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

In the matter of an Application for Restitutio in Integrum in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA RI /04/ 2022

District Court of Panadura

Case No: 2319/P

Kospelawattage Jayasena,

Piyanandagama,

Thembuwana.

Plaintiff

Vs.

1. Kospelawattage Charlet
   Willoraarachchi
   Dediyawala
   Waskaduwa.

2. Kospelawattage Ariyapala,
   Kadaweediya,
   Thembuwana.

3. Kospelawattage Wijepala,
   Kapuhena, Waskaduwa.

4. Hingurage Don Jayantha
   Gunawardane,

No. 146 C, Annasi Kotuwa Road,
Pamunugama. Alubomulla.

<u>Defendants</u>

AND

AS PER THE AMENDED PLAINT

4.Hingurage Don Jayantha
Gunawardane,
No. 146 C, Annasi Kotuwa Road,
Pamunugama. Alobomulla.

5.Hingurage Nayani Lasanthika
Gunawardane
No. 146 C, Annasi Kotuwa Road,
Pamunugama.

4th and 5th Substituted -Plaintiffs

Vs.

1. Kospelawattage Charlet
Willoraarachchi, (Deceased)
School Lane, Dediyawala,
Waskaduwa.

1(a). Sajith Kusumsiri Willoraarachchi,
School Lane, Dediyawala,
Waskaduwa.

2. Kospelawattage Ariyapala,

Kadaweediya, Thembuwana.

3. Kospelawattage Wijepala,
Kapuhena, Waskaduwa

4. Hingurage Don Jayantha Gunawardane,
   No. 146 C, Annasi Kotuwa Road,
   Pamunugama.

5. Hingurage Nayani Lasanthika Gunawardane,
   No. 146 C, Annasi Kotuwa Road,
   Pamunugama, Alubomulla.

6. Kospelawattage Jayasena (Deceased)
   Piyanandagama, Thembuwana.

   6(a). Haupe Don Dilupa Chaminda,
   Thalpitiya Yatawara Junction,
   Kaluthara South.

7. Manathunga Janaka Chaminda Silva,
   No. 20, Newton Silva Mawatha,
   Pinwatta, Panadura.

8. Pallekankanamge Don Inoka Chandima Wijegunawardane,
   Lumbini, Horana Road, Alubomulla,
   Panadura.
9. PalleKankanamge Don Palitha Wijegunawardane,
   Lumbini, Horana Road, Alubomulla,
   Panadura.

<u>Defendants</u>

AND NOW BETWEEN

7. Manathunga Janaka Chaminda Silva,
   No. 20, Newton Silva Mawatha,
   Pinwatta, Panadura.
8. Pallekankanamge Don Inoka Chandima Wijegunawardane,
   Lumbini, Horana Road, Alubomulla,
   Panadura.
9. PalleKankanamge Don Palitha Wijegunawardane,
   Lumbini, Horana Road, Alubomulla,
   Panadura.

Defendant – Petitioners

Vs.

1. Kospelawattage Charlet Willoraarachchi, (Deceased)
   School Lane, Dediyawala,
   Waskaduwa.

1. (a). Sajith Kusumsiri Willoraarachchi,
   School Lane, Dediyawala,
   Waskaduwa.

2. Kospelawattage Ariyapala,
   Kadaweediya, Thembuwana.

3.Kospelawattage Wijepala,

Kapuhena, Waskaduwa.

And

3. Hingurage Don Jayantha Gunawardane,
   No. 146 C, Annasi Kotuwa Road,
   Pamunugama.
4. Hingurage Nayani Lasanthika Gunawardane,
   No. 146 C, Annasi Kotuwa Road,
   Pamunugama, Alubomulla.

4th and 5th Defendant – Substituted – Plaintiff – Respondents

5. Kospelawattage Jayasena (Deceased)
   Piyanandagama, Thembuwana.

6.(a). Haupe Don Dilupa Chaminda,
ThalpitiyaYatawara Junction,
Kaluthara South.

