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

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

Hewa Usaranbage Shayamalie Aloka,
Pelemegedara,
Ketawalagama, Boralapanathara

Case No: CA/RII/05/2017 **Petitioner**

DC Matara Case No: P 14641

1. Siril Rajapakse
   "Rajasiri"
   Phalawitiyala
   Thihagoda

2. Upatissa Pujitha Gunewardhana
   Madiha
   Matara.

3. Udapahalagedara Mudiyanselage
   Rathnayaka
   Wetagoda
   Matara.

4. Yantrawaduge Siril Prenandu
   Nupe
   Matara.

5. Nawaimana Liyanage Sugathadasa
   Nupe

Matara

6. Pathma Gerlin Salgadu
   Welegoda
   Matara.

7. Kapugamage Davundiyas Appu
   Welegoda
   Matara.

8. Hewahalamulage Nandalal Chandrasiri
   No.21,
   Modal Lane
   Rastmalana

9. Hewa Usarambage Karunadasa
   Welegoda
   Matara.

10. Edippili Arachchige Don Mithrananda
    Welegoda
    Matara.

11. Sudurikku Hennadige Gamini De Silva,
    No 80A,
    Sunanda Road,
    Welegoda
    Matara.

12. Kapugamage Bandula
    No. 80 Sunanda Road,
    Welegoda'Matara.

Respondents

Before : **D.N. Samarakoon, J.**
B. Sasi Mahendran, J.

Counsel : Ashan Stanislaus with I. Jabir for the Petitioner
Upul Kumarapperuma with Muzar Lye and S. Gunaratne for the 1st Respondent
Janaka Prathapasinghe for the 3A-3E Respondents

Written Submissions : 17.06.2022(by the Petitioner)
On 17.06.2022 (by the 01st Respondent)

Argued On : 29.03.2022

Decided On : 26.07.2022

B. Sasi Mahendran, J.

The Petitioner, by Petition dated 31st March 2017, seeks to invoke the restitutionary jurisdiction of this Court in terms of Article 138(1) of the Constitution in order to, inter alia, set aside the judgment dated 29th May 1990 and the final decree entered on 09th November 2009 in Case No. P/14641 in the District Court of Matara and to conduct a fresh trial which would enable her to participate in it.

The crux of the Petitioner's case is that the partition case has been conducted in a manner that raises suspicion because firstly, her father (her successor in title to the land), the 1st Defendant in Partition Case No. P/14641, could not have granted proxy to his Attorney-at-Law owing to his paralysis, and secondly, following her father's demise, although the record indicates that one Mr. Shirley Jayaweera, Attorney-at-Law, had tendered a proxy on her behalf to substitute her in place of her father, she is completely unaware of it.

In addition, she challenges Deeds numbered 616,619,628, and 642 on the ground that her father could not have executed those due to his paralysis.

A narration of the facts is necessary.

The 1st and 2nd Respondents, by Plaint dated 14th August 1989, instituted an action in the District Court of Matara to partition a land named 'Pelawatta' alias 'Badullagahawatta' in extent 02 roods and 38.994 perches, depicted as Lots 1-9 in Plan No. 3660 dated 26.09.1989, prepared by S.L. Galappaththi, Licensed Surveyor. The interlocutory decree was entered on 29th May 1990 and the final decree was entered on 09th November 2009. The Petitioner's father was the 1st Defendant and the Petitioner's husband was the 7th Defendant in the said action. It should be noted that the summons was served to both at the same address (Journal Entry No. 07 dated 31.10.1989 - Page 23 of the Brief).

The Petitioner's father after obtaining title to the land from Partition Action No. P/8462 had alienated several portions of the land to persons who were also named as defendants in the partition action. For example, Deeds No. 7610 (dated 11th August 1985) and 7611 (dated 11th August 1985). The Petitioner's father also gifted, subject to the father's life interest, to the Petitioner's husband, who is the 8th Respondent in the instant application, title to a portion of the land by Deed of Gift No. 09 dated 22nd April 1988, attested by H. Somadasa, Notary Public. Following which it was transferred to the 1st Respondent by deeds numbered 616 (dated 01st August 1989), 619 (dated 14th August 1989), 628 (dated 13th September 1989), and 642 (13th December 1989). The father, who had a life interest in the land, also signed all these deeds.

When we perused the signature of the Petitioner's father on Deeds 7610, 7611 and the Deed of Gift and the signature on the allegedly fraudulent Deeds of Transfer, by which the 1st Respondent obtained title, the signature appears to be similar. It should be noted that if the signature is alleged to be fraudulent, it should have been sent to the Department of Examination of Questioned Documents to be verified. However, there is no such report in this case.

