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 Sections 753 and 839 of the Civil Procedure Code read with Article 138 of the Constitution.

C.A. Case No.: CA RII 05/2019
DC Case No: 2120/05/L

Robert Maurice Perera
No.28, Muffet Street,
Wellington,
New Zeeland.

Manthi Sri Lal Perera
No 36,
Siripa Road,
Colombo 5.
(Appearing by his power of attorney holder)

Plaintiff

-Vs-

Subramanium Parameshawaran
18/1,Ishwari Road
Colombo 06.

Defendant

AND NOW

Subramanium Parameshawaran
18/1,Ishwari Road
Colombo 06

Defendant-Petitioner

Vs.

Robert Maurice Perera
No.28, Muffet Street,
Wellington,
New Zeeland
(Deceased)

Manthi Sri Lal Perera
No 36,
Siripa Road,
Colombo 5

Substituted-Plaintiff-Respondent

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

Counsel : Upul Kumarapperuma with Muzar Lye for the Defendant- Petitioner
Bhagya Herath with Sajeevi Jayasinghe for the Substituted- Plaintiff-Respondent

Written Submissions: Defendant Petitioner on 04.12.2019 and 24.02.2022
Substituted Plaintiff-Respondent On 05.02.2020 and 28.02.2022
On

Argued on: 25.01.2022

Order On : 18.03.2022

B. Sasi Mahendran, J.

In this application for *Restitutio- in- integrum and/* or revision filed under Article 138 of the Constitution on 25.03.2019*,* the Defendant Petitioner (hereinafter referred to as "Petitioner"), endeavors, inter alia, to set aside the judgment dated 01.06.2010, of the District Court of Mount Lavinia in Case No. 2120/05/L, to obtain an Order staying the execution of the same, and to restore the rights of the Petitioner.

On 13.06.2019, Counsel for the Substituted Plaintiff-Respondent (hereinafter referred to as "Respondent") moved to file objections, and accordingly, it was filed on 07.08.2019. On 12.09.2019, the Petitioner moved to file counter objections and this Court granted the date to file on or before 24.10.2019 and further directed both Counsel to file their written submissions on separate dates. Accordingly, both parties tendered their written submissions. When this case was called on 07.02.2020 both parties agreed to fix this matter for argument on 01. 07. 2020, on which day it was re-fixed for 11.11.2020.

In the meantime, the Petitioner revoked the existing proxy and filed a new proxy. The Petitioner then, by way of a motion dated 01.02. 2021, moved to take off the case from the argument list and for it to be mentioned on 11.02. 2021. When the case came up on 11.12.2021 Counsel for the Petitioner informed Court that Dr. Sunil Coorey has been retained as new Counsel and therefore he wanted to file an amended Petition.

The reason given by the Petitioners for filing the amended Petition is that having decided to retain a new Counsel, the original Petition filed on 25.03.2019 may pose some confusion since it was not drafted in an orderly manner. It is also admitted that the original Petition has failed to expressly and correctly present to this Court the same issues that were existing at the time of filing the original application.

However, the Respondent objected to the filing of the amended Petition on the basis that they have already taken preliminary legal objections to maintain this action. It should be noted that, by this time, the Petitioner had already filed the counter objections on 24.10.2019. Further, it is claimed that the Petition was sought to be amended in a way that all the objections of the Respondent are sought to be explained. A convenient restating of the Petitioner's case to fill the gaps in the previous Petition.

On 08.11.2021 the amended Petition was filed. This contained new facts to address the objections taken by the Respondent in their statement of objections. Thereafter, when

the matter came before this Court on 25.01.2022 Court observed that the Petitioner has already filed their amended Petition and therefore it directed both parties to file written submissions with regard to objections taken by the Respondent as to maintainability of this action. Accordingly, both filed their written submissions.

The following objections were taken by the Respondent:

a. The suppression of material facts such as the Respondent's abandonment of the action in the District Court, the filing of a revision application in the Provincial High Court of the Western Province (Civil Appellate) holden at Mount Lavinia, and the refusal/rejection of the said Revision application.

b. The unreasonable/ unexplained delay of over nine years, since the impugned judgment of the District Court, in making this application which makes the Petitioner guilty of laches,

c. The Petitioner's contention that the substitution of the Respondent was defective, an argument that is sought to be re-canvassed in this Court, was already considered and rejected by the Civil Appellate Court acting in their Revisionary capacity.

