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

In the matter of an application for *Restitutio in Integrum* and Revision in terms of Article 138(1) of the Constitution and Section 839 of the Civil Procedure Code.

C.A. Case No.11/2017 (Rev)
NWP/HCCA/KUR/129/2005 (F)
D.C. Kurunegala Case No.5211/P

Lokuhetti Arachilage Somapala
of Getakaluwa, Hiripitiya,
Nikadalupotha.
DEFENDANT-PETITIONER

-Vs-

Silpathipathiyalage Wijeratne *alias* Brahmachariyalage Wijeratne
of Getakaluwa, Hiripitiya,
Nikadalupotha.
Substituted-PLAINTIFF-RESPONDENT

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

COUNSEL : Ranjan Gooneratne with Sarath Walgamage for the Defendant-Petitioner

Vidura Gunaratne for the Substituted-Plaintiff-Respondent

Argued on : 01.03.2019

Decided on : 19.07.2019

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

This is an application for *restitutio in integrum* and revision sought under Article under 138 (1) of the Constitution. Both counsel have made submissions on the merits and demerits of the judgment of the District Court of *Kurunegala* in this partition case filed by the Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff") and the Defendant-Petitioner (hereinafter sometimes referred to as "the Defendant") pleads specifically that the judgment of the District Court dated 31.10.2005 is tainted with a fundamental vice and that this Court must exercise its extraordinary jurisdiction in order to ensure that a miscarriage of justice that has been meted out to the Defendant is ameliorated. This is a case that went all the way to the Supreme Court and that story repays attention but not before I have dealt with the factual template in the case.

The original Plaintiff one Punchathi instituted this action against the Defendant-Petitioner in the District Court of *Kurunegala* on 08.10.1999 seeking a partition of the corpus more fully described in the schedule to the plaint. The Plaintiff's action was based on the following premise:-

a) An undivided half share was owned by one Sriyathi and upon her death, her daughter Sopina inherited her rights via maternal inheritance.

b) Sopina on Deed bearing No.19637 and dated 04.11.1977 conveyed her rights to the Plaintiff Punchathi.

c) Samaneris-the father of the Defendant-Petitioner had been in possession of the other half of the land so that the Defendant became entitled to the balance half share.

On this basis, the Plaintiff pleaded that the land should be partitioned with one half to be allotted to her and the other half to Somapala (Defendant). Though the Plaintiff was charitable enough to admit that the balance half must go the Defendant, what turned out to be established at the trial was to the contrary.

The Plaintiff claimed that the corpus was constituted by Lot Nos.1, 2 and 3 of the preliminary plan bearing No.670 of one Licensed Surveyor called R.B. Moragane.

In his amended statement of claim, the Defendant claimed that the land sought to be partitioned has to be Lots Nos.1 and 3 of the aforesaid preliminary plan.

According to the points of contest that were raised on behalf of the Plaintiff, the Plaintiff Punchathi specifically put in issue whether one half share of the corpus should be allotted to her in terms of the devolution of rights pleaded by her from Sopina who had transferred one half share of the land to her by way of the Deed bearing No.19637 and dated 04.04.1997. Thus the Plaintiff claimed the one half tracing it to the deed of sale that flowed from Sopina. Sopina herself had inherited this one half, according to the plaint, from her mother Sriyathi. Upon Sriyathi's death, the one half that Sriyathi had possessed of this land had devolved on Sopina and Sopina transferred the one half in 1997 to the Plaintiff. This was how the devolution was pleaded.

The point of contest based on this devolution has been answered in favor of the Plaintiff by the judgment of the learned District Judge of *Kurunegala* dated 31.10.2005. In other words the District Court allotted the Plaintiff one half of Lots 1, 2 and 3.

The story of the Defendant was otherwise different to that of the Plaintiff. According to him, he sought the exclusion of Lot No.2, which was a different land that had been prescribed by him. Barring Lot No.2, it is Lot Nos.1 and 3 that should form the corpus for partition. He formulated this position in the form of a point of contest. Allied to this issue is also his point of contest No.16 wherein the Defendant claimed the exclusion of Lot 2 on the plea of prescription.

Thus it could be seen that according to the Plaintiff, the corpus is constituted by Lots 1, 2 and 3 of the preliminary plan bearing No.670 and the Plaintiff sought one half of this corpus, whereas the Defendant sought the exclusion of Lot 2 on the basis of prescription and according to the Defendant, the corpus sought to be partitioned should only be Lot 1 and 3.