However, the Petitioner contends that the deeds by which the 1st Respondent obtained title could not have been validly executed, and the signing and authorizing of the proxy to her father's Attorney for the partition case could not have taken place because her father was paralysed from around February 1989 until his demise on 09th October 1990. It was alleged that the signature on the fraudulent proxy was not her father's.

To substantiate this position, she submitted an affidavit (marked "P3") of the doctor who treated her father for this illness until his demise. A Medical Certificate (marked "P2" on Page 733 of the Brief) issued by one doctor (it is not clear if the Report was issued by the same Doctor that gave the affidavit) notes that the Petitioner's father was suffering a case of hypertension with paralysis since February 1989.

Apart from these two documents, there is no evidence that the Petitioner has submitted to establish the actual physical and mental condition in which her father was at the relevant time. An applicant seeking an extraordinary remedy such as restitution, which has extraordinary consequences if granted such as wiping the slate entirely clean, ought to provide material that would substantiate his/her position at least on a balance of probabilities. Without casting aspersions on the work of the Doctor, to a reasonable person the Medical Certificate and the Affidavit, in the absence of any other evidence, appears to have been created for the purpose of satisfying the claim.

We are of the view that these two documents alone do not meet that standard of proof as clearer proof, including more contemporaneous ones such as hospital records or prescriptions, would have helped to clearly establish matters such as the time period in which the Petitioner's father was paralysed (instead of a bare assertion that he was paralysed from sometime around February 1989); whether he was bed-ridden or whether he could move with the assistance of some person (which do not appear to be conclusive in the Doctor's affidavit and Medical Certificate), whether he was completely physically and mentally incapable of signing the deeds and the proxy or giving consent to the same; whether it was the same doctor that treated the Petitioner's father. This is especially because in all the deeds executed, as aforesaid, the Petitioner's father seems to have been ably present and signed in the presence of the Notary, other executants, and witnesses. The Petitioner's father had duly filed his statement of claim in the partition action as well.

The Petitioner further alleges that the purported substitution in the partition action takes place only on the 26th of October 1992 (two years after her father's death) and that in the intermediary period between her father's demise and the substitution two years later the case proceeded as if no death had taken place. The proxy of the Petitioner had been filed in Court on 26th October 1992 by Mr. Shirley Jayaweera, Attorney-at-Law, as per Journal Entry No. 34 (Page 38 of the Brief) dated the same. Notice of the Petitioner's father's demise is brought to Court's attention on the previous date when the

matter was taken up in Court, which was 03rd October 1992, as per Journal Entry No. 33 (Page 38 of the Brief).

The Petitioner has submitted an affidavit of Attorney-at-Law Mr. Shirley Jayaweera (marked "P6") who denies ever having tendered a proxy on her behalf at the District Court. This Affidavit is dated 10th January 2017, more than twenty-five years after the date of submission of the proxy to the Court. A question then arises, as neither the affidavit discloses nor is any material provided, as to how the learned Counsel was able to ascertain that it was not him that submitted the proxy to Court.

If the correctness of the Journal Entry is to be challenged, then an application ought to have been made to the respective Court to impugn such a record. However, years later when the substantive matter has concluded, and the Petitioner is now before this Court seeking to set aside the judgment and decrees of the lower court, we are unable to verify the correctness of such an entry.

In Gunawardene v. Kelaart 48 NLR 522, his Lordship Canekeratne J. held:

"He further objected to the reading of these belated affidavits and referred me to the case of Orathinahamy v. Romanis, where Bonser C.J. said :— With the appeal was filed an affidavit which I have not read and I understand that the affidavit is to the effect that the record of the evidence taken by the Magistrate does not give a correct account of the statements of the witnesses, and it is sought to impeach the record, and to prove that certain statements were made which do not appear on the record .... It seems to me to be contrary to all principle to admit such an affidavit, and I certainly will not be the first to establish such a novelty in appellate proceedings. **The prospect is an appalling one if on every appeal it is open to the appellant to contest the correctness of the record**." [emphasis added]

In Jayaweera v. Asst. Commissioner of Agrarian Services Ratnapura [1996] 2 SLR 70, his Lordship F.N.D. Jayasuriya J. held,

"There is a presumption that official and legal acts are regularly and correctly performed. It is not open to the Petitioner to file a convenient and self serving affidavit for the first time before the Court of Appeal and thereby seek to contradict either a quasi judicial act or judicial record. Justice Dias having considered a cursus curiae, which he has collated for the benefit of the legal profession, has set down the principle that if a

litigant wishes to contradict the record, he must file the necessary papers before the Court of first instance, initiate an inquiry before the Court of first instance and thereafter raise the matter before the appellate court so that the appellate court would be in a position on the material to make an adjudication on the issues with the benefit of the order of the Court of first instance. The Petitioner has filed a convenient and self serving affidavit and is now seeking to contradict the record that notice or summons issued on him. The law does not permit him to do so."

