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

Court of Appeal Case No:
CA/RII/53/2024

D.C. Colombo Case No:
DSP 0207/2024

01. Lasantha Alagiyawanna
Meevitigammana,
Urapola.

02. Duninda Dissanayake,
56, Skeleton Road,
Colombo 05.

03. Mahinda Amaraweera
B63, Mahagamasekara
Mawatha,
Bauddhaloka Mawatha,
Colombo 07.

Plaintiffs

-Vs-

1. Sarathi Dushmantha Mithrapala
Acting Chief Secretary,
Sri Lanka Freedom Party,
528, Karawanella,
Ruwanwella.

2. Nimal Siripala De Silva
   Acting President,
   Sri Lanka Freedom Party,
   93/20, Elvitigala Mawatha,
   Colombo 08.

3. Wijeyadasa Rajapaksa
   No.17, Wijayaba Mawatha,
   Nawala Road,
   Nugegoda.

4. Thilanga Sumathipala
   Vice President,
   Sri Lanka Freedom Party,
   No.02, Dr. Milina Sumathipala
   Mawatha,
   Colombo 10.

Defendants

AND NOW BETWEEN

1. Wijeyadasa Rajapaksa,
   No.17, Wijayaba Mawatha,
   Nawala Road,
   Nugegoda.

3rd Defendant-Petitioner

Vs.

1. Lasantha Alagiyawanna
   Meevitigammana,
   Urapola.

2. Duninda Dissanayake,
   56, Skeleton Road,
   Colombo 05.

3. Mahinda Amaraweera
   B63, Mahagamasekara
   Mawatha,

Bauddhaloka Mawatha,
Colombo 07.

Plaintiff- Respondents

1. Sarathi Dushmantha Mithrapala
   Acting Chief Secretary,
   Sri Lanka Freedom Party,
   528, Karawanella,
   Ruwanwella.

2. Nimal Siripala De Silva
   Acting President,
   Sri Lanka Freedom Party,
   93/20, Elvitigala Mawatha,
   Colombo 08.

3. Thilanga Sumathipala
   Vice President,
   Sri Lanka Freedom Party,
   No.02, Dr. Milina Sumathipala Mawatha,
   Colombo 10.

Defendants-Respondents

Before: Hon. D.N. Samarakoon, J.

Counsel: Dr. Romesh de Silva P.C., with Sugath Caldera, Rasika Dissanayake and Niran Anketell for the 03rd defendant Petitioner, instructed by Sanath Wijewardane.

Chandaka Jayasundera P. C., Amila Dissanayake instructed by Sanjeewa Kaluarachchi for the 1st, 2nd, 3rd Plaintiff respondents.

Kuvera de Zoysa P. c., with Samuditha Kumarasinghe for the 1st defendant respondent instructed by Jayamuditha Jayasooriya.

Avindra Rodrigo P. C., with Vishwaka Peiris and Kalpani Rathnayake for the 2nd defendant respondent.

4th defendant respondent absent and unrepresented.

Supported on: 02.05.2024

All Synopsizes of parties represented tendered on 03.05.2024

Decided on: 07.05.2024

D. N. Samarakoon J.,

(1) The proposition:

In **CEYLON HOTELS CORPORATION LTD., vs. C. JAYATUNGE**, argued on 24th, 26th, 30th June & 1st July 1969 and reasons delivered on 15th July 1969, (The Ceylon Law Weekly, Volume 77 at page 5), Justice Albert Lionel Stanley Sirimane[1], at the commencement of the judgment said,

> "I am unable to uphold the preliminary objection taken by Mr. Coomaraswamy that the defendant has no right of appeal against the order of the learned trial Judge granting the plaintiff an interim injunction[2] restraining the defendant from ejecting the plaintiff from the Kitulgala Rest House. That was an inter partes order made after inquiry at which both parties were heard. Such an order is an appealable one, and the right of appeal is granted to the party dissatisfied by section 73 of the Courts Ordinance, Chapter 6. Section 666 of the Civil Procedure Code does not disallow that right of appeal, and that section would apply in cases where the Court grants an interim injunction in the first instance before the other

[1] Who was then the 3rd in seniority in the Supreme Court of Ceylon having 11 judges and a brother of Justice D. Q. M. Sirimane appointed to the Supreme Court in 1971.

party is heard; or where there are subsequent supervening circumstances which could not have been foreseen, at the time the interim order was made".

Mr. E. R. S. R. Coomaraswamy was for the plaintiff respondent. At the hearing of the appeal of the defendant appellant, the Ceylon Hotels Corporation Ltd., he raised the preliminary objection, that, the defendant has no right of appeal against the order granting the interim injunction.

What was referred to in the "old" Civil Procedure Code, was an injunction. When the plaintiff asks for an injunction in the plaint, under section 86(a) of Courts and Their Powers Ordinance (Courts Ordinance) No. 01 of 1889, an injunction could be, under the law, granted straight away. Though there had been no reference to an interim injunction, what was customarily granted was an interim injunction. The jurisdiction to grant an interim injunction/injunction was conferred by the Courts Ordinance. The procedure was regulated by the Civil Procedure Code.

The relevant sections were as follows,

Courts Ordinance

86. In any action instituted in any District Court or Court of Requests

(a) where it appears from the plaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act or nuisance the commission or continuance of which would produce injury to the plaintiff; or

(b) ……

(c) …….. [(b) and (c) omitted]

it shall be lawful for such court, on its appearing by the affidavit of the plaintiff or any other person that sufficient grounds exist therefor, to grant an injunction restraining any such defendant from….

Civil Procedure Code (prior to 1978)

664. The court shall in all cases, except when it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction cause the petition of application for the same together with the accompanying affidavit to be served on the opposite party; and where the application is made after the defendant has answered, the injunction shall in no case be granted before such service. But the court may in its discretion enjoin the defendant until the hearing and decision of the application.

....

666. An order for an injunction made under this Chapter may be discharged, or varied, or set aside by the court, **on application made thereto on petition by way of summary procedure** by any party dissatisfied with such order.

Therefore, if an injunction or interim injunction had been issued ex parte, any party dissatisfied, can file petition and affidavit and move the district court to either discharge, vary or set aside the same.

Summary procedure commenced in Part II of the Code at Chapter XXIV.

Its initial section, section 373 as well as sections 374 and 375 dealt with the requisites of the application. Section 376 provided for affidavits and exhibits.

If the Court is satisfied either on a prima facie basis or "is of opinion that on the footing of these facts the petitioner is entitled to the remedy, or to the order in his favour, for which the petition prays, or any part thereof,...." Then the Court will make an order either under section 377 (a) or (b).

On the other hand, if the court is of the view, under section 380, that the petitioner has not established the facts averred or that the petitioner is not entitled to the relief which he asks, the court was to refuse the petition.

Hence, when an injunction or interim injunction is granted ex parte, the application to vacate it also could be made ex parte. If a court makes an order under section 377, it was, either "*order nisi, conditioned to take effect in the event of the respondent not showing cause*" under (a) or "*an interlocutory order appointing a day for the determination of the matter of the petition, and intimating that the respondent will be heard in opposition to the petition if he appears before the court for that purpose on the day so appointed*", under (b).

Hence,

(i) Injunction/interim injunction could have been granted ex parte
(ii) A party dissatisfied could have filed papers under section 666
(iii) Then, there was a hearing in terms of section 377(a) or (b)

In 1978 the Judicature Act No. 02 of 1978 was introduced.

Its section 54 says,

54.

> (1) Where in any action instituted in a High Court, District Court, or a Family Court, it appears-
>
> > (a) from the plaint that the plaintiff demands and is entitled to a judgment against the defendant, restraining the commission or continuance of an act or nuisance, the commission or continuance of which would produce injury to the plaintiff; or….

Hence section 54(1)(a) is basically the same as section 86(a) of the Courts Ordinance.

However, the Civil Procedure Amendment Act No. 79 of 1988 certified on 18.12.1988 materially altered the section 664 of the Code. The amended section 664 reads as follows,

"Section 664 of the principal enactment is hereby repealed and the following section substituted therefor:

for injunction. 664. (1) The court shall before granting an injunction cause the petition of application for the same together with the accompanying affidavit to be served on the opposite party.

(2) Where it appears to court that the object of granting an injunction would be defeated by delay, it may until the hearing and decision of the application for an injunction, enjoin the defendant for a period not exceeding fourteen days in the first Instance, and the court may for good and sufficient reasons, which shall be recorded, extend for periods not exceeding fourteen days at a time, the operation of such order. An enjoining order made under these provisions, shall lapse upon the hearing and decision of the application for the grant of an injunction.

(3) The court may, of its own motion, or on an application made by any party, suspend the operation of an enjoining order issued under subsection (2), if it is satisfied that such order was obtained by suppression, or misrepresentation, of any material facts.".

Hence what was in the old section 664,

> "The court shall in all cases, except when it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction cause the petition of application for the same together with the accompanying affidavit to be served on the opposite party….,"

which made it possible to grant an interim injunction ex parte was taken away.

Its place was taken over by an enjoining order under section 664(2).

An enjoining order can be granted only to be in operation for 14 days.

It could be extended, 14 days at a time, “for good and sufficient reasons, which shall be recorded”.

The appearance to the court, that, the circumstances which prevailed at the time of issuing the enjoining order ex parte still in existence, could be a good and sufficient reason. A practice has also evolved where the defendant consents to its extension.

Then there is the new section 664(3) from 18.12.1988. That says,

“

(3) The court may, of its own motion, or on an application made by any party, suspend the operation of an enjoining order issued under subsection (2), if it is satisfied that such order was obtained by suppression, or misrepresentation, of any material facts.".

Hence, either

(i) the court may suspend the operation of the enjoining order ex mero motu or

(ii) do so on an application made by any party

There is no requirement of summary procedure as in section 666.

Hence the hearing of the affected party, often, the plaintiff is not mandatory.

An application under (ii) above can be dealt with ex parte.

Section 666 was also amended by 18.12.1988 amendment. This is what happened.

Replacement of section 666 of the principal enactment.

47. Section 666 of the principal enactment is hereby repealed and the following section substituted therefor:

" How order666. An order for an injunction or enjoining order made under set aside orthis Chapter may be discharged, or varied or set aside by the varied. court, **on application made thereto**, by any party dissatisfied with such order.".

Let us compare this with what was there prior to the amendment.

666. An order for an injunction made under this Chapter may be discharged, or varied, or set aside by the court, **on application made thereto on petition by way of summary procedure** by any party dissatisfied with such order.

The missing words are "**on petition by way of summary procedure.**"

Hence, apart from the suspension of the enjoining order to be effected in terms of section 664(3), an injunction [interim injunction] or enjoining order can be discharged, varied or set aside, by any party dissatisfied with that order,

(i) on application made thereto

(a) no summary procedure
(b) no petition even necessary
(c) on application made

Section 91 of the Code says

"**91**. Every application made to the court in the course of an action, incidental thereto, and not a step in the regular procedure, shall be made by motion by the applicant in person or his counsel or registered attorney, and a memorandum in writing of such motion shall be at the same time delivered to the court".

So it appears, that, the suspension of the enjoining order, as well as, the vacation, etc., of the enjoining order, interim injunction or injunction can be done even by way of a motion.

That is in the same court.

There is a proposition, that, a party aggrieved or dissatisfied by an order issued by it without hearing him, must go before it first.

It appears to this Court, even prior to the examination of authorities, except the above opening remarks of Sirimane J., that, the above proposition is based, at least, partly on considerations of policy; and partly on considerations of principle.

The basis on which Sirimane J., said, that, his lordship is unable to uphold the objection of the plaintiff respondent, that, the defendant has no right to appeal against the order granting the interim injunction is that the district court had made its order having heard both the parties.

His lordship said, that, the dissatisfied party has been granted a right of appeal by section 73 of the Courts Ordinance.

That section reads thus,

> "73. Subject to the provisions in that behalf in the Criminal Procedure Code or any enactment amending the same provided, any party who shall be dissatisfied with any judgment, decree, or order pronounced by a District Court may (excepting where such right is expressly disallowed) appeal to the Supreme Court against any such judgment, decree, or order from any error in law or in fact committed by such court, but no such appeal shall have the effect of staying the execution of such judgment, decree, or order unless the District Judge shall see fit to make an order to that effect, in which case the party appellant shall enter into a bond, with or without sureties as the District Judge shall consider necessary, to appear when required and abide the judgment of the Supreme Court upon the appeal".

At that time the District Court, one of the oldest courts established in this island by the Charter of Justice of 1801 was administering some elements of criminal justice too and hence the reference to the Criminal Procedure Code.

The material part of what Sirimane J., said was,

> "I am unable to uphold the preliminary objection taken by Mr. Coomaraswamy that the defendant has no right of appeal against the order of the learned trial Judge granting the plaintiff an interim injunction[3] ….**That was an inter partes order made after inquiry at which both parties were heard**. Such an order is an appealable one, and the right of appeal is granted to the party dissatisfied by section 73 of the Courts Ordinance, Chapter 6".

So an appealable order was "**an inter partes order made after inquiry at which both parties were heard".**

Section 73 said,

> "….any party who shall be dissatisfied with any judgment, decree, or order pronounced by a District Court may ….appeal to the Supreme Court against any such judgment, decree, or order…."

It does not, subject to anything to the contrary which may have been said in the Criminal Procedure Code or any enactment amending the same [*section 73 is subject to this condition*] said that only inter partes orders were appealable; and it does not seem, that, the question in regard to an interim injunction was dealt with in the Criminal Procedure Code.

But, Sirimane J., did not uphold the above objection on the basis, that, the order was an inter partes one, which makes it possible to assume, that, if the order were an ex parte one, the objection, that, an appeal could **not** have been

preferred successfully, could have been upheld. This has been the cursus curiae of the Supreme Court, in other words, the jurisprudence of that court.

That is why, it was said by this Court above, that, the proposition, that, a party aggrieved or dissatisfied by an order made by a court without hearing him, must go before that court first is based on considerations of policy and principle. The cursus curiae of the Supreme Court, to that effect, pronounced in the above judgment, is based on that policy of the law; and on principle.

(2) The cases:

The learned President's Counsel for the plaintiff respondents, at the oral hearing conducted on 02.05.2024 as well as in the synopsis of oral submissions dated 03.05.2024 refer to the case of **Gargial et al vs. Somasundaram Chetty 1905 09 NLR 26**.

