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 Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/RII/03/2017

D. C. Nawalapitiya Case No. L/455/2015

Vaithyalingam Rajarajeswari,
Ramboda Estate, Ramboda.

Plaintiff

Vs.

Sathasivam Pushparajah. No. 164/4/1. Sri Rathnajothi Sarawanamuttu Mawatha, Colombo 13.

.

Defendant

And now between

Vaithyalingam Rajarajeswari,
Ramboda Estate, Ramboda.

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Plaintiff- Petitioner

Vs

Sathasivam Pushparajah. No. 164/4/1. Sri Rathnajothi Sarawanamuttu Mawatha, Colombo 13.

01st Defendants-Respondent

Thangarajah Ranjith,
Ramboda Estate, Ramboda.

02nd Respondent

Before: Hon. D.N. Samarakoon, Judge of the Court of Appeal
Hon. Sasi Mahendran, Judge of the Court of Appeal

Counsel: Sadi Wadood with Palitha Subasinghe and Harshana Mallawaarachchi instructed by Mallawaarachchi Associates for the Plaintiff Petitioner
Lasitha Kanuwanaarachchi with Nipunika Rajakaruna for the 01st defendant Respondent.
Chathura Galhena with Dharani Weerasinghe instructed by M. Ranawaka for the 02nd respondent.

Written Submissions on: 04/11/2022 by the Petitioner
06/09/2019 and 04/11/2022 by the 01st defendant

Respondent
04/11/2022 by the 02nd respondent.

Date: 18.01.2024

J U D G M E N T

01. A Restitutio in Integrum application coming from the District Court Nawalapitiya case No. 455/2015 L.

02. Vaithyalingam Rajarajeswari the plaintiff petitioner is the widow of W. Dayalan Wellasamy who is since deceased and as admitted by the 1st defendant respondent at page 03 of his written submissions[1], who was an acting Director of the Ramboda Tea Estate Limited.

03. The petitioner says at paragraph 46(b) of her written submissions, that, since the death of her husband, the petitioner had been travelling back and forth to India where she is currently resident with her children.

04. The 01st respondent at page 03 also states that in 2008 the directors were, (01) Dayalan Wellasamy (02) Nirmala Wellasamy (03) G. Meenambal Wellasamy and (04) Jayalashmi Nagarathnam.

05. The 01st respondent also admits at page 03 and 04, that, at that time there was a dispute for the possession of the estate and in an action filed by the police at the Primary Court under section 66 of the Primary Courts Procedure Act possession was given to Dayalan Wellasamy.

[1] Hereafter, unless it is specifically said, the pages referred to as of 01st respondent's is his written submissions.

06. The 01st respondent further admits at page 04 that Dayalan died pending appeal and the petitioner was substituted. (Since no appeal lies from a Primary Courts order it must be an application for revision) (As it appears, this is Provincial High Court No. HCR/49/2010)

07. The 01st respondent says, that, based on that the petitioner tried to claim rights.

08. According to what the 01st respondent admits itself, (i) Dayalan was given possession by the Primary Court (ii) the petitioner was substituted on his behalf and (iii) the petitioner has a right to possess until and unless taken away by a competent court, as the Primary Courts Procedure Act provides.

09. The petitioner says, that, the Primary Courts case is that bearing No. 24799. She instituted District Court Nawalapitiya case No. 455/2015/L for a declaration that she is entitled to lawful possession and for an interim injunction against the 01st respondent to restrain him from dispossessing her including from the bungalow.

10. The petitioner, since she travels often to India, had appointed the 02nd respondent by a Special Power of Attorney to do the following,

> "To file action in the Primary Court of Nawalapitiya (Helboda) against any person who acts in violation of the Primary Court order in the case bearing No. 24799 and to sign all papers, appear and defend the action on behalf of me or to sign any documents, case

record pertaining to the said case **and to arrive at any amicable settlement thereof**".

"Also to appear and defend in the case bearing No. L 455 in the District Court of Nawalapitiya and in the Provincial High Court No. HCR/49/2010 **and sign seal prepare any documents to these cases on my behalf...**"

11. The Special Power of Attorney bearing No. 614 dated 20.09.2015 says, "Special Power of Attorney". ("Y. 49")

The granting of "Special" power is not granting a general power.

