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

In the matter of an application for a *Restitutio in Integrum* under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. R.I. Application No.21/2017

D.C. Colombo Case No.19775/L

H.W. Yasawardena
No.310, Galle Road,
Waturegama, Ahungalla.
PLAINTIFF

-Vs-

1. **Don Benadict Wellington Denawake**
   No.D29, Torrington Flats,
   Housing Scheme,
   Colombo 05.
2. **National Housing Development Authority,**
   Sir Chiththampalam A. Gardiner Mawatha,
   Colombo 02.

DEFENDNATS

AND NOW

Don Benadict Wellington Denawake
No.D29, Torrington Flats,
Housing Scheme,
Colombo 05.
PETITIONER

-Vs-

H.W. Yasawardena
No.310, Galle Road,
Waturegama, Ahungalla.
PLAINTIFF-RESPONDENT

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

COUNSEL : Jacob Joseph with Sandamali Madurawala and Chandrika Silva for the Petitioner

Vidura Gunarathne with Wathsala Mallawarachchi for the Plaintiff-Respondent

Written Submissions on: 21.02.2019 & 25.02.2019

Decided on : 08.05.2019

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

When this matter came up before me on 20.02.2019, both counsel submitted that this matter could be disposed of by written submissions and thus in this application for *restitutio in integrum*, oral submissions have been dispensed with. The written submissions of the respective parties have since been filed and I proceed to pronounce judgment after having perused the written submissions.

Factual Template

The Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff") instituted action against the 1st Defendant-Petitioner (hereinafter sometimes referred to as "the Petitioner") and the 2nd Defendant-National Housing Development Authority (NHDA)-seeking several remedies in his prayer to the plaint dated 12th December 2002. Two of the reliefs sought *inter alia* against the 1st Defendant-Petitioner was ejectment from Unit D/29

of the Torrington Flats and damages. This housing had been given to the Plaintiff-Respondent by the NHDA as he was a government servant and subsequently steps were taken to transfer the ownership of the unit to the Plaintiff-Respondent. In the meanwhile the Plaintiff-Respondent sublet the premises to the 1st Defendant-Petitioner and the cause of action in the District Court was rooted in the refusal of the 1st Defendant-Petitioner to vacate when the Plaintiff-Respondent wanted the premises back. Both the 1st Defendant-Petitioner and the 2nd Defendant (NHDA) filed separate answers praying for a dismissal of the Plaintiff's action. Later the NHDA (the 2nd Defendant) informed Court that it was agreeable to abide by any decision of court.

After trial, the learned Additional District Judge of Colombo by her judgment dated 28.08.2008 held with the Plaintiff-Respondent and the 1st Defendant-Petitioner who faced eviction in light of the judgment preferred an appeal against the judgment to the High Court of Civil Appeal of the Western Province in Colombo. One of the issues among many others that were raised by the 1st Defendant-Petitioner was that the Plaintiff-Respondent could not maintain this action as the 2nd Defendant NHDA had decided to terminate the tenancy given to the Plaintiff by way of a letter marked as **P21**. It is worthy of note *though* that the NHDA asserted in its answer that no final decision had been taken to give effect to any termination of tenancy between the Plaintiff-Respondent and NHDA. The learned High Court Judges of Civil Appeal took cognizance of these matters and dismissed the appeal of the 1st Defendant-Petitioner by their judgment dated 22.09.2015.

The leave to appeal application preferred by the 1st Defendant-Petitioner under Article 128 of the Constitution read with Section 5C of the Provincial High Courts (Special Province) Act No.19 of 1990 as amended by Act No.54 of 2006 was refused by the Supreme Court on 11th July 2016.

Thereafter the learned District Judge entered decree and the Plaintiff applied for a writ of execution and notwithstanding the objection to the issuance of the writ of execution, the learned Additional District Judge of Colombo, after an inquiry, made order issuing the writ of execution on 11.10.2017. In other words the stay of execution of the writ sought by the 1st Defendant-Petitioner was thus refused.

This application for *restitutio in integrum* impugns the decree and writ of execution and the 1st Defendant-Petitioner also seeks in the main that he be restored to possession of the premises from which he has been evicted consequent to the writ of execution. The writ of execution was issued on 11th October 2017 and it was executed on 27th October 2107 and vacant possession was handed over to the Plaintiff-Respondent.

