

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

In the matter of an application for  
Restitutio-in-Integrum in terms of Article  
138 of the Constitution of the Democratic  
Socialist Republic of Sri Lanka.

**Case No. CA/RII/56/2023**

**DC Batticaloa Case No.M/9736/13**

Mahatheva Muralitharan,  
No.22, Station Road,  
Batticaloa.

**PLAINTIFF**

**Vs.**

Anthony Upali de Silva,  
No.77/1, Trinco Road,  
Batticaloa.

**DEFENDANT**

**AND NOW BETWEEN**

Anthony Upali de Silva,  
No.77/1, Trinco Road,  
Batticaloa.

Also of  
No.6, Ediriweera Avenue,  
Dehiwela.

**DEFENDANT-PETITIONER**

Vs.

Mahatheva Muralitharan,  
No.22, Station Road,  
Batticaloa.

**PLAINTIFF-RESPONDENT**

**Before:** **R. Gurusinghe J.**

**&**

**Dr. Sumudu Premachandra J.**

**Counsel:** Upul Jayasuriya, P.C. with P. Radhakrishnan for the  
Defendant – Petitioner instructed by Niluka  
Dissanayake.

Hejaaz Hizbullah with Shifan Maharoo for the Plaintiff  
– Respondent instructed by Neethika Partners.

**Argued On:** 03.09.2025

**Written Submissions:** 10.10.2025 by the Plaintiff-Respondent  
09.10.2025 by the Defendant-Petitioner

**Judgment On:** 15.10.2025.

**Dr. Sumudu Premachandra J.**

1] This is an application for Restitutio-in-Integrum in terms of Article 138 of the Constitution. For the first instance, the Defendant-Petitioner (sometimes referred to as the Petitioner) prays that this Court issues notice on the Plaintiff-Respondent (sometimes referred to as the Respondent) and grant interim relief by staying all proceedings in the District Court Batticaloa Case No. M/9736/2013, preventing the Plaintiff-Respondent, his agents or assigns from executing or dealing with the impugned deed of transfer No. 320 dated 06.11.2012, or otherwise alienating, transferring, mortgaging, leasing, or exploiting the subject property until final determination of this application; to call for the original case record;

And, as the main relief to set aside the ex parte judgment and decree dated 16.12.2019, to restore the status quo as it stood prior to the ex parte trial on 15.03.2018, to recommence proceedings afresh from that stage, to restrain the plaintiff-respondent from exploiting the impugned deed pending final determination of the District Court Colombo Case No. DLM 000239/12; and to grant such other and further relief as the Court may deem fit.

2] The matter was supported; ex parte for interim relief on 19.12.2023 and on that day, formal notice was issued on the Respondent and interim reliefs of paragraphs (b), (c) and (d) were granted. Stay orders are extended till today.

3] Backdrop of this application is as follows: The Petitioner, aged 79, is the lawful owner in peaceful possession since 1983 of prime lands at Nos. 73 and 77 Trincomalee Road, Batticaloa. By Agreement to Sell dated 22.01.2010 (P1), he contracted to sell No. 77 for Rs. 16,500,000/-, receiving Rs. 5,000,000/- as advance, with the balance Rs. 11,500,000/- payable within a week, failing which no deed would be executed. The Respondent defaulted on payment, and thus no transfer took place. In December 2010, the Respondent attempted to forcibly eject the Petitioner, relying on Deed No. 320 dated 06.11.2010, which bore a

forged signature of the Petitioner. The Petitioner lodged complaints regarding the fraudulent deed at the Batticaloa Police (CIB/293/60) on 06.12.2010 and at the CID on 10.12.2010, while the Respondent subsequently filed DC Batticaloa Case No. M/9736/2013 claiming Rs. 1,350,000/- as consideration under the forged deed.

3] Meantime, the Petitioner instituted the DC Colombo Case No. DLM/239/2012 challenging Deed of Transfer No.320 as forged, and two Examiners of Questioned Documents (EQD) reports in 2017 and 2022 confirmed that the signature on the deed was not his. Despite this, the Respondent filed DC Batticaloa Case No. M/9736/2013 claiming Rs. 13,500,000/- as consideration for the forged deed. During its pendency, while a revision application was before the Civil Appeals High Court, the Batticaloa District Court erroneously fixed the case for ex parte trial on a calling date, contrary to procedure. An ex parte decree dated 16.12.2019 was thereafter entered against the Petitioner without annulling Deed No.320, causing grave prejudice.

