ANDRADIE

v.

JAYASEKERA PERERA

COURT OF APPEAL.
G. P. S. DE SILVA, J. AND SIVA SELLIAH, J.
C. A. APPLICIATION No. 488/80.
D. C. COLOMBO CASE No. 10816/D.
JUNE 10, 1985.

Revision and/or Restitutio in integrum – Divorce action – Ex parte trial – Fraud in service of summons and obtaining decree – Procedure that should be followed.

Where a decree entered in a divorce suit was sought to be set aside by way of an application for revision and/or restitutio in integrum on the ground of fraud committed by –

(*a*) service of summons on being pointed out without verification by affidavit of the person pointing out,

(*b*) false pleadings and evidence,

(*c*) getting an imposter to be present in Court in response to alleged service of notice of decree nisi.

Held (on a preliminary objection) –

The practice has grown and almost hardened into a rule that where a decree has been entered ex parte in a 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 that the Court of Appeal will grant the extraordinary relief by way of Revision or Restitutio in Integrum.

Cases referred to :

(1) *Loku Menika v. Selenduhamy (1947) 48 NLR 353.*
(2) *Dingihamy v. Don Bastian (1962) 65 NLR 549.*
(3) *Nagappan v. Lankabarana Estates Ltd. (1971) 75 NLR 488, 491.*
(4) *Jayasuriya v. Kotalawala (1922) 23 NLR 511.*
(5) *Orathinahamy v. Romanis (1900) 1 Browne's Rep. 188, 189.*
(6) *Gunawardene v. Kelaart (1947) 48 NLR 522, 524.*
(7) *Habibu Lebbe v. Punchi Ettena (1894) 3 CLR 84, 85.*
(8) *Gargial v. Somasunderam Chetty (1905) 9 NLR 26.*
(9) *Weeraratne v. Secretary, D. C. Badulla (1920) 2 C. L. Rec. 180 ; 8 C. W. R. 95.*
(10) *Caldera v. Santiagopillai (1920) 22 NLR 155, 158.*
(11) *Sayadoo Mohamado v. Maula Abubakkar (1926) 28 NLR 58, 63.*

APPLICATION for Revision and/or Restitutio in Integrum for setting aside of decree nisi and decree absolute entered in District Court.

E. D. Wikremanayake with *A. W. Atukorala* for petitioner.

S. Mahenthiran for plaintiff-respondent.

Cur. adv. vult.

July 12, 1985.

SIVA SELLIAH, J.

This is an application for Revision and/or Restitutio in Integrum in which the petitioner who was the wife of the respondent seeks to revise the orders made by the learned District Judge of Colombo in case No. 10816/D in regard to the holding of an ex parte trial, entering decree nisi and absolute for divorce against her when she had no notice whatever of the action and to set aside the proceedings subsequent to the filing of plaint by the respondent and to permit the petitioner to file answer and proceed with the case.

The facts material to the application are as follows :

The parties married on 22.2.74 after which they lived together and on 10.8.75 the respondent deserted her. The petitioner then instituted an action for maintenance in case No. 92868/A (vide A) in the M. C. Panadura on 13.1.76 and at the inquiry held on 13.4.76 the petitioner offered to be reconciled to the respondent but he had refused alleging immoral conduct on her part. The case was postponed and on 9.7.76 the respondent agreed to pay her monthly maintenance in a sum of Rs. 100 pending a divorce case filed by him on 8.7.76 in D. C. Colombo 1/787/D (vide A1). The petitioner filed answer stating she was prepared to live with him and the respondent withdrew the action. In the meantime the respondent continued to pay her maintenance until 26.7.77 on which date both agreed to live together and they so lived together at the house of her parents. On 6.12.77 the maintenance case was called again and the respondent refused to live with the petitioner and was directed to resume payment of maintenance – he continued to do so until September 1979 and as he failed to pay thereafter she moved to have the case called and the maintenance case was transferred to D. C. Panadura 195/M which was the Family Court. Thereafter when the maintenance case was called on 26.3.80, the respondent produced a document purporting to be the Decree Absolute for Divorce in case No. 10816/D of the D. C. Colombo granting the respondent a divorce from the petitioner in which Decree Absolute had been entered and he accordingly moved that the maintenance case against him be dismissed. As she was taken completely by surprise by this divorce action of which she had had no notice, the maintenance case was postponed for 7.5.80 to enable her to verify matters. Thereafter on examination of the case records in case No. 1/787/D (A1) which had been dismissed and case No. 10816/D (A2), of which certified copies were issued to her in April 1980 she found to her entire surprise the following :–

(*a*) Case No. 10816/D had been instituted on 11.8.76 and the respondent had alleged refusal by her of conjugal rights to him and non-consummation of marriage and that the petitioner continued to be still a virgin and that as a result of constant quarrels on this ground he was compelled to leave her on 10.8.75. In this application before us she draws reference to his entirely contrary position in the Maintenance Case (A) where he has refused to live with her alleging immoral conduct on her part.

(*b*) The respondent had stated that he had pointed out the petitioner to the fiscal process server and that summons was served on her on 16.12.78.

In this application it has been brought to our notice that there has been no affidavit of identity to say that summons had been served on her upon being pointed out by him.

(*c*) The Journal entries revealed that the petitioner was not present or represented and that ex parte trial was held on 6.2.79 and the respondent had stated he had left her on 10.8.75.