Defendant – Respondents

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

Counsel: Mahinda Nanayakkara with S.K. Gamage for the 7th,8th and 9th Defendant Petitioners

Supported on: 15.02.2022

Order On : 16.03.2022

B. Sasi Mahendran, J

The 7th, 8th, and 9th Defendant- Petitioners (hereinafter referred to as "the Petitioners") by their Petition dated 07.02.2022 have sought to invoke the restitutionary jurisdiction of this Court in terms of Article 138 of the Constitution in order to, inter alia, set aside the judgment and interlocutory decree of Case No. 2319/P of the District Court of Panadura, dated 23.07.2020 and to direct the trial to be held de novo with permission for the Petitioners to file their statements of claim.

It must be noted at the outset that in the caption and prayer of the Petition, the Petitioners have elected not to invoke the revisionary jurisdiction of this Court which is also available in terms of Article 138 of the Constitution.

When this application for *restitutio in integrum*, was taken up for support on 15.02.2022, the learned Counsel for the Petitioners indicated to this Court that the learned District Judge had failed to ascertain the correctness of the corpus of this action and that the calculations of the shares are per se erroneous.

The power to entertain applications by way of *restitutio in integrum* has, without a shadow of a doubt, been conferred on the Court of Appeal by the Constitution.

In order to determine whether the Petitioners are entitled to the relief claimed a brief narration of the facts is important.

The Plaintiff filed a Plaint dated 03.01.2010 in the District Court of Panadura to partition the land called '*Kadjugahaowite kattiya'*. Following the demise of the Plaintiff, the 4th and 5th Defendants were substituted as the "Defendant Substituted Plaintiffs" to proceed with the action. Accordingly, an amended Plaint was filed on 07.04.2017. On 25.08.2017, the 7th, 8th, and 9th Defendants (the Petitioners) were added, and they duly filed their statements of claim, claiming their shares of the corpus. Thereafter, at the pre-trial which was

held on 19.07.2018, the Defendant Substituted Plaintiffs and the Petitioners recorded two admissions and four issues. The trial had commenced on 27.09.2018 with the evidence of the 4th Defendant Substituted Plaintiff. There hadn't been any cross-examination or re-examination of the said witness. The learned District Judge delivered the judgment on 23.07.2020 and the interlocutory decree was entered consequently. By the said judgment the share of the corpus each party is entitled to are as follows:

Plaintiff	1/24
1st, 2nd, and 3rd Defendants	1/24
4th Defendant	21/24
5th Defendant	1/24

Although the remedy of Restitution has acquired constitutional status it is deeply rooted in our case law. The often-cited judgment of Abeyesekere v.Harmanis Appu14 NLR 353 is illustrative of the application of this remedy.

His Lordship Wood Renton J held,

"Under the civil law, where a person suffered a legal prejudice by the operation of law, the praetor having personally inquired into the matter (*causae cognitio*) in the exercise of his imperium, which enabled him to consider all the actual facts of the case, might issue a decree re-establishing the original legal position, that is to say; replacing the person injured in his previous condition. In Roman law *restitutio in integrum* was the removal of a disadvantage in law which had legally occurred. It was a protection against justice(as distinguished from an action against injustice) which was rendered necessary on account of the practical impossibility of taking legally, in advance, all the circumstances into consideration that in reality may occur….. The remedy was received into the Roman-Dutch law in a wider form. *Restitutio* was not only granted to minors. It might be granted to any one, either in *toto*, on the grounds of *metus*, *dolus*, *absentia*, and minority, or partially, on the ground that the damage suffered exceeded the value of what was

obtained through the transaction by half (*ob laesionem enormem*). Van der Linden gives as additional grounds for partial restitution absence and error, and further, all such equitable reasons as rendered it unjust that the act should remain in existence."

His Lordship, at page 357, also referred to a few local decisions.

