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

Kumudu Samanthi Akmeemana,
No. 95,
Piriwena Road,
Borelesgamuwa.
1st Respondent-Petitioner

CASE NO: CA/RI/1/2018
DC NUGEGODA CASE NO: SPL/226/12

Vs.

Araliya Kankaanamge Somasiri de Silva,
No. 94/7/B,
Pepiliyana Road,
Gangodawila,
Nugegoda.
Petitioner-Respondent
Registrar of Lands,
Land Registry,
Delkanda,
Nugegoda.
2nd Respondent-Respondent

Before: Mahinda Samayawardhena, J.

Counsel: S.N. Wijithsingh for the 1st Respondent-Petitioner.

C. Paranagama for the Petitioner-Respondent.

Decided on: 21.02.2019

Samayawardhena, J.

The petitioner-respondent (respondent) instituted these proceedings against the respondent-petitioner (petitioner) under summary procedure in the District Court of Nugegoda seeking cancellation of the caveat in respect of the land relevant to this action and recovery of damages for the wrongful registration of the said caveat. The Court has not from the very beginning followed the summary procedure, and as seen from the journal entry No. 3A, notice and summons have been served on the petitioner in the first instance. The petitioner has then filed a statement of objections seeking dismissal of respondent's action and also seeking a declaration that she is the lawful owner of the said land and damages. The Court has thereafter fixed the matter for the inquiry. On the date of the inquiry, the petitioner being absent and unrepresented, the matter has been fixed for the *ex parte* inquiry. After the *ex parte* inquiry/trial, the Court having realized that, notwithstanding the action has initially been filed under summary procedure, all the steps have thereafter been taken under regular procedure, the Judgment has, as stated in the Judgment, been pronounced as if the case had been filed under regular procedure. The *ex parte* Judgment has been entered against the petitioner and ordered the *ex parte* decree to be served on her. In the *ex parte* decree it has specifically been stated that

any objections shall be notified to Court within 14 days of the service of the decree in terms of section 86(2) of the Civil Procedure Code. There is no dispute that the petitioner did not make the application seeking to set aside the *ex parte* decree within 14 days of the service of the decree as directed in the decree. On that ground the Court has by order dated 09.12.2015 refused the application of the petitioner to vacate the *ex parte* decree.

The petitioner has thereafter filed a Notice of Appeal against the said order, but no Petition of Appeal has been filed to pursue the appeal. The petitioner has not thought it fit to file a Leave to Appeal Application or Revision Application before the High Court of Civil Appeal against that order.

When matters remained as such, more than two years after the aforesaid final order of the District Court, the petitioner has come before this Court on 02.01.2018 by way of *restitutio in integrum* seeking to quash all the orders of the District Court from the very inception until the end, with a new argument not taken up before the District Court, that the entire proceedings before the District Court are tainted with illegality predominantly because an action based on summary procedure cannot be converted into regular procedure.

It must be stressed that "*the power to grant relief by way of restitutio in integrum is a matter of grace and discretion.*" (*Usoof v. Nadarajah Chettiar*[1]) The petitioner cannot seek restitution as of right. There are several threshold matters to be sorted out before addressing the core issue. There is no necessity for the present purposes to address all of them. One such important hurdle to

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[1] (1958) 61 NLR 173 at 177

overcome is that "*relief by way of restitutio in integrum should be sought for with the utmost promptitude*." *Vide Menchinahamy v. Muniweera*[2], *Babun Appu v. Simon Appu*[3], *Sri Lanka Insurance Corporation Limited v. Shanmugam.*[4] Even if we leave aside all the other requirements, for instance, "*restitutio in integrum is not available if the petitioner has another remedy open to her*"[5], it is crystal clear that the petitioner has not acted with the utmost promptitude when she decided to come before this Court more than two years after the District Court held against her. The delay is too long by any stretch of imagination particularly because the final order of the District Court against her was not *ex parte* but *inter partes.*

Delay can be excused if there is an acceptable explanation. The explanation given by the petitioner in the petition that her mother was suffering from cancer during the material time is misleading, if not false. She has tendered three sheets marked Z to prove it. Those documents do not show that her mother was suffering from a terminal illness. They only suggest that the mother was awaiting for hysterectomy (surgical removal of the uterus) at her advanced age. The date of the first sheet of paper, particularly, the last digit of the year, has intentionally been erased to mislead the Court. The date of the other document is 04.05.2017 and Reports are normal. The explanation for delay over two years is unacceptable.

Hence, on that ground alone, the application of the petitioner is liable to be dismissed.

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[2] (1950) 52 NLR 409 at 414
[3] (1907) 11 NLR 44 at 45
[4] [1995] 1 Sri LR 55 at 59
[5] *Menchinahamy v. Muniweera* (1950) 52 NLR 409 at 413

Before I part with this Judgment, let me add the following for completeness.

Unlike in a situation where there is patent or total want of jurisdiction, when the Court has plenary jurisdiction to deal with a matter and the question is invoking such jurisdiction in the right manner, a party cannot keep silent and take up such an objection as to procedure, if the final order is made against him. That is against the law and against common sense. Any objection as to latent or contingent want of jurisdiction shall be taken at the first available opportunity—vide section 39 of the Judicature Act, No. 32 of 1978, as amended. (*Navaratnasingham v. Arumugam*[6]) It is only if want of jurisdiction is patent, the matter can be raised at any time, even for the first time in appeal, and, in which event, the whole proceedings including the Judgment pronounced become nullity *ab initio* due to *coram non judice.* (*Abeywickrama v. Pathirana*[7], *Beatrice Perera v. The Commissioner of National Housing*[8])

In *Dabare v. Appuhamy*[9] the defendant's objection to dismiss the plaintiff's action on *res judicata* was overruled. On appeal by the defendant, the plaintiff submitted that the dismissal of his former action was invalid as the judge in the former case followed the wrong procedure in that instead of summary procedure, regular procedure was followed. At that time, the plaintiff had not taken objection to the wrong procedure being followed. This Court rejecting that argument and allowing the appeal stated that notwithstanding the former judge had followed the wrong

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[6] [1980] 2 Sri LR 1 at 5-6
[7] [1986] 1 Sri LR 120
[8] (1974) 77 NLR 361 at 366-370
[9] [1980] 2 Sri LR 54

procedure, the order of dismissal made by him was valid since he had jurisdiction to hear and determine the action and the plaintiff did not take objection to the wrong procedure being followed at that time.

For the aforesaid reasons, the petitioner's application is dismissed but without costs.

Judge of the Court of Appeal