

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

In the matter of an Application for Restitutio-in-Integrum in terms of Article 138 of the Constitution.

Haljothi Daniel Silva (Deceased)

No. 738, Galle Road, Randombe, Ambalangoda.

**Plaintiff**

Haljothi Pamoda Vasanthi Silva

No. 738, Galle Road, Randombe, Ambalangoda.

**Substituted Plaintiff**

**Case No. C. A. RII 94/2014**

**D. C. Balapitiya Case No. 3091/P**

**Vs.**

1. G. P. De Silva & Sons Spice (Private) Ltd  
No. 123, Main Street, Ambalangoda.
2. Densil Wijeratne
3. Dudly Wijeratne  
Both of No. 632/12, Nawala Road, Rajagiriya.
4. Sita Karunaratne,  
C/O Lakshman Karunaratne, Attorney-at-Law,  
Kandy.
5. Deelin  
Senanayake Road, Dehiwala.
6. Lilani
7. Guneth Silva
8. Jayantha Silva
9. Shantha Silva  
All of Alfred House Garden, Colombo 02.
10. Chanaka Silva
11. Suramya Silva  
Both of Dharmapala Road, Rajagiriya.
12. Manori Muththetuwegama
13. Nalina Wishwajith
14. Sherin  
All of Duplication Road, Colombo.
15. Manik Wolwin
16. Ajith Wolwin  
Both of Charles Circus, Colombo.
17. Perl  
Borella.
18. Dewtron Silva  
Deel Place, Colombo.
19. Clarybel  
Bullers Lane, Colombo.

20. Magina Mirando Tilly
21. Magina Mirando Dany (Deceased)  
Both of Randombe, Ambalangoda.
- 21A. Indumathi Mirando  
No. 48, 4<sup>th</sup> Lane, Ratmalana.
22. Magina Mirando Liti (Deceased)  
Randombe, Ambalangoda.
- 22A. Maheswari Amarasinghe  
No. 48, 4<sup>th</sup> Lane, Ratmalana.
23. Kakulahandi Dulinona
24. Sisil Mirando  
Both of Randombe, Ambalangoda.
25. Cyril Mirando  
Bopegoda, Ratgama.
26. Magina Mirando Sasha,  
"Ancil", Magalegoda, Veyangoda.
27. Rathgamage Sarath Wanshanatha (Deceased)
- 27A. P Nandawathi
- 27B. Sumith Wanshanatha
- 27C. Viyani Deepthika
- 27D. Udani Kanchana  
All of Welikanda, Ahungalla.
28. Leelawathi
29. Sobanahandi Justin
30. Warnakula Premadasa  
All of Randombe, Ambalangoda.
31. Weeraddana Ruban Sumanasena de Soyza  
No. 2, Kalinga Place, Jawatte.
32. Disethuwahandi Lakshman (Deceased)
- 32A. Kalumith Garlinnona  
Olagama Road, Randombe, Ambalangoda.
33. Edirimuni Nandani de Silva  
No. 5, Olagama Road, Randombe,  
Ambalangoda.
34. Rolan Wijeratne  
Dadalla, Galle.
35. W. C. L De Silva, Attorney-at-Law  
Randombe, Ambalangoda.
36. W. Rukmani de Silva  
E Flats, Veluwanapura, Wellawatta.
37. W. Sujith De Silva
38. Ashoka de Silva
39. W. Chamal Silva

40. W. Saman Silva  
All of Galle Road, Ahungalla.
41. W. Tudor de Silva  
Madampe, Ambalangoda.
42. Ranjan de Silva  
Dadella, Galle.
43. Chitra Udeni de Silva  
No. 83A, Gemunu Mawatha,  
Panapitiya, Waskaduwa.
44. Minijothi Rohana de Silva
45. Minijothi Upathissa de Silva
46. Minijothi Yowanee de Silva
47. Minijothi Chathura Tissa  
All of Randombe, Ambalangoda.
48. R. Gunawathi de Soysa  
Olagama Road, Randombe, Ambalangoda.
49. K. M. J. Douglas  
No. 742, Galle Road,  
Randombe, Ambalangoda.
50. Laddusinghe Laitin
51. Laddusinghe Gunadasa
52. Laddusinghe Premadasa  
All of Olagama Road, Randombe,  
Ambalangoda.
53. Laddusinghe Vineetha de Soysa  
Devagoda, Madampe, Ambalangoda.
54. Gonapeenuwala Charlottee  
Galle Road, Randombe, Ambalangoda.
55. Wijesekara Rajakaruna Mudiyanseelage  
Mareena Elizabeth Gunathilake  
No. 178/4, Ganemulla Road, Kandana.
56. H. Dharmasiri de Silva
57. H. Weerasiri de Silva
58. H. Lionel Yasasiri de Silva  
All of Ariyawilasa Road, Horana.
59. Perumadura Athulasena
60. Perumadura Nandawathi
61. Thirimadura Nimalawathi  
All of A. P. De Zoysa Mawatha, Randombe,  
Ambalangoda.
62. Nandana Edirisinghe  
Ranapandeniya, Rathgama.

