

KUSUMAWATHIE

v.

WIJESINGHE

COURT OF APPEAL
JAYASINGHE, J.
JAYAWICKREMA, J.
C.A.884/97
D.C. HORANA 3694/D
JULY 28TH 2001
NOVEMBER 30, 2000

Divorce - Exparte - without Notice - Death of husband - validity of Exparte Judgment - Is the Divorce action a personal action - Could the Court of Appeal interfere with the Decree when one party is dead? Is Restitutio available - Constitution - ART 138(1).

The Defendant was married to one W. After the death of the said 'W' the Petitioner was shown an exparte decree obtained by W, dissolving the marriage.

The Petitioner sought by way of Restitutio - in - Integrum to remedy the injustice caused to her by abuse and misuse of the legal process.

Held :

- (1) Relief by way of restitutio - in -integrum of Judgments of original courts may be sought where the Judgments had been obtained by fraud by the production of false evidence, non disclosing of material facts or by force.

Per Jayasinghe, J.

"When a party appears and complains that she has been wronged by a process of law, this Court would not helplessly watch and allow the fraud practised on that party to be perpetuated. Restitutio - in - Integrum provides this Court the necessary apparatus to step in and rectify any miscarriage of and failure of justice. If this is not the case then there is a serious vacuum in the law, which can be made use of by designing individuals as the Petitioner alleges had happened to her."

APPLICATION by way of Restitutio - in - integrum.

Cases referred to :

1. *Obeysekera v. Haramants Appu* -14 NLR 353

2. *Perera v. Wijewickrema* -15 NLR 411
3. *Lucy Hamy v. Alwis* -26 NLR 123
4. *Sri Lanka Insurance Corporation Ltd., v. Shanmugam* -1995 1 SLR 55
5. *Sirinivasa Thero v. Sudesst Thero* -63 NLR 31
6. *Guneratne v. Dtingiri Banda* - 4 NLR 249

Ikram Mohamed P.C., with *M. Latheef* and *A. C. Abdul* for Petitioner.

S. A. D. S. Suraweera for Respondent.

Cur. adv. vult.

March 22, 2001.

JAYASINGHE, J.

This is an application by the Petitioner by way of Restitutio in Integrum to set aside the decree of divorce entered in Case No: 3694/D by the District Court of Horana after exparte trial. It is the position of the Defendant - Petitioner that she was unaware of the proceedings instituted against her for the dissolution of her marriage to deceased plaintiff and that she had no knowledge of the exparte trial, that no decree nisi was served on her; neither had she any knowledge that the decree nisi has been made absolute. She became aware of these proceedings only after the 3rd months alms - giving, upon the death of the deceased husband.

The Petitioner states that she married the deceased Plaintiff one Wijesinghe Arachchige Wijesinghe on 29.09.1985 and that they lived as husband and wife at the matrimonial home 253A, Millewa, Horana until his death on 24.07.1996. Her husband had become seriously ill on 24.07.1996 whilst living in the matrimonial home and the Petitioner herself had admitted him to hospital at Padukka where he died. At the post -mortem inquiry that followed the Petitioner testified as widow of the deceased and the body was released to the Petitioner. The funeral expenses was borne by the Petitioner. The Petitioner states she was shocked when she was shown a copy of the exparte decree at the Moragahahena Police Station on or about

30.10.1996 when she was summoned to the Police on a complaint made by the Respondent above named the only surviving sister of her late husband. The complaint made on 29.10.1996 against the Petitioner was that the Petitioner was in wrongful occupation of the house after she had been divorced by her husband long before his death. The Petitioner states that being unaware of the said *exparte* decree she made an application to the Department of Pensions to obtain her dues and the said Department informed her that the Respondent above named have forwarded a copy of the said divorce decree requesting the said Department to withhold payments to the Petitioner. It is the position of the Petitioner that she has never been living away from her husband and that they were happily married until his death. There have been no children by the marriage. The Petitioner moved the District Court of Horana on 28.03.1997 praying that a declaration be made that the *exparte* judgment delivered on 14.10.88 was wrongly decided and to restore the status quo she enjoyed prior to the order made by Court. The learned District Judge however by his order dated 04.07.1997 held that the District Court has no jurisdiction to vacate the said decree and to seek relief from the Court of Appeal. The Petitioner accordingly filed application for relief by way of Restitutio - in - Integrum to remedy the injustice caused to her by abuse and misuse of the legal process.