The decree and writ of execution are now challenged before this Court in *restitutio in integrum* proceedings. Before I proceed to consider the arguments advanced to impugn the decree and writ issued in the case, I must observe that the decree is rooted in a judgment that has been upheld by both the High Court of Civil Appeal and the Supreme Court. Then the caveat follows-the doctrine of *res judicata* to which I will advert presently would prohibit the 1st Defendant-Petitioner from re-agitating issues that have either been adjudicated upon or been waived by the Petitioner.

The quintessential argument advanced in the written submissions of the 1st Defendant-Petitioner is that according to Section 10 (4) of the National Housing Development Authority the decree cannot be enforced because the provision requires that it should have been made in favor of the Authority or the General Manager. The aforesaid provision enacts as follows:-

> *"No such flat, house or living accommodation or building or any land shall be* ***attached*** *in execution of a decree of any court except a decree in favour of the Authority or the General Manager, as the case may be."*

In other words the contention is that the decree was a nullity as the decree was not in favour of the National Housing Development Authority nor was it in favour of the General Manager. This presupposes the argument that the NHDA must have sued the 1st Defendant-Petitioner and secured a decree in its favour. It has to be recalled that the State Counsel representing the NHDA sought its discharge at the trial by way of a motion which stated that the Authority would abide by any decision of Court. The question of maintainability of an action by a licensor against his licensee for ejectment is well known to common law and this very question was gone into by the District Court and the High

Court of Civil Appeal and both Courts in their judgments confirmed the right of the Plaintiff-Respondent to maintain this action against the 1st Defendant-Petitioner. It is trite law that one need not be an owner of some premises to institute an action on the ground of landlord and tenancy-***Imbuldeniya v. D. De Silva***[1] (Sharvananda, C.J.) Mark Fernando, J. echoed the same principle in ***Gunasekera v. Jinadasa***[2] thus:-

> *"It is settled law that tenancy is a contractual relation, which may subsist even where the landlord is not the owner of the rented premises."*

The NHDA was no doubt the owner of the premises but there did come into existence a contract of tenancy between the Plaintiff-Respondent and the 1st Defendant-Petitioner. At the trial there were formal admissions that would qualify to fall within Section 58 of the Evidence Ordinance namely *a)* the Plaintiff-Respondent handed over the possession of the premises to the 1st Defendant-Petitioner for a monthly rental of Rs.1000/-; *b)* the 1st Defendant-Petitioner was served with a quit notice dated 09.06.1993; *d)* the 1st Defendant-Petitioner was yet in possession of the premises let notwithstanding the quit notice. On these admissions it is abundantly clear that the Plaintiff-Respondent made out a case for ejectment and the percipient observations of U.de. Z. Gunawardana, J. in ***Ruberu v. Wijesooriya***[3] come into play when the Plaintiff-Respondent instituted action to eject the 1st Defendant-Petitioner.

> *"Whether it is a licensee or a lessee, the question of title is foreign to a suit in ejectment against either."*

Thus the District Court of Colombo embarked on a suit properly constituted and reached a decision ordering the ejectment of the 1st Defendant-Petitioner. This decision of the District Court was upheld by both the High Court of Civil Appeal and the Supreme Court. So the decree flowed from a judgment which is traceable to a validly constituted suit. This suit at the instance of the licensor or lessor is not abrogated by the National Housing Development Authority Act. It is a common law right which the Plaintiff-Respondent

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[1](1987) 1 Sri.LR 367.
[2](1996) 2 Sri.LR 115 at 120.
[3](1998) 1 Sri.LR 58.

availed himself of in order to seek the ejectment of the 1st Defendant-Petitioner and in no way is this right taken away or restricted by the provisions of the National Housing Development Authority Act No.17 of 1979. There is neither an express exclusion nor an implied abrogation of the common law right. So it was in pursuance of a valid judgment that the decree flowed and the writ issued thereafter in the wake of all these concatenation of events, as the crow flies. The judgment which gave rise to the decree and writ was upheld by the High Court of Civil Appeal and the Supreme Court. Now before this Court the decree and writ are sought to be challenged in *restitutio in integrum* proceedings.

