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/58/2023

D.C. Nugegoda Case No:
CL/48/18

1. Ahangamage Malani
   No.132, Raja Maha Vihara Road,
   Mirrihana, Kotte.

Claimant-Petitioner

-Vs-

1. Thilakarathna Arachchige
   Ubayasena
   Waththa Road, Millewa,
   Horana.

Plaintiff-Respondent

AND NOW BETWEEN

1. Ahangamage Malani
   No. 132, Raja Maha Vihara Road,
   Mirihana, Kotte.

Claimant-Petitioner-Petitioner

-Vs-

1. Thilakarathna Arachchige
   Ubayasena
   Waththa Road, Millewa,
   Horana.

   New Address

   No.248A/06, Cyriltton Waththa,
   Kalugahahena,
   Meewana Palana.

   Plaintiff-Respondent-Respondent

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

Counsel: Mr. Varuna Nanayakkara for the Petitioner.

Mr. Asanka Mendis, with Ms. Sandeepani Wijesooriya and Mr. Shehan Rajapakse for the Plaintiff-Respondent-Respondent.

Argued on: On 22.03.2024 both the learned counsel agreed to dispense oral hearing by way of written submissions.

Written submission tendered on: 08.04.2024 by the Claimant- Petitioner-Petitioner.

by the Plaintiff- Respondent.

Decided on: 02.05.2024

D. N. Samarakoon J.,

Ahangamage Malani, the claimant petitioner petitioner had made an application under section 241 of the Civil Procedure Code.

That section says,

> "241. In the event of any claim being preferred to, or objection offered against the seizure or sale of, any immovable or movable property which may have been seized in execution of a decree or under any order passed before decree, as not liable to be sold, the Fiscal or Deputy Fiscal shall, as soon as the same is preferred or offered, as the case may be, report the same to the court which passed such decree or order; and the court shall thereupon proceed in a summary manner to investigate such claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he were a party to the action;
>
> Provided always that when any such claim or objection is preferred or offered in the case of any property so seized outside the local limits of the jurisdiction of the court which passed the decree or order under which such seizure is made, such report shall be made to, and such investigation shall thereupon be held by, the court of the district or division within the local limits of which such seizure was made, and the proceedings on such report and investigation with the order thereon shall, at the expiry of the appealable time, if no appeal has been within that time taken therefrom, but if an appeal has been taken, immediately upon the receipt by such court of the judgment or order in appeal, be forwarded by such court to the court which passed the decree or order, and shall be and become part of the record in the action;
>
> Provided, further, that in every such case the court to which such report is made shall be nearer to the place of seizure than, and of co-ordinate jurisdiction with, the court which passed the decree or order."

The position of the petitioner, who now seeks to revise or restore is that properties in Pe1 were purchased by her husband and hence not owned by hrr son, the defendant in 9518/MS of the District Court of Horana.

The learned district judge has said in her order X7 that the petitioner has not resisted to the Fiscal.

But as the petitioner's written submissions have highlighted the following questions and answers, in which she explained at the cross examination as to why she did not object to the execution of the writ is acceptable.

ප්‍ර: දැන් මම ඇහුවේ මහත්මිය පිළිගන්නවාද නැද්ද කියලා?

උ: ඒ අවස්ථාවේ ඇවිල්ලා කියනකොට ඉතිං පොලිසියට විරුද්ධතාවයක් දක්වන්න බැහැනේ මට,

ප්‍ර: තමුන් එහෙම විරෝධතාවයක් ඉදිරිපත් කලේ නැහැ කියන කාරණය පිළිගන්නවාද

උ.: එවෙලේ ඇහුවම කිවුවා දැන් මොකුත් කරන්න බැහැ. මේක උසාවි නියෝගයක් කියලා කිවුවා.

ප්‍ර-දැන් මහත්මිය මම ඉතාමත්ම පැහැදිලිවම ඇහුවේ මේ වාර්තාව අනුව මම යෝජනාවක් කලේ මේ වාර්තාවේ පැහැදිලි කර තිබෙනවා මේ තහනමට ගන්නා අවස්ථාවේදී මේ නිවසේ සිටි සියලු අය විසින් ඒ තහනමට ගැනීමට විරුද්ධත්වයක් ප්‍රකාශ කලේ නැහැ කියලා. මහත්මිය ඒක පිළිගන්නවාද නැද්ද?