4] When the Petitioner sought to purge default, the learned District Judge rejected a consent arrangement to set aside the decree, reprimanded him in open court, and reported him to the police, resulting in Magistrate's Court Case No. B/646/22 on contempt charges. The Petitioner contends that court records have been tampered with, that the judge who presided over the case is closely related to a litigant in parallel suits against him, and that the notary to the forged deed (now a judicial officer) has been indicted along with others in the High Court of Batticaloa (HCB 3366/2020).

5] The Petitioner asserts that the ex parte decree is per incuriam, procedurally flawed, and contrary to deep-rooted civil practice, highlighting that the Plaintiff was absent at the first ex parte trial date, no notice was given upon receipt of the High Court's order, and consent to set aside the decree was unreasonably refused. He further stresses that the fraudulent deed continues to have legal

force despite EQD findings and pending indictments, creating imminent risk of unlawful transfer to third parties.

6] The Petitioner stressed that in these exceptional circumstances, with no immediate alternative remedy, the Petitioner seeks relief by way of *restitutio in integrum* under Article 138(1) of the Constitution to restore the status quo and prevent irreparable injustice, requesting interim orders to safeguard his ownership and rights over the property. That is the Petitioner's case.

7] The Respondent had filed objections. The Respondent raises preliminary objections stating that the Petitioner is guilty of suppression and misrepresentation of material facts, has not come before the Court with clean hands, and has failed to comply with the mandatory provisions of the Court of Appeal Rules of 1990. Without prejudice to these objections, the Respondent denies the averments in the Petition except those specifically admitted. The Respondent admits certain facts, including specific paragraphs relating to case records, ex parte trial dates, judgments, and writ applications, while denying or claiming lack of knowledge regarding several other averments. In particular, the Respondent disputes the Petitioner's reliance on expert reports concerning questioned signatures, pointing out irregularities in the examination methodology and in the tendering of certified documents and reports as evidence.

8] The Respondent emphasizes that judgments and decrees have already been entered in his favour in DC Batticaloa Case No. 9736/M/13 and the Respondent prays that the Court dismisses the Petitioner's application, vacate all interim relief granted, refuse any further interim relief, award costs, and grant any other relief deemed appropriate by the Court.

9] In countering to the objections, the Petitioner says that the Respondent acted in bad faith by misleading the District Court in Batticaloa during the pendency of a revision application before the Civil Appeal High Court in Batticaloa. In particular, the Respondent's request to fix the case for ex parte trial on

15.03.2018 was made deceitfully, causing prejudice to the Petitioner. Despite the Respondent's absence on the scheduled ex parte trial date, the case was re-fixed without due notice to the Petitioner, depriving him of the opportunity to safeguard his interests. The Petitioner further highlights that the Respondent dishonestly misrepresented payment of the balance consideration under the Agreement to Sell and secured an ex parte decree for amounts not actually paid.

10] The Petitioner further asserts that the Respondent has repeatedly suppressed material facts and misled courts, as evidenced by his contradictory conduct in CA Writ 306/2023 and CA Writ 565/2021. Moreover, while challenging EQD reports in the DC Colombo Case No. DLM/239/2012, the Respondent deliberately withheld that the second report was based on contemporaneous specimen signatures submitted by him. The Petitioner reiterates that the ex parte decree was obtained through deception, abuse of process, and miscarriage of justice, and respectfully prays that the Respondent's version be rejected and relief granted as sought in the Petition.