At the end of the trial, the learned District Judge of *Kurunegala* held in favor of the Plaintiff concluding that the corpus is constituted by Lots 1, 2 and 3 and allotted half of this corpus to the Plaintiff and he kept the remaining one half unallotted. There is also

finding by the learned District Judge of *Kurunegala* that the Defendant has not prescribed to Lot 2. Thus one could see that the District Judge gave the Defendant no interest in the land, though the Plaintiff had conceded in her statement of claim one half to him. The learned District Judge left the other half share unallotted because he took the view that the Defendant failed to establish his title to the other half share. The pith and substance of the judgment of the learned District Judge amounted to a dismissal of the statement of claim filed by the Defendant.

Before I indulge in an analysis of the issues in the case, I have to narrate the other steps that took place in this labyrinthine litigation. Aggrieved by the judgment dated 31.10.2005, the Defendant preferred an appeal to this Court which was later transferred to the High Court of Civil Appeals of the North Western Province holding its sittings in *Kurunegala*. That Court by its judgment dated 30.08.2011 set aside the judgment of the learned District Judge for what it called a want of investigation of title on the part of the District Judge and dismissed the action filed by the Plaintiff. The gist of the judgment of the Civil Appellate Court among many other things was that the Plaintiff Punchathi had failed to prove her pedigree.

It transpired later that at the time of the delivery of the judgment of the Civil Appellate Court on 30.08.2011, the Plaintiff Punchathi had crossed the great divide and her son Siyapathiyalage Wijeratne (the Substituted Plaintiff-Respondent to the application before this Court) preferred a leave to appeal to the Supreme Court and after having granted leave, the Supreme Court (Marsoof, PC, J. with Suresh Chandra, J. and Dep, PC, J. as His Lordship then was) held on 16.03.2012 in SC HCCALA No.398/11 that the judgment of the Civil Appellate Court dated 30.08.2011 was a nullity and that these facts must be brought to the notice of the Civil Appellate High Court. The Supreme Court remanded the case to the Civil Appellate Court for an appropriate order.

When the case was remitted back to the High Court of the Civil Appeals in *Kurunegala*, substitution took place and a different bench of the Court by its judgment dated 06.02.2014, dismissed the Defendant's appeal.

It has to be noted whilst the 1st Civil Appellate bench of the High Court set aside the judgment of the learned District Judge and allowed the appeal of the Defendant, the 2nd bench of the Civil Appellate High Court affirmed the judgment of the District Court and dismissed the appeal of the Defendant.

The Provincial High Court exercising the appellate jurisdiction alluded to a judgment of Gratiaen, J. (with whom Alan Rose C.J had concurred) ***Karunaratne v. Sirimalie*** (1951) 53 N.L.R 444 wherein the learned Judge had held "where in a partition action, all possible claimants are manifestly before Court, no higher standard of proof should be called for in determining the question of title than in any other civil suit." Having cited this judgment, the Civil Appellate Court gave its imprimatur to the judgment of the District Judge stating that the learned District Judge of *Kurunegala* had properly investigated title.

So Gratiaen, J. imposed a burden on the trial court judge that he must satisfy himself that all possible claimants are before him. If it is manifest that at least one claimant is not before Court there would be no proper investigation of title. Then there will be a manifest error in the judgment. I would add that a proper investigation would not only involve the ascertainment of all claimants but also engage the question whether the claims presented before Court were investigated fully and properly by Court.

Having thus failed in the Civil Appellate Court, the Defendant took the matter to the Supreme Court where he was met with a preliminary objection that his leave to appeal was time barred. The Supreme Court by its order dated 22nd May 2107 upheld the preliminary objection and dismissed the application for leave to appeal. In other words the merit of the appeal was not adjudicated upon in the Supreme Court and so the upshot of all this is that the judgment of the 2nd bench of the Civil Appellate Court dated 06.02.2014 affirming the judgment of the District Court dated 31.10.2005 remained valid, when the Defendant petitioned this Court for *restitutio in integrum* and revision by this application dated 10th July 2017. So much for the litigation history of this case.

When this matter was taken up for hearing, Mr. Ranjan Gooneratne the learned Counsel for the Defendant-Petitioner submitted that the judgment of the District Court is so perverse that it cries out for intervention by this Court in its exercise of *restitutio in integrum* or revision.

Restitutio in Integrum

I have to observe that the Court of Appeal is the only Court that is vested with the jurisdiction of *restitutio in integrum* in terms of Article 138 of the Constitution and this jurisdiction has not been specifically conferred on the provincial high court of civil appeals.

