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

In the matter of an Application for Restitution, in the nature of Restitutio in Integrum under the provisions of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Samaraweera Mudalige Dona Nilanthi de Alwis of Singahalayawatta, Thudugala, Dodangoda.

Case No. RII 12 2021

4th DEFENDANT PETITIONER

D.C. Matugama Case No. 5180/P

1. Samaraweera Mudalige Don Premasiri de Alwis of No. 117, Singahalayawatta, Thudugala, Dodangoda and others.

PLAINTIFF RESPONDENTS

Before: Hon. Justice D. N. Samarakoon

Hon. Justice Sasi Mahendran

Counsel: Harendra K. Perera instructed by T. B. Chinthani Kaushalya for the 4th defendant petitioner

J. M. Wijebandara with Chamodi Dayananda for 1st and 2nd plaintiff respondents

Written Submissions on: 31.08.2022 by the petitioner

10.08.2022 by plaintiff respondents

Date: 15.11.2022

D.N. Samarakoon, J.

The application of the 4th defendant petitioner is to add 5 parties, whose names are mentioned in paragraph 24,25 and 26 of the petition as respondents.

The allegation of the petitioner is that in the connected Partition Action, the plaintiff respondent produced a wrong pedigree, incorrectly pleading that a certain Wijesena died leaving only one child, in order to obtain a bigger share, whereas the said Wijesena had children (1) Nilanthi Devika Samaraweera, (2) Priyantha Rohan, (3) Vijitha Kalyani, (4) Roshantha Saman Samaraweera and (5) Uditha Prabath Samaraweera and also the widow.

The birth certificates of the children are marked as A2, A3, A4, A5 and A6, whereas the death certificate of Wijesena has been marked as A.7 and his marriage certificate marked as A.8.

The plaintiff respondent has objected to this application on the basis that under section 69 of the Partition Law No. 21 of 1977 a party can be added before the judgment, but the judgment in the said partition action has been given. It is also stated that a remedy of a person who is affected by the judgment is to institute an action for damages under section 49 of the Partition Law.

Furthermore, the plaintiff respondent has objected that an application for restitutio in integrum is confined to parties to the action and hence the aforesaid parties cannot be added.

The basis of the 4th defendant petitioner's application is that the plaintiff fraudulently represented or intentionally misrepresented to the Court a wrong pedigree in order to obtain a bigger share.

Plaintiff also submits that, even the petitioner concedes that she could not participate at the trial and her applications to the Civil Appellate Court and the Supreme Court were dismissed.

However, in the present application, the petitioner has invoked the exclusive jurisdiction of this Court in restitutio in integrum. It is widely accepted that an allegation of fraud is a ground for invoking of that jurisdiction. It is also generally accepted that restitutio in integrum is confined to parties to the action.

However that may be, the petitioner wishes to question the judgment of the partition action on the basis of fraud. In petitioner's quest, the aforesaid parties become necessary parties whose presence before the Court is essential.

In this regard, **SRI LANKA INSURANCE CORPORATION LTD. v. SHANMUGAM AND ANOTHER, 1995, 1 SLR 55,** [Not 52 NLR 409, as the plaintiff respondent cites in his Written Submissions dated 10.08.2022 at paragraph 13] cited for the plaintiff respondent himself is relevant.

As the plaintiff respondent has quoted in his said Written Submissions, the Court of Appeal said,

> "In this country the remedy of restitutio in integrum was recognised as a mode of relief as far back as the time of Sir Charles Marshall, and has taken deep root in the practice and procedure of our courts. (Abeysekera - supra). At present, Article 138(1) of the Constitution has vested this court with sole and exclusive jurisdiction to grant relief by way of restitutio in integrum. This remedy cannot, unlike an appeal, be claimed by a party as of right. The power of this court to grant such relief is a matter of grace and discretion. Usoof v. Nandarajah Chettiar (4). The power of restitution differs from revisionary power of this court in that the latter is exercised where the legality or propriety of any order or proceedings of a lower court is questioned. Restitution reinstates a party to his original legal condition which he has been deprived of by the operation of law. Thus it follows, the