It was a case that came from the District Court of Kandy. On the day of the trial, the defendant's proctor appeared and moved for a postponement on the basis, that, his client has gone out of Ceylon. The learned district judge refused to grant a postponement. The defendant's proctor refused to take part in the trial. The court after hearing the plaintiff entered the judgment in his favour.

Chief Justice Layard said,

> "The whole of the argument in this case by the appellant's counsel was based on the assumption that the judgment now under appeal was an ex parte judgment, and that there was no appearance in the court below either by the defendant or by his pleader (page 27)…. If Mr. Jonklaas, according to our Code, did appear on that day, then he was, I think, in exactly the same position as if the defendant himself had appeared on that day, because he was the duly appointed proctor of the defendant, and was authorized by his proxy to be present in court and to represent the defendant in every stage in which the defendant himself could appear and make an application (page 28)…. " **Now, if this was an ex parte order, I**

cannot understand how an appeal can be entertained by this court. **The ordinary principle is that, where parties are affected by an order of which they have had no notice, and which had been made behind their back, they must apply in the first instance to the court which made the ex parte order to rescind the order, on the ground that it was improperly passed against them** (page 28)…. That point had been dealt with by Bonser, C.J., in the case of Habibu Lebbe v. Punchi Etana, reported in 3 C. L. R. 84. He there recognized the power of a judge of first instance to open up a judgment given in the absence of one of the parties, and he stated that it had long been the practice-and a practice which had been expressly approved by this court -that in cases of that sort application should be made in the first instance to the court which pronounced the judgment, and that there should be an appeal to this court only if the judge of the court of first instance refused to set it aside. There is no doubt in my mind that that had been the practice of this court for the last thirty years at least, and I believe that it existed prior to that date (page 29)…. I agree with Bonser C.J. in thinking that that is the most convenient course to pursue and that this court should always insist upon its adoption, particularly because the Court of Appeal in England in the case of Vint v. Hudspith ((1885) 29 Ch. D. 322), lays down, that although the Court of Appeal in England may possibly have jurisdiction to hear an appeal from a judgment given by default, yet that it is not desirable that the court of appeal should encourage such appeals to be brought before the application has been made to the court of original jurisdiction (page 29)".

The above view which was expressed with the concurrence of Sir Alexander Wood Renton, shows the truth of the position of this Court, that, the above proposition is based not only on principle, but on policy too. That is why, the English Court of Appeal in 1885 has said, that, although a judgment given, hearing only one party can be appealed, it is not desirable to encourage such appeals.

The next case cited is **Caldera vs. Santiagopillai 1920 22 NLR 155** which was a case that came from the District Court of Kurunegala.

Chief Justice His Lordship Sir Anton Bertram said,

> "The order was made ex parte behind the back of the defendant, and in accordance with the authorities cited in a very recent case (see S. C. No. 58, D. C. (Inty). Badulla, No. 3,358 1[S. C. Mins., Sept. 1, 1920.]). A person seeking to set aside such an order must first apply to the Court which made it, which is always competent to set aside an ex parte order of this description." (page 158).

SCHNEIDER A.J agreed.

Then in **Loku Menika vs. Selenduhamy 1947 48 NLR 353** which was a case that came from the Court of Requests of Ratnapura Dias S. P. J., said,

> "It is clear that the learned Commissioner of Requests held this inquiry under a rule of practice which has become deeply ingrained in our legal system-namely, that if an ex parts order has been made behind the back of any party, that party should first move the Court which made that ex parte order in order to have it vacated, before moving the Supreme Court or taking any other action in the matter. If authority is needed for this proposition, it is to be found in the following cases: In Habibu Lebbe v. Punchi Ettena 1[(1894) 3 C. L. R. at p. 85 and see Craig V. Kanssen (1943) 1 K, B. 256.] Bonser C.J. said "I am informed by my learned brother that it has long been the practice, and a practice which has been expressly approved by this Court, that in cases like the present one, application should be made in the first instance to the Court which pronounced the judgment; and if the Court which pronounced the judgment refuses to set it aside, then, and then only, should there be an appeal from that refusal. This course appears to me to be the most convenient one; and furthermore, it is in accordance with the practice of the Appeal Court in England. It has

been laid down that although the Court of Appeal may have jurisdiction to hear appeals from judgments given by default, yet, that it is not desirable to exercise that power, and to encourage appeals to be brought before the case had been tried .... Therefore, if the judgment was given in the absence of one of the parties, I think that under the practice laid down by this Court, it was competent for the District Judge to deal with the case, and that the plaintiff adopted the proper course in applying first to the District Judge before coming to this Court." In Gargial v. Somasundram Chetty [(1905) 9 N. L. R. 26.] the case of- Habibu Lebbe v. Punchi Ettena (supra) was followed. Layard C.J. said that the practice referred to had been in existence for the last thirty years at least and " I believe that it existed prior to that date". In the Badulla case which was cited, and which is reported under the name of Weeraratne v. Secretary, D. C, Badulla [(1920) 2 C. L. Rec. 180, 8 C. W. R, 95.] Bertram C J. followed the two earlier cases (page 354)

In Caldera v. Santiagopulle Bertram C,J. following Weeraratne v. Secretary, D, C, Badulla (supra) said " The order was made ex parte behind the back of the defendant, and in accordance with the authorities cited in a very recent case .... a person seeking to set aside such an order must first apply to the Court which made it, which is always competent to set aside an ex parte order of this description. In Sayadoo Mohamadu v. Mania Abubaker Jayewardene J. said : " An ex parte order under these sections should, I think, be treated as any other ex parte order made by the Court, and any party affected by it should be entitled to apply to vacate it on notice to the party in whose favour it was made....(page 355)".

Then in **Ranjith Senanayake and others vs. Paul Peiris 1992 2 SLR 169**, a case that came from the District Court of Colombo Asoka de Z. Gunawardana J., said, [*Since it appears to this Court, that, the facts in Senanayake's case has a strong bearing and close resemblance to those in the present case, this Court will*

quote from that judgment, exceeding the eight lines quoted for the plaintiff respondents in their synopsis]

"The learned Counsel for the Respondent raised a preliminary objection to the said two Applications being entertained by this Court, viz., that the Petitioners should have first moved the District Court under Section 213(3) of the Companies Act, "for an Order of revocation or variation of the ex parte order" dated 21 January, 1991, instead of coming direct to this Court. He further submitted that the Petitioners have bypassed the said procedure, by moving for Revision and asking for Leave to Appeal from the said Order.

The Learned Counsel for the Petitioners submitted that there are ample exceptional circumstances warranting the grant of relief by way of Revision. He added that, they have a right to maintain the Application for Leave to Appeal as they have complied with all the necessary requirements for maintaining the said Application (page 171)

The learned Counsel for the Respondent contended that the Petitioners have, by moving for Revision of the said Order, disregarded a well-established practice existing for over a hundred years, and cited the case of Andradie v. Jayasekera Perera (1) where Siva Selliah, J. at page 209 stated that,

> ". . . the practice has grown and almost hardened into a rule that where a decree has been entered ex parte in the District Court and is sought to be set aside on any ground, application must in the first instance be made to that very Court and that it is only where the finding of the District Court on such application is not consistent with reason or proper exercise of the Judge's discretion or where he has misdirected himself on the facts or law will this Court grant extraordinary relief by way of Revision or Restitutio in Integrum which are extraordinary remedies."

In opposition to the said contention the learned Counsel for the Petitioners cited the unreported case of Nadarajah Mahendran v. Chockalingam Sinnadurai (2), where Court of Appeal had acted in revision, in spite of the fact that, the petitioner in that case, had already moved the District Court to set aside the interim injunction under the provision of Section 666 of the Civil Procedure Code. It must however be pointed out that, the Court of Appeal acted in revision in that case on the basis that exceptional circumstances that existed in that case warranted the exercise of the revisionary jurisdiction. The Court held that the petitioner in that case was in peril of being charged for contempt of court, in respect of the interim injunction issued by the District Court, if the petitioner in that case, acted in pursuance of the Order made by the Primary Court. In that case, the petitioner had obtained an Order from the Primary Court enabling him to remain in possession of the premises in question on an application made by him, under Section 66 of the Primary Courts Act. However, the respondent in that case had, subsequent to the Order of the Primary Court, obtained an interim injunction from the District Court restraining the petitioner in that case, from occupying that part of the premises which was occupied by the said petitioner. Thus the application in revision was made in exceptional circumstances where either party may have been dealt with for (page 172) contempt by either the Primary Court or the District Court if both Orders were sought to be implemented. Furthermore, there was also the question whether the District Court had, in the circumstances, the jurisdiction to issue the interim injunction, in view of the prior Order made by the Primary Court, having regard to decision in Mylvaganam v. Kanagasabai (3), where it was held that,

> "The mere fact that a suit is pending in a civil Court does not deprive the Magistrate of jurisdiction to make an Order under Section 62 of the Administration of Justice Law, No. 44 of 1973."

These difficulties could not have been resolved except by a Court having appellate jurisdiction over both the lower Courts. It was in these exceptional circumstances that the Court of Appeal acted in revision in the said case (page 173)".

Hence it appears, that, an appellate court or a court that has revisionary powers interfered with such an order in extreme necessity.

However, this Court does not come to a conclusion on this question, the question of the above proposition, which this Court said as based on policy and principle both, without further examination of decisions.

The plaintiff respondents then cite **Hotel Galaxy (Pvt) Ltd and another vs. Mercantile Hotels Management Ltd., 1987 (1) SLR 5**.

In this case consisting of the judgments of Sharvananda C. J., Justice E. A. D. Atukorale and Justice H. A. G. de Silva, Justice Atukorale said,

"The question then arises whether a court, in the absence of any specific provision in the Code, has the power to set aside its own ex parte order on the application of the party against whom it is made. There is in my view ample authority to show that **a court does have such power**. In Loku Menika v. Selenduhamy (19) a hypothecary decree was entered against the first respondent who had been appointed legal representative in place of the deceased mortgagors. It later transpired that the notices for the appointment of a legal representative had not been served on any of the respondents and that no summons in the mortgage action was served on the first respondent. On an application by the respondents to have all the proceedings in the case vacated the Commissioner of Requests held that all proceedings culminating in the hypothecary decree and thereafter were void and set them aside. In appeal Dias, J. following several earlier decisions referred to by him in his Judgment, observed as follows

" It is clear that the learned Commissioner of Requests held this inquiry under a rule of practice which has become deeply ingrained in our legal system-namely, that if an ex parte order has been made behind the back of any party, that party should first move the Court (page 28) which made that ex parte order in order to have it vacated. before moving the Supreme Court or taking any other action in the matter (page 29)".

The learned Judge further examining authorities in this regard said,

"In Dingihamy v Don Bastian (23) the court without fixing a date for the answer of the defendant fixed the case for ex parte trial on the basis that the defendant was in default and entered decree nisi against her. She then made an application to court to have the decree nisi set aside which was refused on an appeal preferred by her. Tambiah, J. said:

"The defendant quite properly made an application to the learned Commissioner of Requests to rectify an order, made ex parte, without proper notice to her. Indeed, the ordinary principle is that, where parties are affected by an order of which they have had no notice, and which had been made behind their back, they must apply in the first instance to the court which made the ex parte order to rescind the order, on the ground that it was improperly passed against them." (page 29)

In Bank of Ceylon v. Liverpool Marine & General Insurance Co., Ltd. (24) the District Court, acting ex mero motu, made order abating the action under s.402 of the Civil Procedure Code. The plaintiff then filed papers in court to set aside the order of abatement which was refused by the District Judge. On an appeal filed by the plaintiff it was contended on behalf of the defendant that the only course open to the plaintiff was to have made application under s. 403 to set aside the abatement order within -a reasonable time. L-B. de Silva, J. (with H. N. G. Fernando agreeing) held

that although the order of abatement was entered by court ex mero motu, yet it was entered without any notice to the plaintiff who had no opportunity to show cause against it and that it was an ex parte order the validity of which the plaintiff-could challenge in the same case at any time. In Nagappan v. Lankabarana Estates Ltd. (25) Samarawickrame, J. expressed his approval of the principle enunciated in Bank of Ceylon v. Liverpool Marine & General Insurance Co., Ltd. (supra) (24) and in Loku Menika v. Selenduhamy (supra) (19). These authorities therefore clearly establish the principle that a court which makes an ex parte order without notice to the party who is adversely affected by it is entitled to set it aside on the application of such party in the same case. This power is derived not from any express provision in the Code but, as stated above, from a rule of practice which has become deeply ingrained in our legal system. I am therefore of the view- that in the instant case it was legally competent for the learned District Judge to vacate the enjoining order which was made by him ex parte (page 30)".

The above is a survey of some of the decided cases in this country, in respect of any ex parte order made in general; and in respect of ex parte injunctions, interim injunctions and enjoining orders in particular, on the above proposition, which says, that, the remedy must be, or appropriately, one of its synonyms being "judiciously" had in the same court that issued that order, which reflects a profile of the cursus curiae of the superior courts, especially the Supreme Court in this country.

(3) The text writers:

It is appropriate now, to examine, what does the text writers say about the principles and procedure of vacation of ex parte orders; and in this case, especially about ex parte injunctions, which term includes ex parte interim injunctions and ex parte enjoining orders.

There are slight differences in procedure in respect of inunctions in England and India. But the basic norms and principles are same.

Justice Joseph Francis Anton Soza, a distinguished career judge, who could illuminate both the benches of the superior courts of this country, in his lordship's article "Interim Injunction in Sri Lanka" said, referring to Indian procedure, that,

> "There could of course be exceptional situations or new supervening circumstances for which provision could be made to discharge. vary or set aside an injunction entered inter partes. We have not done it but India has by her Civil Procedure Code Order 39 Rule 4 which corresponds to Section 496 of Act No. XIV of 1882 on which our own old Section 666 was based. The Indian Rule 4 reads thus:
>
> "R4. Any order for an injunction may be discharged. varied. or set aside by the court. On application made thereto by any party dissatisfied with such order:
>
> Provided that if in an application for temporary injunction or in any affidavit supporting such an application, a party has knowingly made a false or misleading statement in relation 10 a material particular and the injunction was granted without giving notice 10 the opposing party, the court may vacate the injunction unless, for reasons 10 be recorded, it considers that it is not necessary 10 do so in the interest of justice.
>
> Provided further that where an order for injunction has been passed a/le giving a party an opportunity o/being heard. the order shall not be discharged, varied or set aside on the application of that party excepl where such discharge, variation or selling aside has been necessitated by a change in Ihe circumstances or unless Ihe court is satisfied lhal Ihe order has caused undue hardship 10 the party :' (emphasis mine)

The second proviso was brought in by an amendment made in 1976 "that where an injunction has been granted after giving to aparty the opportunity of being heard, the order for injunction shall not be discharged. varied or set aside on the application of that party except where such discharge; variation or cancellation is necessitated by a change in the circumstances or by reason of the hardship caused by it." (page 79 and 80, "Judges' Journal", the First issue).

