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

In the matter of an Application for *Restitutio in Integrum* under Article 138(1) of the Constitution of Sri Lanka.

C.A. Case No. 02/2016

NWP/HCCA/KUR/34/2010 (F)

D.C. Kuliyapitiya Case No. 12500/L

Iluktenna Arachchilage Piyasena
of Madigepola, Yakwila Post.
Plaintiff

-Vs-

Ratnayake Mudiyanselage Seelwathie Kumarihamy
of Madigepola, Yakwila Post.
Defendant

Rajapakse Mudiyanselage Karunaratne
of Madigepola, Yakwila Post.
Substituted Defendant

AND

Rajapakse Mudiyanselage Karunaratne
of Madigepola, Yakwila Post.
Substituted Defendant - Appellant

-Vs-

Iluktenna Arachchilage Piyasena
of Madigepola, Yakwila Post.
Plaintiff - Respondent

AND NOW BETWEEN

Rajapakse Mudiyanselage Karunaratne
of Madigepola, Yakwila Post.
Substituted Defendant - Appellant - Petitioner

-Vs-

Iluktenna Arachchilage Piyasena
of Madigepola, Yakwila Post.
Plaintiff - Respondent - Respondent

BEFORE	:	**A.H.M.D. NAWAZ, J.** *and* **H.C.J. MADAWALA, J.**
COUNSEL	:	Pubudu de Silva with D.D.P. Dassanayake for the Petitioner.
Decided on	:	23.05.2017

A.H.M.D. NAWAZ, J.

The Substituted Defendant-Appellant-Petitioner (sometimes hereinafter called "the Petitioner") has preferred this application to this court for *restitutio in integrum* invoking Article 138(1) of the Constitution. This is a matter which reached the Supreme Court on an appeal from the Provincial High Court holden in Kurunegala and the Supreme Court refused leave by its order dated 02.09.2015. Two months

after the refusal of leave by the Supreme Court, the application for *restitutio in integrum* to this Court has been made on 23.12.2015.

When this matter came up for support, this Court posed the question to the Counsel for the Petitioner as to whether it was possible for this Court to assume jurisdiction in a matter where the Supreme Court had declined to exercise its appellate jurisdiction by refusing leave. The Counsel for the Petitioner sought to file written submissions in order to respond to this threshold question. When the court pointed out that the order of the Supreme Court wherein it refused leave was not appended to the petition before this Court, the Counsel for the Petitioner again sought leave of this Court to tender the same and upon the grant of leave the Petitioner has filed the necessary documents. This Court is now fully seized of the factual background to this petition.

The chronology of litigation in the case

The Plaintiff-Respondent-Respondent (hereinafter sometimes referred to as "the Plaintiff") instituted a *rei vindicatio* action against the original defendant (since deceased and now represented by the petitioner) seeking a declaration of title to the land described in the schedule to the plaint, ejectment and damages. The original defendant pleaded prescription but the learned District Judge of Kuliyapitiya rejected the plea of prescription after trial –please *see* pages 20-21 of the judgment dated 18.02.2010 marked as P6 to this petition. The learned District Judge of Kuliyapitiya granted the reliefs sought by the Plaintiff. The original defendant appealed to the Provincial High Court of the North-Western Province in Kurunegala and the learned Judges of the Provincial High Court by their judgment dated 29.11.2013 dismissed the appeal of the original defendant. It has to be noted that in the application filed for leave to appeal to the Supreme Court against the judgment of the Provincial High Court dated 29.11.2013, one of the questions of law on which leave was sought was as follows-

> *"Did the High Court, err by failing to consider in any way, and by failing to come to any finding on the second main submission made by or on behalf of the substituted-defendant-appellant, namely on* ***the question of prescriptive title*** *relied on and put in issue by the defendant?"*

In other words, the gravamen of the petitioner's complaint before the Supreme Court in seeking leave was that the learned High Court Judges of the Provincial High

Court in their judgment dated 29.11.2013 had not considered the submissions made on prescription –please *see* paragraph 17 of the application for leave to appeal 30.12.2014.

It is this leave to appeal which came up for support before the Supreme Court on 02.09.2015. The proceedings before the Supreme Court which are briefed to this Court read as follows:

"Before: *K. Sripavan CJ.*

S.E. Wanasundera, PC.J. and

U. Abeyrathne, J.

Counsel: *Dr. S.F.A. Cooray for the Substituted-Defendant-Appellant-Petitioner*

M.D.J. Bandara for the Plaintiff-Respondent-Respondent

Argued &

Decided on: *02.09.2015*

K. Sripavan, CJ.

We have heard learned Counsel for the Substituted-Defendant-Appellant-Petitioner. We have also heard learned Counsel for Plaintiff-Respondent-Respondent. We see no basis to grant leave to appeal. Leave to appeal is refused.

S.E. Wanasundera, PC. J.

I agree.

U. Abeyrathne J.

I agree."