(*d*) The Process Server reported that Decree Nisi had been served on 15.3.79.

(*e*) The case was taken up at the expiry of 3 months on 15.6.79 and the petitioner was recorded as having been present on that date and Decree Absolute has been entered.

It was her contention accordingly that a gross fraud had been perpetrated on her and therefore she made this application for Revision and/or Restitutio in Integrum. The state of affairs revealed in paras (*a*)-(*e*) above regarding the institution of case No. 10816/D for divorce and the entering of Decree Absolute without the knowledge and participation of the petitioner does, if in fact correct, produce serious disquiet regarding the machinery involving the process of the District Court and screams for investigation. At the hearing before us a preliminary objection was taken that the petitioner could not be heard, much less succeed in this application, as she has sought to shortcircuit matters without in the first instance bringing these matters to the notice of the District Court and seeking to have the order for ex parte trial, Decree Nisi and Absolute set aside in that forum on the ground that she was unaware of these proceedings and that she never had notice of them and satisfying that court of the fact that she had never been served with summons or the Decree Nisi and had not been present when Decree Absolute was entered in the case and therefore that these orders had been made without jurisdiction and were null and void, and that not having done so she could not invoke the powers of Revision and/or Restitutio in Integrum which are extraordinary remedies which should not be exercised by this Court when the applicant could have had relief in the District Court. The learned Counsel for respondent quoted a long list of cases in support of this contention and cited the following cases : *Loku Menika v. Selenduhamy* (1), *Dingihamy v. Don Bastian* (2), *Nagappan v. Lankabarana Estates Ltd.* (3), CA 2395/80 CA Minutes of 8.9.81 ; CA 592/79 CA Minutes of 2.11.81 ; CA 734 CA Minutes of 5.7.83 ;

CA LA 89/83 CA Minutes of 6.4.84 ; CA 306/82 CA Minutes of 21.9.84. He contended that these decisions clearly showed that it was a long established practice that the petitioner must in the circumstances first seek her remedy in the District Court before coming to this court and therefore this application must fail.

Against these contentions and authorities it was the contention of the learned Counsel for petitioner that where a fraud has been committed, the remedy was by way of an application for Restitutio in Integrum or action for damages. He contended that the petitioner never wanted a divorce, that the respondent's contradictory contention about her in the maintenance action and in the divorce action already referred to above, his payment of maintenance even after the divorce decree had been entered all showed that the respondent had obtained a decree for divorce behind her back and on the single authority quoted by him in the case of *Jayasuriya v. Kotalawala* (4) contended that Restitutio in Integrum or an action for damages was the proper remedy. The arguments raised by him above are clear ; but the fact remains that the record in the divorce action 10816/D (A2) shows equally clearly that summons was served on the petitioner by being pointed out, that as she had not appeared ex parte trial was held and Decree Nisi was entered and reportedly served on her and on 15.6.79 her presence recorded and Decree Absolute entered. Now these are all matters of record. No doubt ordinary prudence dictates that where summons is served on being pointed out an affidavit of identity by the person so pointing out should be filed – this has not been done in this case, and in the circumstances it may well be that some person other than the petitioner had been pointed out ; but so long as it remains in the record of the action that summons had been served and Decree Nisi served and Decree Absolute entered in her presence the record and the entries and the action of the District Judge cannot be questioned. It has been held in the cases *Orathinahamy v. Romanis* (5) and *Gunawardene v. Kelaart* (6) that the record maintained by the judge cannot be impeached by allegations or affidavits and that "the prospect is an appalling one if in every appeal it is open to the appellant to contest the correctness of the record". *Gunawardena v. Kelaart (supra)* Thus in the face of what appears on the record it is not possible for this court to controvert the record of the District Court unless in the first instance material has been provided before the District Court itself that the entries pertaining to the service of summons and the service of Decree Nisi and entering

of Decree Absolute are incorrect and mere fictions and unless the District Judge is invoked in the first instance to set aside all the proceedings and orders made before him on the ground of a fraud that has been perpetrated rendering all those proceedings and orders ultra vires and null and void. All these are questions of fact as is the question of fraud on which evidence will appear necessary and the petitioner herself should be made available for cross-examination and consequently the judge must make his findings on questions of fact before this court can be invited on inferences and conduct to hold that there has been fraud. I am also of the view on the long line of cases quoted by the learned counsel for respondent 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.

In the case of *Loku Menika v. Selenduhamy (supra)* Dias, J. having considered the cases of *Habibu Lebbe v. Punchi Ettena* (7), *Gargial v. Somasunderam Chetty* (8), *Weeraratne v. Secretary, D.C. Badulla* (9), *Caldera v. Santiagopillai* (10), *Sayadoo Mohamedo v. Maula Abubakkar* (11) followed these decisions and held –

> "where an order is made ex parte the proper procedure to be adopted by the person against whom that order has been made is, in the first instance, to move the court which made the order to set it aside ; such an application would not be in terms of the Criminal Procedure Code but is one which is a rule of practice which has become deeply ingrained in the legal system of Ceylon"

These decisions have consistently been followed in the later cases quoted earlier in the body of this judgment and establish a procedure and practice which has taken deep root and should not be lightly disturbed. I therefore hold that the preliminary objection raised by learned Counsel for the respondent is entitled to succeed and dismiss this application. There will be no costs of this application.

G. P. S. DE SILVA, J. – I agree.

Application dismissed.