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

In the matter of an application for Revision and/or *Restitutio* in *Integrum* in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA Case No: RII/97/2024
Provincial High Court – Colombo
Revision Application No. HCRA 89/24
Magistrate's Court – Nugegoda
Case No. 24725/Maintenance

Shyamali Thanuja Liyanage,
No. 245, University Road,
Raththanapitiya,
Boralesgamuwa.

Applicant

Vs.

Samarasinghe Panalu Arachchige Amal Samarasinghe,
No. 306 1/1, Kaduwela Road,
Battaramulla.

Respondent

AND BETWEEN

Samarasinghe Panalu Arachchige Amal Samarasinghe,
No. 306 1/1, Kaduwela Road,
Battaramulla.

Respondent- Petitioner

Vs.

Shyamali Thanuja Liyanage,
No. 245, University Road,
Raththanapitiya,
Boralesgamuwa.

Applicant- Respondent

AND NOW BETWEEN

Samarasinghe Panalu Arachchige Amal Samarasinghe,
No. 306 1/1, Kaduwela Road,
Battaramulla.

Respondent- Petitioner-Petitioner

Vs.

Shyamali Thanuja Liyanage,
No. 245, University Road,
Raththanapitiya,
Boralesgamuwa.

Applicant- Respondent- Respondent

Before: **R. Gurusinghe J.**

&

M.C.B.S. Morais J.

Counsel: J.P. Gamage with Theekshana Ranaweera for the Respondent-Petitioner-Petitioner instructed by Kalpani Jayasena.

Shenal Fernando instructed by Udeni Gallage for the Applicant- Respondent- Respondent.

Written Submissions: By the Respondent-Petitioner-Petitioner – on 10.02.2025

By the Applicant- Respondent- Respondent on 17.02.2025

Supported on: 21.05.2025

Decided On: **12.03.2025**

ORDER

M.C.B.S. Morais J.

This is an application for revision and/or *restitution in integrum* in terms of Article 138 of the Constitution of Democratic Socialist Republic of Sri Lanka.

The Respondent-Petitioner-Petitioner Samarasinghe Panalu Arachchige Amal Samarasinghe (hereinafter sometimes will be referred to as the Petitioner) is challenging the order of the learned Magistrate of Nugegoda dated 10th of September 2024 and the order of the learned High Court Judge of the Provincial High Court of Western Province dated 14th of October 2024 in the revision application bearing No. HCRA 89/24. Accordingly, the Petitioner has prayed for the following:

"I. Issue Notice on the Applicant-Respondent-Respondent;

II. Set aside the said Order of the Learned Provincial High Court Judge dated 14.10.2024 in Revision Application No. HCRA 89/24;

III. Set aside the Order of the Learned Magistrate dated 10.09.2024 in the Magistrate's Court Nugegoda Case No: 24725/Maintenance;

IV. Issue an Interim Order staying the operation of the said Order of the Learned Magistrate dated 10.09.2024 (marked as "P1(ii)) in Magistrate's Court Nugegoda Case No: 24725/Maintenance, until final determination of this Application;

V. Grant costs, and

VI. Such other and further relief as Your Lordships' Court shall seem meet."

The Applicant-Respondent-Respondent Shamali Thanuja Liyanage (hereinafter sometimes will be referred to as the Respondent) had instituted the case bearing No. 24725/Maintenance in the Magistrate Court of Nugegoda on 27th of March 2017 under section 2(1) of the Maintenance Act No.37 of 1999. A maintenance to the value of Rs.80,000 per month was sought by the Respondent, for her child Dulkith Lithula Disath Liyanage, born on 27th August 2010, claiming that the Petitioner is the biological father of the said child. However, there has not been a matrimonial relationship between the Petitioner and the Respondent.

During the trial at the Magistrate Court, the Respondent has sought an interim maintenance order and an order to submit the Petitioner for a DNA test with regard to the paternity of the child. Accordingly, written submissions were filed by both the parties and the learned Additional Magistrate of Nugegoda has held in the order dated 25th of August 2017, that the question of whether the Petitioner had the responsibility of paying maintenance for the above child can only be decided after an inquiry, since the Respondent has taken about 7 years to institute a maintenance action after the birth of the child.

During the inquiry, evidences were recorded for both the parties. Accordingly, an application was made by the Respondent on 13th of June 2018, for the DNA test to be carried out by the Government Analyst on the Petitioner, with regard to the Paternity of the said child, which the Petitioner objected. Accordingly, the learned Additional Magistrate has upheld the objection of the Petitioner in the order dated 25th of October 2018, as the court has no jurisdiction to order the Respondent who does not consent to the DNA test when a case has been filed in terms of Maintenance Act No. 37 of 1999.

Accordingly, the learned Magistrate by his order dated 10th of September 2024, has ordered the Petitioner to pay Rs.80,000 monthly maintenance to the Petitioner in respect of the child. Being aggrieved by the said order, the Petitioner has instituted the revision application No. HCRA89/24 at the Provincial High Court of the Western Province. However, the application was refused by the learned Provincial High Court Judge, by his order dated 14th of October 2024 on the ground that there are no exceptional circumstances to invoke the revisionary jurisdiction of the court. The Petitioner has also filed an appeal against said order of the learned Magistrate of the Nugegoda bearing No. HCMCA 93/24 to the Provincial High Court, which is still pending.

Being aggrieved by the order dated 14th of October 2024 of the learned Provincial High Court Judge, the Petitioner has made an application in *restitution in integrum*. Accordingly, the Petitioner has invoked the revisionary and/or restitutory jurisdiction under the following exceptional circumstances.

