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* under and in terms of Article 138 of the Constitution of the Socialist Republic of Sri Lanka.

C.A. Case No. RI/19/2014

D.C. Moratuwa Case No. 324/L

Rex Jerome Felthman,

No. 32/1, Wanigasuriya Mawatha,

Suwarapola,

Piliyandala.

PLAINTIFF

-Vs-

M. M. Priyankara Lashal Kumara,

No. 172, Angulana Station Road,

Kaldemulla,

Moratuwa.

DEFENDANT

AND NOW BETWEEN

Kurundeniye Seyath Elle Kaduelle Gedera Mangala Kulatilaka

No. 172, Angulana Station Road,

Kaldemulla,

Moratuwa.

PETITIONER

-Vs-

M. M. Priyankara Lashal Kumara,
No. 172, Angulana Station Road,
Kaldemulla,
Moratuwa.
PLAINTIFF-RESPONDENT

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Thishya Weragoda with Pulasthi Rupasinha and Niluka Sanjani Dissanayake for the Petitioner Asthika Devendra with Sanjeewa Ruwanpathirana and Dinusha Mohanasunderam for the Plaintiff-Respondent
Decided on	:	28.01.2019

A.H.M.D. Nawaz, J.

The Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff") instituted this action against the Defendant-Respondent (hereinafter sometimes referred to as "the Defendant") in the District Court of *Moratuwa* bearing Case No.324/L and pleaded *inter alia* for declaration of title regarding the land, which has been more fully described in the schedule to the said plaint.

The Plaintiff-Respondent in his plaint prayed *inter alia* that:-

a) He claimed title to the property/premises in dispute by a Deed of Transfer bearing No.4945 attested by Mr. John Wilson, Notary Public on 17.02.1978.

b) Upon a mutual understanding, which existed between the Plaintiff-Respondent and the Defendant, he gave the Defendant (his then brother in law *i.e.* his ex-wife's brother) the Leave and License to occupy the premises in dispute.

c) Through a letter dated 08.03.1999 (marked as **V6**) sent by his Attorney-at-Law, the Plaintiff-Respondent terminated the above mentioned Leave and License.

d) Thereafter, by letter dated 04.07.1999 (marked as **P1**) the Defendant denied that he was in possession of the premises in dispute.

e) Upon the failure of the Defendant to deliver possession of the property in dispute to the Plaintiff-Respondent, the Plaintiff- Respondent then instituted an action in the District Court of *Moratuwa* bearing No. 324/L praying for a declaration of title, damages and ejectment of the Defendant and servants, agents and other persons under him.

The Defendant in his Answer stated the following facts that:-

a) The Defendant admitted the averment contained in paragraph 4 of the plaint, *i.e.* that the Plaintiff Respondent had/ has ownership to the property in dispute.

b) The Plaintiff-Respondent by a Power of Attorney No.191 (marked as **V2**) dated 23.08.1990 attested by K.U Gunaratne, Notary Public gave the Defendant the power to sell the property in dispute.

c) The rights of the Plaintiff Respondent were thereafter disposed of by the Deed of Transfer No. 1753 (marked as **P3**) dated 29.04.1998 attested by the Notary Public mentioned above.

It was submitted before this Court that this was a stratagem adopted by the original Defendant (*i.e.* the brother of the ex-wife) to deprive the Plaintiff of his property after the breakdown of the marriage between the Plaintiff and his wife. It was further submitted that the Plaintiff had received no consideration from the present Petitioner, who is the brother-in-law of the Defendant. The present Petitioner who is before this Court claims that he has purchased this property from the Defendant.

This Court would next look at the evidence led before Court at the trial. The right to begin was given by an Order dated 17.10.2001 to the Defendant and it was the Defendant who was ordered by Court to begin the case.

The Defendant's case

The original Defendant who filed the Answer claiming a Power of Attorney which allegedly entitled him to sell this property to the Petitioner never gave evidence before the District Court. It was the Defendant's sister Deepika Ruchira Kumari, who gave evidence on behalf of the Defendant under a Power of Attorney executed in her favor by the Defendant. In her testimony, she stated the following:-

a) The Power of Attorney was granted to the Defendant by the Plaintiff-Respondent on 23.08.1990 in order to sell the premises in dispute.

b) Thereafter, the premises in dispute was transferred to the Petitioner by the Defendant through the Deed of Transfer No.1758 dated 29.04.1998 (marked as A1) for a valuable consideration of Rs.30,000/-.

c) The Petitioner had been in possession of the property in dispute at the time the Plaintiff instituted the action in the District Court of *Moratuwa* bearing Case No. 324/L.

