SRI LANKA INSURANCE CORPORATION LTD.
V.
SHANMUGAM AND ANOTHER

COURT OF APPEAL.
S. N. SILVA, J. (P/CA) AND
RANARAJA, J.
C.A. 532/94
D.C. COLOMBO 13579/MR
NOVEMBER 29, 1994.

Restitutio in integrum – Requirements – Procedure – Definition of fraud – Article 138(1) of the Constitution – Court of Appeal (Appellate Procedure) Rules 1990.

The Respondents sued the petitioner (Sri Lanka Insurance Corporation Ltd.) claiming Rs. 5 million with interest on three causes of action arising from liability on three separate insurance policies. The petitioner appeared in court on summons, filed proxy and being allowed time to file answer, failed to file answer on the final date fixed for answer. An application for a further date for answer was refused and the case was fixed for *ex parte* trial, after *ex parte* trial decree was entered and on being served with the copy of the decree the petitioner filed petition and affidavit and sought to have the *ex parte* decree set aside. After inquiry the District Judge rejected the application to set aside the decree.

In the meantime the 1st respondent moved for writ for execution of decree. Of consent the application for execution was stayed until after disposal of the application to vacate decree. In this situation the petitioner filed application for *restitutio* in *integrum*.

Held:

Article 138(1) of the Constitution has vested in the Court of Appeal sole and exclusive jurisdiction to grant relief by way of *restitutio* in *integrum*. The power of the Court to grant such relief is a matter of grace and descretion.

Restitution reinstates a party to his original legal condition which he has been deprived of by the operation of law. It is an extraordinary remedy and will be granted under exceptional circumstances. The remedy can be availed of only by one who is actually a party to the legal proceeding. He cannot claim damages but he should have suffered damages. A party seeking restitution must act with the utmost promptitude. The court will not relieve parties of the consequences of their own folly, negligence or laches.

The procedure for making an application for restitution has been laid down in the Court of Appeal (Appellate Procedure) Rules of 1990. The application must be by petition and affidavit and accompanied by originals or certified copies of the relevant documents and proceedings of the original court. The application once registered is listed for support within two weeks. Where the court orders notice to issue, dates within stipulated periods are given for tendering of notices for service on the respondents, their objections and counter affidavits of the petitioner if any. Thereafter the matter is listed for hearing.

Relief by way of *restitutio* in *integrum* in respect of judgments of original courts may be sought:

(a) where judgments have been obtained by fraud by the production of false evidence, non-disclosure of material facts or by force; or

(b) where fresh evidence has cropped up since judgments, which was unknown earlier to the parties relying on it or which no diligence could have helped to disclose earlier, or

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

The remedy could therefore be availed of where an attorney-at-law has by mistake consented to judgment contrary to express instructions of his client, for in such cases it could be said that there was in reality no consent but not where the attorney-at-law has been given a general authority to settle or compromise a case.

The petitioner in the instant case sought *restitutio* in *integrum* on the ground that the respondents had obtained judgment by fraud and deceit. The petitioner had paid of 4,000,436/- and an appeal for further payment on which the petitioner took no action the case was lodged. The receipts for payments endorsed a 'in full and final settlement' were in practice not treated as such. Non-disclosure that the 2nd respondent had left the partnership was inconsequential because it was loss caused by fire to Ratgama Stores that gave rise to the suit.

Fraud means "any craft, deceit or contrivance employed with a view to circumvent, deceive or ensnare another person." The facts did not disclose fraud in this.

The principle on which the Court has to act is not whether the Court that gave judgment was tricked into it, but whether one party to the action was deceived by the conduct of the opposing party. It was entirely due to lack of due diligence that petitioner failed to file answer.

Restitution is granted only if no other remedy is available to the party aggrieved. The petitioner has filed an application in revision and also a final appeal.

Cases referred to:

1. *Abeysekera v. Haramanis Appu* 14 NLR 353.
2. *Phipps v. Bracegyrdle* 35 NLR 302.
3. *Dember v. Abdul Hafeel* 49 NLR 62.
4. *Usoof v. Nadarajah Chettiar,* 61, NLR 173.
5. *Perera v. Wijewickrama* 15 NLR 411.
6. *Menchinahamy v. Munaweera* 52 NLR 409.
7. *Mapalathan v. Elayavan* 41 NLR 115.
8. *Babun Appu v. Simon Appu* 11 NLR 115.
9. *Sinnethamby v. Nallathamby* 7 NLR 139.
10. *Wickramasooriya v. Abeywardena* 15 NLR 472
11. *Don Lewis v. Dissanayake* 70 NLR 8.
12. *Buyzer v. Eckert* 13 NLR 371.
13. *Perera v. Ekanaike* 3 NLR 21.
14. *Gunaratne v. Dingiri Banda* 4 NLR 249.
15. *Jayasuriya v. Kotalawela* 23 NLR 511.
16. *Perera v. Don Simon* 62 NLR 118.
17. *Narayan Chetty v. Azeez* 23 NLR 477.
18. *Silva v. Fonseka* 23 NLR 447.

