

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

In the matter of an application for restitutio in integrum under Article 138 of the Democratic Socialist Republic of Sri Lanka

Hatton National Bank,

No. 479, T.B. Jayah Mawatha,

Colombo 10.

Plaintiff

Case No. CA RII/07/2018

Vs.

1. Dodangoda Liyanage Don Prabath Roshan Jayasinghe,

2. Sunethra Arundathie Maureen Jayasinghe

Both at:

No. 57/1, Kaluthara Road, Matugama.

Carrying on business under the name, style and firm of:

“R.J. Technology Systems”,

At No. 57/1 Kaluthara Road, Matugama.

Defendants

AND NOW BETWEEN

1. Dodangoda Liyanage Don Prabath Roshan Jayasinghe,

2. Sunethra Arundathie Maureen Jayasinghe

Both at:

No. 57/1, Kaluthara Road, Matugama.

Carrying on business under the name, style and firm of:

“R.J. Technology Systems”,

At No. 57/1 Kaluthara Road, Matugama.

Defendants-Petitioners

Vs.

Hatton National Bank,

No. 479, T.B. Jayah Mawatha,

Colombo 10.

Plaintiff-Respondent

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Rasika Dissanayake with Dinuka Coorey, A. Sirirathna and K.S.K. Mendis for the Defendant-Petitioners

Ronald Perera P.C. with Thusitha Ediriweera for the Plaintiff-Respondent

Written Submissions Filed On:

Defendant-Petitioners on 20.06.2019

Plaintiff-Respondent on 26.07.2019

Argued On: 13.02.2020

Decided On: 26.05.2020

Janak De Silva J.

The Defendant-Petitioners (Petitioners) are seeking *inter alia* to set aside the following –

- a. The order nisi dated 15.11.2012 of the learned Additional District Judge of Colombo in DDR 83/2012 [P2 at page 41 of the case record marked 'A'];
- b. The order which made the said order nisi absolute dated 15.07.2013 of the learned Additional District Judge of Colombo in DDR 83/2012 [P11 at page 286 of the case record marked 'A'];
- c. The order dated 01.07.2013 of the learned High Court Judges of the High Court of Civil Appellate of the Western Province holden in Colombo in WP/HCCA/COL 63/2013(LA) [P10 at page 430 of the case record marked 'B'];
- d. The order nisi dated 12.07.2017 of the learned Additional District Judge of Matugama in SPL 03/2017 [P19 at page 828 of the case record marked 'D'];
- e. The order dated 17.10.2016 of the learned High Court Judges of the High Court of Civil Appellate of the Western Province holden in Colombo in WP/HCCA/COL 101/2015(LA) [P17 at page 604 of the case record marked 'C'].

The Plaintiff-Respondent (Respondent) has raised several preliminary objections and prayed for the dismissal of the application of the Petitioners.

The Respondent instituted an action in the District Court of Colombo (DDR 83/2012) on 23.10.2012 under the Debt Recovery (Special Provisions) Act No. 02 of 1990 as amended to recover a sum of Rs. 6,065,175.18 together with the interest thereon at the rate of 22% per annum from 01.04.2012 till payment in full. The Respondent also sought in the first instance an order nisi in respect of the said sum. Accordingly, the learned Additional District Judge of Colombo issued 'P2'.

The Petitioners sought leave to appear and show cause which application was allowed and the Petitioners were permitted to file answer on or before 13.07.2013 upon depositing a sum of Rs. 6,065,175.00 or producing security worth of the same amount by the order dated 13.05.2013 [P7 at page 274 of the case record marked 'A'].

Being aggrieved, the Petitioners invoked the appellate jurisdiction of the High Court of Civil Appellate of the Western Province holden in Colombo [WP/HCCA/COL 63/2013 (LA)] by filing a leave to appeal application. The learned High Court Judges refused leave by 'P10' on 01.07.2013. The Petitioners did not prefer an appeal to the Supreme Court.

On 15.07.2013, the learned Additional District Judge of Colombo made the order nisi absolute by 'P11' since the Petitioners failed to act in conformity with 'P7'. Furthermore, the learned Additional District Judge permitted the Respondent to auction the property of the Petitioners and recover the moneys due by order dated 12.08.2015 [P12 at page 802 of the case record marked 'C'].

Being aggrieved, the Petitioners invoked the appellate jurisdiction of the High Court of Civil Appellate of the Western Province holden in Colombo [WP/HCCA/COL 101/2015 (LA)] by filing a leave to appeal application. Since the Petitioners were absent and unrepresented on the day the said application was called to support for leave, the learned High Court Judges refused leave by the order dated 02.09.2015 [P16 at page 687 of the case record marked 'C']. The Petitioners made a re-listing application on 02.09.2015 [page 689 of the case record marked 'C'] and took up the position that the registered Attorney for the Petitioners was unable to peruse the case record and ascertain the date to support due to her sudden illness. However, the learned High Court Judges treated the conduct of the registered Attorney of the Petitioners not as a mistake but negligence and dismissed the application. The Petitioners did not prefer an appeal to the Supreme Court.

The Respondent instituted an action in the District Court of Matugama (SPL 03/2017) on 23.02.2017[P18 at page 833 of the case record marked 'D'] to obtain the possession of the property morefully described in the schedule to the said petition and an order to eject the Petitioners from the same. The Respondent also sought in the first instance an order nisi in respect of the said property. Accordingly, the learned Additional District Judge of Colombo issued 'P19'.