In addition to the Defendant's sister, the Petitioner before this Court also gave evidence in the trial on behalf of the Defendant on 18.02.2003 stating that:-

a) The Plaintiff-Respondent had given the right to sell the property in dispute to the Defendant through a Power of Attorney.

b) The Petitioner purchased the property in dispute by paying a valuable consideration of Rs.300,000/- to the Defendant.

c) The valuable consideration of Rs.300,000/- was paid on the 27.07.1998 to the Defendant and the Deed of Transfer was thereafter executed on 29.04.1998.

The principal submission that was made before this Court was that the Petitioner was well aware in 2003 that there was a District Court action pending in respect of the

property concerned. However, he never took any steps to get himself added as a party Defendant to the case.

The Plaintiff Respondent's case

The Plaintiff Respondent gave evidence and testified *inter alia* to the following:-

a) The Plaintiff-Respondent gave the Leave and License to the Defendant to occupy the premises in dispute.

b) He never granted any Power of Attorney to the Defendant to sell the property in dispute.

The Judgment of the District Court

The learned District Judge of *Moratuwa* delivered his judgment in favour of the Plaintiff on 21.04.2004 *inter alia* holding the following:-

a) The Defendant has failed to prove the document marked as **V2** (Power of Attorney bearing No.191) upon which the Defendant stated the Plaintiff Respondent had granted him the power to sell the property in dispute.

b) The Petitioner has therefore not received any legal title to the property in dispute since it is not evident from the evidence that there had been any legal transfer from the Defendant to the Petitioner.

c) The Plaintiff Respondent has proved that the ownership of the property in dispute is yet vested in him.

The Appeal to the High Court of Civil Appeals

The Defendant thereafter appealed to the High Court of the Western Province at Mount Lavinia. The learned Judges in the Civil Appellate High Court in their judgment also held with Plaintiff declaring *inter alia*:-

a) The said Power of Attorney which was marked as **V2** was marked subject to proof and the learned District Judge held that the document was never proved and hence the same has been rejected by the learned District Judge.

b) The Plaintiff-Respondent has categorically stated that he has never given instructions to the Defendant to sell the premises in dispute nor has the Defendant adduced any evidence contrary to that position held by the Plaintiff Respondent.

c) There has been no legitimate transfer of the property in dispute to the Petitioner.

d) It was the opinion of the District Judge that the Plaintiff-Respondent had not conferred his rights to the Defendant.

In these circumstances, the learned Judges of the Civil Appellate Court affirmed the judgment of the learned District Judge.

The Appeal to the Supreme Court

The Defendant filed a Leave to Appeal application bearing No. SC/HCCA/LA/202/12 in the Supreme Court and this application was dismissed for non-compliance with the mandatory provisions under Rule 28(3) of the Supreme Court Rules and also on the basis that there was no merit in the application and that there is no ground to grant leave to respective application.

Instant Application by the Petitioner

From the above narrative, it would appear that the Defendant-Respondent exhausted all his remedies all the way through to the Supreme Court of this Country. It is thereafter that the Petitioner sought remedies in this Court by filing this instant application for Revision and/or *Restitutio in Integrum* in terms of Article 138 of the Constitution. The remedies that the Petitioner has sought from this Court go as follows:-

a) To revise/ set aside judgment of the District Court of *Moratuwa* dated 21.04.2004.

b) Issue an Order in the nature of *Resitutio in Integrum.*

c) Rehear the Moratuwa Case bearing No.324/L *de novo* and direct the learned District Judge to add the Petitioner as a party to the action in terms of Section 18 of the Civil Procedure Code.

d) Grant an interim order staying the execution of Writ in accordance with DC/Moratuwa 324/L judgment.

e) Grant an interim order staying further proceedings in DC Moratuwa 324/L until the hearing and determination of this application.

It has to be observed that it was only after the Defendant had exhausted all his remedies all the way up to the Supreme Court that the Petitioner who was not even a party to this case has sought the invocation of the jurisdiction of this Court.