APPLICATION for *restitutio* in *integrum* in respect of order and judgment of the District Court of Colombo.

Faiz Mustapha, P.C. with *H. Withanachchi* for defendant-petitioner.
Romesh de Silva, P.C. with *G. Goonewardena* for plaintiffs-respondents.

Cur. adv. vult.

January 10, 1995.
RANARAJA, J.

The plaintiffs-respondents (respondents) instituted this action against the defendant-petitioner (petitioner) claiming a sum of Rs. 5,000,000/- with interest thereon on three causes of action arising from liability on three separate insurance policies. The petitioner appeared in court on summons, filed its proxy and moved for a date to file answer. On the final date for answer, namely 21.1.94, the petitioner moved for further time to do so. This application was

refused by court. The matter was fixed for *ex parte* trial and decree was entered upon judgment entered after trial. A copy of the decree was served on the petitioner on 28.3.94. Petition and affidavit seeking to set aside the *ex parte* decree were filed by the petitioner on 2.5.94. The learned District Judge after inquiry rejected the petitioner's application as it had failed to comply with the provisions of section 86(2) of the Civil Procedure Code.

In the meantime, an application by the 1st respondent for writ of execution of the decree was allowed on 3.4.94. However, it was stayed of consent of parties till the order on the application for the vacation of the *ex parte* decree was delivered. The petitioner has now sought relief from this court by way of *restitutio* in *integrum*, which in substance is for an order remitting the case, after setting aside the orders of 3.5.94 and 24.6.94 for a fresh *inter partes* trial by affording the petitioner an opportunity to file answer.

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) 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). A judgment, according to Grotius, had the power of a final and definite sentence when it does not admit of appeal or reformation or when the time for such appeal

or reformation had passed, unless it is altered by revision. A judgment may however be rescinded by *restitutio* in *integrum,* so as to lose all effect of *res judicata* and the cause is heard *de novo. Dember v. Abdul Hafeel* [3].

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, 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 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. The power of this court to grant such relief is a matter of grace and discretion. *Usoof v. Nandarajah Chettiar* [4]. The power of restitution differs from revisionary power of this court in that the latter is exercised where the legality or propriety of any order or proceedings of a lower court is questioned. Restitution reinstates a party to his original legal condition which he has been deprived of by the operation of law. Thus it follows, the remedy can be availed of only by one who is actually a party to the legal proceeding in respect of which restitution is desired. (*Perera v. Wijewickrema* [5], *Menchinahamy v. Munaweera* [6]). A party seeking restitution must also show that he has suffered actual damage, (*Phipps-supra*), although damages cannot be claimed in an application for restitution. (*Dember-supra*). *Restitutio* in *integrum* being an extraordinary remedy, it is not to be given for the mere asking or where there is some other remedy available, *Mapalathan v. Elayavan* [7]. It is a remedy which is granted under exceptional circumstances and the power of court should be most cautiously and sparingly exercised, (*Perera-supra*). A party seeking restitution must act with utmost promptitude, *Babun Appu v. Simon Appu* [8], (*Menchinahamy – supra*), and before a change has taken place in the position of the parties, (*Sinnethamby v. Nallathamby*) [9]. Where there has been negligence on the part of the applicant seeking relief or his attorney-at-law, restitution will not be granted, (*Wickremasooriya v. Abeywardene*) [10]. The party invoking the extraordinary powers of this court must display honesty and frankness. Thus where a party by its own conduct has acquiesced in or approbated the defective proceedings, court will not exercise its discretion to set aside the impugned proceedings. For it is not the function of 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* [11]).

The procedure in making an application for restitution has been laid down in the Court of Appeal (Appellate Procedure) Rules of 1990. Every such application has to be by way of petition and affidavit in support. The application must be accompanied by originals or certified copies of the relevant documents and proceedings in the original court. The application once registered is listed for support within two weeks. Where court orders notice to issue, dates within the stipulated periods are given for tendering of notices for service on the respondents, their objections and counter affidavits of the petitioner if any. Thereafter the matter is fixed for hearing.