The above was quoted here, not to discuss about the procedure of vacating inter partes injunctions, but to show, that, the procedure is basically same despite some differences.

The writer **G. S. Gupta**, on "**Law of Injunctions," 07th Edition, 2011** under "Vacation of ex parte injunction", says at page 1327 et seq., that,

> "6 Vacation of ex parte injunction. -In Rameshwar Dass v. Brij Bhushan, AIR 1988 HP 31 at 32 (per P. D. Desai, C. J.),
>
> it was observed as follows:-
>
> The counsel for the respondents tried to sustain the order on the ground that an express power is vested in the Court under Order XXXIX Rule 4 to discharge or vary or set aside any order of injunction on an application made thereto by any party dissatisfied with such order and if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court has no option but to vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interest of justice and that, therefore, on the facts and in the circumstances of the case, the trial Court was within its powers to vacate the ad interim relief granted ex parte

without issuing a notice to the petitioner. The argument has been stated merely to be rejected. The main part of order XXXIX, Rule 4 vests the Court with a discretionary power to discharge or vary or set aside any order of injunction upon being moved in that behalf by any aggrieved party. The discretion accordingly conferred has to be exercised reasonably and in a judicial manner and in conformity with the principles of fair play and justice. The requirements would be satisfied if, and only if, the party likely to be affected by the exercise of such discretion is, inter alia, given a reasonable opportunity of being heard. **The same requirement is implicit also when the Court is called upon to vacate an ex parte injunction in compliance of the duty cast upon it under the first proviso to Order XXXIX, Rule 4 in a case where a party is alleged to have knowingly made a false or misleading statement in relation to a material particular in the application for temporary injunction or in any affidavit supporting such application.** In fact, it is inconceivable how the power to be conferred can be reasonably exercised by any Court without affording a reasonable opportunity of correcting and controverting the allegations of such nature to the party who has obtained the ex parte injunction and without determining the correctness of such allegations on a just appraisal of the materials placed before it by both the parties. The rules of procedure to be followed in the Courts are essentially based on the well-recognised rules of fair play and justice and it is impossible to believe that Parliament could have intended to vest the court with the power to vacate an ex parte injunction on the ground of a false or misleading statement in relation to a material particular having been knowingly made by the party obtaining the same without even hearing such party."

The same writer also said at page 218 et seq.,

"Vacation or variation of an injunction order.-Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order: Provided that if an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice: Provided further that where an order for injunction had been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party. Rule 4 of Order XXXIX was amended by the amending Act of 1976 with the object of providing for the vacation of an ex parte injunction on the ground that a false or misleading statement has been made in the application for injunction. A further proviso was added to the effect that where an injunction has been granted after giving to a party an opportunity of being heard, the order for injunction shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or cancellation is necessitated by the change in the circumstances or by reason of hardship caused by it. Change in circumstances or undue hardship not established, varying or changing of order by Court is illegal.

The temporary injunction that is granted under the provisions of Order XXXIX can be broadly divided into two categories; one if the temporary injunction that is granted until the disposal of the suit and the order is the temporary injunction that is granted until further orders. This distinction has to be kept in mind while exercising the judicial discretion under these

provisions including the provision for vacation of the ex parte temporary injunction passed without notice to the otherside. **In such case it is better for a party against whom to file a petition under Rule 4 to discharge the injunction so passed. It is better not to approach the appellate court straight away to vacate that order.** Cases may arise where though the injunction was passed after enquiry owing to fresh circumstances or hardship is caused to the party he may approach the Court to reconsider its orders and pass fresh orders avoiding the undue hardship caused to any party."

In the collection of cases compiled by **Mahinda Ralapanawe**, Attorney at Law on "**Constitutional Injunctions; Sri Lankan cases and materials**," 1992, the case of **Mallika Ratwatte vs. The Minister of Lands (The Hon. C. P. de Silva) S. C. 141/69** is referred to. On 11th April 1969, Samerawickrame J., started his lordship's judgment saying,

"On the application of the petitioners, I made order on the 20th of March. 1969, ordering the issue of a temporary injunction restraining the respondents in respect of the acquisition of certain lands **and in my order, I reserved the right to the respondents to apply, on good grounds shown, to have the order vacated.** The respondents have now applied to have the order set aside and. In view of the imminence of the Court Vacation and the possibility that this matter may not come up for hearing during the term if they controverted the facts and thereby made it necessary for the respondents to file counter affidavit, they have been content with contending that upon the facts and circumstances disclosed in the papers filed by the Petitioners, they were not entitled to the issue of an injunction."

In **Goyle's** "**Law of Injunctions**" second edition by **Ajit K. Sengupta**, **2002**, it is said, that,

"The Madras High Court is of the view that the injuncted party must first exhaust his remedy under r. 4 before filing the appeal. The reasons given in support of this view are that Or. 43, r. 1(r) can be invoked only in a case where the lower appellate court makes a decision after hearing the affected party within the meaning of s2(9) and (14) of the Code of Civil Procedure and expresses itself formally so that its reasoning and grounds on which its decision is based could be scrutinized by the higher court, and where an interim or ex parte order is not founded on any reason and cannot reasonably be characterized as a formal expression of a decision made by a judge and which decision in turn is not based upon intelligible and acceptable grounds, the remedy available to a party affected is under Or. 39, r. 4 and not by invoking the appellate provision under Or. 43, r. 1(r). Of course, in a case where there is a reasoned judgment after hearing the parties, and a decision based on various grounds is made, one way or the other, by the trial court, then obviously, that would be an appealable order. (*Abdul Shukoor Sahib vs. Uma Chander AIR 1976 Mad 350; Ramlingan Naicker vs. Chennakrishna Konar AIR 1983 Mad 347*). The Karnataka High Court is also practically of the same view; **but it does not agree that the right of appeal is dependent upon the distinction between a reasoned order and an unreasoned order.** It is true that a party can move an application under Or. 39, r. 4, CPC for vacation or variation of the ex parte order of interim injunction, in case of any concealment or willful misrepresentation. **However, the pendency of the matter before the single judge who passed the said order would not preclude the right of a party to challenge an ex parte order in appeal.** Even if the matter is pending before the single judge, if the urgency and circumstances so justified, such an appeal would be entertained. (*B. L. & Co., vs. Pfizer Products Inc. AIR 2001 NOC 87 (Del)*). An unreasoned order of rejection is, it is said, equally appealable. It has also been observed that the right of appeal is available to a stranger also where he is affected

by the injunction. (*Parijatha vs. Kamalaksha Nayak AIR 1982 Kant 105 (DB); M. G. Pai vs. Canara Bank Ltd., (1980) 1 Kant 256; Gurupadayya Nagayya Horaginamath vs. Mahadu Arjun Nidoni AIR 1976 Kant 66*). (page 143 to 144)

The learned writer observes at page 146 and 147, that,

"The court also observed that the language of r. 1) of Or. 45 unhedged and broad, and court should lean in favour of an interpretation which expands rather than shrinks a remedial right. **A remedial provision of law is generally construed liberally.** Rule 1(r) creates a remedial right of appeal for protection of substantial and substantive rights (ibid at p. 376).

This case has been followed by the Himachal Pradesh High Court in Raj Kumar Suri v Prem Lal Dhiman, by the Gujarat High Court in Patel Jasmat Sangaji Padalia v Gujarat Electricity Board by the Bombay High Court in S.K. Jusa v Ganpat Dagdu Giri and by the Jammu & Kashmir High Court in Astral Traders v Haji Mohammad Shaban Dar.

The High Courts of Andhra Pradesh, Assam and Calcutta have also reached the same conclusion: see E. Mangamma v A Muniswamy: Akmal Ali v State of Assam; and In re, Sankar Kumar Ghosh.

It is, however, submitted that the observations made by MYFTI BAHA-UD-TIN FAROOQUE, ACTG, CJ. in the J&K case above take a pragmatic view and are to be preferred. He said,

"**I am inclined to agree with the view expressed that an ex parte ad interim injunction is as much appealable as an order of temporary injunction passed after hearing both the parties. But in my opinion it would be in the fitness of things, if, as a matter of practice, the appellate court refuses to entertain an appeal directed against an ad interim injunction so long as the aggrieved party has not approached the trial court for its vacation. I say so on the twin grounds; firstly,**

that an order passed after hearing the parties would naturally be passed upon the material and data placed on the file by either party and, secondly, because such order would provide the appellate court the benefit of the views expressed by the trial court in the matter, howsoever brief and cryptic such views might be. On the other hand, if an appeal against an ex parte order of injunction is entertained, the aggrieved party would necessarily demand that it should be allowed to place on record the material that it seeks to rely upon and this would naturally turn the appellate court into the trial court, and, moreover, the appellate court would not be able to guess as to what the opinion of the trial court would be, if such material were placed before it." (Ibid, para. 14).

It is thus seen, with respect, that the Indian judiciary has addressed the considerations of principle, **based on the jurisprudential question,** for the validation of the above proposition, which this Court is compelled to note, that, the Ceylonese counterpart appeared to have been wanting, which is noted here, not as a remark of disparagement, but as an stimulant to think about the underlying reason for a rule; which provides, it is submitted, a stepping stone, to think ahead.

Despite not being written on this very proposition under consideration, I find some illuminating passages from the book "**Law of Injunctions in Sri Lanka**," (An Analytical and Comparative Exposition)," by **Mr. Anura Bandara**[4], **2007**, which I reproduce here. His views expressed in the following passages, it is submitted, add justification to the reference by this Court above, to Indian authorities and texts.

"On a historical research it is found that the concept of injunction which had its origin in Rome was adopted by the English legal system which

[4] I had the good fortune of experiencing the erudition of this writer, when I was the District Judge of Tangalla in 1998 and he was the Additional District Judge.

subsequently made a voluminous contribution for the development and advancement of this concept as an equitable remedy and was applied in numerous provinces of the law.

It cannot be denied that even the Indian legal system has adopted the English principles in regard to injunctions. In fact Indian Courts have followed the principles and practice of the Chancery Courts. Woodroffe's injunctions 1964, p. 3 indicates that the best guides in the matter of interference by way of injunction have been judicially stated to be the principles which determine the action of a court of equity in England. In Shamnugger Jute Factory Co., Vs. Ram Narain Chatterji, 14 Cal 189 (199, 200) court observed as follows:

"The granting of injunctions is now regulated by sections 54 and 55 of the Specific Relief Act. But these sections had never been understood as introducing new principles of law into India, but rather as an attempt to express in general terms the rules acted upon by the Courts of Equity in England, and long since introduced in this country, not because they were English Law, but because they were in accordance with Equity and Good Conscience."

In administering the law relating to injunctions in India, the Indian Courts follow the law that prevails in England and English cases to interpret the statutory provisions relating to injunctions contained in the Specific Relief Act and Code of Civil Procedure. It was so decided in Ramadas Khatau and Co, Vs. Atlas Mills Co, Ltd. 1931 Bomb 151: 55 Bomb 659,

Similarly, in the Sri Lankan legal system too in interpreting section 54 of the Judicature Act No. 2 of 1978 and the relevant sections in the Civil Procedure Code (662 to 667) most of the Indian and English cases and the concepts and principles introduced by them have been freely adopted". (pages 07 and 08)

Hence, Mr. Bandara in his immaculate way has captured the Romono-Anglo American flavour of interim in injunctions.

Hence, it appears that,

(i) The above proposition is based, partly on policy and partly on principle

(ii) The policy consideration is partly based on regard to that court which issued the ex parte order and partly based on matters of convenience for the appellate courts (A good part of most policy considerations rest on the convenience of the system, not the people that come under its purview)

(iii) The considerations on principle are based on the rule of natural justice audi alteram partem

(a) The court that issued the ex parte order can now hear the other party and thus make a complete order

(b) If the dissatisfied party comes to the appellate or higher court and makes an ex parte application to vacate the order of the lower court made ex parte, both the courts are not afforded with the benefit of the rule audi alteram partem; court No. 01 will hear X; and court No. 02 will hear Y

(c) If the second court hears both parties, as in this case, although the deficiency referred to in (b) is cured to a certain extent, as the last quoted Indian text writer said, or in actuality he meant, the purported views of the lower court on matters that would have been represented before it for the dissatisfied party will be those that assumed by the higher court to be the perspective of the lower court.

Therein lies the importance of the fuller adjudication (even limited to the question at hand) by one and the same court, that, issued the ex parte injunction.

(4) The question of RII:

Intermediate to the transition of the thread of the argument in this order, is the reference to **Aussie Oats Milling (Private) Limited vs. Future Consumer Limited and another C. A. RII 06 2022, the order dated 30.03.2022,** written by me. Intermediate, because what the 02nd defendant says through oral submissions made in his behalf by the learned President's Counsel and the synopsis filed, still dwell in the above proposition, referring to which this order commenced; and then the learned President's Counsel refer to the purported fetters on the jurisdiction of restitutio in integrum, the answer to which that will be given by this Court will occupy the second part of this order.

Aussie Oats case, it must be said, marks a turning point on the availability of the remedy of restitutio as this Court sees it. It appears, that, the sheer necessity and the ingenuity of the learned President Counsel who appeared for the petitioner in that case (Mr. Upul Jayasooriya P.C.) brought it before this Court, which made me, for the first time, to expand the jurisdiction of restitutio, which was up to then confined mostly to some partition actions coming from a few district courts in certain provinces (especially the Southern); and several petitioners who were then benefited from that expansion (subject to appeal) should be grateful to the cleverness of the said learned counsel. The innovation, was resisted by the somewhat conventional but also robust resistance of the learned and much respected barrister, who is a senior President's Counsel and appeared for the contesting respondent. The present President Counsel who appears for the 2nd respondent experienced the drama and the spectacle of that case first hand, for he appeared for another respondent in that case, who did not have a contest with the petitioner. It is left to the posterity, if you know what I mean, to preserve the splendor and elegance of that singular episode, now in history, that marked a milestone of its own kind[5].