Does Revision/*Restitutio in Integrum* lie when the Supreme Court has exercised its jurisdiction?

The first question that arises before this Court is whether the Petitioner can invoke the jurisdiction of the Court of Appeal under Article 138(1) of the Constitution, once the Supreme Court has refused a leave to appeal application which sought identical remedies.

The Supreme Court rejected the Leave to Appeal application bearing No. SC/HCCA/LA/202/12 on 26.07.2013 for non-compliance with the mandatory provisions of Rule 28(3) of the Supreme Court Rules and also on the basis that there was no merit in the application and therefore, there were no grounds to grant leave to the respective application. This clearly shows that the Supreme Court had dealt with the merit of the application made by the Defendant. In other words, the judgment of the District Court the Plaintiff should be declared entitled to the premises in question has been considered and endorsed by the Supreme Court. Thus, it becomes clear that the Supreme Court focused on the very issue that forms the subject matter of this application for Revision or *Restitutio in Integrum.*

In this factual matrix can this Court assume revisionary jurisdiction or grant *Restitutio in Integrum* over issues which the Supreme Court traversed?

The question-Can a party invoke the jurisdiction of the Court of Appeal under Article 138(1) of the Constitution once the Supreme Court has refused the Leave to Appeal application touching the same issue? - was considered in this Court in the case of

Rajapakse Mudiyanselage Karunaratne v. Iluktenna Arachchilage Piyasena C.A. Case no. 02/2016, (CA minutes of 23.05.2017) wherein this Court stated the following:-

> *"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. So, when the Supreme Court has considered a question of law and refuse leave on that question, Restitutio in Integrum cannot be invoked 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 over-emphasize 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".*

The learned Counsel for the Plaintiff-Respondent also cited the case of ***Buyzer v. Eckert*** (1910) 13 N.L.R 371 wherein Middleton, J. held that:-

1. It is not competent for a person to bring an action in an inferior court with the direct object of impeaching a judgment of a superior court affirmed in Appeal.
2. Where fraud is averred against a judgment, such judgment may be set aside by an application for *Restitutio in Integrum* or by the suit in Court which passed the original decree.
3. The provisions of Section 44 of the Evidence Ordinance No.14 of 1895 contemplates cases where the issue of fraud as rebutting a plea of *Res Judicata* arises incidentally in a suit or procedure and not where the action is framed with the object of setting aside the decree of the Court

I have to say at this stage that the principal gravamen of the complaint made by the learned Counsel for the Petitioner Mr. Thishya Weragoda was that the case against the original Defendant was decided without this Petitioner being added as a Defendant in the District Court. The same argument had been taken before the Supreme Court and the

grievance of the Petitioner is the same as it was in the Supreme Court. The learned Counsel for the Plaintiff-Respondent submitted that in the guise of this application for Revision or *Restitutio in Integrum*, the Petitioner is seeking to vary or set aside the decision of the Supreme Court. In my view, this objection to the exercise of Revision and/or *Restitutio in Integrum* is well grounded and is entitled to succeed before this Court. Article 138(1) of the Constitution permits the exercise of revision and *restitutio in integrum* only when Courts, tribunals and other institutions which are below the Court of Appeal have exercised jurisdiction and not when the Supreme Court was seized of a cause or matter. Though this application is bound to fail on this ground, let me deal with the other grounds that came up in the course of the argument.

Only parties to the original court can invoke *Restitutio in integrum*

The application for *Restitutio in Integrum* also suffers from another constraining threshold requirement which was emphasized in ***Perera v. Appuhamy*** (1923) 2 Times 119 *i.e.*,

> *"Relief by way of Restitutio in Integrum is available only to persons who were parties to the suit sought to be restored".*

The same principle was echoed in the case of ***Menchinahamy v. Muniweera*** 52 N.L.R 409 wherein it was stated:-

> *"The remedy by way of Restitutio in Integrum is an extraordinary remedy and is given only under very exceptional circumstances. It is only a party to a contract or to legal proceedings who can ask for this relief. The remedy must be sought for with the utmost promptitude. It is not available if the applicant has any other remedy open to him".*

In regard to an application made in a Partition case for *Restitutio in Integrum*, what was said in the case of ***Ranasinghe and Another v. Gunasekara and Another*** (2006) 2 Sri L.R 393 becomes pertinent to recall:-

a) Only persons who have rights and who are claiming an interest in the land can apply to be added as parties. The Petitioners in any event have acquired their rights after the judgment was delivered.

b) Relief by way of *Restitutio in Integrum* could not be granted as the Petitioner had not been a party to the action.

c) Furthermore, there cannot be Restitution as the Petitioners could not be restored to rights which they did not have at the time the judgment was entered.

d) The Petitioners are not without a remedy (Section 49 of Partition Law).