The remedy of *restitutio* in *integrum* is in effect the restoration of the applicant to his original legal condition. The Court of Appeal, in the exercise of its powers of restitution may achieve this end by reversing, modifying any order, judgment or decree of the lower court or by giving directions or ordering a trial *de novo* as the justice of the case may require, (Article 139(1) & (2) of the Constitution). An order granting or refusing an application for *restitutio* in *integrum* is not a final judgment of this court from which leave to appeal as of right can be claimed, (*Usoof-supra*).

Superior courts of this country have held that relief by way of *restitutio* in *integrum* in respect of judgments of original courts may be sought where (a) the judgments have been obtained by fraud, (*Abeysekera-supra*), by the production of false evidence, (*Buyzer v. Eckert*) [12], or non-disclosure of material facts, (*Perera v. Ekanaike*) [13], or where judgment has been obtained by force or fraud, (*Gunaratne v. Dingiri Banda* [14], *Jayasuriya v. Kotelawela)* [15]. (b) Where fresh evidence has cropped up since judgment which was unknown earlier to the parties relying on it, (*Sinnethamby-supra*), and fresh evidence which no reasonable diligence could have helped to disclose earlier, (*Mapalathan-supra*). (c) Where judgments have been pronounced by mistake and decrees entered thereon, (*Sinnethamby-supra*), provided of course that it is an error which connotes a reasonable or excusable error, (*Perera v. Don Simon*) [16]. The remedy could

therefore be availed of where an Attorney-at-Law has by mistake consented to judgment contrary to express instructions of his client, for in such cases it could be said that there was in reality no consent, (*Phipps-supra*, *Narayan Chetty v. Azeez*) [17], but not where the Attorney-at-Law has been given a general authority to settle or compromise a case, (*Silva v. Fonseka* [18]).

The petitioner seeks relief by way of *restitutio* in *integrum* on the ground that the respondents have obtained judgment by fraud and deceit. The plaint filed by the respondents discloses the payment by the petitioner of an aggregate of Rs. 4,000,436/- on two occasions, on the three insurance policies on which the claims were made. The respondents have made an appeal for further compensation thereon from the petitioner. The present action was based on the inaction on the part of the petitioner in considering that appeal. The petitioner submits that by letter X3A the respondents have accepted the aforesaid sum "in full and final settlement" of all claims on the policies, but had suppressed this fact from court. The respondents deny having signed X3A. A comparison of the signature on X3A and the other documents marked X3B and X3C does in fact show a difference in the signature on the two sets of documents. However what is of relevance is that both X3B and X3C also carry the words "in full and final settlement" of all claims. Despite which, the petitioner had considered the first appeal of the respondents after payment on X3B and paid them a further sum of Rs. 2,483,777/- on X3C. Hence, the petitioner cannot be serious in placing such weight on the words "in full and final settlement" in X3A, to prove fraud and deceit on the part of the respondents.

It is submitted that the 1st respondent has suppressed the fact that the business of Ratgama Stores, which was carried on by both respondents in partnership at an earlier date, had ceased to exist, by the 2nd respondent giving up all connections with it. It is surprising that the 2nd respondent has cooperated with the petitioner by swearing the affidavit X12A to that effect and also handing over letter X12B to him. Quite apart from the propriety of the conduct of both the petitioner and the 2nd respondent in this exercise, the insured on policy No. MF 106767 (P1) is the 1st respondent, trading in the name of Ratgama Stores. The insured on policy No. MF 82753 (P3), is

Ratgama Stores. The third policy has not been produced by either party. However all three claims are in respect of damage by fire to the stocks of Ratgama Stores. Thus, even if the 2nd respondent has ceased to be a partner of the business, the 1st respondent could have pursued the claim as sole proprietor.

It is further submitted that the 1st respondent has falsely represented that letter P2 dated 1.11.91 was written by the "defendant" acknowledging the further appeal by the respondents for compensation, when in fact the petitioner, Sri Lanka Insurance Corporation Ltd., came into existence subsequently. P2 has been written by the Insurance Corporation of Sri Lanka, the predecessor of the petitioner. Whether the liabilities of the latter were taken over by the petitioner was a question of law, which should have been argued at the trial. The description of the writer of P2 as the "defendant" is therefore a mere technicality and not a deceitful attempt by the respondents to mislead court.

"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 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 defences 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 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.

There is another reason why this application should be refused. Restitution is granted only if no other remedy is available to the party aggrieved. The petitioner has made two applications in revision and also filed a final appeal against the orders complained of. Further, these orders have now been superceded by a further order of the original court dated 13.7.94, by which the petitioner's application to set aside the order issuing writ for the execution of the decree was refused. For the reasons stated, we are of the view that this application is without merit. It is accordingly dismissed with costs.

S. N. SILVA, J. – I agree.

Application for restitutio dismissed.