Present : Wood Renton J. and Grenier J.

July 12, 1911

ABEYESEKERE *v.* HARMANIS APPU *et al.*

C. R. Balapitiya, 7,168.

Restitutio in integrum—*Procedure indicated.*

The remedy of *restitutio in integrum* is one which has taken deep root in the practice and procedure of our Courts, and it is too late to hold that the remedy ought no longer to be recognized.

(1) Applications for *restitutio in integrum* should be made in open Court by petition supported by affidavit and by all the materials necessary for the purpose of making out a *primâ facie* case for relief, such application being made to a Bench of one Judge, or of two Judges, according as the tribunal of first instance is the Court of Requests or the District Court, and not by petition addressed to the Judges in Chambers ; (2) the application should be in the first instance *ex parte* ; (3) if the Court is of opinion that a *primâ facie* case for relief has been made out, notice must be given to the other side ; (4) if after hearing both sides the Supreme Court is satisfied that restitution should be granted, the case should be remitted for further inquiry and adjudication in the court of first instance ; (5) such adjudication, subject to an appeal where a right of appeal exists, is final.

THE facts are set out in the judgment of Wood Renton J.

Batuwantudawe, for applicant.

A. St. V. Jayewardene, for respondent.

Cur. adv. vult.

July 12, 1911. WOOD RENTON J.—

This is an application for *restitutio in integrum* by the plaintiff in C. R. Balapitiya, 7,168. Under a writ issued in that action at the instance of the present applicant against the defendants, a 2-9ths part of a land called Maradanawatta, situated at Godagama, was seized in execution. The applicant and five others claimed the entirety of the land. The claim was duly reported to the Court, and at the inquiry the applicant was represented by a proctor, who alleges that he consented to the applicants' claim for an 8-9ths part of the land being allowed, intending that the remaining 1-9th should be left to be fought out in an action under section 247. The Court made the following order : " Parties agree that the claimants' claim to 1-9th be upheld, and also the other 7-9ths,

28—J. N. A 03348 (11/49)

July 12, 1911

WOOD RENTON J.

Abeyesekere v.Harmanis Appu

except Carolis's 1-9th, which, having been previously sold to one of the creditors, be declared saleable under the seizure." The applicant instituted an action under section 247 with regard to the 1-9th. part of the land above named. It is stated in the petition in support of the application for revision that the proctor " had no occasion to look into the record in the claim proceedings " till the answer in the action under section 247 was filed, " when he found that by a misapprehension the learned Commissioner had made a wrong entry." The applicant's proctor thereupon explained to the Court what he had intended to agree to at the claim inquiry. The learned Commissioner accepted the explanation, heard the case on its merits, and gave judgment in the applicant's favour. The Supreme Court in appeal set that judgment aside, holding that the applicant's claim should have been dismissed in view of the order in the claim inquiry which still stood on the record, but reserved the right of the applicant, if he was so advised, to institute proceedings for *restitutio in integrum.*

The case was argued before my brother Grenier and myself on June 26 last, and we then dismissed the application with costs, stating, however, that the grounds of our judgment would be given at a later date. I am clearly of opinion on the merits that the case was not one in which *restitutio in integrum* could properly have been granted. It is by no means clear that, whatever the proctor may have intended to agree to, any mistake was made by the Commissioner in recording what he actually agreed to, or that the Commissioner in accepting his explanation accepted anything more than his statement as to what his intention had been. Moreover, it was the duty of the applicant's proctor to see that an entry had been made in the claim proceedings carrying out the real terms of his agreement on the applicant's behalf. The excuse that he " had no occasion " to look at the record till the time came for filing answer to the action under section 247 is not one that I am prepared to accept.

Under all the circumstances, no ground for *restitutio in integrum* has, in my opinion, been made out. We postponed judgment, however, for the purpose of considering certain important points of law and procedure in regard to such applications as these. The matters to which I am about to refer were set down for argument before the Full Bench recently in C. R. Nuwara Eliya, 4,703. When the case was called for argument, however, there was no appearance in support of the application for *restitutio in integrum*, and it was accordingly dismissed with costs. The questions submitted to the Supreme Court in C. R. Nuwara Eliya, 4,703, were these :—

(1) Is it too late to raise the question as to whether or not *restitutio in integrum* can properly be held to form part of the law of the Colony ?

(2) If that question should be answered in the negative, can the Roman-Dutch remedy of *restitutio in integrum* be regarded as part of the law of Ceylon, in view of (*a*) the absence from the Courts Ordinance and the Code of Civil Procedure of any provision enabling the Supreme Court to grant relief by way of *restitutio in integrum* : (*b*) the powers of revision enjoyed by the Supreme Court ; and further, (*c*) decisions to the effect that an action to set aside a judgment on the ground of fraud or mistake can be brought in the Court which pronounced that judgment ?

