

**SAHEEDA UMMA AND ANOTHER**  
**v.**  
**HANIFFA AND OTHERS**

COURT OF APPEAL  
DE SILVA, J.,  
WEERASURIYA, J.  
C.A. NO. 212/97  
D.C. PUTTALAM NO. 109/L  
NOVEMBER 4, 1998  
JANUARY 21, 1999

*Civil Procedure Code s. 28, s. 408 – Settlement – Fraudulent Proxy – Revisionary jurisdiction – Is the Settlement void – Restitutio-in-integrum – Prescription Ordinance No. 22 of 1871 – S. 11.*

The plaintiff-petitioners and the 1st plaintiff-respondent instituted action seeking a declaration of title to the land in question and further sought an order of ejection of the defendants.

The three plaintiffs had a joint proxy given in favour of Mr. Ibbu, Attorney-at-law.

The 1st plaintiff-petitioner had subscribed to the said proxy by placing her thumb impression.

The plaintiff's Attorney Mr. Ibbu died, and Court failed to issue notice on the parties in terms of s. 28 CPC. It appears that after the death of Mr. Ibbu a new proxy dated 1.7.91 had been filed with a signature said to be that of the 1st plaintiff petitioner. A settlement had been effected between the parties on 22.12.1993. A commission had been issued in terms of the settlement and the Commissioner had returned the commission stating that 1st plaintiff-petitioner had taken objection to his surveying and allotting lots on the land. However, Court made order directing that the parties to the action be allotted their lots in accordance with the Commissioner's Plan.

An Application by the plaintiff-petitioner to the District Court to set aside the said purported settlement was rejected.

**Held:**

1. It is clear that some interested party has placed her signature on the proxy purporting to be that of the 2nd plaintiff-petitioner. She had denied signing the proxy as she is an illiterate person.
2. The settlement had been entered into by tendering a fraudulent proxy of the 2nd plaintiff-petitioner. Therefore, the Court has no jurisdiction to permit a settlement and as such there is a total lack of jurisdiction.
3. Under such circumstances, the settlement is void and can be challenged both in the very Court and in the proceedings in which it was had, and also collaterally.
4. Application for *restitutio in integrum* is an action within s. 11 of the Prescription Ordinance – it is prescribed within 3 years.

*Per de Silva, J.*

"Powers of Revision of this Court are wide enough to embrace a case of this nature. Even though the plaintiff-petitioners have not invoked the revisionary jurisdiction we propose to exercise the Revisionary powers in favour of the 2nd plaintiff-petitioner."

**APPLICATION** by way of *Restitutio in integrum*.

**Cases referred to:**

1. *Punchi Banda v. Punchi Banda* – 42 NLR 382.
2. *Ukku Amma v. Paramanathan* – 63 NLR 306.
3. *Babun Appu v. Simon Appu* – 11 NLR 115.
4. *Wickremasooriya v. Abeywardana* – 15 NLR 472.
5. *Silindu v. Akura* – 10 NLR 193.

*S. R. Crosette Thambiah* for 2nd plaintiff-respondent.

*Malaka Herath* for 3rd plaintiff-respondent.

*Cur. adv. vult.*

March 11, 1999.

**DE SILVA, J.**

The plaintiff-petitioners in this application are seeking to set aside the settlement purported to have been entered into by the parties in this case, on 22.10.1993 and relief by way of *restitutio in integrum*.

The plaintiff-petitioners and the 1st plaintiff-respondent (Sinnathamby Meera Salibu) instituted action by plaint dated 29. 12. 1975, against the defendant-respondents seeking –

- (a) a declaration that they are the owners of the land described in the schedule to the plaint;
- (b) for an order of ejectment of the defendants therefrom and damages.

The plaint seemed to have been amended twice and the second amended plaint was dated 18. 06. 1982. The answer too had been amended by the defendant-respondents accordingly and amended answer was dated 06. 08. 1982.

At the time of the institution of the action, a joint proxy had been filed by one Mr. Ibunu, Attorney-at-law, on behalf of the three plaintiffs in the case. The 1st plaintiff-petitioner (Sinnathamby Saheeda Umma) had subscribed to the said proxy by placing her thumb impression.

A perusal of the journal entries from 18. 07. 1985 to 27. 02. 1990 indicate that the trial in the case had commenced and a part of evidence had been led. However, in May, 1990, the plaintiff's Attorney Mr. Ibunu had died and Court had failed to issue notice on the parties in terms of section 28 of the Civil Procedure Code. The 1st plaintiff-petitioner Sinnathamby Saheeda Umma had conceded that after the death of Mr. Ibunu she did not take any interest in the case.

It would appear that after the death of Mr. Ibburu, a new proxy dated 01. 07. 91 had been filed with a signature said to be that of the 1st plaintiff-petitioner Sinnathambay Saheeda Umma. She had denied signing such a document as she is an illiterate person and can only place her thumb impression on any document which requires a signature. In proof of this fact, the original proxy marked (P1) and statement made by her husband Pitchchi Musthapha to the Mundal Police were produced by the plaintiff-petitioners.

With the filing of the purported new proxy on 01. 07. 1991, further trial was fixed for the 06. 09. 1991. Thereafter, trial in the case had been postponed on several occasions for various reasons and on 22. 12. 1993 a settlement had been effected between the parties. A commission had also been issued on Mr. Watson Perera, licensed Surveyor, in terms of the said settlement.