His Lordship Samayawardhena J. in the recent case of Bandaranayake Liyanaarachchilage Premawathi v. Coranelis Wickremasinghe, CA/RI/133/2010 decided on 02.05.2019, provides a helpful summary of this principle.

The Petitioner claims to have lodged a complaint to the Police as to the allegedly fraudulent or forged deeds. That would be the first step a reasonable person would undertake to impugn their validity. However, no certified copy of the complaint is submitted to us. The reason given was the Police refused to issue one unless this Court made an Order. Yet, the Petition is devoid of a prayer for such an Order. There is no information as to the progress or status of the investigation as well.

Whether or not the deeds and proxies were fraudulent or forged could have been challenged in the correct forum and thus proven. This should have been by way of a separate action.

It is quite astounding that although the Petitioner complains of fraudulent deeds and proxies, in that her father could not have conveyed title owing to his illness, the Petitioner in the present application, as averred at Paragraph 3 of the Petition and reiterated in the written submissions, does not seek to challenge "the merits of the finding in the judgment" but rather seeks "an order to rectify the procedural errors that had led to a grave miscarriage of justice… by virtue of an order for restoring the parties to their original positions as existed on the date of the plaint".

In addition, in her statement of objections filed at the Civil Appellate High Court in Matara it is seen that the Petitioner prays for a retrial of the partition case so that she can participate in it, similar to the instant application, and in her written submissions (dated 06th August 2015) before the said Court she asks to be allocated shares (24.914 perches) in the said land.

It should be noted that the Petitioner's husband derived title from his father-in-law in April 1988, nine to ten months before the father's paralysis. The Petitioner is not challenging the validity of that Deed of Gift. Although it seems odd that the father decided to gift his shares of the land to his son-in-law instead of his daughter (the Petitioner) nevertheless, in the absence of a challenge to that deed by which the Petitioner's husband obtained title to the land, the Petitioner would not be entitled to claim that share of the land as the Petitioner's husband has lawfully obtained title to it and conveyed it to the 1st Respondent, supposedly with the Petitioner's father signing as the life interest holder. Even if the Petitioner proves that her father did not sign the deeds as the life interest holder, in the absence of the Petitioner's father revoking the deed, the title remains with his son-in-law. Either way, the Petitioner will not be entitled to claim shares to that portion of the land.

The law frowns upon a person who both approbates and reprobates. One cannot accept and reject the same instrument. This is a doctrine that is well known in our law. As stated by his Lordship Samarakoon C.J. in Visuvalingam v. Liyanage [1983] 1 SLR 203, one "cannot blow hot and cold".

In Ranasinghe v. Premadharma [1985] 1 SLR 63 his Lordship Sharvananda C.J. held:

"The rationale of the above principle appears to be that a defendant cannot approbate and reprobate. In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts the one he cannot afterwards assert the other; he cannot affirm and disaffirm. Hence a defendant who denies tenancy cannot consistently claim the benefit of the tenancy which the Rent Act provides."

The principle was considered by the House of Lords in Lissenden v. CAV Bosch Ltd [1940] 1 All ER 425.

Browne- Wilkinson V.C. in Express Newspapers v. News (UK) Ltd [1990] 3 All ER 376 held:

"There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that

you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance."

It is trite law that the remedy of restitutio in integrum is an exceptional one granted by this Court only if the party applying for it can demonstrate that one of the grounds for its invocation has been made out (assuming that the party is entitled to apply for it). These grounds have been set out in the following cases:

In Sri Lanka Insurance Corporation v. Shanmugam, [1995] 1 SLR 55, his Lordship Ranaraja J. held:

"Superior courts of this country have held that relief by way of restitution in integrum in respect of judgments of original courts may be sought where (a) the judgments have been obtained by fraud, (Abeysekera-supra), by the production of false evidence, (Buyzer v. Eckert), or non-disclosure of material facts, (Perera v. Ekanaike), or where judgment has been obtained by force or fraud, (Gunaratne v.Dingiri Banda, Jayasuriya v. Kotelawela). (b) Where fresh evidence has cropped up since judgment which was unknown earlier to the parties relying on it, (Sinnethamby-supra), and fresh evidence which no reasonable diligence could have helped to disclose earlier, (c) Where judgments have been pronounced by mistake and decrees entered thereon, (Sinnethamby-supra), provided of course that it is an error which connotes a reasonable or excusable error, (Perera v. Don Simon). The remedy could therefore be availed of where an Attorney-at-Law has by mistake consented to judgment contrary to express instructions of his client, for in such cases it could be said that there was in reality no consent, (Phipps-Supra, Narayan Chetty v. Azeez), but not where the Attorney-at-Law has been given a general authority to settle or compromise a case, (Silva v. Fonseka)"