(3) If the remedy of *restitutio in integrum* still survives in Ceylon, what ought the practice to be in regard to (*a*) the bringing of applications for such relief before the Court (*i.e.* whether *ex parte* or upon notice), and (*b*) the nature of the reference by the Supreme Court to the court of first instance, that is to say, ought the Supreme Court to leave the decision, on the matters referred, to the court of first instance, or to require that any decision at which that Court may arrive should be subject to its own sanction ?

Before considering these questions, it may be advisable to deal shortly with the history of the procedure by way of *restitutio in integrum*. Under the civil law, where a person suffered a legal prejudice by the operation of law, the prætor 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 legal 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 a protection against justice (as distinguished from an action against injustice), which was rendered necessary on account of the practical impossibility of taking legally, in advance, all the circumstances into consideration that in reality may occur. (*Sohm's Institutes of Roman Law, s.* 56, 111, *Burge, 2nd ed., vol.* 4, *chap.* 1.) The restitution thus granted by the prætor *in jure* was then followed by the *judicium rescissorium*, that is, the trial and decision of the action which had been thus restored. The *judicium rescindens* itself, *i.e.*, the proceeding which resulted in the restitution, was invariably conducted and concluded by the prætor himself. In Roman law *restitutio in integrum* was divided into two classes, (i) *restitutio minorum* (under 25 years of age) and (ii) *restitutio majorum* (25 years and upwards), in cases of *absentia, metus, dolus*, and error. The remedy was received into the Roman-Dutch law in a wider form. *Restitutio* was not only granted to minors. It might be granted to any one, either *in toto*, on the grounds of *metus, dolus*,

July 12, 1911

WOOD RENTON J.

Abeyesekere v. Harmanis Appu

absentia, and minority, or partially, on the ground that the damage suffered exceeded the value of what was obtained through the transaction by half (*ob laesionem enormem*). Van der Linden gives as additional grounds for partial restitution absence and error, and further, all such equitable reasons as rendered it unjust that the act should remain in existence.

The substance of the following sketch of *restitutio in integrum* under the Roman-Dutch law is taken from chapter I., Guardianship of Minors, of vol. IV. of the 2nd edition of Burge :—

The object of this action was to undo what legally had been done and had come into existence, and to place the parties (either altogether, or so far as they had suffered loss) in the same condition as they were in at the time when the contract was entered into.

The granting of such a *relief*, and the cancelling of rights which had once been acquired and had been created, could not, of course, be claimed as a matter of right. It was an act of grace, the exercise of a prerogative by the Sovereign in his Great Council at Mechlin, while that Council was in existence.

In 1562, by Octroy of Philip II, the kinds of *relief* which might be granted were classified into two, viz., *relief* granted against material rights which had once been established (material *relief*), and *relief* by undoing legal proceedings which had once become *res judicata* and against which no further appeal lay (formal or processual *relief*). It was at the same time provided that such formal relief should be granted by the *Hof* (or Court of Appeal) *van Holland*.

After the eighty years' war between Spain and the Northern Provinces of the Netherlands had broken out, and the Council of Mechlin had ceased to exercise jurisdiction in those Provinces, the States of Holland, by resolution of May 8, 1573, granted the right to rescind contracts to the same *Hof van Holland*, and after the creation of a Supreme Court (Hooge Raad, 1582) to that high tribunal. In 1795, after the abolition of the Supreme Court, it came back to the *Hof van Holland*.

Though the Supreme Court granted letters of *relief*, it did not investigate cases. These were sent by a *committimus* to the ordinary judge of first instance, who investigated them and granted or rejected the petition, and his decision then received the sanction of the Supreme Court.

The restitution was not granted unless the loss or damage suffered (*a*) was considerable ; (*b*) had occurred through negligence, and not by accident ; (*c*) had been fully proved ; while (*d*) no other remedy was open to obtain redress, *e.g.*, appeal, review, &c. ; and (*e*) the person who had suffered loss was not already protected by mere operation of law.

The person entitled to *relief* was reinstated in all those rights of which he had once been deprived on account of his having entered into the contract. He had to give back what he had acquired by purchase or sale, and the profits which had meanwhile accrued. On the other hand, the person against whom *relief* was granted received back what had been given back by him in pursuance of the agreement, and all pre-existing rights of which he had divested himself revived in his favour. He had to be paid back all expenses incurred by him previously to his returning what he had acquired.

