking to have this application set aside and the decree absolute confirmed.

[39] In a situation where the Plaintiff in the District Court Divorce case, after having obtained an *ex parte* decree of divorce dies, and the Petitioner had already exhausted her rights in the District Court by filing an application seeking to set aside the *ex parte* decree of divorce, no purpose will be served now in sending the complaint of the Petitioner to the same District Court directing it hold an inquiry and re-trial if it arises.

[40] 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 integrum* 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.

[41] In my view, the contention of Mr. Galhena that after the death of the Phillip Joshep Anthony Rodrigo, the *ex parte* decree of divorce cannot be set aside by the Court of Appeal by way of *restitutio in integrum*, is not sustainable and the said preliminary objection is overruled.

**Has the Petitioner satisfied that the *ex parte* decree of divorce had been obtained fraudulently without the knowledge or notice to the Petitioner?**

[42] I turn, now, to the substance of the application and proceed to consider whether the Petitioner has satisfied that the decree for divorce had been obtained without the knowledge or notice to the Petitioner as set out in the application of the Petitioner.

[43] Importantly, the Petitioner has made specific allegations of fraud and pleaded and formulated a case founded on fraud wherein her late husband had obtained the *ex parte* divorce decree against her without knowledge or notice to her. Mr. Galhena brought to our notice that the affidavits of the Fiscal and the Journal Entries Nos. 6 and 12 demonstrate that the summons and the decree nisi had been served on the Petitioner (P5) and when the Petitioner was absent and unrepresented on the summons returnable date, the District Court entered an *ex parte* decree.

[44] He further submitted that when the Petitioner failed to respond to the decree nisi, it was made absolute by the District Court and under such circumstances, the question whether the summons and decree nisi had not been served on the Petitioner is a question of fact which cannot be decided without testing the credibility of the Petitioner's evidence on oath and also without considering the admissibility and authenticity of the Petitioner's documents marked P6 to P11 at a formal inquiry.

[45] The Petitioner has produced two official documents issued by the Grama Niladhari of Pinwatte, Panadura (P6) and Wijerama, Maharagama (P7). By P6, the Grama Niladhari, Pinwatte, Panadura has confirmed that the Petitioner's name had not been registered in the Electoral Registers of Pinwatte, Panadura for the period 2010-2012. By P7, Grama Niladhari, Wijerama has confirmed that the Petitioner has been residing in Gangodawila, Nugegoda from 2005, which falls within the Wijerama Grama Niladhari Division.

[46] The 3<sup>rd</sup> to 6<sup>th</sup> Respondents have stated in their objections that the matters pleaded by the Petitioner in her Petition that she was residing in Gangodawila, Nugegoda and not in Pinwatte, are facts personally known to the deceased person and hence, the Respondents are not in a position to testify to the said facts contained in the Petitioner's documents.

[47] It is not correct to say that the Respondents have nothing to do with the proceedings before this court or that they cannot contradict the facts contained in the Petition of the Petitioner. They are the legal representatives of the deceased husband and as legal heirs of the deceased person; they are very much interested in supporting the *ex parte* decree of divorce so that the surviving spouse would remain a divorcee and not as a widow of the deceased.

[48] On the other hand, the Respondents as legal heirs of the deceased person would be the beneficiaries of the property rights of the deceased person, if the *ex parte* decree of divorce is sustained and this application is dismissed. They have neither produced a single document to contradict the documents marked P6 to P11 including the two documents issued by the Grama Niladhari of Pinwatte and Wijerama, nor made any specific allegation whatsoever, that the said two documents were fraudulent

documents. Under such circumstances, this Court is required to rely on the pleadings and the available documents filed by the parties in this court and satisfy itself, whether the decree of divorce had been obtained without the knowledge of or notice to the Petitioner.

[49] The Petitioner has stated in her application that after her late husband maliciously ejected her from the matrimonial house in Puttalam, she commenced residing from March 2005 with a friend in Nugegoda, Jayawardenapura and not at Pinwatte, Pandura as contained in the caption of the Plaintiff filed by her late husband in the District Court Divorce case and the decree nisi. The Petitioner has taken up the same position in her Plaintiff and the Amended Plaintiff filed in the District Court of Puttalam Case No. 2089/L.