Recently, his Lordship Nawaz J. in Edirisinghe Arachchilage Indrani Chandralatha v. Elrick Ratnam, CA R.I. Case No. 64/2012 decided on 02.08.2017, reaffirmed these grounds as follows:

"Any party who is aggrieved by a judgment, decree or order of the District Court or Family Court may apply for the interference of the Court and relief by way of *restitutio in integrum* if good grounds are shown. The just grounds for restitution are fraud, fear,

minority etc. Our Superior Courts have held that the power of the Court to grant relief by way of *restitutio in integrum*, in respect of judgments of original Courts, is a matter of grace and discretion, and such relief may be sought only in the following circumstances:-

a) Fraud
b) False evidence
c) Non-disclosure of material facts
d) Deception
e) Fresh evidence
f) Mistake
g) Fear"

In the instant case, assuming that the Petitioner is entitled to apply for restitution, although fraud is alleged, there is insufficient material, especially in the light of the assertions of the opposing side, for this Court to grant the remedy of restitutio in integrum and completely wipe out the judgment and decrees in the partition case.

The standard of proof for fraud was recently reiterated in C.A. Case No 1258/2000 (F) decided on 31.07.2019. His Lordship Priyantha Fernando J. held:

"When fraud is alleged in signing of a deed, in a Civil Court it would require a higher degree of probability although it does not adopt the standard of proof beyond reasonable doubt."

His Lordship referring to the judgments of Kumarasinghe v. Dinadasa [2007] 2 SLR 203 and Peiris v. Siripala [2009] 1 SLR 75 further held:

"On the above line of authorities, it is clear that in proving a fraud in a civil transaction, although the standard of proof is balance of probabilities a strict proof is required."

Further, this Court observes that the Petitioner has not been truthful in her application. She has not stated anywhere that the property conveyed by her father was to her husband, who is the 8th Respondent in the instant application.

As mentioned above, the address of the 1st and 7th Defendants in the partition case (her father and husband respectively) was the same. She has not indicated that the address given by the both Defendants was wrong or that summons was not served on

them and when an appeal to this Court on a previous occasion was lodged (on 17th January 1997 by the 10th Defendant in the partition action) whether notice, which ought to have been issued by registered post, was served on the Respondents. There is a presumption in terms of Section 114 of the Evidence Ordinance that judicial and official acts have been regularly performed. She cannot say that she was unaware of the action concerning the land.

The absence of good faith when seeking exceptional remedies which lie at the Court's discretion is a ground to dismiss an application. (Blanca Diamonds v. Wilfred Van Els [1997] 1 SLR 360, Dahanayke v. Sri Lanka Insurance Corporation [2005] 1 SLR 67, Siripala v. Lanerolle [2012] 1 SLR 105)

The Respondents also contend that the Petitioner is guilty of laches, as she lodged the present application seven years after the final decree was entered in the partition action.

The Petitioner claims that she became aware of the partition case, and all these transactions, only in 2014 when she received notice, which was in her father's name, relating to the Revision case (bearing No. SP/HHCA/RA/08/2014) filed (by one Gamini de Silva and Kapugamage Bandula) before the Civil Appellate High Court in Matara. It was only then that she intervened and filed her statement of objections stating that her father could not sign the proxy as he was paralysed and prayed for a re-trial.

Nevertheless, she waited for about two years before filing the instant application in this Court. No explanation is forthcoming as to why she delayed. This Court also observes that in the meantime she has not taken any steps to institute an action to impugn the allegedly fraudulent deeds. A person seeking restitution must act with utmost promptitude.

The contention of the Respondents would not be acceptable had fraud been made out to this Court as delay cannot defeat this Court's inherent power to guard an innocent party against an injustice perpetrated on such party.

This position was made manifest by his Lordship Jayasinghe J. in Kusumawathie v. Wijesinghe [2001] 3 SLR 238:

"Where a party appears before Court and complains that she has been wronged by process of law this Court would not helplessly watch and allow the fraud practiced on that

party to be perpetuated. Restitutio - In - Integrum provides this Court the necessary apparatus to step in and rectify any miscarriage or failure of justice."

In Chandani Princy Mapitiya nee Epasinghe v. Irani Manorika Shrimalee, CA RI 12/2016 decided on 29.05.2019, his Lordship Samayawardhena J. held:

"Delay shall not be a ground for dismissal of an action when there is a manifest fraud, especially, abusing the process of the Court, proven before Court."

However, in the absence of cogent evidence to prove fraud and in the absence of an explanation for the delay to institute this action the belated application must be dismissed.

Therefore, for the foregoing reasons we dismiss this application with costs.

JUDGE OF THE COURT OF APPEAL

D.N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL