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

C.A. R.I. Case No. 64/2012

D.C. Gampaha Case No. 1800/L

Edirisinghe Arachchilage Indrani Chandralatha
No. 09, Housing Scheme,
Kibulgoda,
Yakkala.
DEFENDANT-PETITIONER

-Vs-

Elrick Ratnum
No. 308/35/A09, Kibulgoda,
Yakkala.
Presently at
No. 173 10/5, Charmara Sevana Mawatha,
Miriswaththa,
Mudungoda.
PLAINTIFF-RESPONDENT

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	M.W. Padmaraji for the Defendant-Petitioner. Neomal Pelpola with B. Gamage for the Plaintiff-Respondent.
Written Submissions on:		29.04.2016 (For the Plaintiff-Respondent) 02.05.2016 (For the Defendant-Petitioner)
Argued on	:	11.03.2016
Decided on	:	02.08.2017

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

When this application for *restitutio in integrum* was taken up for argument, the Defendant-Petitioner (hereinafter sometimes referred to as "the Petitioner") moved Court that the application be disposed of by way of written submissions. The Plaintiff-Respondent (hereinafter sometimes referred to as "the Respondent") however raised a preliminary objection in regard to the maintainability of the application.

The preliminary objection raised the inadequacy of or failure to fulfill the requirements necessary to maintain an application for *restitutio in integrum.*

It was strenuously contended by the Counsel for the Respondent Mr. Neomal Pelpola that having identified the nature of the application before this Court as "In the matter of an application for *restitutio in integrum*", the Petitioner in the prayer to the Petition does not specify an order or act from which she seeks the remedy of restitution. In order to understand this contention, it is apposite to set out the reliefs sought by the Petitioner in the prayer to the petition dated 28.02.2012. The prayer goes as follows:-

> *"Wherefore the Defendant-Petitioner prays that Your Lordships Court be pleased to*
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> *a) issue notice of the application to the Plaintiff-Respondent;*
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> *b) issue an order staying the proceedings in the District case bearing No. 1800/L pending hearing and determination of this application;*
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> *c) stay execution of the writ ordered on 13.02.2012 marked **R** and **R1**;*
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> *d) in case the Defendant-Petitioner is ejected by the Plaintiff-Respondent to restore back the position of the Defendant-Petitioner with damages of Rs. 2,500,000/-;*
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> *e) grant costs and such other and further relief as to Your Lordships Court shall seem meet."*

Before this Court determines whether the aforesaid prayer lacks specificity or fails to seek the remedy of *restitutio in integrum*, the factual background of this application needs narration. Upon a perusal of the pleadings filed in the case, it becomes apparent that a settlement was entered into by both the Petitioner and Respondent in the District Court

of Gampaha in Case No. 1800/L - see a certified copy of the terms of settlement entered into on 11.03.2011 which have been briefed to this Court marked "I" to the petition. It appears that the said document marked "I" clearly shows that the terms of settlement were explained to the Plaintiff (Respondent) and Defendant (Petitioner), who, having agreed to the said terms, thereafter signed the record. This Court observes that both parties had been represented by Counsel at the time the terms of settlement were entered into. Subsequently alleging a breach of the terms of the settlement, the Respondent moved the District Court and sought a writ against the Defendant-Petitioner.

By an order dated 13.02.2012, the learned District Judge of Gampaha examined the existence or otherwise of the alleged breach and issued a writ of execution in favour of the Plaintiff-Respondent - vide the order marked as **R1** to the petition for *restitutio in integrum*. Aggrieved by the issue of writ of execution, the Petitioner states in paragraph 11 of the petition that she invoked the jurisdiction of the Provincial High Court of the Western Province in both appeal and revision and notice was issued on the Respondent returnable for 09.03.2012.

This application for *restitutio in integrum* has been filed in this Court on 28.02.2012. It is this application, whose lack of specificity or requirements sufficient to maintain a proper application for *restitutio in integrum*, that is being complained of in the preliminary objection. So in a nutshell let me sum up the dates that I find material in the times lines of this case.

1) A settlement dated 11.03.2011 in the District Court of Gampaha (Case No. 1800/L);
2) An order of the District Court dated 13.02.2012 confirming the breach of the terms of settlement and issuing a writ of execution;
3) An appeal and revision filed in Civil Appellate High Court of the Western Province holden in Gampaha, wherein notice was issued returnable for 09.03.2012;
4) This application for *restitutio in integrum* was filed in this Court on 28.02.2012.