උ : විරුද්ධත්වයක් මට පොලිසියට දක්වන්න බැහැ. ඉතිං ඒකයි.

The manner in which writs of execution are implemented, on occasions are known. The words "den mokuth karanna behe. Meeka usawi niyogayak...." attributed to the Registrar/Fiscals is characteristic of them. The problem is not only with some of the officers but the lack of training they get in this regard. Having functioned in the JSC for sometime I know of instances where writs of

possession were executed well after 6.00 p.m. and families with small children were evicted from premises which were not **even** the subject matter of the case. In respect of one such property at Dematagoda I have testified against a Registrar even after leaving the JSC. It is also accepted that all officers are not corrupt.

Then the non production of receipts, it is unlikely that such things of furniture etc., will be retained after twenty years. But the photographs taken sometime ago marked as X9 and X10 show that the items were in the possession and ownership of the petitioner.

The plaintiff respondent has taken up certain preliminary objections, which will be addressed at this stage,

(i) Restitutio in integrum not available for an order in a claim inquiry:

In the article "**Two unusual appellate remedies: revision and restitutio in integrum in the law of Sri Lanka**" **Jerold Taitz**[1] 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…"
>
> "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

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

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. 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 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.**"

Therefore at the commencement too it was never a remedy available only in regard to judgments fraudulently obtained, etc. It is 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)**." **Inequitable situations created by law are not limited to that which the plaintiff respondent enumerates.**

Those who try to enumerate instances of availability of restitution do it due to ignorance of the law, with respect. What Alexander Hamilton said in Federalist No. 78 about the inclusion of purported bills of rights in constitutions will apply, mutatis mutandis.

(ii) No exceptional grounds:

Retitutio does not need them. The taken for granted law, that exceptional grounds are necessary for revision was addressed by Justice Upali de Z. Gunawardana in FERNANDO v. CEYLON BREWERYS LTD. (1997) 1998 (03) S. L. R. 61.

The extraordinary nature of the power of revision was discussed in **FERNANDO v. CEYLON BREWERYS LTD. (1997) 1998 (03) S. L. R. 61,** decided by Upali de Z. Gunewardane J., in Court of Appeal, where it was said having considered the dictum of Abrahams, CJ in Ameen v. Rasheed, that ' *I can see no reason why the petitioner should expect us to exercise our revisional powers in his favour when he might have appealed and I would allow the preliminary objection and dismiss the application with costs* ', that,

> '**But the validity of the above reason for denying the relief in revision can no longer be accepted with favour inasmuch as the Court of Appeal in consequence of the amendment of section 753 by Act No. 79 of 1988 is now clothed with greater amplitude of power in making orders and is not confined, as formerly, ie before the aforesaid amendment, to making the same order which it might have made had the matter been brought before it by way of appeal**. Since, prior to the amendment of section 753 the court could whilst acting in revision only make the same order as it could have made in the exercise of its appellate jurisdiction - the right of appeal and right in revision were justifiably treated as more or less, alternative remedies - available, more or less, in such a way that when one was accepted or made available the other had to be rejected or refused. **When, as was the case prior to the amendment of section 753 of the Civil Procedure Code, the reliefs available or the orders that could be made by the court, by way of appeal and revision, were conterminous or the same - it could legitimately and even logically be inquired or**

queried, as had been done by His Lordship, Abrahams, CJ, in the excerpt of the judgment cited above, as to why the revisionary process, which may be described as a privileged procedure, was invoked in preference to that of appeal,several advantages or benefits being attendant on the revisionary process which would not be available to one who seeks relief by way of an appeal (for instance one need not furnish security or keep to certain prescribed time-limits as in the case when one appeals against an order) - the recourse to revision was treated as an extraordinary procedure in contradistinction to the procedure of appeal which was considered to be the normal remedy, when the order in question was appealable - as is the order in this case before me'. Page 66

The amendment to which His Lordship Justice Gunewardane referred to was that to section 753 made by Amendment Act No. 79 of 1988. Justice Gunewardane observed,