An order for restitution was construed strictly.

Pending judgment in a claim for restitution, the position of affairs between the parties had to remain unaltered.

If restitution was sought against a judgment which had become *res judicata*, such judgment ought not to be executed, unless adequate security were given for restoration by the person who had obtained the judgment against the person who claimed restitution.

Even then no execution could take place (*a*) in case irreparable damage would be done by such execution ; (*b*) if the person who claimed relief was able at once to show the manifest illegality of the transaction on which the right to execution was based ; or (*c*) if the claim for *relief* had been instituted before the execution of the judgment which had preceded it had commenced.

In Ceylon, as far back as the time of Sir Charles Marshall, *restitutio in integrum* was recognized as a mode of relief against fraud, and also as a means of setting aside the process of parate execution by which in certain specified cases, for example, the recovery by Fiscals of the purchase money of sales in execution, or due to auctioneers, the previous stages of an ordinary suit at law were dispensed with, and the creditor was at once entitled to seize in execution the person or property of his debtor in satisfaction of his debt.[1] There was considerable controversy at that time as to whether the power of granting restitution was vested in the Supreme Court alone or in the District Court I may refer now to a few of the local decisions in regard to *restitutio in integrum*. In D. C. Matale, 1,174[2] it is indicated that *restitutio in integrum* is a remedy to be sought through " the Sovereign in Council," which, I suppose, means the Privy Council in England. In *Obeysekere v. Gunasekera*[3] it was held in appeal by Clarence J. that the District Court had jursidiction to set aside a judgment obtained by fraud, but that the application ought to be made in a separate suit. In *ex parte Gordon*,[4] Phear C.J. and Stewart and Dias JJ. held that error, *res noviter veniens*, or fraud can be raised in revision. In *Perera v. Ekanayake*,[5] Withers J. and Browne J. held that a judgment obtained by fraud or passed under mistake might be set aside either by a regular action or possibly by way of summary procedure as regulated by the Civil Procedure Code, and that this cannot be done by mere motion supported by affidavits with notice to the decree-holder. In *Stork v. Orchard*,[6] Mr. Justice Lawrie, then Acting Chief Justice, held that the remedy of *restitutio in integrum* was available in all cases where a contract can be shown to have proceeded on total misconception. In *Gunaratne v. Dingiri Banda*,[7] Sir John Bonser C.J., with whom Withers J. concurred, held that the proper remedy, where the consent of a party to a case instituted

[1] *Marshall's Judgments, pp. 173 and 197.*

[2] *(1836) Morgan, Beling, Conderlaag, and Prins, 82.*

[3] *(1884) 6 S. C. C. 102.*

[4] *(1879) 2 S. C. C. 108.*

[5] *(1897) 3 N. L. R. 21.*

[6] *(1893) 2 S. C. R. 1.*

[7] *(1898 & 1899) 4 N. L. R. 249.*

July 12, 1911

WOOD RENTON J.

Abeyesekere v. Harmanis Appu

in the District Court was obtained by fraud and so judgment obtained, was to apply to the Supreme Court for an order on the Court below to review the impugned judgment and to confirm or rescind it. At the close of his judgment, Sir John Bonser said : "Any such application will, of course, be an *ex parte* one." In describing the Roman-Dutch procedure, he made use of the following language : "If the applicant satisfied that Court" (*i.e.*, the highest Court of Appeal in Holland) "that he had a *primâ facie* case, the case was remitted to the Judge who pronounced the decree, and if he found that the decree had been fraudulently obtained, he would restore the parties to their original position." There are some Roman-Dutch authorities which show that the decision of the Judge of the court of first instance required the sanction of the Supreme Court. In *Sinnatamby v. Nallatamby*,[1] Wendt J., Middleton J., and Grenier J. held that, where a consent decree had been entered by mistake, relief may not be sought in a separate action, but must be obtained in the same case by application, on due materials, to the Supreme Court for an order on the Judge of the lower Court to investigate the matter. In *Silindu v. Akura*,[2] Wendt J. and Middleton J. held that on proper materials laid before the Supreme Court by a party who desires to be relieved of a decree which had been improperly obtained against him, it will upon an *ex parte* application by such party direct the Court which passed the decree to hear all necessary parties and determine whether the petitioner is entitled to be relieved from the said decree and be restored to his rights as existing prior to the decree. In that case Wendt J. stated the form of the *ex parte* order which ought to be made in such cases. In some recent cases, none of which have yet been reported, we have declined to act *ex parte* in applications of this kind. In the case of *Dodwell Carlill & Co., v. Rawter*,[3] to which Mr. Tambyah as *amicus curiae* has kindly called my attention in the course of this judgment, it was held that, when any other remedy is open to a party, the extraordinary one of *restitutio in integrum* cannot be granted. My attention has also been called by Mr. Tambyah to the case of *Buyzer v. Eckert*,[4] decided by my brother Middleton and myself, where we held that where fraud is averred against a judgment, such judgment may be set aside by *restitutio in integrum*, or by a suit in the Court which passed the original decree. I may myself have acted on the law as laid down by Sir John Bonser C.J. and Withers J. in *Gunaratne v. Dingiri Banda* and by the Full Court in *Sinnatamby v. Nallatamby*, and in other cases which have not been reported. It might well have been found too late even for the Full Court, and it is certainly too late for a Bench of two Judges, in the state of the law as I have outlined it above, to hold that the remedy of *restitutio in integrum* ought no longer