The words "...and to arrive at any amicable settlement thereof," is limited to Primary Court case bearing No. 24799.

In respect of District Court Nawalapitiya case bearing No. L 455 and Provincial High Court case bearing No. HCR 49/2010 it says, "...and sign seal prepare any document pertaining to these cases on my behalf".

12. The following facts are narrated according to page 02 et. Seq., of the written submissions of the 01st respondent,

In L 455 the petitioner supported for the interim injunction on 22.09.2015. The court did not issue an enjoining order, but only issued notice of interim injunction.

The petitioner against that order instituted leave to appeal application bearing No. CP/HC/LA/79/15.

In the meantime on 11.08.2016, the 01st respondent and the Power of Attorney holder of the petitioner, the 2nd respondent, entered into a settlement before the District Court of Nawalapitiya the terms of which are,

(i) The plaintiff agrees to withdraw the plaint ant to grant the 1st respondent the reliefs in paragraphs (b) and (c) of the prayer to the Answer, that is,

(b) for a declaration that the 1st respondent is entitled to the lawful possession of the premises and

(c) for a permanent injunction against the petitioner restraining her from disturbing that possession (according to "Y. 45")

(ii) The 01st respondent to pay the petitioner a sum of Rs. 3,250,000/-

13. According to the 01st respondent's written submission page 05, the petitioner's position is, that, she did not know about the settlement dated 11.08.2016; that she came to know about it after coming from India on 14.09.2016.

14. The petitioner's position is, that, the 02nd respondent has acted beyond the power given to him by the Special Power of Attorney and that the settlement is a fraud practiced on her rights. Hence she prays for Restitutio in Integrum and or Revision.

15. The 01st respondent says, that, the petitioner was represented in court by her Power of Attorney Holder and her lawyer.

16. The 02nd respondent in his written submissions dated 04th November 2022 at page 06 et. Seq., submits, that, (i) he had the authority under the Special Power of Attorney to do what he did

He reproduces the clause,

> "Also to appear and defend in the case bearing No. L 455 in the District Court of Nawalapitiya and in the Provincial High Court No. HCR/49/2010 **and sign seal prepare any documents to these cases on my behalf...**"

(ii) the law recognizes the ratification of the act of an agent and (iii) the petitioner is estopped from denying his authority

17. Hence neither the 01st nor the 02nd respondent say that the petitioner knew about the settlement dated 11.08.2016 or that she consented to the same.

This shows, that, the petitioner's position that she was unaware of the settlement is correct.

18. The words in respect of case No. L 455 "...and sign seal prepare any documents to these cases on my behalf..." is not an authorization to settle the case against the wishes of the petitioner. **The petitioner's wish was to proceed with the case. The settlement is to withdraw the case.** The authorization to sign seal and prepare any document was to prosecute the case not to abandon it for considerations of money or otherwise.

This is further confirmed by the earlier clause in the Power of Attorney in respect of Primary Court case No. 24799 where the Special Power of Attorney specifically said,

> "...and to sign all papers, appear and defend the action on behalf of me or to sign any documents, case record pertaining to the said case **and to arrive at any amicable settlement thereof**."

There is no such part in respect of case No. L 455.

Hence the 02nd respondent had no authority to settle that case the way it was settled, the petitioner was not aware of what he was doing and the petitioner never ratified what he did.

There is no impediment or estoppel in law against the petitioner from averring and urging the correct position. The 02nd respondent has defrauded her. The settlement entered behind the back of the petitioner is a fraud.

19. The case **Dember vs. Abdul Hafeel 49 NLR 69** decided in the Supreme Court of Ceylon said that where a judgment has been obtained by fraud the remedy of Restitutio in Integrum is available.

This case decided by Canekeratne J. was followed by Mahinda Samayawardena J., in C. A./RII/12/2016 dated 29.05.2009. His lordship further said,

> "Chief Justice Bertram in Suppramaniam v. Erampakurukal ((1922) 23 NLR 417at 435) citing Black on Judgments (Black on Judgments,

Vol 1, Section 292-293) stated that "Fraud is not a thing that can stand even when robed in a judgment". Vide also Maduluwawe Sobitha Thero v. Joslin ([2005] 3 Sri LR 25 at 28)".