Before this Court considers the legal objections taken by the Respondent with regard to filing an amended Petition, this Court observes that Rule 3 (8) of the Court of Appeal (Appellate Procedure) Rules 1990, provides the method of amending the pleadings. It reads as follows,

> *A party may,* ***with the prior permission of the Court****, amend his pleadings, or file additional pleadings affidavits or other documents within two weeks of the grant of such permission, unless the Court otherwise directs. After notice has been issued, such permission shall not be granted ex parte.* [emphasis added]

This rule was discussed in the case of Dias v. Karawita 1999 (1) SLR 98 by His Lordship De Silva, J.

> *"The Court of Appeal (Appellate Procedure Rules 1990 - Rule 8) permits a party "with prior permission, amend his pleadings or file additional*

pleadings or other documents within two weeks of the grant of such permission unless the court otherwise directs". Rule 15 specifically states that: "These rules shall also apply mutatis mutandis to applications made to the court under any provision of the law, other than Articles 138, 140 and 141 of the Constitution". The above mentioned rules therefore empowers the Court of Appeal to permit amendments of any application made to the Court of Appeal. The petitioner had effected the amendments with permission of court. In these circumstances the submission that this court has no power to permit the amendment is devoid of any substance."

When we perused the written submissions filed by the Petitioner dated 24.02.2022, it is evident that the Petitioner's position is that pleadings were amended according to Sections 93 and 46 of the Civil Procedure Code. Generally, the procedure to be adopted is to tender the draft proposed amendment for the Court to consider. This procedure was not followed by the Petitioner.

It is observed that the Petitioner has failed to disclose that he has obtained the prior permission of this Court to file this amended Petition. On a perusal of the journal entries prior to 08.11. 2021 there is no indication that the Petitioner has obtained permission to file the amended Petition prior to filing it. It shows that only after the amended Petition has been filed that he has sought to obtain this Court's permission. This will amount to non-compliance of the Rules of the Court of Appeal.

The **factual background** is set out as follows for the purpose of convenience.

The inception of this long-drawn-out legal battle begins when the original Plaintiff (the father of the Respondent) sold the property, to which this application is concerned, for a sum of Three Million Rupees (Rs.3,000,000/-), by Deed of Transfer No. 487 dated 28.05.2003 attested by Mr. Joy M. Jayaratnam, Notary Public, to the Petitioner. The said deed was signed by Mr. Ananda Malalgoda who was the Attorney for the Plaintiff. The Plaintiff was residing in New Zealand at that time. Following the execution of the deed, the Plaintiff became aware that the market value of the property was Twelve Million Rupees (Rs.12, 000,000/-).

Thus, the original Plaintiff, represented by his Power of Attorney, the Respondent, instituted an action in the District Court of Mount Lavinia by Plaint dated 28.12.2005

(Case No. 2120/05/L), and thereafter filed an amended Plaint on 24.08.2006, against the Petitioner, under the doctrine of '*Laesio Enormis*', on the basis that at the time of execution of the said Deed of Transfer the property was worth Twelve Million Rupees and the price at which it was sold is less than half its true value. The Plaintiff in his Plaint (dated 28.12.2005) and amended Plaint (dated 24.08.2006) prayed, inter alia, for a judgment to cancel the Deed of Transfer No. 487 dated 28.05.2003, and in the alternative for an Order directing the Petitioner to transfer the property to the Plaintiff upon the payment of Three Million Rupees.