"In Stork v. Orchard, Mr. Justice Lawrie, then Acting Chief Justice, held that the remedy of restitutio in integrum was available in all cases where a contract can be shown to have proceeded on total misconception. In Gunaratne v. Dingiri Banda, Sir John Bonser C.J., with whom Withers. J. concurred, held that the proper remedy, where the consent of a party to a case instituted in the District Court was obtained by fraud and so judgment obtained, was to apply to the Supreme Court for an order on the Court below to review the impugned judgment and to confirm or rescind it. At the close of his judgment, Sir John Bonser said:" Any such application will, of course, be an ex parte one." In describing the Roman-Dutch procedure, he made use of the following language :"If the applicant satisfied that Court" (i.e. , the highest Court of Appeal in Holland) "that he had a prima facie case, the case was remitted to the Judge who pronounced the decree, and if he found that the decree had been fraudulently obtained, he would restore the parties to their original position."

A comprehensive analysis of this remedy is also found in the judgment of <u>Sri Lanka Insurance Corporation Ltd v. Shanmugam and another</u> [1995] 1 SLR 55 in which His Lordship Ranaraja J. expounded the grounds on which Restitution can be claimed. It was 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, (Abeyesekere-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, (Mapalathan-supra). (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 Ratnum, CA R.I. Case No. 64/2012 decided on 02.08.2017, succinctly reiterated 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 application, the Petitioners were unsuccessful in proving, to the satisfaction of this Court, the existence of any of the aforesaid grounds. For this reason alone, this application must be dismissed in limine.

A factor that this Court must also bear in mind is the absence of Petitioners to exhaust other remedies to impugn the said judgment and interlocutory decree, such as exercising a right of appeal available to the Petitioners under the Partition Law.

His Lordship Pereira J in Perera v. Wijewickreme 15 NLR 411 held,

"it was not granted unless no other remedy was available to the applicant or unless restitution was the more effectual remedy."

A position echoed by His Lordship Ennis J,

"This is an application for restitutio in integrum. It appears clear that such an application is not granted in Ceylon if any other remedy is available."

Similarly in Menchinahamy v. Muniweera 52 NLR 409 His Lordship Dias J held, "*Restitutio in integrum is not available if the petitioner has another remedy open to her."*

In Sri Lanka Insurance Corporation v. Shanmugam (supra) a reason for refusing the application was that *"Restitution is granted only if no other remedy is available to the party aggrieved. The Petitioner has made two applications in revision and also filed a final appeal against the orders complained of."*

A plea to invoke *restitutio in integrum* at the first instance might be contrary to the purpose of Article 138 (1) of the Constitution which reads 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 the High Court, in the exercise of its

appellate or original jurisdiction or 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 High court, Court of First Instance, tribunal or other institution may have taken cognizance: [emphasis added]

The Partition Law provides for appeals that parties may take if they are dissatisfied with an Order. According to Section 48 (1) of the Partition Law which reads thus,

Save as provided in subsection (5) of this Section, the interlocutory decree entered under Section 26 and the final decree of partition entered under Section 36 shall**, subject to the decision on any appeal which may be preferred therefrom**, and in the case of an interlocutory decree, subject also to the provisions of subsection (4) of this Section, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decree relates and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court other fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree [emphasis added]

In Jayaratne & Another v. Premadasa & Others [2004] 1 SLR 340 His Lordship Weerasuriya J held,

"It is significant that section 48(1) of the Partition Law gives final and conclusive effect to the interlocutory decree subject to the decision on any appeal which may be preferred therefrom and subsection (4) as referred to earlier".

In addition to the above reasons, this application has to be refused on the basis that the Petitioners have failed to disclose any exceptional circumstances to invoke the jurisdiction of this Court.

Thus, we are of the view that this is not a case that merits the invocation of the restitutionary jurisdiction of this Court.

We accordingly dismiss the application of the 7th,8th, and 9th Defendant Petitioners.

JUDGE OF THE COURT OF APPEAL

D.N.SAMARAKOON,J

I AGREE

JUDGE OF THE COURT OF APPEAL