[5] One of the initial days of argument, unfortunately, became the last appearance in court of another respected President's Counsel who appeared as junior counsel, due to his untimely passing away, on that evening, in regard to which a reference was made by this Court on the next inquiry date: TRIBUTE to ANIL TITTAWELLA PC - News Features | Daily Mirror

In the synopsis filed on behalf of the 2nd defendant, the learned President's Counsel describes the reason as to why this Court intervened in his own words, as follows,

> "It is notable that in **Aussie Oats Milling (Private) Limited v Future Consumer Limited and Another,** Your Lordship's Court allowed such application in restitutio in integrum because the Petitioner therein had made the requisite application in the Commercial High Court to set aside the Orders complained of therein, and it is only because the Learned High Court Judge had delayed the supporting of such application that Your Lordships Court allowed the Petitioner in such matter to maintain the same".

Looking back at my order in Aussie Oats case which was made two years one month and seven days ago, I find, that, at a certain initial part in that order too, as I did in this order, I have dealt with the thread of authorities commencing from **Habibu Lebbe vs. Punchi Etana 1894 03 CLR 85,** the 130 year old case about the above proposition. I have not departed from that proposition. But I have said, that, there was no violation of it.

Some excerpts from pages 06 and 07 of my order would explain the circumstances under which the learned President Counsel in that case brought the petitioner's case before me.

> "However, as evident by the few opening paragraphs of this order and paragraphs 41 (a) to (k) of the said written submissions, this court has been hearing the applications of both parties, if it may say so, giving dates sooner than later as far as the circumstances permitted[6].
>
> **(1) <u>The grievance of the petitioner:</u>**

[6] At the last hearing on 09th March 2022, it intended to give only one week (07 days) for the parties to file written submissions, despite it being extended to 10 days on the application for the petitioner Aussee Oats Milling (Private) Limited.

The grievance of the petitioner for coming before this court, is the exact opposite, that the Commercial High Court did not allow its application to be supported urgently.

In fairness to that court, however, it must be stated that the said court had taken the case for hearing on the motion of the petitioner on 14th February 2022. However, the learned President's Counsel for the petitioner was then, (*according to the affidavit of Raghav Gupta of Aussee Oats Milling (Private) Limited dated 14th of February 2022*), before Court No. 404 of the Supreme Court appearing in SC/FR/123/16 and his junior counsel sought permission of the Commercial High Court to take the matter later. The said affidavit further states that since there were no other matters pending before that court it ordered to mention the matter on 24th February 2022. It was stated from the Bar that when this happened the time was 10.25 a.m. The said affidavit further states that a motion was filed on 14th February 2022 itself in the said court requesting to call the case on 15th February 2022 but that motion was not allowed. It was said from the Bar that a matter concerning the same subject, case No. CHC 78/2021 CO was to be heard on 15th February 2022.

As per the paragraph 02 of the aforesaid written submissions of the respondent, it instituted the case No. CHC 02/2022/CO on 26th January 2022 and in terms of section 224 and 225 of the Companies Act No. 07 of 2007 read with section 520 obtained ex parte interim orders. As per its paragraph 04, the petitioner has made an application on 09th February 2022, under section 521(1) of Companies Act to set aside and or revoke or vary the said orders.

It appears that this second application made by the petitioner Aussee Oats Milling (Private) Limited was the one that came for support on 14th February 2022 and the aforesaid incident narrated in the affidavit of Raghav Gupta took place.

The petitioner, Aussee Oats Milling (Private) Limited has further stated in its aforesaid affidavit that in case No. CHC 78/2021 CO, the same learned High Court Judge has granted certain interim orders against the respondent.

It must be said that in case No. CHC 78/2021 CO, the present 01st respondent petitioner, Aussee Oats Milling (Private) Limited is the petitioner and the present petitioner respondent, Future Consumer Limited is the 01st respondent.

The said affidavit further states that the Attorney at Law of the respondent has sent letters, to the State Bank of India and Hatton National Bank PLC and others on 11th February 2022 based on the interim orders dated 26th January 2022 and informed the said banks to refrain from acting upon any instructions issued by the petitioner, in effect freezing the accounts of the petitioner, upon the threat of legal action against the said banks if they carry out any instructions of the petitioner.

The petitioner states in the said affidavit that this has brought the operations of the petitioner into a grinding halt causing grave loss and damage to the petitioner, thereby effectively destroying the petitioner and the livelihood of its over 200 employees and their families.

The petitioner has also stated that certain interim orders granted by the Commercial High Court on 26th January 2022 are contrary to interim orders it granted earlier in case No. CHC 78/2021 CO".

So, in that case, the petitioner went before the same court. But, as it was apparent, without a valid reason for having so to do, the Commercial High Court delayed hearing him. The Banks were stayed from making transactions. The operations have come into a grinding halt. Two hundred employees and an even larger number of their families were being affected. Their livelihood was under threat. So the Court had to intervene.

The following is how I dealt with the string of cases on the above proposition, in Aussie Oats case,

> "The oldest case cited on the first ground is **Habibu Lebbe vs. Punchi Etana 1894 03 CLR 85** decided by Sir Winfield Bonser C.J., in which case it was held, that it has long been the expressly approved practice by the Supreme Court, if an order or judgment has been made in the absence of a party, that party must first apply to the court that pronounced the judgment for same to be set aside and it is

only if that court refuses to set it aside that there should be an appeal against such refusal.

This principle was followed in the other cases cited for the respondent which are **Caldera vs. Santiagopillai 22 NLR 155**, **Loku Menika vs. Selenduhamy 48 NLR 353**, **Fernando vs. Dias and others 1980 (2) SLR 48** and **Hotel Galaxy (Private) Limited and others vs. Mercantile Hotels Management (Private) Limited 1987 (1) SLR 5.**

However, the petitioner has gone before the court which issued the ex parte order. The letters sent to the Banks by the Attorney at Law of the respondent being on 11th February 2022, by 14th February 2022 03 days have gone. When the matter was postponed from 14th February 2022 to 24th February 2022 it will be further 10 days and altogether about 14 days or two weeks the petitioner will not be able to function. The court did not allow the application to call the case for support on 15th February 2022, despite the existence of the other case also on that day. Thus it was not going to change the date for 24th February 2022. Besides 24th February 2022 was also a "mention" date and there was a reasonable doubt (*since the court refused to give an audience despite a motion being filed*) whether the matter will be allowed to support on that date. It was in those circumstances the petitioner came before this court. In most cases of revision and restitutio in integrum relief is refused because parties come to the court of appeal after delay. Should the petitioner be punished for being alive in the matter of safeguarding its rights?"

(Aussie Oats pages 08 and 09)

The 2nd defendant, having transited to the domain of restitutio in integrum, imposes fetters on it. As in respect of all legal concepts and institutions, restitutio too is not and was never unfettered.

In C. A. RII 24 2024, in which case an order was delivered yesterday, i.e., 06.05.2024, the learned President's Counsel who appeared for the petitioner; and who appears for the petitioner in this case too, had submitted in written submissions, that, this Court would not, limit the restitutio jurisdiction. It will

not. It reproduces, the following excerpt which had been employed elsewhere too for the purpose of reiterating its commitment to uphold the usefulness of that remedy."

The following is an examination of the case law on restitutio in integrum, mostly on a chronological order, but departing from that rule on necessity.

(i) Perera vs. Ekanaike, 03 NLR 21

Withers J., decided, that,

> "A judgment obtained by fraud or passed under a mistake may be set aside either by a regular action or, possibly, by application by way of summary procedure as regulated by the Civil Procedure Code. It cannot be done by mere motion supported by affidavits with notice to the decree-holder."

It was also said, that,

> "This appears to us 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 the 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".

The words "mistake" or "in ignorance of facts" according to the above passage emanated from the fraud practiced on court.

There was no direct mention of restitutio in integrum.

(ii) Buyzer vs. Eckert 13 NLR 371

In this case, "Plaintiff's license to practise as surveyor was cancelled by the District Court on proceedings instituted by the Surveyor-General on the petition of the defendant. Plaintiff subsequently instituted the present action in the Court of Requests, claiming damages against the defendant, on the ground that he had maliciously placed false documentary evidence before the District Court, and claiming also a declaration of the invalidity of the documentary evidence so adduced".

Middleton J., said,

> "The proper course in such a case as this is laid down by this Court in Gunaratne v. Dingiri Banda [1 (1898) 4 N. L. R. 249.] and in Sinnetamby v. Nallatamby,[2 (1904) 7 N. L. R. 139.] by proceedings by way of restitutio in integrum, or even, as I said in my judgment in the latter case, an action in the District Court might be brought on the ground of fraud to set aside the judgment".

In Gunaratne v. Dingiri Banda [1 (1898) 4 N. L. R. 249.] it was a question of fraud on a consent judgment. Sir Winfield Bonser, Chief Justice, said,

> "**There seems to be some doubt** as to what should be the proper procedure in cases where a party wishes to get a decree set aside on the ground of fraud. There is no doubt that, if a consent of the parties to a judgment is obtained by fraud, there must be some remedy for the fraud. **This application was in substance an application for what is called restitutio in integrum,** -which is a well-known civil law remedy for setting aside, a judgment which had been improperly obtained. It scorns to have been the practice in Holland to apply for restitutio in integrum to the highest Court of Appeal, which had delegated to it the powers of the Sovereign in this respect."

Withers and Brown JJ., in their lordships' judgments did not mention about restitutio in integrum.

The words of Bonser C. J., "there seems to be some doubt" and "…**what is called** restitutio in integrum," only shows the lack of knowledge, with respect, of this remedy in 1898.

In Buyzer itself, there is a judgment of Wood Renton J., too. It said,

> "It would clearly have been open to the appellant to have applied to the Supreme Court on an allegation that the decree against him in the special case had been obtained by the fraudulent production of false evidence, for an order of restitutio in integrum, and I am not prepared to say, on the materials before me at present,. that an action to set aside the decree directly might not perhaps have been brought in a Court whose jurisdiction is concurrent with that of the Court which pronounced it."

As referred to in elsewhere in this judgment itself, in Buyzer, Middleton J., said,

> "On the ground that this action is brought for the purpose of setting aside a judgment of a superior court, I would hold that the proceedings do not lie in their present form, and would dismiss the action with costs, without prejudice to any right the plaintiff may have to raise the question in the manner I have indicated, either by substantive action in the District Court for fraud or by way of restitutio in integrum."

(iii) Jayasuriya vs. Kotalawala et al 23 NLR 511

Sir Anton Bertram, Chief Justice said,

> "The fact that a man is deceived by fraudulent representations cannot be construed as a misfortune preventing him from appearing to show cause. His proper remedy is to apply either for restitutio in integrum or to seek damages for the fraud. Mr. Jayawardene asks us to say that the Court has an inherent power to set aside a decree issued ex parte."

Up to now, the cases referred to have considered on the aspect of fraud practiced on court. Would that mean, that, fraud is the only situation in which

restutio is available? This Court says, that, reference only to fraud in these cases at the end of the 19th and at the beginning of the 20th centuries shall not say, that, fraud practiced on the decision maker is the only ground for restitutio. In fact, the proponents of the theory that restitutio is an extra ordinary remedy granted only on the grace of the court too accept, that, there are other instances in which the remedy is applicable.

(iv) Sinnatamby vs. Nallathamby 07 NLR 139

This was a case in which it was alleged, that, the consent decree was entered due to mistake.

Middleton J., said,

> "I think, therefore, that this Court has jurisdiction on application by petition duly supported by affidavit to grant an order upon the Judge of first instance **in certain cases of alleged error upon judgment,** to inquire into and to ascertain, and then to correct if necessary and right so to do, by restitutio in integrum."

Wendt., J., said,

> "Appellants' Counsel has questioned the soundness of the decision in Gooneratne v. Dingiri Banda, and has sought to re-open the whole question. Conceding that the Sovereign could even now grant restitutio in integrum, he has denied that this Court stands in the place of the " Court of Holland, " to which the Sovereign's powers had been specially delegated. He has cited Van Leeuwen's description of the Court of Holland, and his definition of the scope of the remedy of restitution (2 Kolze, pp. 428-4,31, 342-347), and has pointed out that in more than one of the cases enumerated as falling within the scope of restitutio, the right to claim relief by action is now recognized in Ceylon. But I think that the rule laid down in the case I have already mentioned is a most wholesome one, and ought to be adhered to. This Court there pointed out that some uncertainty had

previously existed as to the proper procedure to be followed in cases where a party desired to be relieved of a decree which had been improperly obtained against him, and it proceeded to consider the question with a view to settling the point. It was very fully argued, and having been a Counsel in the case I am able to say that not only were the opinions of Voet and Groenewegen cited, but the several local authorities in Marshall's Judgments, 2 S. C. C. 108, 6 S. C. C. 102, 3 C. L. R. 13, 3 N. L. R. 21 were discussed, as well as the English cases. The Court consisting of Bonser, C.J., and Withers, J., laid it down that the party complaining of the decree should in the first instance apply ex parte on proper materials to the Supreme Court, which if satisfied that a prima facie case was made out would direct the Court which passed the decree to hear the application and review its own decision, confirming it or setting it aside, according to the proof laid before it. If the decree-holder have already taken steps to enforce the decree, doubtless the Court so appointed would in a proper case stay its hand pending the investigation. Considering how often in our Courts litigants who have rushed into Court upon the impulse of some grievance adjust their differences before the trial day or arrive at a friendly compromise, and consent to a decree on terms agreed upon, I think there would be a manifest danger in enabling a party who shortly repents of his agreement to begin an action to have the decree set aside on the ground that he was deceived into consenting, or consented under a mistake, without any guarantee that there is a reasonable ground for the complaint".

Grenier A. J., said,

" I agree with the rest of the Court that this appeal must be dismissed with costs. I have had the advantage of reading the judgments of my brothers, and there is little that I can add to what they have held in regard to the remedy of restitution as it is understood in the Roman-Dutch Law

and as it has been recognized by our Courts. It is a very wholesome rule, and one that has been consistently followed, that the Supreme Court should be first approached upon proper materials and a prima facie case made out before any reference is made to the lower Court which passed the decree complained of…….

The policy of the Roman Dutch Law, as I have always understood it, never encouraged a procedure of this kind, and that is the reason why the remedy known as restitutio in integrum was made available to a litigant in certain circumstances where the ordinary Courts were powerless to relieve."

The above dicta also show, with respect, the doubts that existed on the very nature and scope of the remedy in the early days of the last (20th) century. The last two quotations amply demonstrate, it is submitted, that, the remedy was understood as a power especially delegated by the sovereign to the court which exercised it; and as Grenier A. J., specifically referred to, a "policy" of limiting the remedy to one of last resort "where the ordinary courts were powerless to relive" was mentioned. However, unfortunately, no authority was cited for this alleged "policy" in Roman Dutch Law, except, that, it could have been "taken for granted', as an off shoot of the origin of the remedy on the authority of the sovereign. So were English writs.