The Petitioner in his amended Answer dated 19.10.2006, made a cross-claim against the Plaintiff claiming for a sum of Five Million Rupees on improvements and further claimed that until the sum of Five Million Rupees was paid to him, he was entitled to retain the property. The Plaintiff by his Replication dated 23.11.2006, denied the cross-claim. When the trial commenced on 17.09.2007, four admissions were recorded. The Plaintiff raised eight issues (and two consequential issues) while the Petitioner raised thirteen issues (and one consequential issue). The Respondent and the Land Valuer Mr. R.S. Wijesuriya gave evidence and both were cross-examined. A date was then set to call for the Petitioner's evidence. On 11.03.2010 the Petitioner was absent and he was unrepresented. Therefore, the Court fixed the matter for ex-parte trial against the Petitioner. Thereafter, the learned District Judge delivered his judgment on 01.06.2010, in favor of the original Plaintiff after considering the evidence before him.

Subsequent to the death of the original Plaintiff on 07.10.2014, the Respondent made an application to Court on 04.06.2015 seeking to substitute himself as the Plaintiff. An Order was made on 11.05.2016 and according to that Order, the Respondent was appointed as the Substituted-Plaintiff. Then as per Journal Entry 54, a sum of Three Million Rupees was deposited in Court. The Respondent made an application to get the property transferred in his name. As per the Court's instructions, the Respondent duly tendered the affidavits of the heirs of the original Plaintiff consenting to the transfer of the property in the Respondent's name. On 27.04.2017, the Court made an Order allowing the application to transfer the property to the Respondent.

According to the statement of objections filed on 07.08.2019, the Respondent, in paragraph 18, states that the Petitioner had filed a Revision application on 09.06.2017 in the Provincial High Court of the Western Province (Civil Appellate) holden at Mount Lavinia to set aside the judgment delivered on 01.06.2010.

The Respondent in their statement of objections, in the above-said case, took a preliminary objection that the Petitioner had failed to make an application to the District Court of Mount Lavinia to vacate the ex-parte Order. The learned Judges of the Civil Appellate Court delivered judgment on 08.01.2018. They upheld the preliminary objection and held there was negligence and unreasonable delay by the Petitioner. It must be noted that the Petitioner has not taken any steps to revise this Order.

The Petitioner in his original Petition has omitted to indicate the above-said facts to this Court. This omission was sought to be rectified in the amended Petition only after it was exposed by the Respondent.

Thereafter, the Petitioner has invoked the restitutionary jurisdiction of this Court by application dated 25.03.2019 one year and three months after the judgment of the Civil Appellate Court to set aside the same judgment which was refused by the Civil Appellate Court.

There is nothing to indicate that the Petitioner has made an attempt to vacate the Order in the District Court.

The following authorities illustrate the attitude our Courts have taken on such a failure.

In Loku Menika v. Selenduhamy 48 NLR 353 His Lordship Dias J, held,

"It is clear that the learned Commissioner of Requests held this inquiry under a rule of practice which has become deeply ingrained in our legal system-namely, that if an ex parte order has been made behind the back of any party, that party should first move the Court which made that ex parte order in order to have it vacated, before moving the Supreme Court or taking any other action in the matter. If authority is needed for this proposition it is to be found in the following cases: In Habibu Lebbe v. Punchi Ettena [1][(1894) 3 C. L. R. at p. 85 and see Craig V. Kanssen (1943) 1 K, B. 256.] Bonser C.J. said "I am informed by my learned brother that it has long been the practice, and a practice which has been expressly approved by this Court, that in cases like the present one, application should be made in the first instance to the Court which pronounced the judgment; and if the Court which pronounced the judgment refuses to set it aside, then, and then only, should there be an appeal from that refusal."

In Hotel Galaxy (Pvt) Ltd v. Mercantile Hotels Management Ltd, His Lordship Sharvananda, C.J. held,

"These authorities therefore clearly establish the principle that a court which makes an ex parte order without notice to the party who is adversely affected by it is entitled to set it aside on the application of such party in the same case. This power is derived not from any express provision in the Code but, as stated above, from a rule of practice which has become deeply ingrained in our legal system."

The failure to make an application to vacate the ex-parte Order which was made by the District Court is sufficient to dismiss this application in limine.

Now, this Court will deal with the preliminary objections taken by the Respondent with regard to the maintainability of this action.

Uberrima fides

It must be borne in mind that an application for Restitutio in integrum is an exceptional remedy that is granted only on limited grounds and only in exceptional circumstances.