It has to be noted that if the settlement entered into voluntarily in the District Court on 11.03.2011 is the act or order that the Petitioner seeks to impugn, there is no mention anywhere in the petition before this Court that the settlement was by trickery and fraud - grounds that are available to nullify terms of settlement. In other words the antecedent terms of settlement are not impugned at all in the prayer to the petition before this Court. If at all, it is only the writ, that was issued consequent to the entering into the terms of settlement, that is being attacked before this Court. It ill behoves the Petitioner to impugn the writ of execution, unless she has succeeded in attacking the terms of settlement that resulted in the writ. The terms of settlement crystallized into a consent decree before the learned District Judge. It was the breach of that consent decree that led to the writ being issued against the Petitioner. How can this writ be impugned unless the precedent consent decree is nullified? That deficiency appears to be the Achilles heel of the petition before me.

Though the prayer does not seek a nullification of the consent decree, none of the grounds that are usually relied upon to set aside a consent decree have been adverted to by the Petitioner in the application. The following precedents setting out the relevant grounds of nullity to set aside consent decrees have been carefully culled by U.L.A. Majeed in his "*A Commentary on Civil Procedure Code and Civil Law in Sri Lanka*"-(Volume II) at pp 1619 and 1620. I set down the following passages from the learned author's work.

GROUNDS FOR RESTITUTION

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: where the judgment has been obtained by fraud, relief can be granted-see *Abeysekera v. Harmanis Appu et al*[1]. In *Gooneratne v. Dingiri Banda*[2] 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.

In the case of ***Kusumawathie v. Wijesinghe***,[3] the Petitioner alleged that she was married to one Wijesinghe and they lived as husband and wife. Wijesinghe died on 24.07.1996 while living with her at the matrimonial home. After the death of Wijesinghe, she applied to the Department of Pensions, for her dues, where she was shown an *ex parte* decree obtained by Wijesinghe dissolving the marriage. The Petitioner contended that there was no such divorce and she was unaware of the *ex parte* decree and sought relief by way of *restitutio in integrum* to remedy the injustice caused to her by abuse and misuse of the legal process.

It was held that relief by way of *restitutio in integrum* of a judgment of an original court may be sought where the judgment had been obtained by fraud by the production of false evidence, non-disclosure of material facts or by force.

Jayasinghe J held:

> *"When a party appears and complains that she has been wronged by a process of law, this Court would not helplessly watch and allow the fraud practised on that party to be perpetuated. Restitutio in integrum provides this Court the necessary apparatus to step in and rectify any miscarriage of and failure of justice. If this is not the case then there is a serious vacuum in the law, which can be made use of by designing individuals as the Petitioner alleges had happened to her."*

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[1] 14 N.L.R 353
[2] 4 N.L.R 249
[3] 2001 (3) Sri L.R. 238

The above judgment was followed in a similar case of ***Paulis v. Joseph and Others***,[4] in which too, a divorce had been obtained by fraud, but the Court of Appeal granted restitution.

(b) **False Evidence**: where the judgment has been obtained by the production of false evidence, the remedy is available by proceedings by way of *restitutio in integrum*, or even in an action in the District Court on the ground of fraud to set aside the judgment. But, an action cannot be prosecuted in an inferior court with the direct object of setting aside a decree of a superior court - Middleton J. ***Buyzer v. Eckert***.[5] In this case, the Plaintiff instituted an action to claim damages against the Defendant on the ground that he had maliciously placed false documentary evidence to cancel his licence.

(c) **Non-disclosure of material facts**: where the judgment has been obtained by non-disclosure of material facts, it can be set aside. Withers J. referring to the facts in ***Perera v. Ekanaike*** commented - "This appears to be an attempt to set aside a judgment of consent between the present Plaintiff and the present Defendant on the ground either that the judgment was obtained by fraud-the fraud being that plaintiff, well knowing the facts of the settlement on or after 1884, concealed that fact from Court, and so obtained a judgment which otherwise she would never have obtained, or on the ground that these facts through ignorance of the present parties had been kept back from the Judge who passed the judgment under a mistake and in ignorance of facts which had he known he would not have passed the judgment in question-***Perera v. Ekanaike***.[6]

(d) **Deception**: The Defendant was in prison when he was sued on a bond. Being deceived by the Plaintiff he made no effort to appear in the action, and judgment was entered for Plaintiff. It was held that his remedy was either to apply for *restitutio in integrum* or to seek damages for the fraud. The reason why the Defendant