The Petitioner in support of her contention that she has never been living away from the matrimonial home or her husband produced a number of documents. She has produced marked 'A' a copy of a document which she has signed as a witness in February 1990 when she was living together with her husband whereby her husband sought to sell property belonging to him to one Suneetha Edirisinghe; the Death Certificate as 'B' and the Post-Mortem Report as 'C' certifying that the body of the deceased and the death certificate have been handed over to her; an obituary notice marked 'C' where her name appears as the wife along with the name of the Respondent. A complaint made by the Respondent to the Police on 29.10.1996 marked 'D'; the case record marked 'F'. The

petitioner states that she is a teacher by profession and for about 10 years she had been attached to Olaboduwa Maha Vidyalaya upto 1995 and produced marked 'H' a letter from the principal of her present school. The Petitioner states that her late husband had fraudulently given a false address as 404/B, Panadura Road, Horana as that of the Petitioner. Petitioner further states that her husband admitted her to Castle Street Maternity Hospital for medical examination and produced marked 'J', the Diagnosis Card. The Petitioner says that the Respondent tendered extracts of the Voters List marked 'A1', 'A2', 'A3' in respect of years 1994, 1991 and 1986 respectively to show that the Petitioner was living away from the husband. Petitioner states that the application for insertion of names on the voters list in fact has been filled and signed by the deceased husband and that the Petitioner cannot be held responsible for the omission of her name. Petitioner states that even though the purported decree of divorce has been obtained in the year 1988 voters list for the year 1992 marked 'M' reveal that both the Petitioner's as well as the deceased husband's names are included as voters in the matrimonial home. The Petitioner States that the deceased has fraudulently made a declaration in September 1990 to the Department of Pensions that he was unmarried when in fact there was decree of divorce already obtained. This letter is produced marked 'O'. The Petitioner complains that the said decree of divorce has been obtained by her late husband without service of summons fraudulently by abuse of legal process.

The petitioner filed an application in the District Court of Horana on 28.03.1997 marked 'K' to have the said exparte decree dated 04.06.1997 marked 'L' vacated, the Court held that the District court has no jurisdiction to vacate the said decree and observed that the Petitioner should seek relief from this Court.

The Petitioner consequently filed this application inviting this Court to exercise the jurisdiction vested in this Court by way of Restitutio in Integrum and to set aside the decree entered in case No. 3694/D by the District Court of Horana.

Mr. Suraweera submitted that the divorce action before the District Court was a personal action and with the death of the

husband the action was brought to a close; that the Petitioner is prevented from making allegations against the deceased husband as he is no longer in a position to defend himself or rebut the allegations made against him. He submitted that the application should be dismissed in limine. He also submitted that the Petitioner has failed to establish fraud as required by law and that the decree of proof required is very high. The content of Mr. Suraweera's submissions is that the deceased is not before Court to meet the allegations made against him and to that extent this Court should not interfere with the decree entered by a Court of competent jurisdiction.

The question for determination by this Court is whether this Court would interfere with the decree entered by the District Court when one of the parties to the proceedings is dead and therefore unable to refute the allegation of fraud which the Petitioner claims has been perpetuated on her. Mr. Suraweera was vehement in his objections that this Court ought not to interfere with the findings of the District Court as this being a personal action which has been brought to a close with the death of the deceased husband. The learned President's Counsel on the other hand submitted that where an injustice has been caused to a party by an act of Court this Court is not without the necessary apparatus to repair the injury and grant redress to the aggrieved party.

In *Obeyskera v. Haramants Appu*⁽¹⁾ it was held that the remedy of Restitutio - in - integrum is one which has taken deep root in the practice and procedure of Courts, and it is too late to hold that the remedy ought no longer to be recognised. If court is satisfied that there is a prima facie case, court shall issue notice on the other sides.