11] Thus, the Petitioner sought mainly;

- a) Issue notice on the plaintiff-respondent;
- b) Make interim order;
- c) Grant interim relief ....;
- d) Make interim relief;
- e) Make order setting aside the ex parte judgement and decree dated 16.12.2019 entered in District Court Batticaloa Case No. M/9736/2013;
- f) Make order restoring status quo in District Court Batticaloa Case No. M/9736/2013 as it was prior to fixing for ex parte trial on 15.03.2018;
- g) Make order to commence proceedings a fresh in District Court Batticaloa Case No. M/9736/2013 as at from 15.03.2018; and
- h) Make order preventing the plaintiff-respondent his agents and assigns from executing any deed or document notarial or otherwise and from engaging in any act whatsoever including but not restricted to alienating,

transferring, mortgaging, letting on lease or rent the subject matter of this application by exploiting the impugned Deed of Transfer No.320 dated 06.11.2010 attested by M.H.M. Hamsa Notary Public until the final determination of District Court of Colombo Case No. DLM 000239/12;

i) Grant costs and orders deem fit...

12] The Respondent instituted the action of recovery of money, a sum of Rs. 1,350,000/- against the Petitioner in the District Court of Batticaloa as to the consideration of Deed of Transfer bearing No. 320 dated 06.11.2010 attested by M.H.K. Hamsa, Notary Public (X). Consequent to the said transaction, the Petitioner stated that he lodged a complaint to the Criminal Investigation Department, CIB /293/60 dated 10.12.2010. Further, the Petitioner said that he instituted a case against the Respondent in the District Court of Colombo, bearing No. DLM 00239/12 on 18.12.2012, praying for the declaration of annulment of the purported Deed No. 320.

13] The Respondent, by plaint dated 05.03.2013, after the DLM 00239/12, has filed case bearing No. M/9736/2013, in the District Court of Batticaloa for recovery of money, a sum of Rs. 1,350,000/- against the Petitioner in the District Court of Batticaloa as to the consideration of Deed of Transfer bearing No. 320 dated 06.11.2010 attested by M.H.K. Hamsa, Notary Public. Pleadings show that the answer was filed by the Petitioner, however, his list of witnesses was rejected by the learned District Judge of Batticaloa. Against the said order, the Petitioner has filed a revision application bearing No. EP/HCCA/RE 15/2016. The learned President Counsel for the Petitioner in the oral submission has informed this court that the revision application was allowed and the learned District Judge of Batticaloa was directed to accept the list of witnesses; meanwhile, the ex parte trial was held and judgment was pronounced against the Petitioner, rendering Civil Appeal High Court Order nugatory.

14] The journal entries of the case bearing No. M/9736/2013 shows that the matter was taken out of the trial roll, and calling dates were given. This court

notes that DC case bearing No. M/9736/2013 was called on 16.01.2017, 20.03.2017, 29.05.2017, 23.08.2027, 02.11.2017 25.01.2025 and 15.03.2018. When I go through P5, on 15.03.2018, it is obviously a calling date, and the matter has not been fixed for trial. Simply, it was not a trial date or first date for the trial. Despite being a calling date, the learned District Judge has fixed the matter ex parte, thereafter an ex parte inquiry was held, ex parte judgment and the decree were entered.

15] Section 84 deals with the matter of fixing ex parte when a Defendant is absent. It says;

*“Section 84 of the Civil Procedure Code which deals with the default of a Defendant reads: If the **defendant fails to file his answer** on or before the day fixed for the filing of the answer, or on or before the day fixed for the subsequent filing of the answer **or having filed his answer, if he fails to appear on the day fixed for the hearing of the action**, and if the court is satisfied that the defendant has been duly served with summons, or has received due notice of the day fixed for the subsequent filing of the answer, or of the day fixed for the hearing of the action, as the case may be, and if, on the occasion of such default of the defendant, the plaintiff appears, then the court shall proceed to hear the case ex parte forthwith, or on such other day as the court may fix” [ Emphasis is added]*

16] In fact, the day, it was appointed for fixing ex parte, precisely, on 15.03.2018, is a calling date, not a trial date. This court firmly believes that since the Petitioner has filed the answer and the said date merely to see the progress of the revision application, the learned District Judge of Batticaloa cannot fix the matter for ex parte on a calling date as stipulated by section 84 of the Civil Procedure, and therefore, the order is tainted with illegality. If the Defendant failed to file an answer, or defaulted on the trial date, the court can fix it for ex parte trial.