The learned Counsel for the Plaintiff-Respondent strenuously advanced the argument that *Restitutio in Integrum* exists only to persons who were parties to the initial legal proceedings. In opposition to this argument, the learned Counsel for the Petitioner submitted that neither the Plaintiff nor the Defendant made an application to the Court in terms of Section 18 of the Civil Procedure Code to add the Petitioner as a party to the action. The Counsel for the Petitioner further submitted that even after the filing of the action, there was nothing that precluded the Plaintiff from adding the Petitioner as a party to the action since sufficient details of the Petitioner had been disclosed in the Answer of the Defendant.

It is the argument of the learned Counsel for the Petitioner that by way of the judgment of the District Court of *Moratuwa* a third party namely Petitioner has been prejudiced in his proprietary right. It was his argument that the rights of the Petitioner have been affected by the District Court of Moratuwa. At one stage Mr. Thishya Weragoda for the Petitioner made the submission that the Court itself must have added the Petitioner. In the circumstances, *Restitutio in Integrum* is the proper remedy to have the judgment of the District Court set aside-the learned Counsel argued.

Addition of the Petitioner as a party to the case

Should the Petitioner have been added as a party in the original Court? Whose duty was it to have added him if at all it was necessary to add him?

In order to resolve this question, Section 18(1) of the Civil Procedure Code repays attention:-

> *"The Court may on or before the hearing upon the application of either party, and on such terms as the Court thinks just, order that the name of any party, whether as Plaintiff or as Defendant improperly joined, be struck out; and the Court may at any time, either upon or without such application and on such terms as the Court thinks just, order that any Plaintiff be made a Defendant, or that any Defendant be made a Plaintiff, and that name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle or the question involved in that action be added".*

There are two limbs to Section 18 and whilst the 1st limb deals with the power to strike out parties, the 2nd limb deals with the power to add parties. The argument before me concerned the alleged failure to have added the Petitioner in the Court *a quo* as a party and it behoves me to look at the 2nd limb. Section 18(1) can be invoked either by a party to the suit or by the Court *suo moto*. Mere inaction on the part of a Plaintiff to implead a party does not affect the court's power under the subsection. If A sues B, either A or B can seek to add a party or Court on its own motion can seek to add a party. As I read Section 18(1) between the lines, I observe that a third party C desiring to be added as a party cannot make an application. It is either A or B or Court who can make additions. If C makes an application to Court to be added, it is not on the motion of the Court and therefore Court cannot make the addition. So if at all C wants to be added, C has to seek the assistance of either A or B. This is what I see in Section 18(1) and Section 19 fortifies my view because, according to Section 19, no person shall be allowed to intervene in a pending action otherwise than in pursuance of, and in conformity with the provisions of the last preceding section namely Section 18. In other words interventions or additions have to be effected within the four corners of Section 18. It is either the Plaintiff or the Defendant who has to make the application for addition or it has to be the Court acting on its own motion. The power to add is not unbridled *though*.

Merely because the Court has the power to add a party on its own motion, it does not enjoy the freedom of the wild ass if I may use that infelicitous expression.

In exercise of the power to implead a person *suo moto*, the Court has to exercise its discretion judicially, keeping in mind that one of its objects is to prevent multiplicity of suits and conflict of decisions.

Section 18(1) itself gives guidelines as to when additions should be made. Any person who ought to have been joined either as a Plaintiff or a Defendant, or any person whose presence before Court is necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the action. Under the subsection, a person may be added as a party to a suit in the following two cases:-

(i) When he ought to have been joined as plaintiff or defendant, and is not joined so; or

(ii) When, without his presence, **all questions involved in the suit** cannot be completely decided.