Article 138(1) of the Constitution vested in the Court Appeal sole and exclusive jurisdiction to grant relief by way of *restitutio in integrum*. The passage of the High Courts of the Provinces (Special Provisions) (Amendment) Act No.54 of 2006 did not have the effect of transferring or conferring this jurisdiction on the High Courts of Civil Appeals.

On a perusal of Section 5A(1) of the High Courts of the Provinces (Special Provisions) (Amendment) Act No.54 of 2006, the High Court established by Article 154P of the Constitution for a Province was conferred with appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court or Family Court within such Province, but jurisdiction to hear applications for *restitutio in integrum* has not been so conferred on the Provincial High Court.

Section 5A(2) of this Act enacts that, "The provisions of Section 23 to 27 of the Judicature Act No.2 of 1978 and Sections 753 to 760 and Sections 765 to 777 of the Civil Procedure Code (Chapter 101) and of any written law applicable to the exercise of the jurisdiction referred to in subsection (1) by the Court of Appeal, shall be read and construed as including a reference to a High Court established by Article 154P of the Constitution for a Province and any person aggrieved by any judgment, decree or order of a District Court or Family Court, as the case may be, within a province, may invoke the jurisdiction referred to in that subsection, in the High Court established for that Province."

A conferral of a particular jurisdiction in a Court cannot be lightly presumed and there must be an express conferment of such jurisdiction. There is no express conferral of *restitutio in integrum* in the High Courts. There is another reason why I hold the view that the High Court of Civil Appeals does not enjoy *restitutio in integrum*. If High Courts enjoy this jurisdiction, the question arises-to which Court does an appeal from such jurisdiction lie? There is no such right of appeal expressly conferred by statute on any court as a right of appeal has to be expressly provided for in a statute. Therefore the jurisdiction of *restitutio in integrum* does not reside in High Courts of Civil Appeals.

This Court assumed jurisdiction over this matter because *restitutio in integrum* is specifically provided for in Section 48 of Partition Law No.21 of 1977. The finality of partition decrees can be impeached in this Court by virtue of revision and *restitutio in integrum*.

Before I deal with the fundamental vice that Mr. Ranjan Gooneratne complained of, the perversity of the judgment seems to be present in another aspect of the matter where exclusion of Lot 2 sought by Defendant has been disallowed by the learned District Judge.

Exclusion of Lot 2

At page 112 of the Appeal Brief the Plaintiff herself admits that Somapala had been living fenced off in Lot 2. It had been fenced off for nearly 37 years. So Lot 2, on the Plaintiff's own evidence, had been separated for 30 years prior to the date she gave evidence in 2004. Somapala (the Defendant) says this as well (*see* page 125 of the Appeal Brief). The Defendant's evidence that he had been separately possessing Lot 2 has been corroborated by the Plaintiff. That explains why the Defendant wanted an exclusion. The learned District Judge of *Kurunegala* does not refer to this aspect of the case at all in his judgment dated 31.10.2005.

Even though the Plaintiff claimed one-half of Lots 1, 2 and 3, upon the evidence of the predecessor in title of the Plaintiff, there is strong evidence of adverse possession of Lot 2

by the Defendant. Lot 2 therefore cries out for an exclusion but the learned District Judge just brushed aside this question of adverse possession that had surfaced to the fore.

Instead the learned District Judge goes on the basis that what Sopina (the predecessor in title of the Plaintiff) passed to the Plaintiff by way of **P1** dealt with the entire land (Lot 1, 2 and 3), whereas it is quite clear upon the evidence of Sopina herself that she could not have passed Lot 2 to the Plaintiff (**P2** is dated 04.04.1977). By 04.04.1997, the separate possession of Lot 2 on the part of the Defendant was almost 15 years.

I have examined the evidence given on behalf of both the Plaintiff and Defendant and I find that the elements of adverse possession necessary to give rise to prescription are rife in this case and a case for an exclusion of Lot 2 was thus made out. This appears to me as a manifest error in the judgment that has to be remedied in this jurisdiction.

Transfer without title-Feeding the Estoppel

Next I get on to the question of transfer of one half of Lots 1, 2 and 3 by Sopina which Mr. Ranjan Gooneratne for the Defendant-Petitioner argued was a transfer without title to one fourth. In other words Sopina had only one fourth but she purported to transfer one half.