(v) Sabapathy vs. Dunlop 37 NLR 113

This case decided in 1935 referred to "fear and surprise". As the perusal of this judgment further would show, a learned writer had devoted a one whole chapter for restitutio in integrum on fear or "metus[7]."

Akbar S. P. J., held, that,

[7] Hommage à Berthold Kupisch, In Integrum Restitutio under Classical Roman Law, Particularly on the Ground of Metus, and Berthold Kupisch, Jeroen Chorus * Université de Leiden

> "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."

Hence it was, in that case, coercion allegedly exerted by a Judge.

Neither Akbar S. P. J., nor Koch A. J., (both of whom wrote separate judgments in that case) did not find that there was coercion by the learned Judge. But Koch A. J., in a word of caution said,

> "This case conspicuously manifests the danger of Judges participating in the discussion of terms of settlement and taking too active a part in seeking to bring about a compromise. The terms of settlement should be left entirely to the parties and their legal advisers who know best, or else there always will remain the possibility of remarks or observations coming from the Judge in the course of the discussion being misunderstood and wrong interpretations put thereon".

The basic duty of a judge is to hear and decide.

Although the remedy of restitutio was not granted, both the learned judges made valuable observations in regard to the scope of the remedy as expressed by learned Dutch text writers.

Akbar S. P. J., said,

> "The application to set aside the order of settlement has been made in the alternative either by way of the revisionary powers of this Court or by way of restitutio in integrum. In my opinion this Court has the power to set aside the order either by way of restitution or revision, if good grounds are shown for the interference of this Court.

In Voet, bk. IV., tit. 6, c l. 17 (Sampson's Trans, p. 105) there is the following passage :-

> " Further if a particular judgment has been consented to by the parties to the suit, as it will not then be improper for the judge to decide according to the wish of the parties, without further hearing, so if the judgment is given by a Court of not supreme jurisdiction, there is no reason why restitution should not be allowed against it, if grave prejudice is shown to have been incurred by it. For if restitution is applicable against mutual agreements because of laesio enormis, and the authority of a matter decided by a judge of not supreme jurisdiction is not so great as to put a stop to relief by restitution should a just cause of restitution appear, **even in cases in which the judgment has been given after the fullest consideration; it follows that, whether we regard the agreement of the parties or the authority of a judgment, it cannot be said that restitution would in that case be inequitable. And it supports this, that appeals from such a judgment are nowadays allowed**."

His Lordship further said,

> "Mr. Perera quoted Voet, bk. IV., tit. 1, cl. 26, and argued that the only just grounds for restitution were fear, fraud, minority, &c, enumerated in the clause and that fear meant fear caused by present or future danger of a substanial evil which would exclude all notion of consent and vitiate the agreement ab. initio. He argued that if the fear was of a conditional nature, i.e., some threatened harm, this did not exclude all notion of consent and made the agreement only voidable. He further quoted Voet, bk. IV., tit. 2, cl. 11-14, to show that the fear to be adequate must be of the first kind. I cannot agree with him that unless the fear is of the first kind we have no

jurisdiction to entertain the application. For one thing there is the passage I have quoted above from bk. IV., tit. 6, cl. 17, which states that if it can be shown that grave prejudice had been incurred by a consent judgment of a Court of not supreme jurisdiction, there is no reason why restitution should not be allowed (see also 2 Kotze, p. 341). According to Voet, bk. IV., tit. 2, cl. 10, all that is required is that the fear should be caused by something done illegally, even by a Magistrate. Supposing in this case it was proved that the Judge directly threatened to dismiss plaintiff's claim in 1,635 unless he signed the terms of settlement. **Mr. Perera, further urged that surprise was not a valid ground for an application by way of restitution. Here too I cannot agree, for according to the passage from Voet, bk. IV., tit. 6, cl. 17, <u>if grave prejudice has been caused to the applicant through any cause whatever</u>[8], there is no reason why restitution should not be allowed. This point is, as pointed out by my brother, covered by the obiter dictum of Bertram C.J. in Fernando v. Singhoris Appu[1 26 N. L. R. 469], in which he mentions any equitable ground such as mistake or surprise as being sufficient**. The only difference between that case and the one before us is that here the petitioner alleged the conduct and act of the trial Judge himself as constituting the surprise which would entitle him to a rescission of the agreement."

Koch A. J., said,

"Van Leeuwen in his Commentaries in vol. II (2nd ed.), p. 338, referring to obligations, says that where fraud, bad faith or impropriety exists, the debitor will have his remedy against it by restitution and will be restored, **upon request to the supreme authority,** to his former position".

(vi) Mapalathan vs. Elayavan 41 NLR 115

[8] As it will be seen, this pronouncement of Akbar S. P. J., is very much similar to what Jerold Taitz would say in this regard.

In this case decided in 1939 Soertsz J., held, 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.
>
> 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".

The learned Judge tracing the then recent history of the remedy said,

> "It is true that at one time the question was raised whether restitutio in integrum could be properly held to form part of the law of Ceylon in the absence from the Courts Ordinance and the Code of Civil Procedure of any provision enabling the Supreme Court to grant relief by way of restitutio in integrum, and in view of the power of revision enjoyed by the Supreme Court. But in Abeyesekere v. Haramanis Appu [2 14 N. L. R. .353.] it was held by Wood Renton and Grenier JJ. that the remedy of restitutio in integrum is one which has taken deep root in the practice and procedure of our Courts and that it is too late that this remedy ought no longer to be recognized."

The learned Soertsz J., in an attempt to enumerate the instances in which the remedy will be available (according to Johannes Voet) said,

> "I, therefore, address myself to the present petition only to consider the application for restitutio in integrum. Now, in the words of Voet " resti-tutio in integrum is extraordinarium remedium, not to be given, (a) where there is some other remedy available to the person seeking restitutio. Sed nee tune plerumque restitutioni locus datur, cum alind ordinarium aeque pingue ad indemnitatem remedium a jure comparatum est; (b) It is not to

be given for the mere asking non tamen cuivis restitutionem petente, causamque alleganti, ea promiscue concedenda est, sed causa demum cognita, an nempe vera an justa, an satis gravis sit; (c) It is not to be given unless it is sought within a certain period. Nee omni tempore ad restitutionis remedium patet aditus ". In regard to (b) Voet goes on to say that " causae justae restitutionis sunt, metus, dolus, minor, aetas, capitis, diminutio, absentia, alienatio judicii mutandi causa, Justus error". In addition to these, the discovery of fresh evidence, res noviter veniens ad notitiam 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. (Voet IV. 1, passim.)

So far as the present application is concerned, Counsel for the respondent takes no objection to it on the ground either that there is some other remedy available to the petitioner or on the ground that the application is not made within reasonable time. But, he contends that the mistake which the petitioner relies on is not such a mistake as falls within the meaning of Justus error. He says that the mistake referred to was a mistake which would not have occurred if the petitioner had presented his case with due care, and also that the petitioner is not in a position to show that but for the mistake the Judge who heard the appeal could not but have reached a conclusion in his favour".

In conclusion His lordship said,

"But for the petitioners to succeed in an application for restitutio in integrum they 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."

(vii) Perera vs. Don Simon 62 NLR 118

In this case decided in 1958, Sansoni J., (later Chief Justice) held, that,

"An application for Restitutio in integrum cannot be made in a partition action

Nor would Restitutio be granted where there has been negligence or delay on the part of the petitioner."

But presently, in the Court of Appeal restitutio is granted in partition cases and some years ago, in the recent past, it was so confined to partition actions, that some would have "taken for granted" that it is available only in partition actions but not in other actions before original courts, including commercial, civil and criminal high courts. **This also shows, together with the above discussion, that, the enumerations attempted to say that restitutio is available for that or no other are mere rules of practice as emanated from time to time, which, if one considers the last 127 years (from 1898) was in a state of flux.**

Although Soertsz J., said in the above case, that, "The Supreme Court has no power to revise or review a case decided by itself" (in exercising restitutio) as it would be seen below in detail, Dias S. P. J., in 1951 did the very same thing, setting aside the judgment of the Supreme Court on exercising restitutio in integrum.

In the case under consideration, Sansoni J., said,

"Restitutio in integrum can be claimed on the ground of justus error, which I understand to connote reasonable or excusable error."

In the realm of contract law, a justus error refers to a reasonable mistake made by one of the parties involved in an agreement. In the South African case of African Information Technology Bridge 1 (Pty) Ltd v. the MEC for Infrastructure Development the case centered around tenders. The Gauteng Department of Transport and Public Works entered into tenders with a bidder. The bidder, African Information Technology Bridge 1 (Pty) Ltd (formerly known as Crestwell Trading 9 (Pty) Ltd), had undergone a name change. Despite the name change, certain company details

submitted with the bid were those of another relevant company, African Bridge. The mistake in the identity of the contracting party was fundamental and constituted a material and justus error, resulting in the tenders being invalid and unenforceable[9]. It means a "reasonable mistake."

(viii) Menchinahamy vs. Muniweera 52 NLR 409

Now, this case, decided in 1950 by Dias S. P. J., was in regard to a partition action from the District Court of Tangalla[10]. The reader will recall, that just 08 years later Sansoni J., would say that it is not available in partition cases, which is, with the greatest of respect, (Chief Justice Melanie Claude Sansoni was once the District Judge of Tangalla) not the case in several restitutio applications up to the present.

Dias S. P. J., has also said, that, it is (i) an extraordinary remedy (as seen above under (vi) based on Voet – but Dias S. P. J., did not cite an authority for this proposition). (ii) it is available only to a party to a contract (Perera v. Wijewickreme 1[(1912) 15 N. L. R. at p. 413.] and Perera v. Simeon Appuhamy 2[(1923) 2 T. L. R. at p. 119.] and (iii) the remedy must be sought with utmost promptitude (based on Babun Appu v. Simeon Appu [(1907) 11 N. L. R. at p. 45).

(ix) Sri Lanka Insurance Corporation Limited vs. Shanmugam and another 1995 (1) SLR 55

In this case decided in the Court of Appeal in 1995, Dr. R. B. Ranaraja J., among other things said, that,

> "Under Roman Law, the remedy of restitutio in integrum was the removal of a disadvantage in law which had legally occurred. **It was a protection against injustice (as distinguished from an action against injustice)**

[9] ttps://www.lexology.com/library/detail.aspx?g=a9b444e7-05b4-4665-8656-3f9984157fb2
[10] This Court was gazetted in 1834 as "Tangalla" not "Tangalle"

which was rendered necessary on account of practical impossibility of taking legally, in advance, all the circumstances that in reality may occur. The remedy was granted by the Praetor who himself conducted the proceeding in which judicium rescindens might ultimately be granted. Abeysekera v. Haramanis Appu (1). The remedy was received into Roman Dutch Law in wider form, where restitutio in integrum was primarily intended for relief from contracts on the ground of minority, error, fraud and duress. Relief by way of restitutio in integrum was also granted from the effect of an order in judicial proceedings. Phipps v. Bracegyrdle (2). Vander Linden groups cases when relief could be obtained under two heads. (a) Relief relating to the original matter itself (substantial relief); relieving a party from any act or contract and replacing him in his former situation on the ground of his having been induced through fear, fraud, minority, error, absence or other sufficient reasons to do the act against which he prays relief. (b) Relief relating merely-to some omission or error in the process of pleading, (judicial relief)."

His lordship further said,

"In this country the remedy of restitutio in integrum was recognised as a mode of relief as far back as the time of Sir Charles Marshall[11], and has taken deep root in the practice and procedure of our courts. (Abeysekera - supra). At present, Article 138(1) of the Constitution has vested this court

[11] Sir Charles Marshall (1788 – 5 February 1873) was the sixth Chief Justice of Ceylon.

Marshall was the only son of Sergeant Marshall, a lawyer, and was educated at Westminster School. He matriculated at Jesus College, Cambridge in 1806, graduating B.A. in 1810, and M.A. in 1814. He was called to the Bar at the Inner Temple in 1815.

Marshall was knighted in 1832 and appointed Chief Justice of Ceylon on 18 February 1833, succeeding Richard Ottley. In 1835 he fought a duel with Sir John Wilson, in command of British troops in Ceylon, which took place in the Cinnamon Gardens, Colombo, once a plantation. He held the position until his resignation on 3 March 1836, when he was succeeded by William Norris.

with sole and exclusive jurisdiction to grant relief by way of restitutio in integrum".

To say that "The power of this court to grant such relief is a matter of grace and discretion," his lordship referred to Usoof v. Nadarajah Chettiar 61 NLR 173.

Usoof vs. Nadarajah Chettiar was a case decided in 1958 by H. N. G. Fernando J., (later Chief Justice). In pronouncing that restitutio is a matter of grace, His lordship referred to Burge, which Wood Renton J., cited in Abeysekera vs. Haramanis Appu 1911. The court said,

> "Burge refers to the proceeding as an action to undo what legally had been done but emphasizes that the granting of such relief could not be claimed as a matter of right **but was an act of grace <u>in the exercise of the Royal Prerogative</u>** Wood Renton, J. cites a number of earlier cases in Ceylon and reaches the conclusion that in the then state of the law it was too late for a bench of two Judges or probably even for the Full Court to hold that the remedy of restitution ought no longer to be recognised, and he laid down what seemed to him to be the appropriate procedure to be followed in the case of an application to the Supreme Court for restitution".

Before the end of his lordship's judgment, Fernando J., used the word "grace" twice more, without the term "Royal Prerogative." It is unfortunate, that, the primary, secondary, tertiary and Quaternary references readily took the word "grace" without the term "Royal Prerogative". The remedy being in its origin and for most part of its evolution being one of Royal Prerogative supports the argument of this Court in due course, that, restitutio in integrum extends as a remedy in public law.

The case of Abeysekera vs. Haramanis Appu 1911, 14 NLR 353 a decision of Wood Renton J., was considered in the case referred to in (vi) above and also in Usoof vs. Nadarajah Chettiar 1958 61 NLR 173 decided by H. N. G. Fernando J.

