

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANK.

In the matter of an application for the exercise of
extra ordinary powers of Restitutio in Integrum
under the provisions of the Constitution of the
Democratic Socialist Republic of Sri Lanka and the
Common Law Principles pertain to the Principle of
Per-incuriam and relevant concepts

Case No. RI/07/2017

D.C. Case No. 20317/L

Civil Appellate High Court

Kandy case No. CP/HCCA/Kandy/64/2012/(FA)

01. Manel Senanayake
02. Ayoni Bogahalanda
No. 22,
Rajapihina Mawatha,
Kandy.

Plaintiffs.

Vs.

01. Rathnakulathunga, Power of Attorney
holder of Aunra Kulathunga
02. Kolitha Nishantha Kulathunga
03. Asela Chandrashantha Kulathunga.
All of
No. 186 A,
D.S. Senanayake Vidyalaya,
Kandy.

Defendants.

Between

01. Rathnakulathunga, Power of Attorney holder of Aunra Kulathunga.

02. Kolitha Nishantha Kulathunga

03. Asela Chandrashantha Kulathunga.

All of

No. 186 A,

D.S. Senanayake Vidyalaya,

Kandy.

Defendant-Appellants.

Vs.

01. Manel Senanayake

02. Ayoni Bogahalanda

No.22, Rajapihina Mawatha,

Kandy.

Plaintiff – Respondents.

AND NOW Between

01. Rathnakulathunga, Power of Attorney holder of Aunra Kulathunga.

02. Kolitha Nishantha Kulathunga

03. Asela Chandrashantha Kulathunga.

All of

No. 186 A,

D.S. Senanayake Vidyalaya,

Kandy.

Defendant-Appellant- Petitioners.

Vs.

01. Manel Senanayake
02. Ayoni Bogahalanda
No.22, Rajapihina Mawatha,
Kandy.

Plaintiff-Respondent-Respondents.

Before : E.A.G.R. Amarasekara, J
Counsel : D.D.P Dasanayake AAL with Pubudu Silva AAL for the Petitioner.
Decided on : 26.10.2018

E.A.G.R. Amarasekara, J

In this application for the exercise of extraordinary powers of Restitutio in Integrum under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka, the Petitioner prays inter alia for the following reliefs:

1. To set aside the Judgment of the learned District Judge of Kandy dated 04.11.2011 and to set aside or vary or modify the order dated 04.06.2013 of the Civil Appellate High Court of the Central Province Holden at Kandy.
2. For Costs.

For the following reasons, I decline to issue notice on the Respondent and dismiss the application in limine.

As per the amended Petition, the learned District Judge had entered the Judgment in favor of the Respondents- vide X18. Being aggrieved by the said Judgment the Petitioner appealed to the Civil Appellate High Court of Kandy but even the said appeal was dismissed by the said Civil Appellate High court -Vide X22. Thereafter, the Petitioner filed leave to appeal application in the Supreme Court but, later on, it was withdrawn stating his intention to file an application in this court – Vide X23 and X24. It appears that after withdrawing the aforesaid leave to appeal application the Petitioner has filed this Restitutio in Integrum application in this Court.

It must be stated that the jurisdiction with regard to Restitutio in Integrum is an extraordinary jurisdiction given to this Court to remedy miscarriages of justice or harms that have been caused by a decision, a judgement or a step of a lower court. In **Menchinahamy Vs Muniweera 52 NLR 409**, it was held as follows;

“That the remedy by way of restitutio in integrum is an extraordinary remedy and is given only under very exceptional circumstances. It is only a party to a contract or legal proceedings who can ask for this relief. The remedy must be sought forthwith the utmost promptitude. It is not available if the applicant has any other remedy open to him.”

The Petitioner must establish the exceptional circumstances that warrant the invocation of this extraordinary jurisdiction. When other remedies are available and the petitioner evades from using such remedies, this Court will be reluctant to use this extraordinary jurisdiction to grant relief. On the other hand, this remedy shall not be considered as an alternative to an appeal.

A careful perusal of the amended petition of the Petitioner confirms that all the grounds stated therein in support of the reliefs prayed for in the prayer relate to alleged failure of learned District Judge or Civil Appellate High Court Judges to assess the evidence led or to apply the law in relation to the facts of the case.

The amended Petition alleges that the Judge or Judges of the lower courts, as the case may be, misdirected themselves both in law and facts. It further alleges that their decisions are factually and legally incorrect or that they have not considered or evaluated evidence led or the admissions recorded properly or that their Judgments are contrary to law and against the weight of the evidence led.

These cannot be considered as exceptional circumstances or extraordinary situation to use this extraordinary Jurisdiction as all of these grounds could have been relied upon in the leave to appeal application to get leave to proceed with the appeal. If the Judges in the lower courts who heard the trial or appeal, as the case may be, have failed in applying law or if there is an issue of law with regard to the lower Court's Judgements or the Judgments are perverse and not supported by the facts led in evidence, all those matters can be agitated in an appeal or leave to appeal application filed against the said Judgment. For the reasons best known to the Petitioner, without agitating the facts and grounds referred to in the Petition in support of the leave to appeal application filed in the Supreme Court, the said leave to appeal application was withdrawn as mentioned before in this order.

By withdrawing the leave to appeal application, the Petitioner impliedly has admitted:

1. That the Judgements given in the lower Courts are not perverse and/or are supported by the facts involved.
2. That there are no issues of law in relation to the Judgments of the lower courts and the Judges of the lower courts have applied law correctly.

Otherwise the Petitioner could have proceeded with the leave to appeal application.

All the facts or grounds referred to in the amended Petition, even if they are true and correct, are facts or grounds that the Petitioner could have presented to get leave to appeal in the Supreme Court. I do not see that any exceptional ground or extraordinary situation, that could not have taken up in support of the leave to appeal application, exists or forms the basis of the amended Petition to show that there is prima facie case to issue notice to the Respondents.

On the other hand, relevant judgments and /or order were delivered in 2011 and 2014. The aforesaid withdrawal of the leave to appeal application was allowed on 16.06. 2016 but this application was filed only in March 2017. The petitioner does not explain why he could not file this application with utmost promptitude.

Though the petitioner, in his written submissions, states that certain parts of the judgement should be rectified to indicate that the relevant deed exists with unilateral application, his prayer in the amended petition requests to set aside both the judgements delivered by the District Court as well as by the Civil Appellate High Court of Kandy. I do not see any reason why he could not take up this in support of

his leave to appeal application. On the other hand, the District Court judgment binds only the parties to the action. Thus, if any statement was made by the learned District Judge with regard to the deed or deeds, that would be with regard to the effect of such deeds towards the opposite party or between the parties to the action. Therefore, I do not see any reasons to interfere with the judgment of the district court on the grounds relied on by the Petitioners.

Hence, I dismiss this application without issuing notices to the Respondents.

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E.A.G.R. Amarasekara.

Judge of the Court of Appeal.