20. There was a duty on behalf of the District Court to ascertain whether the 02nd respondent had the authority to settle the case the way it was done.

21. The 01st respondent argues, that, a lawyer represented the petitioner. Had the petitioner been in this country, even if not physically present in court on that day and had the lawyer upon instructions entered into this settlement the petitioner cannot seek to set it aside successfully because the proxy gives the power to a lawyer to allow a judgment being entered against his client.

But here the extent of authority given by the proxy is curtailed because the petitioner was not in the country and she was represented by a Power of Attorney Holder whose power was specifically limited.

If a lawyer could freely enter into any settlement that involves his client when the latter is out of the Island too then there is no requirement to appoint a Power of Attorney holder.

But it is a well reconised principle that once the client is not in the island the lawyer cannot represent her only on the proxy where a Special Power of Attorney Holder has been appointed.

22. According to the 01st respondent's written submission page 05 itself, the petitioner came to know about the settlement on 14.09.2016.

She filed the present application on 24th March 2017 after about 06 months.

The 01st respondent says this is delay. But it is not delay at all. The 01st respondent at page 08 says that a copy of the record has been obtained in January 2017 according to the seal and there is delay. But on 24th March 2017 it was filed. People cannot be expected or required to institute applications the day following the obtaining of the copy of the case record they do not sleep at the door step of the court.

In the above case No. C. A./RII/12/2016 Justice Samayawardhena dealing with an allegation of delay said,

> "Counsel also submits that the petitioner is guilty of laches. Delay shall not be a ground for dismissal of an action when there is a manifest fraud, especially, abusing the process of the Court, proven before Court. (Biso Manika v. Cyril De Alwis, Sebastian Fernando v. Katana Multi-Purpose Co-operative Society Ltd, Velun Singho v. Suppiah)."

23. The 01st respondent further alleges, that, the petitioner should have canvassed the matter before the District Court of Nawalapitiya.

There is no such a rule, principle, law or practice otherwise than a "taken for granted law".

As very appropriately observed by **His Lordship Jayewardene A. J.,** in **Samed vs. Segutamby, 1924, 25 NLR 481 at page 495 and 496** in which it was said,

> "This seems to be in consonance with what Lord Denman C. J. said in the celebrated case of O' Connel vs Regina (1844) 11 Cl & F. (H. L.) 155 at

372, where referring to a dictum of Lord Mansfield in another case, he said:-

> "I am tempted to take this opportunity of observing that a large portion of that legal opinion which has passed current for laws falls within the description of "law taken for granted." If a statistical table of legal propositions shown be drawn out and the first column headed "Law of Statute" and the second "Law of Decision;" a third column, under the heading of "law taken for granted," would comprise as much matter as both the others combine. **But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain and has often been proved by recent experience that the mere statement and restatement of a doctrine** – the mere repetition of the cantilena of lawyers – **cannot make it law, unless it can be traced to some competent authority and if it be irreconcilable to some clear legal principle."**

If fraud allows Restitutio in Integrum as Canekerathne J., said in the above case and if it has been committed already then nothing prevents a party seeking relief before this court under Article 138 of the Constitution.

In the above case of C. A./RII/12/2016 Justice Samayawardhena has succinctly narrated the plight of a wife whose husband "divorced" her while she was abroad fraudulently serving summons on her and the dismissal of the case she instituted in the original court to declare that the divorce decree is one obtained by fraud

> "…stating that the petitioner shall, in view of Kusumawathie v. Wijesinghe ([2001] 3 Sri LR 238), seek relief by way of an application for restitutio in integrum in this Court".

So when they go there, they are asked to come here and must I now say they must go there?

The aim of the Constitution based on the Rule of law is not to drive people who seek justice from pillar to post.

In one of the cases Justice Samayawardhena too cites in his above judgment as a case which required a party to go to the District Court first (Justice Samayawardhena did not require the petitioner before his lordship to go to the District Court) the case of Andradie vs. Jayasekera Perera ([1985] 2 Sri LR 204) Siva Sellaiah J., said, that, the question of fraud in that case was a matter to be decided by leading of evidence and cross examination and hence the petitioner should go to the District Court first.