One of the hallmarks of this remedy is that the applicant must display honesty and frankness and the applicant must display utmost promptitude. Therefore, Court expects the Petitioner to reveal all the relevant facts to this Court for it to exercise its discretionary jurisdiction of Restitutio in integrum.

An allegation is made that the Petitioner was guilty of suppressing material facts such as the filing of a Revision Application in the Civil Appellate Court against the same Order, which was dismissed. It is true that the particular application was not filed in the Court of Appeal but a similar matter was canvassed in a different forum. The fact that he had filed an application in the Civil Appellate Court seeking identical relief was not made known to this Court. Similar facts were considered by His Lordship Yapa, J as suppression of material facts in the following case.

In Jayasinghe v. The National Institute of Fisheries and Nautical Engineering [2002] 1 SLR 277, His Lordship Yapa, J held,

"Similarly, the Petitioner's failure to disclose to this Court, the fact that he had filed an application in the Court of Appeal seeking identical relief (a fact known to him when he supported this application in the Supreme Court) is a serious suppression of a material fact……. Thus, it is manifestly clear that the petitioner had failed to carry out an imperative legal duty and obligation to Court.

Therefore, the conduct of the petitioner in withholding these material facts from Court shows a lack of uberrima fides on the part of the petitioner. When a litigant makes an application to this Court seeking relief, he enters into a contractual obligation with the Court. This contractual relationship requires the petitioner to disclose all material facts correctly and frankly. This is a duty cast on any litigant seeking relief from Court."

His Lordship referred to the judgment of Blanca Diamonds (Pvt) Limited v. Wilfred Van Els and Two Others [1997] 1 Sri LR 360, in which this "contractual obligation" was emphasised by the Court.

In referring to these two judgments, in the case of Dahanayake v. Sri Lanka Insurance Corporation [2005] 1 SLR 67 His Lordship Marsoof, J. held,

"If there is no full and truthful disclosure of all material facts, the Court would not go into the merits of the application but will dismiss it without further examination."

In Siripala v. Lanerolle [2012] 1 SLR 105 His Lordship Sarath de Abrew, J. held,

"It is a cardinal principle in revisionary jurisdiction that in order to invoke discretionary revisionary powers the petitioner should made a full disclosure of material facts known to him and thereby show uberrima fides towards Court. Deliberate non-disclosure should be regarded as fatal to the application."

The absence of reasons as to why the Petitioner abandoned the action at the District Court and failed to vacate the judgment at that stage and the suppression of material facts would result in the Petitioner being found in breach of an imperative legal duty i.e., his conduct lacked uberrima fides.

Laches

The present application was filed on 25.03.2019. That is **nine years** since the delivery of the judgment at the District Court of Mount Lavinia. The Civil Appellate Court had also observed that there was no reason forthcoming for the unreasonable delay on the part of the Petitioner in filing the Revision application in that Court. Similarly, no reasons were forthcoming in the original Petition why this delay occurred. This was another omission that was sought to be rectified in the amended Petition.

The following line of authorities buttresses this position that laches will result in refusal to entertain an application for Restitution.

In Menchinahamy v. Munaweera 52 NLR 409 , His Lordship Dias, S.P.J. held

"It has also been laid down that relief by way of restitutio in integrum should be sought for with the utmost promptitude-see Babun Appu v. Simeon Appu 3[(1907) 11 N. L. R. at p. 45.]. It has been argued that an examination of the relevant dates will show not only that the petitioner has been guilty of unreasonable delay in seeking her remedy, but that the facts seem to indicate that she is acting in collusion with the appellants whose appeal against the interlocutory decree was dismissed by this Court. It is pointed out that the judgment in appeal was delivered on February 16, 1949; that thereafter there was some abortive attempt to appeal to the Privy Council; and when that failed this petitioner on March 10, 1949, moved this Court and is in effect seeking to over-rule the interlocutory decree and the judgment of the Supreme Court in appeal. The explanation given by the petitioner in her affidavit is that she sought her relief as soon as she heard what had happened, and she submits that the course this trial took has gravely prejudiced her, and she is asking for relief. I am unable on the materials before me to hold that her statements are false. After all she is a village woman living in a remote part of this Island, and it may well be that she was in total ignorance of what was happening. Furthermore, there is no evidence which would justify me in holding that she is acting in collusion with the defeated appellants."