'The essence of the difference between the two forms of section 753 ie in its original and amended form is this: as the said section stood originally, the Court of Appeal or the Supreme Court in the exercise of its revisionary powers could have only made the same order which it might have made had the case been brought before it by way of an appeal**whereas in the amended form the section empowers** the Court of Appeal, in the exercise of its powers of revision, **to make any order as the interests of justice may require'.** Pages 64,65

His Lordship concluded,

'**Thus it would be noticed that the amended section enables the court to be more flexible and less legalistic in its means and in approach in dealing with a matter for section 753 in its amended form seems to exalt not so much the rigour of the law but unalloyed justice, in the sense of good-sense and fairness**. So that the basis of the rationale for insistence on the requirement of special circumstances as a condition -

precedent to the exercise of revisionary powers had disappeared as a consequence of the amendment of section 753 of the Civil Procedure Code by virtue of which amendment the Court of Appeal is now freed from the duty or rather the necessity of making the same order as it would have made in appeal and is empowered to make any order as the interests of justice may require'. Page 65

In deciding FERNANDO v. CEYLON BREWERYS LTD., in 1997, Justice Gunewardane lamented that he has not been referred to any decision of superior courts on this question made after the aforesaid amendment.

The judgment in Rustom vs. Hapangama& Co. 1978-79-80 (1) S. L. R. 352, in which several other cases they also cite, had been referred to by Ismail J., was decided in 1980. The decision in Bank of Ceylon vs. Kaleel and others 2004 (1) S. L. R. 284, although decided in 2003, has not considered FERNANDO v. CEYLON BREWERYS LTD. It is so in several other cases such as Somindra vs. Surasena and others 2000 03 S.L.R. 159, Leslie Silva vs. Perera 2005 02 S.L.R. 184 and also in BengamuweDhammalokaThero vs. Dr. Cyril Anton Balasuriya S.C. Appeal No. 09/2002, S.C. spl. L.A. No. 242/2001 in favour of availability of revision too.

It appears to this court hence, the judgment in FERNANDO v. CEYLON BREWERYS LTD., is a strong persuasive authority in favour of availability of revision, especially as the decision is based on the very construction of the words in the amended legal provision enacted by the legislature in its wisdom.

Though the decision in The Ceylon Brewery Limited vs. Jax Fernando, Proprietor, Maradana Wine Stores, 2001 decided in the Supreme Court by Mark Fernando J., overruled the above decision of U. de Z. Gunewardane J., it was done only in respect of the decision in the latter that an application made under section 86(2) of Civil Procedure Code can be allowed even if that was made one day after the stipulated time of 14 days. The Supreme Court said, “I therefore set aside the judgment of the Court of Appeal on that point.” The decision pertaining to wider

powers given by amended section 753, the ability of the court to make a justifiable order in revision and hence revision not being only an additional remedy granted on mere discretion was hence not set aside.

The words such as "**to make any order as the interests of justice may require**" or words of similar import are not found in Article 138 or Article 139(1) of the Constitution.

But when a lower court has the authority to apply a legal remedy more broadly, the scope of the higher court cannot be narrower.

(iii) The petitioner guilty of laches:

The delay in coming to this court, as alleged by the plaintiff, for 05 months from 09.08.2023 to 10.01.2024 is not laches in the circumstances of this case. Courts must take a realistic approach taking into consideration (a) the circumstances under which the order was made (the petitioner was not a party to the case in which the writ was issued, etc.) (b) the practical difficulties in retaining Attorneys at Law and counsel (c) the current situation as far as economy is concerned in this country (The state itself declared its bankruptcy in April 2022 and presently taking loans from the IMF which demands wide taxation) and (d) last but not the least, that, in a vast majority of cases people come to court as the last resort.

(iv) Suppression and Misrepresentation:

Failure to attach certified copies and alleged suppression of the fact that her so, the defendant, resides in the same address.

The former will be considered under the next heading.

Even if the defendant, lives in the same address, there is nothing that prevents the items in question are in the ownership of petitioner's husband and herself. Hence it is, in any event, not a material fact to be stated. The permanent residence of the defendant must not be confused with the fact whether the defendant owns the items or not.