17] In **Kandasamy v. Kandasamy** [2006] 2 SLR 260 His Lordship Wimalachandra J. held:

*“However, **on the trial date if the defendant does not appear** but an Attorney-at-Law appears on his behalf and acts and pleads on his behalf, the defendant is deemed to have duly appeared before Court..... When sections 84 and 144 of the Civil Procedure Code are read with section 24 of the Code, it appears that it is not necessary for a defendant to be present in person, but he is deemed to have duly appeared before Court when he is represented by the registered Attorney-at-Law or an Attorney-at-Law on the instructions of his registered Attorney-at-Law.” [ Emphasis is added]*

18] Thus, it is clear, it should be on the trial date and not on a calling date. Thus, it is seen that there was no fault on the Defendant, and the court ought not to have fixed ex parte on that day, 15.03.2018.

19] In **Donsimange Kanchana vs Diyapaththugama Vidanelage Sirisena Samarasinghe**, CA 1158/96 (F), ARGUED & DECIDED ON: 11.07.2012., His Lordship A.W. Abdus Salam, J. considered the position when the Defendant has no fault as;

*“The learned trial judge **could not have ignored the fact that the defendant has been unduly prejudiced by the act of Court in fixing the case for ex parte trial for no fault on the part of the defendant. In my opinion he should have been granted the relief asked for.***

*In any event as was suggested by the learned counsel for the defendant appellant on 4th October 1995, **when the court fixed the matter for ex-parte trial it has been done without jurisdiction since none of the ingredients spelt out in section 84 had given rise to the matter being fixed for ex parte trial. Taking all these matters into consideration to mete out Justice, the only way in which the Appellate Court can***

***now undo the damage caused to the defendant appellant***” [Emphasis is added]

19] Thus, fixing the ex parte trial is questionable. In ***Rajasingham v. Seneviratne and Another***, [2002]1 SLR 82, Wigneswaran, J. clearly held;

***"When the order fixing the case for ex parte trial itself was questionable the nature of evidence placed by the 2nd defendant to set aside the ex parte decree becomes irrelevant.***

*If notice of amendment of pleadings is not given in terms of the law to the party affected, if the Court does not consider (whether the affected party is before Court or not) the feasibility of the amendment prayed for and act in terms of the law, ***all proceedings thereafter would become tainted with illegality, whatever the shortcomings in the defendant's conduct might be. A Court of law should not be an apathetic bystander under these conditions***".* [ Emphasis is added]

20] Thus, on serving the ex parte decree, has the Petitioner come within 14 days, has the Petitioner shown a reasonable excuse, and all questions relating to purge default would not arise when all the proceedings have been tainted with illegality, 15.03.2018 onwards.

21] This Court, by Article 138 (1) of the Constitution, is vested with the power to correct all errors of the lower court. Article says;

*"The Court of Appeal shall have and exercise, subject to the provisions of the Constitution or any law, ***an appellate jurisdiction for the correction all errors in fact and in law which shall be committed by any Court of First Instance, tribunal or other institutions*** and sole and exclusive recognizance, by way of appeal, revision and ***restitutio in integrum*** of all causes, suits, actions, prosecutions, matters and things of which such Court of First Instance, tribunal or other institution may have taken cognizance".* [ Emphasis is added]

22] Nearly a century ago, in **Phipps v. Bracegirdle** 35 NLR 302, the Supreme Court of Sri Lanka held;

*"Relief by way of restitutio in integrum from the effect of an order in judicial proceedings will not be granted where the legality of such order is not questioned."*

23] In the impugned order, the legality is seriously questioned and apparently tainted with. Therefore, we set aside the entire proceedings from 15.03.2018 (including 15.03.2018, the order fixing ex parte) and direct the learned District Judge of Batticaloa to recommence the trial inter partes as directed by the final order No. EP/HCCA/RE/15/2016 and further direct that District Court matter is to be tried expeditiously. Therefore, we make orders granting relief prayer "e", "f" and "g". As prayer "h" is related to the DC Colombo DLM/ 239/2012 case, not relating to District Court Batticaloa Case No. M/9736/2013, prayer "h" is refused. Thus, the application for Restitutio-in-Integrum is allowed; however, the parties shall bear their own costs.

JUDGE OF THE COURT OF APPEAL

R. GURUSINGHE J.

I agree

JUDGE OF THE COURT OF APPEAL