In Perera v. Don Simon 62 NLR 118 His Lordship Sansoni, J (as he then was) held;

"I would refer in this connection to Mapalathan v. Elayavan and Dember v. Abdul Hafeel . In those cases it was held that restitutio would not be granted where there has been negligence on the part of the applicant for relief. The case is all the worse if the error

is due to the act of the plaintiff himself, as would appear to be the case here. ……Over three years had elapsed between the entering of the decree and the filing of the present application, and it was therefore filed too late."

In M.A. Don Lewis v. D.W.S.Disanayake 70 NLR 8 His Lordship Tennekoon,J (as he then was) held;

"These being the facts the first question that arises for consideration is whether this court should exercise its extraordinary powers of revision or by way of Restitutio in Integrum in favour of the applicant. There is no doubt in my mind that the petitioner was aware of the partition action from the date the Surveyor first went on the land. Petitioner has only himself to blame if he pursued the ill-advised course of trying to usurp the place of the 8th defendant-respondent. Petitioner could, long before the Interlocutory Decree, have sought to have himself added instead of taking the inexplicable course he did. Even after the Interlocutory Decree was entered the petitioner in seeking to intervene persisted in trying to persuade the District Court that he and Carolis Caldera were one and the same person. Further when his application to intervene was dismissed by the District Court (which in its order explicitly stated that the petitioner's remedy if any was by way of an application for revision to this court) the petitioner did nothing for 8 months. It is not the function of this court in the exercise of the jurisdiction now being invoked to relieve parties of the consequences of their own folly, negligence and laches. The maxim Vigilantism, non dormientibus, jura subveniunt provides a sufficient answer to the petitioner's application on the ground now under consideration."

This dictum was followed by His Lordship Ranaraja J in Sri Lanka Insurance Corporation v. Shanmugam and another 1995 (1) SLR 55

" The remedy of restitution in integrum is not available to a party that has been guilty of a blatant lack of due diligence"

And recently, in Kumudu Samanthi Akmeemana v. Araliya Kankaanamge Somasiri de Silva & Others CA/RI/1/2018 , Decided on 21.02.2019, His Lordship Samayawardhena, J held,

"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 Chettiar1) The petitioner cannot seek restitution as of right. There are several threshold matters to be sorted out before

addressing the core issue……. One such important hurdle to overcome is that " relief by way of restitutio in integrum should be sought for with the utmost promptitude." Vide Menchinahamy v. Muniweera, Babun Appu v. Simon Appu, Sri Lanka Insurance Corporation Limitted v. Shanmugam ……., 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…… The explanation for delay over two years is unacceptable. Hence, on that ground alone, the application of the petitioner is liable to be dismissed."

In addition, the Petitioner has failed to demonstrate any of the following grounds which were considered by Our Courts when relief by way of Restitution was sought.

U.L. Abdul Majeed in his book "A Commentary on Civil Procedure Code and Civil Law in Sri Lanka" (Volume Two) (from pages 1617 – 1622) set out the grounds which were considered by our Courts.

a. Fraud
b. False Evidence
c. Non-disclosure of material facts
d. Deception
e. Fresh Evidence
f. Mistake
g. Fear
h. Minority

This was referred to by His Lordship Nawaz J. in Edirisinghe Arachchilage Indrani Chandralatha v. Elrick Ratnum, CA RI Case No. 64/2012 decided on 02.08.2017.

From the above analysis, we are of the view, having carefully scrutinized all volumes of the brief, that the Petitioner has not made out any grounds for the exercise of Restitutio in integrum.

We uphold the objections taken by the Respondent and dismiss the application owing to the failure to explain the delay, the suppression of material facts, and the absence of any grounds to claim Restitution.

Therefore, we dismiss the application.

JUDGE OF THE COURT OF APPEAL

D.N.SAMARAKOON,J.

I AGREE

JUDGE OF THE COURT OF APPEAL