[50] The caption of the Plaintiff filed by Phillip Joshep Anthony Rodrigo in the District Court of Puttalam Case No. 2631/D dated 11.09.2009 (P5 (a) refers to the Petitioner's address as "Pinwate, Panadura". The Panadura Fiscal had reported that the summons had been served on the Defendant on 29.11.2010 and the decree nisi on 17.01.2012 at her Pinwatte, Panadura address (Vide- Fiscal Reports marked P5).

[51] The document marked P7 is a Certificate on Residence and Character issued by the Grama Niladhari, No. 52C, Wijerama, Maharagama confirming that the Petitioner had been residing in several rented houses from 2005 in the Gangodawila Grama Niladhari Division as a tenant and at present, she is residing at 53/1, Sri Soratha Mawatha, Gangodawila, Nugegoda from 2005 also as a tenant.

[52] The document marked P8 is a letter issued by a Lecturer of the University of Sri Jayawardenapura confirming that the Petitioner has been residing in Gangodawila area since March 2005 and that in 2011, the

Petitioner together with her neighbors and friends organised a “Katina Chivera Pinkama” at the Gangodawila Sunethradevi International Buddhist Center Temple. The document marked P9 is also a letter issued by Gangodawila Social Service Organisation confirming that the Petitioner has been a member of its Organization since 2011.

[53] The document marked P11 is an affidavit of one H.D.L.I Perera confirming that in 2012, the Petitioner who is residing at No. 43, Soratha Mawatha, Gangodawila assisted him in organising the annual “Katina Chivera Pinkama” at the Gangodawila Sunethradevi International Buddhist Center Temple.

[54] The Grama Niladari of Pinwatte, Panadura Division No. 696 has clearly confirmed that the name of the Petitioner had not been registered in the Electoral List of Pinwatte Panadura Grama Niladhari Division for the period **2010 and 2012**.

[55] As noted, the Respondents have failed to produce a single document to contradict the Petitioner’s documents marked P6 to P6, P7, P8, P9, and P11 and demonstrate that they are fraudulent documents produced by the Petitioner to suppress the correct address of the Petitioner contained in the caption of the Plaintiff filed by the deceased husband in the Divorce case. The obvious result of the absence of any document to contradict the contents of the documents marked P6-P9 and P11 is that it is not open to the Respondents now to contest the correctness of the documents marked P6-P9 and P11 and contend that the Petitioner’s address at all material time of the divorce case was not Gangodawila, Nugegoda.

[56] On an examination of the Petitioner’s documents marked P6-P9 and P11, it is clearly established that the address of the Petitioner during all material time of the divorce case filed by the Plaintiff in the District Court

of Puttalam was Gangodawila, Nugegoda and not the address contained in the caption of the Plaintiff or the decree nisi, namely, Pinwatte, Panadura.

[57] If the aggrieved spouse under such circumstances is told off the gates of her application by way of *restitutio in integrum*, it would clearly cause a miscarriage of justice to the surviving spouse who would suffer serious legal consequences of an *ex parte* divorce decree in terms of her marital status and rights of a widow in her deceased husband's property.

[58] I hold that the Petitioner has clearly satisfied on the material tendered to this Court that *ex parte* decree of divorce had been obtained by her deceased husband without the knowledge or notice to the Petitioner. Hence, the Panadura Fiscal could not have served summons or decree nisi on the Petitioner on the basis of the address contained in the caption in the Plaintiff or the decree nisi. Accordingly, the report of the Panadura Fiscal had been produced by misusing the process of court, causing a miscarriage of justice and serious damage to the Petitioner' marital status and her right to the property of the deceased husband.

### **Exceptional Circumstances**

[59] The Respondents have further raised a preliminary objection that the Petitioner has not pleaded exceptional circumstances in the Petition and therefore, the Petitioner is prevented from seeking relief by way of *restitutio in integrum*. The Petitioner has clearly pleaded exceptional circumstances in paragraph 22 of the Petition and established that the *ex parte* decree of divorce had been obtained without serving summons and decree nisi on her at her Gangodawila, Nugegoda address and thus, such decree of divorce is a nullity. Accordingly, the Petitioner is entitled the to invoke the revisionary and/or *restitutio in integrum* jurisdiction of this court against the said *ex parte* decree of divorce (P5 (g)).