1985 was almost half a century ago. It was a practice of the bygone days of imperiality that the appellate courts were averse to disputed facts and remedies such as Restitutio in Integrum and Revision were considered as extraordinary (*to mean that they are rare and must be used sparingly*) weapons in the judicial armory to be used in exceptionally ceremonious occasions. If they are "extraordinary" that only means that they are in addition to the ordinary action beginning with writ[2] (*which means a written plaint*) recording of evidence, judgment and decree.

In the new world of the 21st century the ancient harsh distinction between the questions of law and questions of fact has thinned. In a world of intricacy where every question of law is mixed with questions of fact and every question of fact is affected by questions of law the courts should not strictly police the ancient boundaries of law and facts.

[2] Long before the Civil Procedure Codes of Sri Lanka or India were enacted in England in common law an action began by an "original" writ, which still survives in certain countries as "writ of summons". Restitution and Revision are "extraordinary" because they do not come within this regular procedure. They are not "extraordinary" because they would be only sparingly employed. This also is a "taken for granted" law. It is not correct to say that all restitution is included in revision or all revision is included in restitution. The Forms of Action | Introduction to English Legal History | Oxford Academic (oup.com)

The truth of the above will be demonstrated by the following adage, attributed to

Carl Sandburg (*an American poet, biographer, journalist, and editor*) Alan Dershowitz (*Harvard Law School professor*) Jerome Michael (*Colombia professor*) Jacob J. Rosenblum (*Dewey's Homicide Bureau Chief*) Oliver Wendell Holmes (*an American jurist who served as an associate justice of the U.S. Supreme Court from 1902 to 1932*) and finally as anonymous

> "If the facts are on your side, pound the facts into the table. If the law is on your side, pound the law into the table. If neither the facts nor the law are on your side, pound the table[3]".

Besides, as said above, the 01st or the 02nd respondents never say, that, the petitioner authorized or consented the settlement. Thay say that it is covered by that clause in the Special Power of Attorney or by a lawyer appearing for the plaintiff. This is a question of law. It was addressed above. Hence there is no requirement of the petitioner going first to the district court.

24. The 02nd respondent at paragraph 32 says, that, if he had exceeded authority, the petitioner should have sent him a Letter of Demand or a Notice.

Coupled with what was said in paragraph 23 above, there are various paths to follow. But if "all roads lead to Rome," so to say, it is not the function of a court to drive a litigant from pillar to post.

In the further written submissions of the 01st respondent, it has been submitted, among other things, that, when facts are in dispute revision is

[3] Legal Advice: Pound the Facts, Pound the Law, Pound the Table – Quote Investigator®

not available and exceptional circumstances must be specifically averred in a revision application.

To begin with, the power this Court exercises in this case is Restitutio in Integrum. There are no disputed facts. The fact of fraud committed on the petitioner is established. There is no requirement in law neither in Restitutio in Integrum or in Revision to aver specifically in pleadings that there are exceptional circumstances. Furthermore, fraud itself is an exceptional circumstance that requires the intervention of this Court in Restitutio in Integrum.

25. Therefore, this court

(a) Allows the application for Restitutio in Integrum

(b) Restores parties to the position before 11.08.2016

(c) Directs that the 01st and the 02nd respondent shall vacate the premises in question including the bungalow giving its peaceful possession to the petitioner within 30 days of the date of this judgment

(d) Directs that if the 01st and or the 02nd respondents or anyone holding under them fail to do so the writ of execution will issue against them for that end from the District Court of Nawalapitiya the expenses of which shall be borne by the person or persons who failed to comply with the order of this Court

(e) Directs the learned District Judge of Nawalapitiya to issue writ, in case it is necessary, as in paragraph (d) above

(f) Directs the learned District Judge of Nawalapitiya to go on with case No. L 455 from its position before 11.08.2016 according to law

(g) Grants the petitioner the costs of this application.

The reliefs (c) (d) and (e) are in addition to the liability of any such person for the Contempt of this Court.

Judge of the Court of Appeal.

Hon. Sasi Mahendran J.,

I agree.

Judge of the Court of Appeal.