Undue Delay and/or Laches

One of the preliminary objections taken up by the Respondent is that the Petitioners have invoked the jurisdiction of this court by way of restitutio in integrum several years after the orders sought to be set aside were made. As pointed out by the Respondent, the order nisi marked 'P2' was pronounced on 15.11.2012 (i.e. almost 5½ years prior to the instant application), the order which made the said order nisi absolute marked 'P11' was pronounced on 15.07.2013 (i.e. almost 5 years prior to the instant application), the order marked 'P10' was pronounced on 01.07.2013 (i.e. almost 5 years prior to the instant application), the order nisi marked 'P19' was pronounced on 12.07.2017 (i.e. almost 9 months prior to the institution of the instant action) and the order marked 'P17' was pronounced on 17.10.2016 (i.e. almost 1½ years prior to the instant application).

Article 138(1) of the Constitution has vested this court with sole and exclusive jurisdiction to grant relief by way of restitutio in integrum. This remedy cannot, unlike an appeal, be claimed by a party as of right [*Sri Lanka Insurance Corporation Ltd v. Shanmugam and Another* (1995) 1 Sri.L.R. 55]. Therefore, the power to grant relief by way of restitutio in integrum is a matter of grace and discretion [*Usoof v. NadarajahChettiar* (61 N.L.R. 173)]. A party seeking restitution must act with the utmost promptitude [*Babun Appu v. Simon Appu et al* (11 N.L.R. 44), *Menchinahamy v. Muniweera et al* (52 N.L.R. 409), *Sri Lanka Insurance Corporation Ltd v. Shanmugam and Another* (supra)]. The Court will not relieve parties of the consequences of their own folly, negligence or laches [*Sri Lanka Insurance Corporation Ltd v. Shanmugam and Another* (supra)].

The Petitioners claimed in their petition [paragraph 21] that the delay in instituting the instant action was due to the fact that the Petitioners were negotiating with the Respondent and it took a while to obtain legal advice and collect the relevant documents. However, they have not produced any evidence in support of the said facts except their *ipse dixit*. They could have easily produced the correspondence with the Respondent regarding the alleged negotiations if there were any.

Therefore, I hold that, in the circumstances, delays such long are far too longer to be overlooked by this Court.

Alternative Remedy

In this application the Petitioners contend that the Respondent cannot maintain an action under the provisions of the Debt Recovery (Special Provisions) Act No. 02 of 1990 as amended since it does not provide for the enforcement of a mortgage bond on immovable property. The Petitioners further contend that the Respondent is not entitled to recover sums of money such as “penal interest demand” and “overdue interest demand” as it is expressly prevented by section 22 of the said Act.

However, these matters were urged by the Petitioners In both the District Court and the High Court of Civil Appellate of the Western Province holden in Colombo. The learned High Court Judges, by the order dated 01.07.2013, ruled that the Respondent is entitled to maintain an action under the provisions of the Debt Recovery (Special Provisions) Act No. 02 of 1990 as amended since the Respondent has only pleaded to recover the moneys due and not to enforce the mortgage bond. The issue of penal interest was not addressed.

Section 5C (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 reads –

“An appeal shall lie directly to the Supreme Court from any judgment, decree or order pronounced or entered by a High Court established by Article 154P of the Constitution in the exercise of its jurisdiction granted by Section 5A of this Act, with leave of the Supreme Court first had and obtained. The leave requested for shall be granted by the Supreme Court, where in its opinion the matter involves a substantial question of law or is a matter fit for review by such Court.”

If the Petitioners were aggrieved by the order dated 01.07.2013 of the learned High Court Judges of the High Court of Civil Appellate of the Western Province holden in Colombo in WP/HCCA/COL 63/2013 (LA) and by the order dated 17.10.2016 of the learned High Court Judges of the High Court of Civil Appellate of the Western Province holden in Colombo in WP/HCCA/COL 101/2015 (LA), It was open to the Petitioners to invoke the appellate jurisdiction of the Supreme Court as of right even on the issue of penal interest which was raised but not addressed. They failed to do so.

The Respondent instituted the action bearing no. SPL 03/2017 in the District Court of Matugama to obtain the possession of the property morefully described in the schedule to the petition and an order to eject the Petitioners. The Respondent also sought in the first instance an order nisi in respect of the said property. Accordingly, the order nisi dated 12.07.2017 was

issued by the learned Additional District Judge of Matugama and the same was handed over to the petitioners [page 832 of the case record marked 'D'].

Section 5A (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 reads –

“A High Court established by Article 154P of the Constitution for a Province, shall have and exercise appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court or a Family Court within such Province and the appellate jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such District Court or Family Court, as the case may be.”

If the Petitioners were aggrieved by order nisi dated 12.07.2017 of the learned Additional District Judge of Matugama in SPL 03/2017, it was open to the Petitioners to invoke the appellate jurisdiction of the High Court of Civil Appellate as of right.

Restitutio in integrum is more in the nature of an overriding (equitable) jurisdiction that may be invoked at the discretion of the court. If there is some other adequate remedy available, restitutio in integrum will not lie [*Perera et al v. Wijewickreme et al* (15 N.L.R. 411), *Menchinahamy v. Muniweera et al* (supra), *Sri Lanka Insurance Corporation Ltd v. Shanmugam and Another* (supra)].

For all the foregoing reasons, I hold that the Petitioners are not entitled to invoke the jurisdiction of this court by way of restitutio in integrum.

The preliminary objections enumerated above are upheld and the application of the Petitioners is dismissed *in limine* with costs.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal