

**PAULIS
VS
JOSEPH AND OTHERS**

COURT OF APPEAL.

IMAM, J. AND

SRISKANDARAJAH, J.

CA 478/2003.

DC MT. LAVINIA 160/931/D.

OCTOBER 28, 2004.

SEPTEMBER 30, 2004.

JULY 19, 2005.

Divorce obtained ex-parte - Complaint that divorce was obtained by abuse and misuse of legal process and by fraud - Restitution in intergrum - Court of Appeal (Appellate Procedure Rules) 1990, and Rule 3(5)-No affidavit accompanying objections - Exceptional circumstances - Right to pension - Constitution, Article 138(1).

The petitioner sought to revise and sought *restitutio - in intergrum* and to set aside the judgment, decree nisi, and decree absolute entered dissolving the marriage of the petitioner to one P, and a declaration that she is the lawful wife of the said P. She further sought a declaration that, she is entitled to the pension.

It was contended that the petitioner not being a party in the District Court case cannot seek *restitutio - in - intergrum* and as the objections are not accompanied by an affidavit the objections should not be accepted.

HELD:

- (1) Where one of the parties to the divorce action was dead, and if it is shown by the surviving spouse that divorce was obtained fraudulently without service of summons and by abuse and misuse of legal process the Court of Appeal has the power to grant *restitutio - in - intergrum* as well as act in revision and set aside the divorce.
- (2) The Colombo fiscal's reports seem to have been produced by a misuse of the legal process.

Held further :

- (3) Even though there is no affidavit accompanying the objections, the petitioner has pointed out exceptional circumstances to revise the order.
- (4) The petitioner is the lawful wife of deceased P and is entitled to the pension, being the lawful wife of P.

APPLICATION for revision and *restitutio - in intergrum* from an order of the District Court of Mt. Lavinia

Cases referred to :

1. *Kusumawathie vs Wijesinghe* 2001 Sri LR 238
2. *Sirinivasa Thero vs. Sudassi Thero* - 63 NLR 31

S. Mithrkrishan R. Mithrkrishanan for petitioner.

A. Muthkrishan with *K. Sabaratnam* for respondent.

Cur. adv. vult.

September 7, 2005.

IMAM, J.

This is an application by the Petitioner for a revision and or Restitutio in Intergrum to set aside the Judgment, Decree Nisi, Decree Absolute entered in DC. Mount Lavinia in Case No. 160/93 Divorce dissolving the marriage of the petitioner to Anthonipillai Paulis null and void, for a declaration that the petitioner is the lawful wife of the said Anthonipillai Paulis who died on 16. 12. 2002, for a declaration that the petitioner is entitled to obtain the widow's pension of her deceased husband Anthonipillai Paulis, and for an order on the 2nd and 3rd Respondents to pay the pension of Anthonipillai Paulis who died on 16. 12. 2002 to the Petitioner, *inter alia* other reliefs sought for in the Petition.

On 12. 07. 2004 Counsel for the petitioner brought to the notice of Court that the statement of objections of the 1st Respondent were not accompanied by an affidavit as stipulated by the Court of Appeal (Appellate Procedure) Rules, which resulted in Counsel for the 1st Respondent seeking permission from Court to file an affidavit, which application was refused by this Court.

The facts of this case as set out in the Petition are briefly as follows : The Petitioner is the widow of Anthonipillai Paulis who died on 16. 12. 2002 while serving as Assistant Director of Education (English) at Thunukkai in the Mullaitivu District (X7a). The Petitioner married the aforesaid Anthonipillai Paulis on 20. 02. 84 (X2a), with the Birth Certificate of the petitioner being marked as (X1). After marriage, the Petitioner was living with her husband at her ancestral and dowry house at No. 131C,

Beach Road Jaffna. At the time of their marriage, the Petitioner's husband was employed as a Teacher at Pundulu Oya, and he was subsequently transferred to other schools. On or about 1990 the Petitioner having discovered that her husband had started an illicit affair with the 1st Respondent, resulted in constant misunderstanding between the Petitioner and her husband. Nevertheless the Petitioner continued to live with her husband, and the couple did not produce any children. About October 1995 due to the problems in Jaffna the Petitioner and her husband were displaced from their house at 131C Beach Road, Jaffna with a fax copy of a letter given by the Grama Sevaka corroborating this situation (X3), and a English translation being marked as (X3a). The Petitioner went to live with her mother at Nellyyaddy, although her husband never joined her as promised. The Petitioner after about eight months came to Colombo on or about 23. 06. 1996 and was residing at SSK Lodge at 42 A/1, Sagara Lane, Bambalapitiya for about two years with a true copy of the declaration made to the police being marked as X4. From about 24. 06. 1998 the Petitioner was living at 12, Fernando Road, Colombo 06 until February 2000, a true copy of the Declaration made to the Police dated 24. 06. 1998 being marked as X5. Since then the Petitioner is living at No. 10/1, Fernando Road, Colombo 06 as set out in (X6).

The Petitioner's position is that although she made several attempts to live with her husband who was employed in the Education Department at Thunukkai, he evaded living with her. The Petitioner states that her husband died while he was functioning as Assistant Director of Education (X7a) and his funeral took place in Jaffna which she could not attend. The Petitioner avers that after the death of her husband when she went to the Zonal Department of Education Thunukkai on or about 27. 12. 2002, and made an application to get her Widow's Pension, the Petitioner to her utter dismay was informed by the Officers there, that in her husband's file there is a marriage certificate stating that her husband was married to the 1st Respondent. In mid January 2003 the Petitioner was informed by the aforesaid officers that the 1st Respondent had claimed the Widow's pension which was due to the petitioner and that the 1st Respondent had

produced the Decree of Divorce of the petitioner's marriage to her husband issued by the District Court of Mount Lavinia. The Petitioner states that she obtained certified copies of all the relevant papers in DC Mount Lavinia Case No. 160/93, including the Judgment, Decree nisi and Decree Absolute marked as X8a, X8b, and X8C respectively.

The Petitioner contends that in the aforesaid Divorce case against her filed by her plaintiff husband, her address has been cited as "134 Eli House Road, Colombo 15," although she never resided at this address, and further does not know these premises. She avers that although the Colombo Fiscal reported to Court that summons was served on the Petitioner on 08. 11. 1993 that summons was never served on her. She further contends that after Ex-parte Trial was held on 10. 10. 94, although the Colombo fiscal reported that Decree Nisi was served on her on 23. 12. 94, it was never served on her. The Decree Nisi was made absolute on 07. 06. 95. The Petitioner contends that the particulars of the registered Voters lists in the years 1993 to 2001 of the addresses mentioned in the Pleadings as mentioned in the Documents marked X10a (1) to X10a (9) do not refer to the name of her husband the Plaintiff in the Divorce Case, and the voters list marked X11a(1) to X11a(9) do not contain her name, and thus the addresses of both the plaintiff (her husband) and herself are false. The Petitioner submits that her husband had sought to obtain the divorce by abuse and misuse of legal process and or by fraud and or by producing false evidence. She further states that grave injustice has been caused to her, and she has been deprived of her widow's pension. She contends that the final decree entered in the Divorce Case be declared null and void.

As the objections of the 1st respondent are not accompanied by an affidavit, and no subsequent affidavit was filed, Rule 3 (5) of the Court of Appeal (Appellate Procedure Rules) 1990 has been contravened, and thus the objection cannot be accepted, as the aforesaid rule is mandatory. Nevertheless the position of the 1st respondent is that the remedy of *restitutio in integrum* is an extra ordinary remedy and should only be

granted in exceptional circumstances and that the District Court having original jurisdiction the parties must go before the District Court. The position of the 1st respondent is that only a party to a contract or to legal proceedings can seek this relief. The view of the 1st Respondent is that the issue of summons is a matter between Court and the officer concerned, and when an alternative remedy is provided in law, the remedy has to be exhausted before resorting to Restitutio in integrum. The contention of the 1st Respondent is that she got married to Anthonipillai Paulis on 04. 07. 1998, and is thus the lawful wife.

As the 1st Respondent did not file any affidavit with the objections as mentioned earlier the Petitioner's averments stand uncontradicted. Counsel for the 1st Respondent accepted this in his oral submissions; however he wished to make written submissions on a point of law. 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. The facts of this case are almost identical to *Kusumawathie vs Wijesinghe*⁽¹⁾. That case too dealt with the right to pension. In that case the wife filed papers in the District Court to set aside the ex-parte Judgment and Decree after the death of the plaintiff when she became aware that the Decree for Divorce was obtained fraudulently. The District Court held that it has no jurisdiction as the plaintiff was dead. The Court of Appeal held that in a situation where one of the parties to the divorce action was dead, and if it is shown by the surviving spouse that divorce was obtained fraudulently without service of summons and by abuse and misuse of legal process the Court of Appeal has the power to grant Restitutio in integrum as well as act in revision and set aside the Divorce.

In this case although the Colombo Fiscal reported that summons had been served on the petitioner, on examination of documents marked X10a(1) to X10a(9) and X11a(1) to X 11a(9), it is proved beyond doubt that the addresses of the Plaintiff (husband) and Defendants (Petitioner) are not those contained in the caption of the plaint nor in the Decree

Nisi. Hence the Colombo Fiscal could not have served summons nor a copy of the Decree Nisi on the Petitioner. Thus the Colombo Fiscal's reports seem to have been produced by a misuse of the legal process.

In *Sirinivasa Thero vs Sudessi Thero*⁽²⁾ at 31 it was held that Article 138(1) of the Constitution has vested in the Court of Appeal sole and exclusive jurisdiction to grant relief by way of Restitutio in integrum. The Petitioner has also pointed out exceptional circumstances to revise the order of the learned District Judge of Mount Lavinia entered in District Court Mount Lavinia Case No. 160/93 Divorce dissolving the marriage of the Petitioner to Anthonipillai Paulis which order this Court declared null and void. The Petitioner has thus proved that she is the lawful wife of the aforesaid Anthonipillai who died on 16. 12. 2002.

For the aforesaid reasons we grant relief to the petitioner as prayed for in the prayer to the petition, and this Court directs the 2nd and 3rd Respondents to pay the widow's pension to the Petitioner being the lawful wife of Anthonipillai Paulis who died on 16. 12. 2002. We further order the 1st Respondent to pay the Petitioner Rs. 5000/- costs.

SRISKANDARAJAH, J. - I agree.

Application Allowed.