It appears, to this Court, that, one of the most important cases in which the history of the remedy of restitutio in integrum was considered was the above case of Abeysekera vs. Haramanis Appu 1911. The decision in that case would have been more complete, however, if the petitioner in the application that arose from C. R. Nuwara Eliya, 4,703 was diligent in prosecuting his case. As per the judgment in Haramanis even a Full Bench was established to hear and decide three questions referred to in that case. But when the case was called there was no appearance in support of the application and it was dismissed with costs. Anyway Wood Renton J., in Haramanis set down those questions as follows,

> "(1) Is it too late to raise the question as to whether or not restitutio in integrum can properly be held to form part of the law of the Colony?
>
> (2) If that question should be answered in the negative, can the Roman-Dutch remedy of restitutio in integrum be regarded as part of the law of Ceylon, in view of (a) the absence from the Courts Ordinance and the Code of Civil Procedure of any provision enabling the Supreme Court to grant relief by way of restitutio in integrum (b) the powers of revision enjoyed by the Supreme Court; and further, (c) decisions to the effect that an action to set aside a judgment on the ground of fraud or mistake can be brought in the Court which pronounced that judgment?
>
> (3) If the remedy of restitutio in integrum still survives in Ceylon, what ought the practice to be in regard to (a) the bringing of applications for such relief before the Court (i.e. whether ex parte or upon notice), and (b) the nature of the reference by the Supreme Court to the court of first instance, that is to say, ought the Supreme Court to leave the decision, on the matters referred, to the court of first instance, or to require that any decision at which that Court may arrive should be subject to its own sanction?"

However before considering those questions Wood Renton J., considered the history of the remedy of restitution which is referred to in detail in Haramani's case which is referred to below in point form.

(i) Under the civil law, where a person suffered a legal prejudice by the operation of law, the prætor having personally inquired into the matter (causae cognitio) in the exercise of his imperium, which enabled him to consider all the actual facts of the case, might issue a decree re-establishing the original legal position, that is to say, replacing the person injured in his previous condition.

(ii) In Roman law restitutio in integrum was the removal of a disadvantage in law which had legally occurred. It was a protection against justice (as distinguished from an action against injustice), which was rendered necessary on account of the practical impossibility of taking legally, in advance, all the circumstances into consideration that in reality may occur. (Sohm's Institutes of Roman Law, s. 56, 111, Burge, 2nd ed., vol. 4, chap. 1.)

(iii) The restitution thus granted by the praetor in jure was then followed by the judicium rescissorium, that is, the trial and decision of the action which had been thus restored. The judicium rescindens itself, i.e., the proceeding which resulted in the restitution, was invariably conducted and concluded by the praetor himself.

(iv) In Roman law restitutio in integrum was divided into two classes, (i) restitutio minorum (under 25 years of age) and (ii) restitutio majorum (25 years and upwards), in cases of absentia, metus, dolus, and error.

(v) The remedy was received into the Roman-Dutch law in a wider form.

(vi) Restitutio was not only granted to minors. It might be granted to any one, either in toto, on the grounds of metus, dolus, absentia, and minority, or partially, on the ground that the damage suffered exceeded the value of what was obtained through the transaction by half (ob laesionem enormem). Van der Linden gives as additional grounds for

partial restitution absence and error, and further, all such equitable reasons as rendered it unjust that the act should remain in existence.

(vii) In 1562, by Octroy[12] of Philip II[13], the kinds of relief which might be granted were classified into two, viz., relief granted against material rights which had once been established (material relief), and relief by undoing legal proceedings which had once become res judicata and against which no further appeal lay (formal or processual relief). It was at the same time provided that such formal relief should be granted by the Judge of (or Court of Appeal) van Holland.

(viii) After the eighty years' war between Spain and the Northern Provinces of the Netherlands had broken out, and the Council of Mechlin had ceased to exercise jurisdiction in those Provinces, the States of Holland, by resolution of May 8, 1573, granted the right to rescind contracts to the same Hof van Holland, and after the creation of a Supreme Court (Hooge Raad, 1582) to that high tribunal. In 1795, after the abolition of the Supreme Court, it came back to the Hof van Holland.

(ix) Though the Supreme Court granted letters of relief, it did not investigate cases. These were sent by a committimus to the ordinary judge of first instance, who investigated them and granted or rejected the petition, and his decision then received the sanction of the Supreme Court. [This has the combined effect of certiorari – bring the record to see – and procedendo – proceed to judgment] [The term “writ” too originated in a writing addressed to (often) an inferior court. Here the reference is to a “letter”]

[12] octroy (third-person singular simple present octroys, present participle octroying, simple past and past participle octroyed) To grant (a privilege etc, by a government etc).

[13] Philip II[note 1] (21 May 1527 – 13 September 1598), also known as Philip the Prudent (Spanish: Felipe el Prudente), was King of Spain[note 2] from 1556, King of Portugal from 1580, and King of Naples and Sicily from 1554 until his death in 1598. He was also jure uxoris King of England and Ireland from his marriage to Queen Mary I in 1554 until her death in 1558.[1] He was also Duke of Milan from 1540.[2] From 1555, he was Lord of the Seventeen Provinces of the Netherlands… Deeply devout, Philip saw himself as the defender of Catholic Europe against the Ottoman Empire and the Protestant Reformation.

(x) In Ceylon, as far back as the time of Sir Charles Marshall, restitutio in integrum was recognized as a mode of relief against fraud, **and also as a means of setting aside the process of parate execution by which in certain specified cases, for example, the recovery by Fiscals of the purchase money of sales in execution, or due to auctioneers, the previous stages of an ordinary suit at law were dispensed with, and the creditor was at once entitled to seize in execution the person or property of his debtor in satisfaction of his debt.**

(xi) There was considerable controversy at that time as to whether the power of granting restitution was vested in the Supreme Court alone or in the District Court. [During those early days, the only inferior court to the Supreme Court of Ceylon, in civil litigation was the District Courts, first established under the Charter of Justice of 1833 A. D.]

(xii) Here Wood Renton J., examined the following cases, to wit;

(a) D. C. Matale, 1,1742 ((1836) Morgan, Beling, Conderlaag, and Prins, 82.) it is indicated that restitutio in integrum is a remedy to be sought through " the Sovereign in Council," which, I suppose, means the Privy Council in England. [With respect to Wood Renton J., as it will be explained below according to the article of Jerold Taitz “the Sovereign in Council” was the Emperor [Imperato] of Rome who often delegated this power of the Royal Prerogative to the Preator]

(b) In Obeysekere v. Gunasekera3 ((1884) 6 S. C. C. 102) it was held in appeal by Clarence J. that the District Court had jursidiction to set aside a judgment obtained by fraud, but that the application ought to be made in a separate suit.

(c) In ex parte Gordon,4 ((1879) 2 S. C. C. 108) Phear CJ. and Stewart and Dias JJ. held that error, res noviter veniens, or fraud can be raised in revision.

(d) In Perera v. Ekanayake,5 ((1897) 3 N. L. R. 21) Withers J. and Browne J. held that a judgment obtained by fraud or passed under mistake might be set aside either by a regular action or possibly by way of summary procedure as regulated by the Civil Procedure Code, and that this cannot be done by mere motion supported by affidavits with notice to the decree-holder.

(e) In Stork v. Orchard,6 ((1893) 2 S. C. R. 1) Mr. Justice Lawrie, then Acting Chief Justice, held that the remedy of restitutio in integrum was available in all cases where a contract can be shown to have proceeded on total misconception.

(f) In Gunaratne v, Dingiri Banda,7 ((1898 & 1899) 4 N. L. R, 249,)Sir John 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.

(g) [The learned Judge referred to Sinnatamby vs. Nallatamby referred to in (iv) above].

(h) In Silindu v. Akura,2 ((1904) 7. N. L.R. 296) Wendt J. and Middleton J. held that on proper materials laid before the Supreme Court by a party who desires to be relieved of a decree which had been improperly obtained against hint, it will upon an ex parte application by such party direct the Court which passed the decree to hear all necessary parties and determine whether the petitioner is entitled to be relieved from the said decree and be restored to his rights as existing prior to the decree.

(i) In the case of Dodwell Carlill & Co., v. Rawter,3 ((1899) 1 Tam. 18) to which Mr. Tambyah as amicus curiae has kindly called my attention in the course of this judgment, it was held that, when any other

remedy is open to a party, the extraordinary one of restitutio in integrum cannot be granted.

(j) My attention has also been called by Mr. Tambyah to the case of Buyzer v. Eckcrt,4 ((1910) 13 N.L.R.371;2 Cur. L.R.200) decided by my brother Middleton and myself, where we held that where fraud is averred against a judgment, such judgment may be set aside by restitutio in integrum, or by a suit in the Court which passed the original decree. I may myself have acted on the law as laid down by Sir John Bonser C.J. and Withers J. in Gunaratne v. Dingiri Banda and by the Full Court in Sinnatamby v. Nallatamby, and in other cases which have not been reported; It might well have been found too late even for the Full Court, and it is certainly too late for a Bench of two judges, in the slate of the law as I have outlined it above, to hold that the remedy of restitutio in integrum ought no longer to be recognized.

The judgment has the following addendum at the end,

"The Supreme Court of Ceylon is indebted to the Registrar of the Supreme Court of British Guiana[14] for the following communication regarding the practice prevailing in that Colony re applications for restitutio in integrum: -

1. Restitutio in integrum, is still part of the law of British Guiana.

2. It depends on the common law and not on statute.

3. The remedy is sought by action, and not by application ex parte or otherwise.

[14] British Guiana was a British colony, part of the mainland British West Indies, which resides on the northern coast of South America. Since 1966 it has been known as the independent nation of Guyana.[2]

4. The court of trial is left to adjudicate on the claim, and any adjudication at which it may arrive does not require the sanction of the Supreme Court".

[In the presentation of points elucidated in Haramanis' case, the comments within square brackets [ ] were added in this judgment]

From and after 07th September 1978, the remedy is embodied in Article 138(1) of the Constitution.

The jurisdiction under Article 138(1) of the Constitution:

The Constitution is the Grundnorm. In applying the law on the directions set by the Preamble to the Constitution, which not only refers to JUSTICE but also to the ingredients of Rule of Law, convenience must yield to justice. The words in the Preamble makes it impossible for a Court to do the vice versa, that is, to give in to convenience at the expense of justice. There are no fetters imposed on restitutio in integrum by Article 138(1) of the Constitution. That Article envisages,

(i) Subject to the provisions of the Constitution,
(ii) Subject to the provisions of any law
(iii) an appellate jurisdiction for the correction of all errors in fact or in law **and**
(iv) sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things

There is no question, with respect, of the interpretation of this provision here. There is no doubt whether it means A or B. There is no impediment in law in its direct application. This Article describes the jurisdiction of the Court of Appeal. Despite the "side note" in the very next Article, Article 139(1) saying "powers in appeal", the body of the article refers to the exercise of the jurisdiction of the Court of Appeal. Hence the exercise of the power of restitutio in integrum must

also be done "according to law." The term "law" is defined in Article 170. There is no statute on restitutio in integrum. There is a direct affinity between "subject to…any law" in Article 138(1) and "according to law" in Article 139(1). Hence, in the above (i) to (iv), if (ii) subject to the provisions of any law, is not available, then, what is applicable is (i), which is subject to the provisions of the Constitution. Hence, restitutio in integrum must be applied under the Constitution in its purest form. **That is the power of Royal Prerogative delegated by the Emperor to the Preator.**

The learned President's Counsel for the 2nd defendant, apart from the above, raised a novel position at the oral hearing.

He said, that, the remedy of restitutio is not there to correct injustice, but it is available when the judgment, order, decision or even a contract itself is true and correct; in other words, not when the judgment, etc., creates injustice, but when it is just; but when it practically creates a disadvantageous situation.

He said that if the order is palpably wrong, as the petitioner alleges, then, the remedy is not RII but an appeal. He called the present application an appeal clothed in the garb of RII.

The answer to the above by this Court is as follows,

In the article "**Two unusual appellate remedies: revision and restitutio in integrum in the law of Sri Lanka**" **Jerold Taitz**[15] Senior Lecturer Faculty of Law University of Cape Town and Attorney of the Supreme Court of South Africa says that

> "**Restitutio in Integrum originated in Roman law <u>through the imperium</u>** (supreme judicial powers) <u>delegated to the praetors after the expulsion of the kings</u>. **It has been described as the judicial termination of the inequitable situation** <u>(created by the law per se)</u> and the restoration of the status quo…"

[15] https://journals.co.za/doi/pdf/10.10520/AJA00104051_856

"**Restitutio in Integrum was used as a form of appeal against a valid judgment or magisterial order made in terms of the law and which caused inequitable loss or injury to a party**. Cicero refers to the rescission of a number of judgments originally granted by Verres as governor of Sicily. **The judgments were rescinded by his successor Metullus on account of their having been founded initially on incorrect premises of law**. A further ground was that no proper trial had taken place as the court had not been properly constituted. The following example of restitutio in integrum being used as an appellate remedy is given by Engelsman. **The praetor set aside a decision on account of an error in the formula. It would appear that although the formula was framed correctly in terms of the contentions of the parties it contained an error which could have led only to a wrong decision**. [*This is a question of jurisdiction or a jurisdictional question, a wrong answer for which affects the jurisdiction of the Tribunal*] An aggrieved party had locus standi and could apply directly to the praetor for relief. The intercession of an official was unnecessary in regard to restitutio in integrum. The remedy was wide and could be invoked in a number of situations. For example it could be granted to creditors who suffered loss resulting from the debtor undergoing capitis diminutio minima. This form of legal disability extinguished all the contractual debts of the affected party. By virtue of the remedy the praetor restored the rights of action to creditors. **The power to grant restitutio in integrum was also held by the emperor**. **He used the remedy inter alia to set aside administrative decisions** [*This is administrative justice*] **eg. To pardon Roman citizens who had been deported (deportio in insulam)**. As a result of the pardon the citizen was restored to his **patria potestas** and was said to be **restitutus in integrum.**"
[The parts within [ ] Square brackets added in this judgment]

Therefore at the commencement too it was a basic remedy that covers the public as well as the private law including criminal law. It is "**the judicial termination of the inequitable situation (created by the law per se)**." What are these

"**inequitable situations created by law per se"** have been analyzed by me elsewhere. [in a published order].

(5) The "Bold[16]" Facts:

The third and final part of this order will deal with the allegation of the petitioner, that the order is palpably wrong, coupled with the further allegations made in the synopsis, that, it is ex facie wrong, null and void, has inflicted a wrong on the petitioner which warrants a remedy, detrimental to the interests of SLFP (Sri Lanka Freedom Party) and to the public of Sri Lanka (particularly in an year when elections are scheduled to be held) and the time taken to set aside the enjoining order in the District Court is unreasonable.