**Delay in preferring this application after a lapse of 2 years and 7 months from the death of the late husband of the Petitioner and after a lapse of 3 years and 8 months from the decree nisi being made absolute by the District Court**

**Failure to prefer a revision application to the High Court of the Civil Appeal against the order made by the District Court**

[60] The next question to be examined is whether the Petitioner is disqualified in obtaining this relief due to undue delay in filing this application. The important question here is to determine whether the Petitioner had given a valid explanation for the delay in filing the present application. It must be remembered that every delay of a party in filing an application for revision or *restitutio in integrum* alone is not enough to turn down such application and shut the door against such party.

[61] The question whether the delay is fatal to an application in revision or *restitutio in integrum* depends on the facts and circumstances of the case (*Gnanapandithan v. Balanayagam* (1988) 1 Sri LR 391). In the High Court of Madras Case of *Mrs. A. Abitha Nachi v. Tmt. K.S. Saroja*, decided on 20 October, 2016, supra), the High Court considered what constitutes an explanation for “sufficient cause” for the delay and stated at paragraph 13 as follows:

*“There cannot be a straitjacket formula for accepting or rejecting any explanation furnished for the delay caused in filing an action or application. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation.*

[62] The Indian Supreme Court recently in *Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy & others*, (2013) 12 SCC 649, decided on 13 September, 2013 held that there should be a

liberal, pragmatic, justice oriented, non-pedantic approach while dealing with an application for condonation of delay. The principles that are elucidated in Paragraphs 15(viii)-(xii) of the Judgment *inter alia*, are:

*"15. (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.*

*(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the Courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.*

*(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the Courts should be vigilant not to expose the other side unnecessarily to face such a litigation.*

*(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.*

*(xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception. ...."*

[63] The Petitioner has pleaded that she first came to know of the divorce action instituted by her late husband on or about 06.05.2013 during the funeral of her late husband and filed as application in the District Court of Puttalam in terms of section 839 of the Civil Procedure Code within a period of 3 months (August 2013) from the date of the death of her late husband P12(a). The learned District Judge, however, held on 23.05.2014 that the District Court has no jurisdiction to set aside a decree of divorce as

the Plaintiff was dead and the Petitioner shall seek relief either in the Court of Appeal or make an application to the High Court of Civil Appeal.

[64] The Petitioner has not made any application to the High Court of Civil Appeal against the order made by the District Court refusing to entertain her application. Even if she had failed to make any application to the High Court of Civil Appeal, it does not prevent her from coming before this Court by way of *restitutio in integrum* as this Court has sole and exclusive jurisdiction to entertain an application by way of *restitutio in integrum* in terms of Article 138 of the Constitution.

[65] The Petitioner filed this application on 03.02.2016 inviting this Court to exercise jurisdiction vested in this court by way of revision/*restitutio in integrum*. Thus, the Petitioner has filed this application within a period of 2 years and 9 months from the date on which she was made aware of the divorce action filed by her late husband. In *Saheeda Umma and another v. Haniffa and others* (1999) 1 Sri LR 150, it was held that an application for *restitutio in integrum* is an action within the meaning of section 11 of the Ordinance No. 22 of 1871 and is prescribed within 3 years. Hence, this application is not barred by the provisions of the Prescription Ordinance.

[66] Even if it is assumed that the Petitioner had filed this application after a period of 1 year and 9 months from the date of the District Court order, the Petitioner is entitled to maintain this application where a miscarriage of justice has occurred in relation to her status and her rights to her late husband's property. It is settled law that if the impugned order or part thereof is manifestly erroneous and is likely to cause grave injustice, the court should not reject the application on the ground of delay alone (*Caroline Nona and Others v. Fedrick Singho and Others* (2005) 3 Sri LR

176). In *Biso Menike v. Cyril de Alwis* (1982) 1 Sri LR 368, Sharvananda, J. (as then he was) at page 379 observed:

*"When the Court has examined the record and is satisfied the order complained of is manifestly erroneous or without jurisdiction, the Court would be loathe to allow the mischief of the order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically."*

[67] In the case of *Lazarus Estates Ltd. v. Beasley* [1956] 1 Q.B. 702 Denning LJ. held that no court will allow a person to keep an advantage which he has obtained by fraud as fraud unravels everything and thus, the court had a jurisdiction to relieve against fraud in all cases. He stated at page 713:

*"No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever."*

[68] In the present case, the delay of 2 years and 9 months in filing this application has been sufficiently explained by the Petitioner and the Petitioner has further established that a miscarriage of justice has occurred to her as described. For the foregoing reasons, I reject the contention of the Respondents with regard to laches and undue delay in filing this application by way of *restitution in integrum* in the Court of Appeal.