How does one find out **all questions involved in the suit**? Basnayake C.J gave an illuminating example of this in ***Weerapperuma v. De Silva*** 61 N.L.R 481. He explained the expression *all questions involved in the suit* thus:-

> *"When a question is so inextricably mixed with the matters in dispute in an 'action' as to be inseparable from them and the action itself cannot be decided without deciding it, the question may be said to be involved in the action. Any question arising on the case set up by an intervenient in his petition and not arising in the case set up in the pleadings of the parties is not a question involved in the action."*

The question would then arise-what would be the question involved in this suit? One has to gather the questions from the plaint and answer.

The plaint sought a declaration of title and ejectment of the Defendant. But in the answer the Defendant pleaded that upon the authority of a power of attorney granted to him by the Plaintiff he sold the property to the Petitioner in this application. It is not the case of

the Plaintiff that he executed the power of attorney. That is why the plaint is silent on such a power of attorney nor is there a replication denying the grant of a power of attorney. Therefore the burden of the due execution of the power of attorney is on the Defendant and one certainly does not need the Petitioner to decide and determine this question. The Petitioner was never a witness to the power of attorney. It is crystal clear that if the power of attorney is incapable of being proved in court, the Defendant would not have the power to transfer the property of the Plaintiff to the Petitioner. The transfer would become valid only if the Defendant was properly and duly authorized by the Petitioner. It is axiomatic that if the so called Power of Attorney was not established in court, the transfer by the Defendant to the Petitioner would *ipso facto* become null and void.

The Plaintiff does not need the Petitioner to establish his case completely and effectually and therefore the argument by the learned Counsel for the Petitioner that the Plaintiff should have added the Petitioner as a Defendant in the case is without any foundation. By the same criterion I would not take the view that the Petitioner was necessary to establish the Defendant's case namely that the Plaintiff gave him a power of attorney.

I would now briefly allude to the narrower and broader constructions surrounding the concept of additions and the slew of case law that have developed.

It is often said that the decisions in the cases of ***Weerapperuma*** *(supra)*, ***Ponnutthurai*** *et al v.* ***N.B. Juhar*** *et al* 66 N.L.R 375, ***The Chartered Bank v. L.N. de Silva*** 67 N.L.R 135 and ***The G.A. Kalutara v. Gunaratne*** 71 N.L.R 58 of our Supreme Court could all be considered as having preferred the "narrower construction" placed upon the Rule regulating the addition of persons as parties in pending proceedings in England.

One is cognizant of ***Arumugam Coomaraswamy v. Andiris Appuhamy and Others*** (1985) 2 Sri L.R 219 wherein Ranasinghe, J. (as His Lordship then was) having been justified by the 'wider construction' of Lord Esher in ***Byrne v. Browne and Diplock*** (1889) 22 Q.B.D 657 held: (with Sharvananda C.J. and Atukorale J. agreeing), "In deciding whether the addition of a new party should be allowed under section 18(1) of

the Civil Procedure Code the wider construction adopted by English Courts is to be preferred. Whenever a Court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that other actions may be brought in respect of that transaction, the Court has the power to bring all the parties before it and determine the rights of all in one proceeding."

But the right of the other party must be an enforceable right and it cannot be chimerical or unreal.

I have just borne in mind the words of Section 18-"*......whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle or the question involved in that action be added.*" and taken the view that the addition of the Petitioner would have been otiose since the question involved in the action does not involve the Petitioner for an effectual adjudication. In so doing I might have adopted the narrower construction which *though* ensures that justice is meted in a case where it is quite apparent that the power of attorney became a simulated transaction in light of the fact that it was not conclusively proved at all.

In such a situation it would be otiose for the Court to have added the Petitioner on its own motion. If indeed the Petitioner wanted to be a party, he could have asked his brother in law -the Defendant- to move the Court to add him as a party-an act which could have been initiated by the Petitioner. Instead he chose to become a witness for the Defendant but his testimony was not of any assistance to establish the fact in issue-whether the Plaintiff had effected a valid power of attorney in favor of the Defendant.

Thus I find that the Petitioner is not a necessary party in the suit between the Plaintiff and the Defendant and from the foregoing I take the view that there are no circumstances that warrant the exercise of jurisdiction of this Court by way of revision and/or *restitutio in integrum* and accordingly I dismiss the Petitioner's application.

JUDGE OF THE COURT OF APPEAL