The Commissioner returned the commission stating that 1st plaintiff-petitioner Saheeda Umma had taken objection to his surveying and allotting lots on the land. Nevertheless, on a subsequent direction, the Commissioner tendered his plan bearing No. 1215 whereupon, Court made order on 25. 11. 1994 directing that the parties to the action be allotted their lots in accordance with the said plan and report of the Commissioner, and decree to be entered accordingly.

The position of the 1st plaintiff-petitioner Saheeda Umma is that she came to know about the purported settlement only on 12. 12. 94 when the defendant-respondents fixed post for the purpose of fencing the land. She made an application to the District Court of Puttalam to set aside the said purported settlement. After an inquiry the learned Additional District Judge rejected her application by order dated 09. 07. 1996. Thereafter, the 2nd and 3rd plaintiff-petitioners sought relief from this Court by way of *restitutio in integrum*.

At the hearing of this application, counsel for the 2nd plaintiff-petitioner contended that Saheeda Umma was never a party to the

said settlement or any of the proceedings after the death of the original registered Attorney, namely Mr. Ibbun, due to the fact that she was never represented by any Attorney-at-law appointed by way of a proper proxy.

In view of this, the submission of the counsel was that the settlement arrived at on 22. 10. 1993, was not in conformity with the requirements of section 408 of the Civil Procedure Code and is devoid of any consequences.

Section 408 of the Civil Procedure Code provides that only in the event that all parties to a settlement are present before Court either by person or by representation by a recognized agent, a settlement can be lawfully entered into. It was held in *Punchi Banda v. Punchi Banda*<sup>(1)</sup> that when settlements, adjustments, admissions, etc., are reached or made their nature should be explained clearly to the parties and their signatures or thumb impressions should be obtained. In the case of *Ukku Amma v. Paramanathan*<sup>(2)</sup> Court came to the conclusion that not only where the provisions of sections 408 and 91 of the Civil Procedure Code as to notification to Court by motion not complied with, but there was nothing on record to show at whose instance the settlement was arrived at that the decree entered in terms of the settlement should be vacated.

Counsel for the defendant-respondents submitted that relief by way of *restitutio in integrum* is not available to the 2nd and 3rd plaintiff-petitioners as the settlement complained of was entered on 22. 10. 1993 that is more than four years before the invocation of the jurisdiction of this Court. He relied on the decision of *Babun Appu v. Simon Appu*<sup>(3)</sup> where it has been held that a party seeking restitution must act with utmost promptitude.

Counsel also contended that as Saheeda Umma has admitted that she failed to take any interest in the case after Attorney Ibbun's death she is not entitled to the relief. He cited the decision in *Wickremasooriya*

v. *Abeywardena*<sup>(4)</sup> which states that where there has been negligence on the part of the applicant seeking relief by way of restitution such relief should not be granted. In *Silindu v. Akura*<sup>(5)</sup> it has been held that an application for *restitutio in integrum* is an action within the meaning of section 11 of Ordinance No. 22 of 1871 and is barred in three years. Since relief by way of *restitutio in integrum* is prescribed after three years, we hold that the objection of the defendant-respondents is valid and the plaintiff-petitioners are not entitled to get any benefit under that. Nevertheless, the powers of revision of this Court are wide enough to embrace a case of this nature. Even though the plaintiff-petitioners have not invoked the revisionary jurisdiction we propose to exercise the revisionary powers in favour of the 2nd plaintiff-petitioner. We are mindful of the fact that revisionary powers should only be exercised in exceptional circumstances such as –

- (a) where there has been miscarriage of justice;
- (b) where a strong case for the interferences of the Superior Courts have been made out by the petitioner;
- (c) where the petitioner proves to the satisfaction of Court that he was unaware of the order made by the original Court.

In the instant case, it is clear that some interested party has placed a signature on the proxy purporting to be that of Saheeda Umma the 2nd plaintiff-petitioner. She had denied signing of such a document as she is an illiterate person. In the original proxy (P1) given to Mr. Ibunu, the fact that she has placed her thumb impression is clearly proved. There is no reason for us to disbelieve her when she says she never signed a proxy to be given to any other Attorney after the death of Mr. Ibunu. No affidavit has been furnished from the senior Attorney who held the proxy on behalf of Saheeda Umma to say that she in fact signed the proxy in his presence. To prevent this kind of abuse or fraud, some Courts now insist that the proxy should indicate the number of the identity card of the person who signs it.

The settlement had been entered into by tendering a fraudulent proxy of the 2nd plaintiff-petitioner. Therefore, the Court has no jurisdiction to permit a settlement and as such there is a total want of jurisdiction. Under such circumstances, the settlement is void and can be challenged both in the very Court and in the proceedings in which it was had and also collaterally. We hold that the settlement entered on 22. 10. 1993 is bad in law and devoid of any legal consequences.

The 2nd plaintiff-petitioner Sinnathamby Kabeer too had made certain allegations regarding the purported settlement. In view of the above findings, we do not propose to consider those allegations as the outcome of that will not affect our decision.

We set aside the settlement of 20. 10. 1993 recorded by the District Judge in case No. 109/L as well as the judgment and decree made thereafter. We also set aside the order of the Additional District Judge dated 09. 07. 1996. We direct the District Judge to continue with the trial according to law on tendering a fresh proxy by the plaintiffs in the case.

This application is allowed with costs.

**WEERASURIYA, J.** – I agree.

*Application allowed.*