Thus it is quite clear that the Supreme Court refused to grant leave on the question of prescription after having heard the submissions on behalf of both Counsel for the Substituted-Defendant-Appellant-Petitioner and Plaintiff-Respondent-Respondent.

The Petitioner was represented by so eminent a Counsel as Dr. S.F.A. Coorey and having framed a question of law on prescription, there is no gainsaying that the learned Counsel addressed Court on prescription. It cannot be said that the Supreme Court was not addressed on prescription. It is not even suggested that the Supreme Court did not hear submissions on prescription.

Whilst the Supreme Court has refused leave on the submissions made before it, an attempt is now made to this Court invoking Article 138 of the Constitution to re-agitate the identical issue of prescription before this Court. If the Provincial High Court erred by turning a Nelsonian eye to prescription, the remedy of leave to appeal to the Supreme Court was available by virtue of the provisions of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 as amended by Act No. 54 of 2006 and this right was certainly availed of by the Petitioner but with no avail.

Is restitutio in integrum available?

No doubt the power to entertain applications by way of *restitutio in integrum* has been conferred with the Court of Appeal by the Constitution of the country.

Article 138(1) of the Constitution states thus,

> *"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 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 Court of First Instance, tribunal, or other institution may have taken cognizance."***

A careful reading of the scope and ambit of ***restitutio in integrum*** brings out the fact that the exercise of this extraordinary jurisdiction extends to *all causes, suits, actions, prosecutions, matters and things of which a Court of First Instance, tribunal, or other institution may have taken cognizance* **in that there must be a court of first instance, tribunal or other institution which must have heard in the first instance a cause, suit, prosecution, matters and things, so to speak. It is the orders, judgments or whatever description you may call it, that are made in the first instance, that become susceptible to cognizance of this Court in its exercise of *restitutio in integrum.*** The words ***"such Court of First Instance, tribunal, or other institution"*** in

Article 138(1) of the Constitution should be read *ejusdem generis* and it is as plain as the nose on your face that these words would not include the Supreme Court. Let me reiterate that there is no allegation in the petition before me nor is it supported by any affidavit that the Supreme Court did not hear submissions on prescription before it proceeded to dismiss the application for leave to appeal by its order dated 02.09.2015. So the question of law on prescription becomes a *matter* or *thing* that the Supreme Court took cognizance of and this Court cannot assume a jurisdiction that it does not possess in order to exercise *restitutio in integrum* over a matter which the Supreme Court took cognizance of. In terms of Article 138(1) of the Constitution, *restitutio in integrum* is reserved for the review of orders made by institutions beneath the Court of Appeal.

If a question of law such as prescription was brought home to the apex Court of this Country which disallowed it after submissions, I cannot hold the view that the self-same question can be traversed by this Court in its exercise of *restitutio in integrum.* Article 138(1) of the Constitution does not bestow a jurisdiction to order restitution in a matter where the Supreme Court has declined jurisdiction, having heard submissions on the identical issue.

In ***Sri Lanka Insurance Corporation Ltd. vs. Shanmugam and Another***[1], Ranaraja, J. (with S.N. Silva, J. (P/CA) agreeing) declared that Article 138(1) of the Constitution has vested the Court of Appeal with the sole and exclusive jurisdiction to grant relief by way of *restitutio in integrum*. The power of the Court to grant such relief is a matter of grace and discretion. Restitution reinstates a party to his original legal condition which he has been deprived of by operation of law.[2]

Be that as it may, it is undeniable that *restitutio in integrum* is an extraordinary remedy and will be granted only under exceptional circumstances and the remit of that jurisdiction is the review of *causes, suits, actions, prosecutions, matters and things of which Courts of First Instance, tribunal, or other institution may have taken cognizance.*

When the Supreme Court has acted in its jurisdiction touching upon an issue and if a petitioner seeks to revive and revisit that issue in this Court, this Court cannot usurp a jurisdiction which it does not have, in the guise of *restitutio in integrum.*

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[1] 1995 (1) Sri L.R 55

[2] See the observations at page 59 of *Sri Lanka Insurance Corporation Ltd. v. Shanmugam and Another* (*supra*)

So when the Supreme Court has considered a question of law and refused leave on that question, *restitutio in integrum* cannot be invoked to re-agitate the same question under Article 138(1) of the Constitution. The very terms of Article 138(1) place an embargo and prohibit the invocation of this Court's jurisdiction. Such invocation is outside the pale of Article 138(1) of the Constitution and no proceedings could be had on this application. One cannot but overemphasize the fact that there has to be a *finis* to litigation and the boundaries of *restitutio in integrum* are not so extensive as to accommodate causes which have run their course and exhausted themselves in the Supreme Court.

Accordingly notice is refused and the application for *restitutio in integrum* is disallowed.

JUDGE OF THE COURT OF APPEAL

H.C.J. Madawala, J.
I agree

JUDGE OF THE COURT OF APPEAL