(v) Having failed to tender a full certified copy of the record in District Court of Nugegoda CL/48/18 the petitioner has violated Rules 3(1)(a) and 3(1)(b) of Court of Appeal Rules:

On the evening of Wednesday, August 29, 1906, at the Annual Meeting of the American Bar Association convened in the State Capitol in St. Paul, Minnesota, Roscoe Pound, then thirty-six years old and the dean of the law department of the University of Nebraska, read a paper entitled "**The Causes of Popular Dissatisfaction with the Administration of Justice**". That speech, as Dean Wigmore wrote some thirty years later, "**struck the spark that kindled the white flame of high endeavor, now spreading through the entire legal profession and radiating the spirit of resolute progress in the administration of justice**". The speech also launched Roscoe Pound on a national career[2]. [Emphasis added in this order]

In that speech Pound said,

> "If we except the Connecticut Practice Act of 1878, which shows English influence, American reform in procedure has stopped substantially where that commission left it. In England, beginning with 1826 and ending with 1874, five commissions have put forth nine reports upon this subject. As a consequence we have nothing in America to compare with the radical treatment of pleading in the English Judicature Act and the orders based thereon. **We still try the record, not the case**. We are still reversing judgments for nonjoinder and misjoinder. The English practice of joinder of parties against whom relief is claimed in the alternative, rendering judgment against any that the proof shows to be liable and

[2] https://www.jstor.org/stable/25725452

dismissing the rest, makes an American lawyer rub his eyes. We are still reversing judgments for variances. We still reverse them because the recovery is in excess of the prayer[3], though sustained by the evidence[4]". [Emphasis added in this order].

As this Court sees, based also on what Pound said 118 years ago, there is a "use" and "abuse" of paper; the use is when it records science, law, arts, history, etc., the accumulation of millennia of cumulative human knowledge; the abuse could be given in a one example, rather than in abstract terms, that is when a man or woman is physically present, breathing, talking and crying, some administrative officer ignoring that presence, due to the non availability of the exact certification required in a document, with the seal. The law is there to safeguard them in such situations. That has been described as "The Law's Finest Hour."

In a somewhat similar situation, though not exactly in respect of the Court of Appeal rules, Dr. A. R. B. Amerasinghe, former Judge of the Supreme Court said,

> "Judges, do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicalities, although parties on the road to justice may choose to act recklessly. **On the contrary, as the indispensable vehicle for the appointment of justice, civil procedural law has a protective character**. In its protective character, civil procedural law represents the orderly, regular and public functioning of the legal machinery and the operation of the due process of law. **In this sense the protective character of procedural law has the effect of safeguarding every person in his life, liberty, reputation, livelihood and property and ensuring that he does not suffer any deprivation except in**

[3] This was 97 years prior to Surangi Vs Rodrigo 2003 (3) Sri L.R 35, Amaratunga J., gave in the Court of Appeal as single judge.

[4] https://www.encyclopedia.com/law/encyclopedias-almanacs-transcripts-and-maps/causes-popular-dissatisfaction-administration-justice

accordance with the accepted rules of procedure." [Emphasis added in this order].

(vi) Restitutio in integrum not available when there is another remedy:

There is no such rule. What was said under (i) applies. A comprehensive analysis of local cases on restitutio in integrum for the last century or so mostly on a chronological order is done in my order or final character in C. A. RII 53 2024 dated 07.05.2024.

(vii) Alleged fraudulent conduct of the petitioner:

The allegation is that the claimant (petitioner) or her husband did not produce receipts at the inquiry before the District Court stating that since the items are about 30 years old, the receipts are not with him, but with the present petition some fraudulent receipts are attached.

The survey done for the plaintiff at page 07 of written submissions with a table comparing dates and serial numbers of receipts; and especially the serial number in the receipt dated 27.09.2007 being 000075 and that of the receipt dated 10.11.2010 being 000100 (the argument, that, for over 03 years that particular establishment sold only 24 items) is commendable. But it is not final to establish fraud. There can be other reasons why the number 000100 is there on the second receipt, such as, the books having been renewed. It is a matter that needs cross examination to prove.