63. Dinayadura Kumara de Silva  
No. 750, Galle Road,  
Randombe, Ambalangoda.
64. L. H. Suseema Jayaseeli
65. L. H. Seelawathi
66. L. H. Piyaseeli
67. Garumuni Karunawathi de Silva  
Kurunduwaththa Road, Wathugedara,  
Andadola.
68. Ranmuni Leelawathi de Soysa
69. Garumuni Edward Lal de Silva
70. Garumuni Raveendra Nuwan de Silva
71. Garumuni Anura Ushantha de Silva
72. Garumuni Nihal Ananda de Silva
73. Garumuni Lalani Gunasekara  
All of Randombe, Ambalangoda.

**Defendants**

**AND NOW BETWEEN**

G. P. De Silva & Sons Spice (Private) Ltd  
No. 123, Main Street, Ambalangoda.

**1<sup>st</sup> Defendant-Petitioner**

**Vs.**

Haljothi Pamoda Vasanthi Silva  
No. 738, Galle Road, Randombe, Ambalangoda.

**Substituted Plaintiff-Respondent**

2. Densil Wijeratne
3. Dudly Wijeratne  
Both of No. 632/12, Nawala Road, Rajagiriya.
4. Sita Karunaratne,  
C/O Lakshman Karunaratne, Attorney-at-Law,  
Kandy.
5. Deelin  
Senanayake Road, Dehiwala.
6. Lilani
7. Guneth Silva
8. Jayantha Silva
9. Shantha Silva  
All of Alfred House Garden, Colombo 02.
10. Chanaka Silva
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12. Manori Muththetuwegama
13. Nalina Wishwajith
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All of Duplication Road, Colombo.
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- 27C. Viyani Deepthika
- 27D. Udani Kanchana  
All of Welikanda, Ahungalla.
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All of Randombe, Ambalangoda.
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E Flats, Veluwanapura, Wellawatta.
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41. W. Tudor de Silva  
Madampe, Ambalangoda.
42. Ranjan de Silva  
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No. 83A, Gemunu Mawatha,  
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Devagoda, Madampe, Ambalangoda.
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Galle Road, Ramdombe, Ambalangoda.

55. Wijesekara Rajakaruna Mudiyansele  
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71. Garumuni Anura Ushantha de Silva
72. Garumuni Nihal Ananda de Silva
73. Garumuni Lalani Gunasekara  
All of Randombe, Ambalangoda.

**Defendant-Respondents**

**Before:** Janak De Silva J.

**Counsel:**

H. Withanaachchi for the 1<sup>st</sup> Defendant-Petitioner

Sanjaya Kodituwakku for the Substituted Plaintiff-Respondent

**Written Submissions tendered on:**

1<sup>st</sup> Defendant-Petitioner on 04.04.2018

Substituted Plaintiff-Respondent on 17.10.2017

**Decided on:** 20.01.2020

**Janak De Silva J.**

The 1<sup>st</sup> Defendant-Petitioner Company (Petitioner) filed the petition dated 24.03.2014 seeking inter alia to set aside the judgment of the learned Additional District Judge of Balapitiya dated 28.10.2009 in D.C. Balapitiya Case No. P/3091 and the Order of the learned High Court Judges of the High Court of Civil Appellate of the Southern Province holden in Galle dated 30.05.2012 in SP/HCCA/GA/RA/29/2011.

The Substituted Plaintiff-Respondent (Respondent) filed his Statement of Objections on 29.09.2014 taking up several preliminary objections and prayed for the dismissal of the application of the Petitioner.

The Petitioner filed its counter objections on 07.05.2015.

**Facts of the Case**

The Original Plaintiff instituted an action in the District Court of Balapitiya Case No. P/3091 and sought to partition the land called "Galpottewatta" situated at Randombe containing in extent A.1-R.2-P.0 morefully described in paragraph 2 of the Amended Plaint dated 02.03.1999.

On 15.06.2007, the Substituted Plaintiff was allowed to produce a consolidated pedigree. The consolidated pedigree was filed on 30.10.2007.

The trial was held inter partes and the Substituted Plaintiff gave evidence. However, she was not cross-examined by any of the Defendants. All the Defendants accepted the evidence given by the Substituted Plaintiff and none of the documents marked by her were objected to. The Judgement was delivered on 28.10.2009.

The application made by the Substituted Plaintiff to correct the clerical and arithmetical mistakes contained in the said Judgment was rejected twice by the District Court of Balapitiya. Upon the revision application preferred by the Substituted Plaintiff, the learned High Court Judges of the High Court of Civil Appellate of the Southern Province holden in Galle amended and/or modified the shares allotted to the parties by the said judgment of the learned Additional District Judge of Balapitiya and an interlocutory decree was entered in conformity with the said amendment.