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[4] 2005 (3) Sri L.R. 162
[5] 13 N.L.R. 371
[6] 3 N.L.R. 21

did not appear in the action was not that he was prevented by misfortune, but that he was deceived and defrauded-*Jayasuriya v. Kotalawela.*[7]

(e) **Fresh evidence:** In an application for *restitutio in integrum* on the ground of discovery of fresh evidence after decree, the Petitioner must show that he was unable, with reasonable diligence, to obtain the evidence sooner, and that the evidence produced would, if believed, be decisive in his favour-***William Singho v. Thegis Appuhamy.***[3]

"I conceive that in cases where judgments have been pronounced by mistake and decrees entered thereon (except perhaps such mistakes as I have already referred to), or where it is alleged that fresh evidence has cropped up since judgment which was unknown earlier to the parties relying on it before judgment, or in case of fraud discovered within a short time of judgment and before a change has taken place in the position of parties, the remedy may be by way of the proceedings indicated by me for *restitutio in integrum*"-Per Middleton J. in ***Sinnatamby v. Nallatamby.***[9]

Voet says that, "the discovery of fresh evidence, *res noviter veniens ad noitiam (facts newly coming to knowledge)*is recognized as a good ground for giving this relief provided, of course, it is evidence which no reasonable diligence would have helped to disclose earlier.

It was held, by Soertsz J. in the case of ***Mapalathan v. Elayavan,***[10] that the Supreme Court has no power to revise or review a case decided by itself. Relief by way of restitution on the ground of *justus error* will not be granted to a party who has failed to place before the Court matter, which was at his command, if reasonable diligence had been exercised.

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[7] 23 N.L.R.511
[8] 1 C.L.W. 148
[9] 7 N.L.R 139
[10] 41 N.L.R.115

In order to succeed in an application for restitution the Petitioner must show that the fact was not merely material but of such vital and essential materiality that it must have altered the whole aspect of the case.

(f) **Mistake:** Where a Proctor under the general authority given to him by a proxy enters into a compromise with regard to an action, such a compromise is binding upon his client. The fact that there is a limitation of that apparent authority does not affect the authority to compromise, unless that limitation is communicated to the other side.

(g) **Fear:** In ***Sabapathy v. Dunlop et al***,[11] it was held that "where an action has been adjusted by agreement or compromise under Section 408 of the Civil Procedure Code, the Supreme Court has power to set aside, by way of restitution or revision, a judgment entered in terms of the section, on the ground of fear or mistake. A threat from a Judge to dismiss a plaintiff's case unless he agreed to the terms of settlement would amount to fear".

Akbar J. expressed the view in the above case that, "According to Voet,[12] all that is required is that the fear should be caused by something done illegally, even by a Magistrate". Koch J., (the other Judge of the Bench) citing a passage from Nathan in vol. IV., s.1997, which lays down that it is the duty of a Judge in deciding cases to act in accordance with the law, says that "this must be obviously so, and if a Judge contravenes the law or acts improperly, there can be no doubt that this Court can exercise its powers by way of revision and grant relief to the aggrieved in appropriate cases, and particularly so when the party concerned has no right of appeal as in this case".

Koch J., further expressed the view that, "I am of opinion therefore that it is the duty of the Court before passing a decree under Section 408 of the Civil Procedure Code to satisfy itself as to the legality of the agreement contemplated in that section, where that legality is questioned on the grounds such as fraud, fear, mistake, surprise, etc., and if not satisfied should refuse to enter an order, but if the Judge wrongly does pass a decree, this Court

[11] 37 N.L.R. 113
[12] Bk. IV, tit. 2, cl.10

has jurisdiction to entertain an application to have that decree set aside or altered or modified according to circumstances both by virtue of power to grant restitution as well as to act by way of revision, and the fact that the equitable ground upon which relief is sought is directed against the judge who passed the decree will not alter the position".

From the above survey it is quite clear that the petitioner has not made out any of the above grounds recognized for the invocation of *restitutio in integrum.* If this Court were to take cognizance by *restitutio in integrum* of a matter that has been heard by the District Court, the grounds for nullification must have been brought home to this Court.

Harking back to the provenance of this remedy I must observe that it was in the case of ***Abeysekere v. Harmanis Appu et al***[13] that Grenier J declared that the remedy of *restitutio in integrum* is one which has taken deep root in the practice and procedure of our Courts, and it is far from desirable to ignore it or to declare it obsolete.[14] In the same breath Wood Renton J stated that it is too late to hold that the remedy ought no longer to be recognized.[15]

So by 1911 when *Abeysekere v. Harmanis Appu et al* was decided, the remedy had become an integral part of the law of this country and was too deep-rooted not to be acknowledged as such.