"Under the Civil Law, where a person suffered a legal prejudice by the operation of law, the praetor having personally inquired into the matter (causae cognitio) in the exercise of his imperium, which enabled him to consider all the actual facts of the case might issue a decree re-establishing the original

position; that is to say replacing the person injured in his previous condition. In Roman Law *restitutio in Integrum* was the removal of a disadvantage in law which had legally occurred. It was protection against injustice (as distinguished for an action against injustice) which was rendered necessary on account of practical impossibility of taking legally in advance all the circumstances into consideration that in reality may occur" Wood Renton, J. held further that - "In Ceylon as far back as the time of Sir Charles Marshal *Restitutio in Integrum* was recognised as a mode of relief against fraud and also as a means of setting aside the process of *exparte* execution."

In *Perera v. Wijewickrama*⁽²⁾ Court held that this remedy can be availed only to those who are actually parties to a contract or legal procedure. This remedy is not granted in Ceylon if the applicant has any other remedy equally effectual open to him. The Roman Dutch Law remedy of *Restitutio in Integrum* has not been impliedly abrogated by the provisions of the Civil Procedure Code but such power should be exercised cautiously and sparingly.

In *Lucy Hamy v. Alwts*⁽³⁾ it was held that where the Defendant against whom a judgment has been entered alleges that the judgment has been obtained by fraud. The Court may stay the execution of the decree and give him time to apply for *Restitutio in Integrum*. The Court must enter an order of abatement of the earlier case pending the second action.

In *Sri Lanka Insurance Corporation Ltd. v. Shanmugam*⁽⁴⁾ it was held that 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 discretion. 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.

Relief by way of Restitutio in Integrum of judgments of original Courts may be sought where the judgments have been obtained by fraud by the production of false evidence, non disclosing of material facts or by force.

In *Sirinivasa Thero v. Sudessi Thero*⁽⁵⁾ Court observed that justice requires that he should be restored to the position he occupied before the invalid order was made, for it is a rule that the Court will not permit a suitor to suffer by reason of a wrongful act, Court will so far as possible put him in the same position which he would have occupied if the wrong order had not been made. It is a power which is inherent in the Court itself and rests on the principle that the Courts of justice is under a duty to repair the injury done to a party by its act.

In *Gunaratne v. Dingiri Banda*⁽⁶⁾ Bonsor, C. J. observed that "This application was in substance an application for what is called Restitutio in Integrum which is a well known civil remedy for setting aside a judgment which has been improperly obtained. It seems to have been the practice in Holland to apply for Restitutio in Integrum to the highest Court of Appeal which has delegated to it the powers of the sovereign in this respect. If the applicant satisfies Court that he had a prima facie case, the case is remitted to the Judge who pronounced the decree who if he found that the decree had been fraudulently obtained would restore the parties to their original position."

Mr. Suraweera's main contention was the action by the deceased Plaintiff against the Defendant-Petitioner was a personal action and therefore since the deceased Plaintiff is unable to refute the allegation against him this Court ought not to interfere with the findings of the District Judge. I am unable to subscribe to this point of view. Where a party appears before Court and complains that she has been wronged by process of law this Court would not helplessly watch and allow the fraud practiced on that party to be perpetuated. Restitutio - In - Integrum provides this Court the necessary apparatus to step in and rectify any miscarriage or failure of justice. If this is not the case

then there is a serious vacuum in the law which can be made use of by designing individuals as the Petitioner alleges has happened to her. I am of the view this is an appropriate case for this Court to step in.

I do not see any purpose of sending back the case for inquiry/re-trial as the Plaintiff is dead. Hence on the material tendered to this Court I am satisfied that the decree for divorce had been obtained without the knowledge or notice to the Defendant-Petitioner.

Hence I set aside the decree for divorce entered in case No. 3694/D by the District Court of Horana. Further I declare that the Petitioner's marital status with the said Plaintiff remain unaffected by the proceedings held in Case No. 3694/D of District Court of Horana. I further hold that the Petitioner is entitled to the pension rights on the death of the husband and the Director of Pensions is hereby directed to take necessary steps for payment of the same to the Petitioner.

The application for Revision is allowed. Since the Plaintiff is now deceased we make no order for costs.

JAYAWICKRAMA, J. - I agree.

Application allowed