[69] In *Sirinivasa Thero v Sudesi Thero* 63 NLR 31, the Court recognised the principle that a court whose act has caused injury to a suitor has an

inherent power to make restitution as may be necessary to meet the ends of justice. Sansoni J, stated at page 34:

*"Justice requires that it should be restored to the position be occupied before the invalid order made for it is a rule that the Court will not permit a suitor to suffer by reason of its wrongful act. The Court will, so far as possible, put him in the position which he would have occupied if the wrong order had not been made. It is a power which is inherent in the Court itself and rests on the principle that a Court of Justice is under a duty to repair the injury done to a party by its act."*

[70] *Restitutio in Integrum* is not itself an action, nor a cause of action (Huber, *Heedendaegse Rechtsgeleertheyt*, 4.37.1.). It is a remedy in terms of which existing legal rights are nullified, rather than enforced, by means of an exercise of extraordinary power of a court of law, providing relief to an aggrieved litigant (Voet, 4.1 (Translator's note)). One or more of the following essential elements must be present before an order of *restitutio in integrum* is available:

1. an order of *restitutio in integrum* involves the nullification or making void ab initio of a previously valid legal transaction, or of the legal consequences of an event (De Groot, *Inleydinge*, 3.48.5; Van Leeuwen, *Roomsche-Hollandsche Recht*, 4.42.pr; Huber);
2. The nullification of valid legal rights by means of an order of *restitutio in integrum* requires the exercise of an extraordinary power, by either a sovereign body, or by a court of law (De Groot, *Inleydinge*, 3.48.5; Van Leeuwen, *Roomsche-Hollandsche Recht*, 4.42.pr; Huber);
3. The exercise of this power to nullify valid legal rights must be justified by the existence of good, or just, reason (*justa causa*). (Do4.1.3; Huber, *Ileedendaegse Rechtsgeleerthayt*, 4.37.6; Voet,

Commentanus, 4.1.1; Van der Linden, Koopmans Handboek, 1.18.10; Nathan, Common Law of South Africa vol 2, Chapter 12, para 845);

4. The nullification of valid legal transactions or the legal consequences of events is ordered to rectify, or to prevent, damage to the interests of the person seeking relief (D.4.6.27; Buckland, Text-book p 720, relying on Do4.1.1-4; Voet, Commentanus, 4.1.1);
5. Once the original legal transaction or the legal consequences of an event are nullified, it follows that any property or benefits given and received in consequence of the original legal relations must be restored to the person from whom they were received, and that any legal rights lost be restored to the aggrieved party (De Groot, Inlaydinge, 3A8.5; Voet, Commentanus, 4.1.21; Hosten et al., Introduction to South African Law, p 293).

- [71] As the Petitioner has satisfied that the *ex parte* decree of divorce has been obtained without the knowledge or notice to her and that a miscarriage of justice has occurred in relation to her status and her rights to her late husband's property. Accordingly, I hold that the Petitioner is entitled to relief by way of *restitutio in integrum* for setting aside the *ex parte* decree of divorce entered by the District Court of Puttalam in Case No. 2621/D.

## Conclusion

[72] For those reasons, I grant relief to the Petitioner as prayed for in paragraph (b) of the prayer to the Petition and set aside the divorce decree absolute dated 19.04.2012 entered by the District Court of Puttalam in Case No. 2621/D.

[73] I further declare that the Petitioner's marital status with the said Plaintiff, Phillip Joseph Anthony Rodrigo remains unaffected by the proceedings held in Case No. 2621/D of the District Court of Puttalam.

[74] The Petitioner's application is allowed. I make no order for costs.

**JUDGE OF THE COURT OF APPEAL**

**Shiran Gooneratne J.**

I Agree.

**JUDGE OF THE COURT OF APPEAL**