Mr. Ranjan Gooneratne for the Defendant-Petitioner argued that this was a fundamental vice that vitiates the judgment of the District Court dated 31.10.2005. He contended that this fundamental vice emanated from what he called the cardinal error which the learned District Judge made when he allotted one half of Lots 1, 2 and 3 to the Plaintiff. According to him, Sopina (the predecessor in title of the Plaintiff) could not have transferred one half because she did not have one half at the time of transfer. She only had title to one fourth. Upon the death of Sopina's mother Sriyathi who had one half, Sopina could have got only one fourth as her father who was alive at that time of the death of Sriyathi inherited the other one fourth share. In fact Sriyathi predeceased her husband and it is clear that at the time of transfer of one half to the Plaintiff, Sopina had only one fourth. The balance one fourth resided in Sopina's father. The fact that Sopina's father was alive at the time of transfer is also spoken to by Plaintiff who says that

Sopina's father married her later on. In other words the Plaintiff became the second wife of Sopina's father. I would accept the argument that at the time of transfer Sopina had only one fourth and the learned District Judge was oblivious to this fact. He goes on the basis that Sopina had one half and allots one half to the Plaintiff.

Notwithstanding this fact which the learned District Judge failed to notice, I yet hold that the decision of the District Judge to allot one half can be rationalized and justified.

It is my view that though Sopina purported to transfer one-half to the Plaintiff, whereas she had only 1/4th, her father's 1/4th share would have devolved on her later upon the death of her father. The death of Sopina's father was not disputed at all. Admittedly there were no other siblings that Sopina had. By the time the trial came around, it is a given that Sopina's father was no longer living and his 1/4th share had to devolve on Sopina.

Though Sopina did not have title to the 1/4th share of her father when she effected its transfer to the Plaintiff, she acquired title to the 1/4th share upon the death of her father. Bertram C.J held in ***Gunatilleke v. Fernando*** (1919) 21 N.L.R 257 that Roman Dutch law is in accord with the English law on the subject that a person who sells the property is estopped from disputing the title of his vendee, and that when he subsequently acquires title, that title passes to his vendee-*see* ***Gamagedara Jayaratne v. Gamagedara Karunawathie and three others*** C.A. Case No.671/1997 (F) D.C. Kandy 12838/P (CA minutes of 19.06.20180). This principle that forms the fulcrum of the defence of "*exceptio rei venditae et traditae*" emanates from the equitable principle of feeding the estoppel-*see* ***Doe v. Oliver*** 2 Smith's Leading Cases, 11th edition, 724.

Thus the Plaintiff derived one-half from Sopina and the question arises how this one-half should be given to the Plaintiff. I have already held that Lot 2 must be excluded as there has been long possession of Lot 2 by the Defendant. This has received barely any attention of all the judges who dealt with the case and there is a such manifest error which this Court feels impelled to rectify in its jurisdiction of *restitutio in integrum*. If Lot 2 is excluded in favour of the Defendant, one-half that the Plaintiff wanted to be allotted can be given from Lot 1 and 3. But the Plaintiff had sought in her plaint one-half of Lots 1,

2 and 3. When the Defendant succeeds in having Lot No.2 excluded, it is nothing but fair that the Plaintiff gets an extent which is equal to the one half of Lots 1, 2 and 3. But this one half, albeit equal to the one half of the total extent of Lots 1, 2 and 3, must emanate from Lots 1 and 3. After giving the one-half to the Plaintiff from Lot 1 and 3, the remaining share can be kept unallotted, as there are no claims to the remainder.

To this extent, the judgment of the District Court dated 31.10.2005 is set aside and varied. In the circumstances the judgment of the Civil Appellate Court dated 06.02.2014 which affirmed the judgment of the District Court is perforce set aside in the exercise of *restitutio in integrum*. The learned District Judge of *Kurunegala* is to enter decree accordingly namely Lot 2 has to be excluded in favour of the Defendant. The total extent of Lots 1, 2 and 3 is 161.5 perches. One-half of the total extent of the land that the Plaintiff wanted (Lot 1, 2 and 3) would be 80.75 perches. This extent of 80.75 perches can be carved out of the combined extent of Lots 1 and 3 which is equivalent to 89.30 perches.

The extent of 80.75 perches (one-half of the total extent of Lots 1, 2 and 3 namely 161.5 perches) has to be given to the Plaintiff from the total extent of Lots 1 and 3-*i.e.*, 89.30 perches and the remainder (8.55 perches) has to be kept unallotted. In a nutshell the final scheme of partition will carry the following:-

1. Lot 2 to be excluded in favor of the Defendant.
2. 80.75 perches to be given to the Plaintiff from the total extent of 89.30 perches of Lots 1 and 3.
3. The remainder namely an extent of 8.55 perches of Lots 1 and 3 must be kept unallotted.

JUDGE OF THE COURT OF APPEAL