With the enactment of the 1978 Constitution it became a constitutional remedy and the power to grant relief by way of *restitutio in integrum* is now well recognized and vested in the Court of Appeal by Article 138 (1) of the Constitution,[16] which declares,

> *"The Court of Appeal shall have and exercise, subject to the provisions of the Constitution or any law, an appellate jurisdiction for the correction all errors in fact and in law which shall be committed by any Court of First Instance, tribunal or other institutions and sole and exclusive recognizance, by way of appeal, revision and restitutio in integrum of all causes, suits, actions,*

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[13] (1911) 14 N.L.R 353

[14] *Ibid at p 359*

[15] *Ibid at pp 358 and 359.*

[16] 1978 Constitution of the Democratic Socialist Republic of Sri Lanka

prosecutions, matters and things of which such Court of First Instance, tribunal or other institution may have taken cognizance".

I have already dealt with this Article in relation to the remedy of *restitutio in integrum* in two previous precedents of this Court namely ***Seylan Bank PLC v. Christobel Daniels*** (CA (PHC) Application No. 58/2014 decided on 14.12.2016) and ***Rajapakse Mudiyanselage Karunaratne v. Iluktenna Arachchige Piyasena*** (CA 02/2016 decided on 23.05.2017). The upshot of reasoning in these cases is that before there is an invocation of this jurisdiction of *restitutio in integrum* in the Court of Appeal under Article 138 of the Constitution, a Court of First Instance, tribunal or other institution must have taken cognizance of a cause, suit, action, matter, and thing. I have omitted a reference to the word *prosecution* as I take the view that *restitutio in integrum* has always been available in respect of civil suits only.

No doubt the District Court took cognizance of the civil suit and entered a consent decree. But the jurisdiction under Article 138 of the Constitution for restoration can be exercised only if there is an order to be set aside and there is an application to restore back the previous position or status. As I pointed out, I must emphasise that in the prayer to the petition no relief has been prayed for to rescind/set aside the consent decree that was made in this case, leave alone an application to the same court which entered the consent decree. It has to be noted that even at the stage when the plaintiff respondent complained to the District Court alleging a breach of the consent decree, the defendant-petitioner did not move to call in question the decree on the strength of the several recognized grounds for impugning a consent decree. Thus there is a jurisdictional defect that taints this application.

Restitutio in integrum is only available in respect of proceedings if there is an allegation of fraud or other vitiating factors-see the reiteration of these principles in ***Sri Lanka Insurance Corporation Ltd v. Shanmugam and another.***[17] There is no allegation whatsoever in the pleadings that there has been a fraud or a judgment obtained in the

[17] (1995) 1 Sri.LR 55 per Ranaraja J (with S.N. Silva J concurring as he then was) at page 60.

court *a quo* in a fraudulent manner-see ***Kusumawathie v. Wijesinghe*** *(supra)*. I would also advert to ***Phipps v. Bracegirdle***[18] wherein it was held that "Relief by way of *restitutio in integrum* from the effect of an order in judicial proceedings will not be granted **where the legality of such order is not questioned.**"

It has to be borne in mind that an application for *restitutio in integrum* is an exceptional remedy and it is granted **only on limited grounds** and **only in exceptional circumstances.**

Restitutio in integrum is not available as a matter of right and cannot be invoked as such. The remedy is discretionary which the Court can grant only in exceptional circumstances, **when there is no other remedy available**-see ***Perera v. Wijewickrema***,[19] ***Menchinahamy v. Muniweera et al***,[20] and **CA RI/01/2016** (argued and decided on 23.05.2016).[21] On her own admission the Defendant-Petitioner avers in paragraph 11 of the petition that she has sought both leave to appeal and revision in the Provincial High Court holden in Gampaha (CALA 03/2012) and thus in my view this is not a fit case for this Court to exercise its discretionary jurisdiction of *restitutio in integrum.*

On the above analysis I take the view that the Defendant-Petitioner has not made out any grounds for the exercise of *restitutio in integrum* and I accordingly reject and dismiss the Defendant-Petitioner's application.

JUDGE OF THE COURT OF APPEAL

[18] 35 N.L.R 302
[19] (1912) 15 N.L.R 411 at 413 per Pereira J (with Ennis J concurring)
[20] (1950) 52 N.L.R 409 at 414 per Dias S.P.J with Gunasekera J in agreement
[21] Nawaz J with H.C.J. Madawala J agreeing