This Court, in the first part of this order analysed the proposition that an affected party by an order made behind his back must first go to the court that made the order and dissected it to its underlying policy and principle with a touch of the jurisprudential basis.

This Court is not exercising appellate jurisdiction. Hence it does not consider the merits of that order as done in an appeal. But it is the decision of this Court, that, it has jurisdiction to invoke the powers of restitutio in integrum and revision, provided that, the order is so wrong, palpably wrong; and had created a situation of blatant injustice.

There was such blatant injustice in Aussie Oats case two years ago, but there too the petitioner went to the original court; he tried his best to tell that court that its order of refixing the supporting of his motion for a date after about two weeks creates such injustice. But the court again delayed hearing him. The repercussions of that delay were referred to above. So he came to this Court.

[16] The word used in the sense of "decisive" or "paramount".

Actually he had no other remedy; in the sense of expeditious and effective remedy than RII. This is not to limit, as certain past judgments had imposed fetters on RII, or to say, that, RII is available when there is no remedy at all. **No, RII is available when it is the appropriate remedy and when justice demands that its power be invoked.** For this purpose; and to ascertain this, the factual dispute will now be considered.

As the petitioner describes in the synopsis filed on his behalf, the following are the facts,

“FACTS IN BRIEF

16. Hon. Maithripala Sirisena functioned as the Chairman/Leader of the party from January 2015 to 4th April 2024 without objection.

17. He functioned as the Chairman/Leader from January 2015 to November 2019 on the ground that he was the president of the country.

18. He functioned as Chairman/Leader of the party from November 2019 to April 2024 for the reason that he was elected by the "Vidhayake Sabhawa"

19. Maithripala Sirisena was restrained by an enjoining order from functioning as the Chairman/Leader of the SLFP from 4.4.2024.

20. The Plaintiffs in the case has claimed that there was a meeting of the "Deshapalana Mandalaya" on the 8.4.2024; vide paragraph 9.

21. They state that there were 6 members of the Deshapalana Mandalaya, that is the three plaintiffs and Honourable Nimal Siripala de Silva, Faiser Mustapha and Hon. Weerakumara Dissanavake [Reply -This is ex facie incorrect because the Three Plaintiffs are not members of the Deshapalana Mandalaya]

22. Documents P4[1] to P4[14] set out the members of the Deshapalana Mandalaya and their letters of appointment.

23. There are 14 because the 15th is ex officio the Chairman/Leader of the SLFP

24. The plaintiffs themselves have filed at page 67 of the documents filed by the Plaintiff, the attendance sheet of the Deshapalana Mandalaya on 31.3.2024

25. This document is attached for the ready reference of court.

26. Clearly the 3 Plaintiffs were not members of the Deshapalana Mandalaya even according to the plaintiffs.

27. Thus

(a) There was no meeting of the Deshapalana mandalaya on 7th April

(b) Only 3 members met, namely Hon. Nimal Sirilapala de Silva, Hon. Weerakumara Dissanayaka and Faiszer Mustapha.

28. In the circumstances

a. There was no meeting of the Deshapalana Mandalaya

b. Only 3 persons participated.

29. On 19.4.2024 the secretary was requested to convene a meeting of the Deshapalana Mandalaya by 10 members of the Deshapalana Mandalaya

30. The secretary convened a meeting of the Deshapalana Mandalaya on the 20.4.2024

31. 11 members of the Deshapalana Mandalaya were present.

32. The members absent were Hon. Maithripala Sirisena who had been restrained by an enjoining order, Hon. Nimal Siripala de Silva, Hon. Weerakumar Dissanakaya and Faiszer Mustapha

33. The aforesaid 11 members of the Deshapalana Mandalaya unanimously decided to request the secretary of the party to convene a meeting of the Vidhayaka Sabhawa

34. In deference to the aforesaid decision the secretary convened a meeting of the Vidhayaka Sabhawa on 21.4.2024.

35. Not one single member of the Vidhayaka Sabhawa have denied the receipt of notice of the meeting (not even the plaintiffs or Hon. Nimal Siripala de Silva]

36. There was a meeting of the Vidhayake Sabhawa on 21.4.2024

37. 119 members of the Vidhayaka Sabhawa were present in person [vide Minutes P11]

38. Those 119 members unanimously decided that the Hon. Wijedasa Rajapakse function as the acting Chairman.

39. Thereafter further 22 members have stated that they were unable to be physically present at the meeting but have ratified the decision [P12(0]-P12[xxil)

40. In the aforesaid circumstances in brief

(i) 3 members of the politburo elected Hon. Nimal Siripala [de Silva]

(ii) No meeting was convened

(iii) 10 members of the polit bureau requested the secretary to convene a meeting of the Deshapalana Mandalaya

(iv) The secretary did so

(v) The meeting of the Deshapalana Mandalaya was held on 20.4.2020.

(vi) 11 members were present who unanimously requested the secretary to convene a meeting of the Vidhayaka Sabhawa

(vii) The meeting of the Vidhayaka Sabhawa was held on 21.4.2024 and 119 members were physically present and unanimously decided that Hon. Wijeyadasa Rajapakse function as the acting chairman.

(viii) Therefore 141 members of the Vidhayaka Sabhawa have approved the appointment of Hon. Wijeyadasa Rajapakse

(ix) More members of the Vidhayaka Sabhawa have ratified this resolution but due to lack of time these documents have not been filed.

(x) Therefore at least 141 out of 246 members of the Vidhayaka Sabhawa have ratified the appointment of Hon. Wijeyadasa Rajapakse as the acting Chairman/Leader of the SLFP".

At the commencement of oral submissions, the learned President's Counsel for the petitioner referred the attention of this Court to,

(i) Clause 16 of the Constitution of SLFP – "Deshapalana Mandalaya" and to

(ii) Clauses 11 and 12 thereof – "Vidhayaka Sabhawa" and its powers and responsibilities

The learned President's Counsel submitted, that,

(a) The position of the plaintiffs in this case is that on 08.04.2024 a meeting of the "Deshapalana Mandalaya" elected the 02nd defendant as the Acting leader

(b) "Deshapalana Mandalaya" has no authority to elect acting leader or leader

The synopsis filed on behalf of the petitioner states, that,

(i) The "Vidhayaka Sabhawa" includes (a) all sitting members of the SLFP (b) Organisers and (b) representatives of various committees

(ii) Thus the Vidhayaka Sabhawa is the core of the SLFP

(iii) Its powers are set out in clause 12

(iv) Clause 12(ii) sets out the way in which the Chairman/Leader has to be elected

(v) Hence it is the Vidhayaka Sabhawa that can elect the Chairman/Leader

(vi) Therefore the acting Chairman/Leader must be elected by the Vidhayaka Sabhawa

(vii) Deshapalana Mandalaya has no power to elect Chairman/Leader

(viii) Clause 16 sets out its powers

(ix) Clause 33 is casus ommisus

(x) Deshapalana Mandalaya can decide unforeseen situations

(xi) "However the Deshapalana Mandalaya on 20.04.2024 at a meeting convened by the secretary at which 11 members of the Deshapalana Mandalaya decided to convene a meeting of the Vidhayaka Sabhawa to elect an Acting Chairman/Leader" (paragraph 56 of the synopsis).

(xii) "Whatever wording is there in clause 16 of the Constitution it does not and cannot take away the express power of the Vidhayaka Sabhawa set out in clause 12[1](ii)("Ee" [4th letter of Sinhala Alphabet] to elect the leader". (paragraph 58 of the synopsis).

(xiii) "The word[s] Uththareethara or Avasanathmaka….in clause 16[i] and 16[ii] cannot take away the express power of the Vidhayaka Sabhawa in terms of 12[1](ii)("Ee" [4th letter of Sinhala Alphabet]. (paragraph 59 of the synopsis).

(xiv) Clause 16 only prescribes at most a particular status but does not give a power to act contrary to the constitution

(xv) In any event, the Deshapalana Mandalaya itself requested the secretary to convene a meeting of the Vidhayaka Sabhawa

(xvi) That is the decision of the Deshapalana Mandalaya

(xvii) "It is submitted that the purported meeting of the Hon. Nimal Siripala de Silva, Hon. Weerakumara Dissanayake and Faiser Musthapha and the 3 plaintiffs cannot and do not constitute a meeting of the Deshapalana Mandalaya". (paragraph 63 of the synopsis).

The gist of the petitioner's submission, therefore, is, that,

(a) The Deshapalana Mandalaya has no power to elect a Chairman/Leader or acting Chairman/Leader

(b) Its purported meeting on 08th April is not a valid meeting due to the reasons enumerated above

(c) Hence the appointment of the 2nd defendant as acting Chaiman/Leader is void

(d) In any event, the Deshapalana Mandalaya at its meeting on 20th April decided to call a meeting of the Vidhayaka Sabhawa on 21st April which was done

(e) At that meeting the petitioner was elected/appointed as the acting Chairman/Leader

(f) That election/appointment is valid

In regard to this, the following is the position of the plaintiff respondents quoted from the synopsis filed on their behalf,

"2nd Defendant Respondents appointment as the Acting Chairman of the Party

(a) Hon. Maithripala Sirisena who was the Chairman of the Sri Lanka Freedom Party (SLFP) was enjoined by the District Court after considering, inter alia, his conduct including him being found guilty by the Supreme Court at least in two instances for serious violations of Fundamental Rights of the citizens.

(b) Thereafter, a long-standing member of the Party, Hon. Nimal Siripala de Silva was appointed as the Acting Chairman of the SLFP at a දේශපාලන මණ්ඩල (politburo) meeting of the SLFP held on 08th April 2014. The said decision or the meetings not been challenged by any member of the SLFP in any Court of Law (or within the constitutional organisations of the SLFP) to-date

(c) There is no express provision in the Constitution of the SLFP on appointing an Acting Chairman in a situation where the chairman is not in a position to act for whatever reason. The only provision stipulated in the Constitution is for the appointment of a chairman (as opposed to an Acting Chairman) as per Article 12 of the Constitution of the SLFP. Therefore, the casus ommissus clause in the Constitution contained in Article 33 provides as follows:

මෙම ව්‍යවස්ථාවට ඇතුළත් නොවූ ක්‍රියාමාර්ග පිළිබඳ ව යම් කාරණයක් පැන නැගුණහොත් හෝ ව්‍යවස්ථාවල සඳහන් යම් විධානයක් තේරුම් ගැනීම පිළිබඳ ව යම් සැකයක් ඇති වුවහොත් හෝ ඒ කාරණය දේශපාලන මණ්ඩලය විසින් තීරණය කළ යුතු ය.

(d) Therefore, it is respectfully submitted that the only manner in which the Party can act in a situation where no provision is provided in the Constitution is by invoking the provisions of Article 33 which is the manner in which the 2nd Defendant Respondent was appointed as the acting Chairman on 8th April 2024 by a properly convened Politburo. It is reiterated that the said appointment has not been challenged either within the party structure or in any Court of Law

3.1 The purported Meeting held on 20th April 2024 purporting to be a Meeting of the දේශපාලන මණ්ඩලය (Politburo)

a. The 1st Defendant Respondent has selectively informed several individuals to participate at a meeting purporting to be a Politburo meeting on 20th April 2024 at Monarch Imperial. Even though the Plaintiffs - Respondents are members of the Politburo of the SLFP, the 1st Defendant - Respondent has failed and/or neglected to send any notice of the said meeting purporting to be a meeting of the Politburo of the SLFP.

3.2. The Meeting Purporting to be an Executive Committee Meeting Held on 21 April 2004

4. At the said meeting purporting to be a meeting of the Politburo, a purported decision has been taken to call for a meeting of the Executive Committee (විධායක සභාව), and accordingly has called for a meeting purporting to be an Executive Committee Meeting on 21 April 2024.

b. At the said meeting purporting to be the Executive Committee Meeting, a purported decision has been taken to appoint the Petitioner as the acting chairman (.....) of the SLFP.

Since then, until the enjoining order was obtained, the Petitioner has represented himself as the acting chairman of the SLFP

Synopsis of submissions

4. The Calling of the Meeting Purporting to be Politburo Meeting of the SLFP by the 1 Defendant-Respondent is Bad in Law, inter alia, due to the following reasons:

4.1 The 1 Defendant-Respondent could not have called for a meeting of the Politburo of the SLFP inasmuch as:

a meeting of the Politburo of the SLFP can be called only by the Chairman or on instructions of the Chairman of the Party when a Chairman and/or an Acting Chairman is present.

xii දේශපාලන මණ්ඩලයේ සියළු රැස්වීම කැඳවීමේ බලය සභාපතිවරයා සතු වන අතර, සභාපතිවරයාගේ උපදෙස් මත ප්‍රධාන ලේකම්වරයාට ද දේශපාලන මණ්ඩලයේ රැස්වීම් කැඳවිය හැක.

vide Article 16(xii) of the Constitution of the SLFP:

However, the 2nd Defendant Respondent who is the Acting Chairman of the Party has never instructed the 1st Defendant-Respondent to call for a meeting of the Politburo.

4.2 the 1st Defendant-Respondent could not have selectively invited members of the Politburo and individuals who are not members of the Politburo to a meeting purporting to be a Politburo meeting of the SLFP. The Plaintiffs

Respondents who are members of the Politburo the SLEP were never invited to the said meeting.

5. The Calling of the Meeting Purporting to be an Executive Committee Meeting of the SLFP held on 21 April 2024 is Bad in Law, inter alia, for the following reasons

5.1 a special meeting of the Executive Committee can be called only in accordance with Article 32(ii) of the Constitution of the SLPF which reads as follows:

32 (ii)

මෙම ව්‍යවස්ථාවේ නිර්දිෂ්ඨ කවරම සංවිධානයක හෝ අනු සංවිධානයක හෝ සාමාජික සංඛ්‍යාවෙන් තුන්නෙන් එකක (1/3) අත්සනින්, මාසයක් කල් දී කරන ලිඛිත ඉල්ලීමක් උඩ සංවිධානයේ හෝ අනු සංවිධානයේ හෝ ලේකම් හෝ සභාපති හෝ විශේෂ රැස්වීමක් කැඳවීමට වග බලාගත යුතුය. එම ලිඛිත ඉල්ලීමේ රැස්වීම කැඳවීමේ හේතුව දැන්විය යුතු අතර, රැස්වීම පිළිබඳ දැන්වීමේ එම හේතුව අඩංගු විය යුතුය.