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A. *The statements and/or evidence of the Respondent are fraught with inconsistencies and/or suppression and/or misrepresentation of material facts and lack of credibility.*
B. *No cogent evidence has been submitted by the Respondent to prove that the paternity of the Petitioner.*
C. *The Respondent has slept on her rights and taken 7 long years to make the maintenance claim*
D. *The Respondent was legally married to Nadaraja Janakan at the time of the birth of the child, and the presumption of paternity as per section 112 of the Evidence Ordinance applies.*
E. *No evidence has been submitted to establish the income of the parties.* ”

It is the first contention of the Petitioner that the Respondent has adduced evidence which is inconsistent and misrepresented. The Respondent has claimed to be a Christian in her affidavit and affirmed accordingly, however, the counter objections and the oral evidences provided on the 31st of January 2019, mention her to be a Buddhist. Further, the Obstetric history of the Respondent ensures that it is her 2nd pregnancy, however the Respondent has contradicted to this statement in the cross examination held on 13th of June 2018 by stating that she had not had an intimate relationship with any male previously and the Respondent has also denied that she was married to Nadaraja Janakan on 29th of December 2008. Therefore, it is the contention of the Petitioner that the evidence presented by the Respondent contains significant contradictions and inconsistencies. Further, it is alleged that there has not been any cogent evidence presented by the Respondent to prove the paternity of the Petitioner.

Further, the claim under maintenance has only been made approximately 7 years after the birth of the child. Therefore, the Petitioner contends that the maintenance action is a mere afterthought sought to claim maintenance from the Petitioner. It is established that there has been a valid marriage between the Respondent and the Nadaraja Janakan on the 29th of December 2008 and the said child was born on the 27th of August 2010. Therefore, the Petitioner contends that during the birth of the said child, the Respondent was in a legal marriage and the presumption of paternity ought to be on the spouse and not the Petitioner

under section 112 of the Evidence Ordinance. For the aforesaid reasons, the Petitioner contends that the learned Magistrate of Nugegoda and the learned Provincial High Court Judge have erred in law.

However, it should be noted that an application in revision or *restitutio* does not provide the court to review the credibility and the acceptability of the evidence made in the original forum. If the Petitioner is challenging the evidence provided by the Respondent in the Magistrate court, it can only be done through an appeal in an appellate forum.

The learned Magistrate in his order dated 10th of September 2024 has considered the fact that there has been evidence provided by the Respondent to prove that the Petitioner is the father of the said child. Further, the learned Magistrate has concluded that the important evidence that could have been provided to decide the paternity, the DNA test, has been refused by the Petitioner. Even though the Petitioner has a right to refusal; the Petitioner has failed to furnish any valid reasons for his refusal. Therefore, considering the circumstances the learned Magistrate of Nugegoda has decided the case based on section 114 of the Evidence Ordinance.

Section 114 of the Evidence Ordinance reads as follows,

> *" **114***
>
> *The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case.*
>
> *f) that evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it"*

According to section 114 of the Evidence Ordinance, the court can presume the existence of certain facts considering the circumstances, under section 114(f) of the Evidence Ordinance, the learned Magistrate has presumed that the DNA, which was refused by the Petitioner, if produced, would be unfavorable to the Petitioner. Further, the court has also considered the DNA report adduced on behalf of the Respondent, which proves that the Nadaraja Janakan who was married to the Respondent is not the father of the said child and therefore section 112 of the Evidence Ordinance cannot be applied at this instance. Furthermore, the

Respondent has corroborated her stance by providing evidence to prove that her spouse is not the father of the child and the Petitioner has not provided any evidence to prove otherwise. Therefore, the learned Magistrate of Nugegoda has applied the presumption under section 114(f) of the Evidence Ordinance in arriving at the decision. Further, the learned Magistrate has also considered the expenses of the said child as provided in the affidavit dated 22nd of March 2017 to be reasonable and therefore has ordered to grant a sum of Rs.80,000 as maintenance per month for the child.

An application in terms of *Restituio in integrum* under Article 138 of the Constitution of Democratic Socialist Republic of Sri Lanka, can only be addressed in exceptional circumstances where no other alternative remedy is available to seek justice.

In ***Sri Lanka Insurance Corporation Ltd. V. Shanmugam and Another (1994) 1 SLR 55,*** Ranaraja J. held as follows:

> *"Restitutio in integrum being an extraordinary remedy, it is not to be given for the mere asking or where there is some other remedy available, Mapalathan v. Elayavan (7). It is a remedy which is granted under exceptional circumstances and the power of court should be most cautiously and sparingly exercised"*

However, in the present circumstance, the Petitioner has filed an appeal bearing No. HC MCA 93/24 challenging the order dated 10th of September 2024 in the Colombo High Court. The Petitioner has also made a revision application bearing No. HCRA 89/24 against the order of the learned Magistrate, and the learned Provincial High Court Judge has dismissed the said revision application by the order dated 14th of October 2024. Being aggrieved by the said order, the Petitioner has also instituted an appeal in the court of Appeal. Therefore, it is apparent that the Petitioner has already sought and continues to pursue alternative remedies available under the law, hence the stringent requirements for invoking the jurisdiction of this court under revision or *restitutio in integrum* have not been met.

For the aforesaid reasons, I do not find merit in the case of the Petitioner and the order dated 10th of September 2024 of the learned Magistrate of Nugegoda and the order of the learned High Court Judge of the Provincial High Court of Western Province dated 14th of October 2024 need not be interfered with.

Therefore, this application is dismissed with a cost of Rs.50,000 to be payable by the Petitioner to the Respondent.

Notice refused.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree

Judge of the Court of Appeal