### **Undue Delay and/or Laches of the Petitioner**

One of the preliminary objections taken up by the Respondent is that the Petitioner has invoked the jurisdiction of this Court by way of restitutio in integrum after 4½ years from the Judgment of the learned Additional District Judge and 2 years after the Order of the learned High Court Judges. As pointed out by the Respondent, the Judgment of the learned Additional District Judge was pronounced on 28.10.2009 whereas the petition of the Petitioner was filed on 24.03.2014. Also, the Order of the learned High Court Judges was delivered on 30.05.2012.

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. Nadarajah Chettiar* (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 Petitioner has neither in its petition nor in its counter objections explained the reasons for the undue delay and/or laches in invoking the jurisdiction of this Court by way of restitutio in integrum.

### **Availability of an Alternative Remedy**

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.”*

The judgement of the learned Additional District Judge has been amended/modified by the Order of the learned High Court Judges of the High Court of Civil Appellate of the Southern Province holden in Galle dated 30.05.2012 in SP/HCCA/GA/RA/29/2011. If the Petitioner was aggrieved by the said Order, it was open to the Petitioner to invoke the appellate jurisdiction of the Supreme Court.

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 is available, the remedy 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)].

As I observed earlier, if aggrieved by the Order of the learned High Court Judges, it was open for the Petitioner to seek relief in the Supreme Court which was not done.

#### **Exceptional Circumstances**

The remedy by way of restitutio in integrum is an extraordinary remedy and is given only under very exceptional circumstances and the power of the Court should be most cautiously and sparingly exercised [*Perera et al v. Wijewickreme* (supra), *Menchinahamy v. Muniweera et al* (supra), *Sri Lanka Insurance Corporation Ltd v. Shanmugam and Another* (supra)].

In *Sri Lanka Insurance Corporation Ltd v. Shanmugam and Another* (supra), Ranaraja, J. observed (at page 62) -

*"Fraud is defined by Labeo as any craft, deceit or contrivance employed with a view to circumvent, deceive or ensnare another person. (Lee – Introduction to Roman Dutch Law 5th Ed. p225). Learned President's Counsel endeavoured to convince this Court that the Respondents had deceived the Original Court into giving an ex parte judgment on the suppression of evidence and misrepresentations referred to. Clearly, the grounds relied on by the Petitioner to prove fraud do not fall within Labeo's definition of fraud.*

*The principle on which this Court has to act is not whether the Court that gave judgment was tricked into it, but whether one party to action was deceived by the conduct of the opposing party. Clearly it was not the case in this instance. It was entirely due to the lack of due diligence on the part of the Petitioner that it took no steps to file the Answer. Thereafter, it failed to file the necessary papers within the stipulated period to have the decree set aside. Had the Petitioner filed its answer at the proper time, it could have taken up all the defenses which it claims would have deprived the Respondents of the Judgment obtained in their favour. Thus, it cannot now complain of a denial of justice. It has failed to avail itself of the opportunity offered to present its case, not once but twice. When the Court or the provisions of any law requires a party to adhere to specific mandatory time limits, they should be complied with if due administration of justice is to be ensured. Those who choose to ignore the time limits imposed, do so at their peril. They cannot be heard*

to complain of injustice later. ***The remedy of restitutio in integrum is not available to a party that has been guilty of a blatant lack of due diligence.***" [Emphasis added]

During the trial before the learned Additional District Judge, not only an authorized agent of the Petitioner was present but the Petitioner was also represented by a Counsel. However, the Petitioner did not object to and dispute any of the evidence, oral or documentary, led by the Substituted Plaintiff (i. e. the Respondent). Neither did the Petitioner cross-examine her during the trial even though the opportunity was given.

Where a party by its own conduct has acquiesced in or approbated the defective proceedings, the Court will not exercise its discretion to set aside the impugned proceedings. For it is not the function of the Court in the exercise of its jurisdiction in restitution to relieve the parties of the consequences of their own folly, negligence or laches [*Don Lewis v. Dissanayake* (70 N.L.R. 8)].

As I observed earlier, the Petitioner was represented by a Counsel throughout the entire process. The Petitioner consented to the consolidated pedigree and didn't dispute the evidence led by the Substituted Plaintiff. If the conduct of the Substituted Plaintiff was contrary to law and fraudulent, the Petitioner had ample opportunity to bring it to the notice of the Court. However, it was not done. Therefore, I hold that that the Petitioner acquiesced in or approbated the alleged defective proceedings. Hence there are no exceptional circumstances.

For all the foregoing reasons, I hold that the Petitioner is 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 Petitioner is dismissed in limine with costs.

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Judge of the Court of Appeal