Res judicata

In this backdrop the invocation of *restitutio in integrum* by virtue of Article 138 of the Constitution would be barred by the doctrine of *res judicata*, which would preclude the Petitioner from maintaining this application before this Court. This case which began between the two parties originally in the District Court has run its course all the way up to the Supreme Court. If one peruses the application to this Court for *restitutio in integrum* some of the issues that were agitated in the previous litigation have again been made the subject-matter of contention in this application. For instance paragraph 20 of the application for *restitutio in integrum* regurgitates the same grouse-namely the tenancy of the Plaintiff-Respondent had been terminated by the NHDA on 19.03.1991 by the Deputy General Manager of the 2nd Defendant for violating Section 10 of the NHDA Act. This issue was litigated in the previous action (D.C. Colombo 19775/L) between the parties. In fact the want of *locus standi* that the 1st Defendant-Petitioner alleged against the Plaintiff-Respondent was disposed of and I have myself held above that the licensor enjoys *locus standi* to institute an action to eject his licensee. The NHDA itself had informed Court that there was no finality reached on the question of terminating the Plaintiff's tenancy and this was a live issue that was considered even by the High Court of Civil Appeal. Can this be reagitated before this Court in the guise of *restitutio in integrum*? I am afraid that the

Petitioner is estopped from re-litigating this issue before me. This is *issue estoppel or cause of action estoppel* that gives rise to *res judicata.*

According to the view expressed by former Chief Justice, Basnayake, in the case of ***Herath v. the Attorney General***[4], the whole of our law of *res judicata* is to be found in Section 34, 207 and 406 of the Civil Procedure Code.

Voet defines *res judicata* as thus: "Now an exception is the shutting out of an action which is available in strict law." So according to Voet, the effect of *res judicata* is the ouster of a 2nd proceeding on the same issue.

Section 207 of the Civil Procedure Code reads:-

> "All decrees passed by the court shall subject to appeal, when an appeal is allowed, be final between the parties; and no plaintiff hereafter be non-suited.
>
> **Explanation:** Every right of property or to money or to damages, or to relief of any kind which can be claimed, set up, or put in issue between the parties to an action upon the cause of action for which the action sis brought, whether it be actually so claimed, set up, or put in issue or not in the action, becomes, on the passing of the final decree in the action, a *res judicata*, which cannot afterwards be made the subject of action for the same cause between the same parties."

Basnayake, C.J., refers to the explanation given above and states that "according to the explanation for a matter to be *res adjudicata* the previous action which is pleaded as a bar to the subsequent action must be, *a)* for the same cause of action, and *b)* between the same parties"[5].

In the course of his judgment in ***Sathuk v. Layandeen and others***[6] Basnayake, C.J. states:

> "Voet states that the three requisites for *res judicata* are, same persons, thing and cause. He (Voet) states there is nevertheless no room for this exception unless a suit which had been brought to an end is set in motion afresh between the same persons,

[4] 60 N.L.R. 194
[5] 60 N.L.R. 194 at 223
[6] 63 N.L.R. 25

about the same mater and on the same cause of claiming, so that the exception falls away if one of these three things is lacking."

Basnayake, C.J. goes on to quote, Voet with regard to the term 'same person'. "A deceased and his heirs, a principal and his agent, a free town and its manager, an insane person or a soldier and his curator, a ward and his guardian and a father and the son of his household are in Civil Law the same person."

So this application for *restitutio in integrum* is doomed to fail as the same persons litigated the same issues in the previous litigation. Apart from *res judicata* which will bar the Petitioner, principles surrounding *restitutio in integrum* will also preclude this Court from exercising this jurisdiction. Let me turn to some of the cases which have enunciated the principles.

Restitutio in integrum is more in the nature of an overriding (equitable) jurisdiction that may be invoked at the discretion of court. It may be invoked not only in respect of voidable contract, but in respect of any voidable obligation, including a judgment, in respect of which there is no other remedy. If there is some other adequate remedy is available, the *restitutio in integrum* will not lie- ***Perera et al v. Wijewickreme***[7].

In ***Abeyesekere v. Haramanis Appu***[8] it was held:

> *"the remedy of restitutio in integrum is one which has taken deep root in the practice and procedure of Courts, and it is too late to hold that the remedy ought no longer to be recognized. If the Court is satisfied that there is a prima facie case, Court shall issue notice on the other side."*

Restitutio in integrum to impugn judgments

The power to entertain applications by way of *restitutio in integrum* has now been conferred with the Court of Appeal by the Constitution of the country. Article 138(1) of the Constitution states that, "The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of

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[7] 15 N.L.R 411
[8] 14 N.L.R 353

all errors in fact or in law which shall be committed by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and *restitutio in integrum*, of all causes, suits, actions, prosecutions, matters and things of which such Court of First Instance, tribunal, or other institution may have taken cognizance."