Fraud if alleged must be established by cogent evidence.

It is well established in Fiona Trust v Privalov [2010] EWHC 3199 that “cogent evidence is required to justify a finding of fraud or other discreditable conduct.” This is because fraud and dishonesty are both very serious allegations. As such, clearer evidence is required to prove fraud or dishonesty than other torts i.e. negligence or innocence.

One of the reasons the petitioner is moving in restitutio in integrum is on the basis, that, receipts were evidence discovered after the inquiry on the basis of SLIC vs. Shanmugam and others (1995) 1 SLR 55.

In respect of some cases cited by the plaintiff on the question of restitutio in integrum, in Mapalatan vs Elayavan 41 NLR 115, SOERTSZ J. said, that, "The Supreme Court has no power to revise or review a case decided by itself".

But a decade later the Supreme Court did just that in Menchinahamy vs. Muniweera of 1951 (Dias S. P.J.,).

In **Mrs. Vivionne Gunawardena vs. Hector Perera, Officer in Charge, Police Station, Kollupitiya and others S.C. Application 20/1983** Ranasinghe J., despite being on the minority said,

> ""**The real basis upon which relief is given and the precise nature of the relief so given by the Supreme Court upon an application made to it for relief against an earlier Order made by the Supreme Court itself was very lucidly and very effectively expressed by Dias S.P.J. way back in the year 1951 in the case of Menchinahamy v. Muniweera, (40).** In that case, about six weeks after an appeal to the Supreme Court from an interlocutory decree in the District Court was dismissed by the Supreme Court, an application was made to the Supreme Court, on 23.3.1949, " for revision or in the alternative for restitutio-in-integrum" by the heirs of a party defendant, who had died before the interlocutory decree was entered but whose heirs had not been substituted in his place before the interlocutory decree was so entered. It was contended on behalf of the respondents: that there was no merit in the application: **that if the relief sought is granted then the Supreme Court would in effect be sitting in judgment on a two-Judge decision of the Supreme Court which had passed the Seal of the Court that the Supreme Court cannot interfere with the orders of the Supreme Court itself.** In rejecting these

objections, Dias S.P.J., placed this matter in its proper setting quite convincingly in the following words:

> "In giving relief to the petitioner we are not sitting in judgment either on the interlocutory decree or on the decree in appeal passed by this Court. **We are merely declaring that, so far as the petitioner is concerned, there has been a violation of the principles of natural justice** which makes it incumbent on this Court, despite technical objections to the contrary, to do justice. "

Although his lordship's opinion in **Mrs. Vivionne Gunawardena's** case was a dissenting one, the passage he quoted from the judgment of Dias S. P. J., was the majority opinion of the Supreme Court.

This shows that the purported authorities on restitutio in integrum are not final, sometimes contradicting; and that the best explanation, given in terms of the Roman and Roman Dutch laws is the one referred to by this Court under (i) above, referring to **Jerold Taitz.**

In a claim inquiry, the claimant does not have the burden of proof similar to the plaintiff in actio rei vindicatio.

The relevant provisions say,

"

Claimant to adduce evidence.

243. The claimant or objector must on such investigation adduce evidence **to show that at the date of the seizure he had some interest in, or was possessed of, the property seized**.

Discretion of court to release the property claimed.

244. If upon the said investigation the court is satisfied that, for the reason stated in the claim or objection **such property was not, when seized, in the possession of the judgment-debtor, or of some person in trust for him** or in the occupancy of a tenant or other person paying rent to him, or that being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the court

> shall release the property wholly, or to such extent as it thinks fit, from seizure and make such order as to payment of fees and charges already incurred by the Fiscal as it may deem fit.

This court is of the view, that, the petitioner has established the above.

Preliminary and other objections are overruled.

The order marked X7 is set aside.

It is declared that the items in question are not liable to be seized in execution. I know, that, there is no prayer for that. But it is the very basis of the claim. What Pound said, "....**We still reverse them because the recovery is in excess of the prayer**", referred to in (v) above is applicable; and therefore followed.

It is directed that they be released to the petitioner.

There is no order on costs.

Judge of the Court of Appeal