5.2 The notice (පැ13 to the Plant) of the so-called meeting purporting to be an Executive Committee Meeting of the SLFP held on 21st April 2024 was not called based on a request for a meeting made one month prior to the date fixed for the meeting. Further the Notice did not contain any reason as to why the meeting was held.

5.3 Since the so-called meeting purporting to be the Politburo Meeting held on 20th April 2024 was bad in law and void ab-initio, the purported decision to call the meeting dated 21st April 2024 is also bad in law. Thus, the meeting purporting to be a meeting of the Politburo the SLFP held on 21st April 2024 is bad in law.

5.4 The 3rd Defendant - Petitioner and Several Others Who Were Not Members of the Politburo or the Executive Committee of the SLFP, had

Participated in the Meetings Purporting to be Politburo Meetings or Executive Committee Meetings of the SLFP and therefore, the said Meetings in Any Event Cannot be Called Politburo or Executive Committee Meetings of the SLFP".

The position of the 1st defendant, the secretary of the party is, in brief, as follows,

THE SEQUENCE OF EVENTS IN BRIEF LEADING UP TO THE APPOINTMENT OF THE 03RD DEFENDANT-PETITIONER AS THE CHAIRMAN OF THE SLFP.

5. The 01st Defendant respectfully submits that on or about the 19th of April 2024, the 01st Defendant received a letter marked as "P5" annexed to the petition of the Petitioner, titled "ශ්‍රී ලංකා නිදහස් පක්ෂයේ දේශපාලන මණ්ඩල රැස්වීමක් කැඳවීම සඳහා කරනු ලබන ඉල්ලීමයි." signed by ten (10) out of a total of fifteen (15) members of the දේශපාලන මණ්ඩලය of the SLFP.

The 01st Defendant respectfully submits that as per the said letter marked as "P5", two-thirds (2/3) of the දේශපාලන මණ්ඩලය of the SLFP requested for the දේශපාලන මණ්ඩලය of the SLFP

to be convened to discuss and decide on the appointment of the Chairman of the SLFP.

7. The 01st Defendant respectfully submits that thereafter the දේශපාලන මණ්ඩලය of the SLFP

convened on the 20th of April 2024.

8. The 01" Defendant respectfully submits that all fourteen (14) members of the දේශපාලන මණ්ඩලය were present at the said meeting held on the 20th of April 2024, however as demonstrated by the Attendance Sheet marked as "P6" annexed to the petition of the Petitioner, eleven (11) out of a total of fourteen (14) members of the දේශපාලන මණ්ඩලය signed the said Attendance Sheet marked as "P6".

9. The O1st Defendant respectfully submits that at the දේශපාලන මණ්ඩලය meeting held on the 20th of April 2024, as demonstrated by the minutes of the said meeting marked as "P7"

annexed to the petition of the Petitioner, it was resolved that the විධායක සභාව of the SLFP

would be convened on the 21st of April 2024.

7. ශ්‍රීලනිප විධායක සභාව කැඳවා ශ්‍රීලනිපයේ වැඩ බලන සභාපතිවරයෙකු පත් කිරීමට යෝජනා කිරීම පවතින හොඳම විසඳුම බව සරත් ඒකනායක මහතා යෝජනා කළේය. එවැනි විධායක කමිටු රැස්වීමක් පැවැත්විය හැකි ශ්‍රී ලනිප ව්‍යවස්ථාවේ 33 වැනි වගන්තිය ද සඳහන් කර යෝජනා කළේය.

8. ශ්‍රීලනිප ව්‍යවස්ථාවේ 33 වැනි වගන්තිය යටතේ විධායක කමිටු රැස්වීමක් කැඳවීමේ මෙම යෝජනාවට වැඩබලන මහලේකම්වරයා එකඟ වී පසුව එයට පක්ෂව සියලු දෙනාට ඡන්දය දෙන ලෙස ඉල්ලා සිටියේය. එම ඡන්ද ප්‍රතිඵලය මෙසේය.

පක්ෂව --- 11

එරෙහිව -- 03

(නිමල් සිරිපාල ද සිල්වා, ෆයිසර් මුස්තාපා සහ වීරකුමාර දිසානායක යන මහත්වරු කැඟසමින් රැස්වීම කඩාකප්පල් කරමින් සිටියහ. එම නිසා එම යෝජනාවට පටහැනි බවට තීරණයක් ගෙන ඇත.)

9. ඒ අනුව 2024 අප්‍රේල් 21 වැනි දින විධායක කමිටු රැස්වීම සඳහා කැඳවීමට තීරණය කරන ලදී.

** සැලකිය යුතුයි .:- පැමිණීමේ පත්‍රිකාව නිමල් සිරිපාල ද සිල්වා, ෆයිසර් මුස්තාපා සහ වීරකුමාර දිසානායක යන මහත්වරුන් විසින් අත්සන් කිරීම ප්‍රතික්ෂේප කරන ලදී.

10. The 01st Defendant respectfully submits that consequent to the decision of the දේශපාලන මණ්ඩලය on the 20th of April 2024, Notice of the විධායක සභාව meeting to be held on the 21st

of April 2024 was sent to all the විධායක සභාව members, as illustrated by “P9" annexed to the

petition of the Petitioner.

11. The 01st Defendant respectfully submits that the විධායක සභාව of the SLFP convened on the 21st of April 2024. The 01st Defendant respectfully submits that out of the total of two hundred and forty-six (246) members of the විධායක සභාව, one hundred and nineteen (119) members were physically present for the said විධායක සභාව meeting on the 21st of April 2024, as demonstrated by the Attendance Sheets of the “විධායක සභාව” marked as “P10” annexed to the petition of the Petitioner.

12. The 01" Defendant respectfully submits that at the විධායක සභාව meeting on the 21st of April 2024, as demonstrated by the minutes of the විධායක සභාව meeting marked as “P11” annexed to the petition of the Petitioner, it was unanimously decided that the 03rd Defendant -Petitioner would be appointed as the Chairman of the SLFP.

ශ්‍රී ලංකා නිදහස් පක්ෂයේ වැඩබලන සභාපතිවරයා පත්කිරීමට ඊයේ දින රැස් වූ දේශපාලන මණ්ඩලයේදී බහුතර ඡන්දයෙන් සම්මත කර ගත් බවත්, ඒ අනුව විජේදාස රාජපක්ෂ මහතා විධායක සභාවට යෝජනා කරන බවත් පක්ෂයේ ජ්‍යෙෂ්ඨ උප සභාපති මහාචාර්ය රෝහණ

ලක්ෂ්මන් පියදාස මහතා සභාවට දන්වන ලදි.

එම යෝජනාව තමන් ස්ථීර කරන බව පක්ෂයේ නියෝජ්‍ය ප්‍රධාන ලේකම් සරත් ඒකනායක මහතා සඳහන් කරන ලදි.

වෙනත් යෝජනා තිබෙනවාදැයි වැඩබලන ප්‍රධාන ලේකම්තුමා සභාවෙන් විමසූ අතර ඒ සඳහා කිසිදු වෙනත් යෝජනාවක් ඉදිරිපත් නොවිණි.

ඒ අනුව ඒකමතික යෝජනා සම්මතයකින් පක්ෂයේ වැඩබලන සභාපති ධුරයට ජනාධිපති නීතිඥ විජයදාස රාජපක්ෂ මහතා විධායක සභාව විසින් පත් කර ගන්නා ලදි.

13. The 01st Defendant respectfully submits that twenty-two (22) members of the විධායක සභාව who could not be physically present at the said meeting on the 21st of April 2024,

subsequently sent letters marked as "P12(i)" to "P12(xxii)" annexed to the petition of the Petitioner, approving and ratifying the decision of the විධායක සභාව to appoint the 03rd Defendant-Petitioner as the Chairman of the SLFP.

14. In the said circumstances the 01st Defendant respectfully submits that one hundred and forty- one (141) members out of a total of two hundred and forty-six (246) members of the විධායක සභාව of the SLFP, unanimously appointed the 03rd Defendant – Petitioner as the Chairman of the SLFP.

Therefore, now, as it appears to this Court, the following contentions are before court,

The petitioner says,

(i) The Deshapalana Mandalaya (Politburo) has no power to appoint a Chairman or an acting Chairman

(ii) The Politburo meeting on 08th April 2024 is void

(iii) Hence the appointment of the 2nd defendant as acting chairman is void

(iv) On 20th the Politburo decided to call the Executive Committee (Vidhayaka Sabhawa) meeting on 21st April 2024

(v) It has the power to elect/appoint a chairman or acting chairman

(vi) It validly appointed the petitioner as the acting chairman

The plaintiff respondents say,

(i) Hon. Maithreepala Sirisena was enjoined by a court from functinong as the chairman

(ii) On 08th April 2024 the Politburo appointed the 2nd defendant as the acting chairman

(iii) There was no express power or authority under the constitution for this

(iv) Hence it came under casus ommissus in clause 33

(v) It is only a chairman that can call for a politburo meeting as per the Clause 16(xii)

(vi) The 2nd defendant never asked the 1st defendant to call for a meeting of the politburo on 20th April 2024

(vii) Hence the purported politburo meeting on 20th April 2024 is void (paragraph 5.3 of the plaintiffs' synopsis)

(viii) Hence the calling of the Executive Committee for 21st April 2024 is void (paragraph 5.3 of plaintiffs' synopsis)

(ix) Hence the appointment of the petitioner is void

The questions that arise for decision now are,

(a) Had the politburo meeting held on 08th April 2024 the power to appoint an acting Chairman?

The Chairman Hon. Sirisena had been enjoined by a court.

It has to be considered, whether clause 33 validly appoints the 2nd defendant.

(b) Could the 1st defendant validly call for a politburo meeting for 20th April 2024?

Clause 16(xii) has to be considered.

If it applies, then, there arises a further question, whether the 1st defendant had the instructions ("upades") of the 2nd defendant to call it.
What would have been the position, if, the 2nd defendant's appointment as acting chairman was not valid?

Then again it does not appear that the 2nd defendant's appointment made on 08th April 2024 was held by a court to be void, or at least, it was challenged in a court of law.

This makes the way for, perhaps, the last question,

Even if the 2nd defendant's appointment as the acting chairman was void, can the petitioner be appointed as the acting chairman without first obtaining a ruling that the 2nd defendant's appointment is not valid; and hence, there is no chairman or an acting chairman?

On what was discussed in the first part of this order, on the "proposition" and also the legal position, that, it is the original court that has an unfettered jurisdiction of deciding all questions of law as well as facts, this Court is of the opinion, that,

(i) On considerations of principle and policy discussed above what is appropriate in law is for the petitioner who is the 3rd defendant in the case to take up these matters in the original court, and

(ii) On the basis of

(a) The inappropriateness in law of this Court deciding the above questions, and
(b) The 03rd defendant petitioner having an equally effective alternative remedy

this Court must not exercise its powers of restitutio in integrum or revision.

In **Fernando vs. Dias and others, 1980 (2) SLR 49**, Rodrigo J., in the Court of Appeal said,

> "It is not open to the petitioner to invoke the jurisdiction of the Appellate Court in the exercise of its revisionary powers without first having recourse to the original Court which issued the injunction to have it set aside in terms of section 666 of the Civil Procedure Code. **It was not a sufficient excuse to plead that delay will be involved in filing papers and waiting for the District Court to fix a date of hearing and eventually dispose of the application**".

This Court does not agree with the first sentence of the above passage which is underlined. In an appropriate case the higher court can do it. But this Court agrees with the second sentence in "bold" print.

At present the statement in "bold" print becomes doubly valid, because, there was not only section 666 but also section 664(3) although its scope is limited to allegations of suppression, etc.

It appears, that, Edussuriya J., in **Ajith vs. Ceylon Paper Sacks Ltd., 2000 (3) SLR 64,** queried, whether if the defendant fails to come into court after the

service of the petition and affidavit and notice of application come under section 666 without purging his default.

This Court is of the view, although it does not directly arise for question in this case, but still has a bearing to the "proposition" referred to at the beginning of this order, he can come. **Because it is a fundamental precept of the Rule of Law that when there is an order against a man issued without him being heard he need not (i) wait until he is summoned to show cause and (ii) his right to challenge the order does not vitiate due to the fact that he purposely or otherwise disobeyed such summons.**

This opens the door to consider another matter that was raised for the petitioner at the hearing, that, he has not yet been served with notices or summons and he came to know about the enjoining order from the press (media).

140 years ago, in **United Telephone Company vs. Dale, 1884, 25 Chancery Division 778**, it was said, that,

> "In order to justify the committal of a defendant for breach of an injunction **it is not necessary that the order granting the injunction should have been served upon him**, if it is proved that he had notice of the order ***aliunde***[17], and knew that the plaintiff intended to enforce it."

In **Ratnayake vs. Wijesinghe 1987, 1989 (1) SLR 406,** S. B. Goonewardene J., in the Court of Appeal decided, that,

> "proceedings upon an application to discharge an enjoining order are distinct from proceedings in opposition to the grant of an interim injunction".

[17] from a source extrinsic to the matter, document or instrument under consideration Aliunde legal definition of aliunde (thefreedictionary.com)

This shows that the remedy under section 666 is a separate, independent method of obtaining relief, and it has no connection with serving of the notice of interim injunction.

In the case, which was already referred to above, **Mallika Ratwatte vs. The Minister of Lands 1969** Samerawickrame J., said, that,

> "….; it is quite sufficient if the Court finds a case which shows that there is a substantial question to be investigated, and that matters ought to be preserved in status quo until that question can be finally disposed of".

In my order in **CA/RII/11/2023 dated 23.10.2023 Mohan de Silva, Member of Capri Club and others Vs Anusha Elfi Gunasekara nee Corea and others (ON INTERIM ORDER)**, from page 23 to 63, I have discussed the principles to be followed in granting interim injunctions and or interim relief in the nature of temporary restraining orders.

Hence, I see no reason to exercise the power of restitutio in integrum or revision in this case. The application of the 03rd defendant petitioner is dismissed.

There is no order on costs.

As the parties were in agreement that this matter must be disposed of expeditiously, they filed synopsizes by late afternoon on 03.05.2024. As this Court is presently handling certain other urgent work too, this order was pronounced, on the day and time stated in the footer. The Court is grateful to all learned counsel for the unstinted corporation extended and their learned contribution made to the development of jurisprudence. Due to constraints of time, only about 1/3rd of the cases and text books provided by Ms. Ajantha Widanapathirana of the Judges' Library could be included. In conclusion, this Court expresses its wish and hope, that her services will be retained in that library as long as possible, in a post that suits her, since her services are a great asset to those who use the Library.

Judge of the Court of Appeal