In ***Kusumawathie v. Wijesinghe***[9], the defendant was married to one 'W'. After the death of the said 'W', the petitioner was shown an *ex parte* decree obtained by 'W', dissolving the marriage, by the deceased's sister at the police station, alleging that the petitioner was occupying the house after she had been divorced and that the petitioner was not entitled to pension of the deceased.

The petitioner sought by way of *restitutio in integrum* to remedy the injustice caused to her by abuse and misuse of the legal process.

It was held by the Court of Appeal that; relief by way of *restitution in integrum* of judgments of original courts may be sought where the judgments had been obtained by fraud by the production of false evidence, nondisclosure of material facts or by force.

> *"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 practiced on that party to be perpetuated. Restitutio in integrum provides this Court necessary apparatus to step in and rectify 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" Per* Jayasinghe J.

In ***Sri Lanka Insurance Corporation Ltd. v. Shanmugam***[10] the following ratio appears. Relief by way of *restitutio in intergrum* in respect of judgments of original Courts may be sought;

(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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[9] 2001 (3) Sri L.R. 238,
[10] (1995) 1 Sri.LR 55.

(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

(c) Where judgments have been pronounced by mistake and decrees entered thereon provided of course it is an error which connotes a reasonable excusable error.

Section 10(4) Argument

None of these criteria are grounds of attack in this case except for the assertion that the decree must have been entered in favor of the NHDA or its General Manager. Section 10(4) of the NHDA Act has been called in. In other words the argument is that since the decree is in favour of the Plaintiff-Respondent who is a government servant, the writ that was issued was nullity. This argument does not hold water as the decree contemplated under Section 10(4) is one that seeks to *attach* a flat, house or living accommodation or building or any land belonging to the NHDA. Section 10(4) is referable to Section 10(3) which reads as follows:-

> *"No lien by deposit of the title deeds as security for a debt, of any flat, house or other living accommodation or building or any land that has been sold by the Authority shall be capable of being created in favour of any person and no caveat in support of any such lien by deposit shall be capable of being registered under the Registration of Documents Ordinance."*

Section 10(3) prohibits a vendee from NHDA depositing the title deeds as a security for a loan given to him by a third party. No lien in favour of the third party can be created by the vendee for a loan from a third party by depositing title deeds. In other words there cannot be an equitable mortgage in favor of anyone over a flat, house or living accommodation or building or any land that has been sold by the NHDA. Section 10(4) prohibits the creditor of the vendee taking out a writ to *attach* the dwelling. No such thing has happened this case. The NHDA never sold this property to the Plaintiff-Respondent. There is no evidence that the Plaintiff-Respondent borrowed from a third party like a bank and deposited the title deeds with the creditor. This could not have happened because the Plaintiff did not have any title deeds as he was not a vendee of the NHDA. No lien could have been created

by the Plaintiff-Respondent. In the circumstances Section 10(4) of the NHDA Act has no application to the facts of this case. One has to read between the lines when one tries to interpret Section 10(4).

Attachment

In the phrase *writ of attachment*, the word *attachment* will bear this meaning-the taking into custody of a person's property to secure a judgment or to be sold in satisfaction of a judgment. Joseph Goulden, in *The Million Dollar Lawyers* 52-53 (1978) seeks to render a meaning to the concept of attachment. "The disputed residence was important because a writ of attachment-briefly, an order freezing cash or other assets-cannot be obtained against a person unless the person has a foreign address." Possibly assets were in one jurisdiction and the owner was in another and unless one knew his address, the writ of attachment cannot travel afar-this is how Joseph Goulden pithily summarized it.

Needless to say, Section 10(4) speaks of an order which is akin to sequestration or seizure and it has nothing to do with the writ that was issued against the 1st Defendant-Respondent. What issued against the 1st Defendant-Respondent was a writ that executed a decree within the meaning of Section 217(C) of the Civil Procedure Code. The decree was one that was directed to the Petitioner to yield up possession of immovable property and that decree was entered properly in favor of the Plaintiff-Respondent. That writ need not issue solely at the instance of the NHDA.

So all the principles that have an interplay in the case namely *res judicata* and availability of alternative remedies that the Petitioner himself has exhausted by taking the case all the way to the Supreme Court will shut the door to the remedy of *restitutio in integrum*. There is no reasonable error or Justus error in the judgment of the Court *a quo*.

Accordingly I proceed to affirm the decree and writ that have been entered in the case and dismiss this application for *restitutio in integrum*.

JUDGE OF THE COURT OF APPEAL