remedy can be availed of only by one who is actually a party to the legal proceeding in respect of which restitution is desired. (Perera v. Wijewickrema(5), Menchinahamy v. Munaweera(6)). A party seeking restitution must also show that he has suffered actual damage, (Phipps-supra), although damages cannot be claimed in an application for restitution. (Dember-supra). Restitutio in integrum being an extraordinary remedy, it is not to be given for the mere asking or where there is some other remedy available, Mapalathan v. Elayavan (7). It is a remedy which is granted under exceptional circumstances and the power of court should be most cautiously and sparingly exercised, (Perera-supra). A party seeking restitution must act with utmost promptitude, Babun Appu v. Simon Appu, (Menchinahamy - supra), and before a change has taken place in the position of the parties, (Sinnethamby v. Nallathamby)(9). Where there has been negligence on the part of the applicant seeking relief or his attorney-at-law, restitution will not be granted, (Wickremasooriya v. Abeywardene) (10). The party invoking the extraordinary powers of this court must display honesty and frankness. Thus where a party by its own conduct has acquiesced in or approbated the defective proceedings, court will not exercise its discretion to set aside the impugned proceedings. For it is not the function of court in the exercise of its jurisdiction in restitution to relieve the parties of the consequences of their own folly, negligence or laches, (Don Lewis v. Dissanayake The procedure in making an application for restitution has been laid down in the Court of Appeal (Appellate Procedure) Rules of 1990. Every such application has to be by way of petition and affidavit in support. The application must be accompanied by originals or certified copies of the relevant documents and proceedings in the original court. The application once registered is listed for support within two weeks. Where court orders notice to issue, dates within the stipulated periods are given for tendering of notices for service on the

respondents, their objections and counter affidavits of the petitioner if any. Thereafter the matter is fixed for hearing.

In the said Written Submissions, immediately after the aforequoted text, the plaintiff has reproduced a sentence beginning with, "Relief by way of restitutio in integrum in respect of judgments of original Courts may be sought…", giving the impression that it is the continuation of what was already quoted.

However, it is not so. That part is from the summary that appears at the beginning of the judgment. It says,

> "Relief by way of restitutio in integrum in respect of judgments of original courts may be sought:
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> (a) where judgments have been obtained by fraud by the production of false evidence, non-disclosure of material facts or by force; or
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> (b) where fresh evidence has cropped up since judgments, which was unknown earlier to the parties relying on it or which no diligence could have helped to disclose earlier, or
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> (c) where judgments have been pronounced by mistake and decrees entered thereon provided of course it is an error which connotes a reasonable and "excusable error.

If the allegation of the petitioner is true then it come within (a), it will be, fraud, production of false evidence and non disclosure of material facts.

Not only what is quoted earlier, but the said judgment also said,

> "**Under Roman Law, the remedy of restitutio in integrum was the removal of a disadvantage in law which had legally occurred.** It was a protection against injustice (as distinguished from an action against injustice) which was rendered necessary on account of practical impossibility of taking legally, in advance, all the circumstances that in reality may occur. The remedy was granted by the Praetor who himself

conducted the proceeding in which judicium rescindens might ultimately be granted. Abeysekera v. Haramanis Appu(1). The remedy was received into Roman Dutch Law in wider form, where restitutio in integrum was primarily intended for relief from contracts on the ground of minority, error, fraud and duress. Relief by way of restitutio in integrum was also granted from the effect of an order in judicial proceedings. Phipps v. Bracegyrdle(2)".

Hence, if this Court exercising its grace, decides to remove the disadvantage in law which has legally occurred, then, the addition of these parties who were not parties to the original action should not be an obstacle.

In the circumstances, the petitioner's application to add those parties as respondents is allowed. There is no order on costs.

Judge of the Court of Appeal

Hon. Sasi Mahendran, J.

I agree.

Judge of the High Court of Civil Appeal