[1] (*1903*) *7 N. L. R. 139.*
[2] (*1904*) *7 N. L. R. 296.*
[3] (*1899*) *1 Tam. 18.*
[4] (*1916*) *13 N. L. R. 371 ; 2 Cur. L. R. 200.*

to be recognized. It seems desirable, however, to regulate the existing practice in some particulars. It may perhaps be doubted whether Sir John Bonser C.J., when he stated in *Gunaratne v. Dingiri Banda* that applications for *restitutio in integrum* should be made *ex parte*, meant anything more than that they should be made *ex parte* in the first instance. That is clearly right. But there is no Roman-Dutch authority that I can find, and it is obviously inequitable, that they should be *ex parte* throughout. No man ought to be deprived of a judgment in his favour, and exposed to the hazard of further legal proceedings, behind his back.

Restitutio in integrum in South Africa seems to come under the ordinary jurisdiction of the Court, and to be granted where a case for it is made out in an action for restitution (*Maasdorp, vol.* 3, *p.* 57), which may be brought where relief is claimed against a judgment before the tribunal that pronounced that judgment (*Peale v. National Bank of South Africa, Ltd.*[1]).

It appears to me (1) that applications for *restitutio in integrum* should be made in open Court by petition supported by affidavit and by all the materials necessary for the purpose of making out a *primâ facie* case for relief, such application being made to a Bench of one Judge, or of two Judges, according as the tribunal of first instance is the Court of Requests or the District Court, and not by petition addressed to the Judges in Chambers ; (2) that this application should be in the first instance *ex parte* ; (3) that, if the Court is of opinion that a *primâ facie* case for relief has been made out, notice must be given to the other side ; (4) that if, after hearing both sides, the Supreme Court is satisfied that restitution should be granted, the case should be remitted for further inquiry and adjudication in the court of first instance ; and that (5) such adjudication, subject to an appeal where a right of appeal exists, should be final.

GRENIER J.—

I am of the same opinion as regards the recognition of the remedy of *restitutio in integrum* as a part of the law of the land for a very considerable period. The remedy is one which has taken deep root in the practice and procedure of our Courts, and it is far from desirable to ignore it or to declare it obsolete at the present time. Much uncertainty, however, has hitherto prevailed as to the procedure to be followed when an application of this nature is made. In a recent case I adopted the form of the *ex parte* application made in *Silindu v. Akura*,[2] but I had grave doubts as to the correctness of the procedure. It seemed to me wrong to make an *ex parte* order and send the case down for investigation by the lower Court without any notice to the other side. It occurred to me that in numerous instances it would not be necessary for the lower Court to hold any investigation at all if this Court was satisfied after hearing

[1] (*1908*) *26 S. A. L. J. 230.* [2] (*1904*) *7 N. L. R. 296.*

July 12, 1911

GRENIER J.

Abeyesekere v. Harmanis Appu

both sides, provided a *primâ facie* case in support of the application had first been made out, that the remedy by way of restitution should not be granted. I cannot find a better illustration of this than the present case. Had we followed the procedure laid down in *Silindu v. Akura*, we would have put both parties to much expense and trouble. We had no difficulty after we had heard counsel in support of and against the application to declare that it was groundless. The form of procedure prescribed by my brother has my entire concurrence.

Application refused.

The Supreme Court of Ceylon is indebted to the Registrar of the Supreme Court of British Guiana for the following communication regarding the practice prevailing in that Colony *re* applications for *restitutio in integrum* :—

1. *Restitutio in integrum* is still part of the law of British Guiana.

2. It depends on the common law and not on statute.

3. The remedy is sought by action, and not by application *ex parte* or otherwise.

4. The court of trial is left to adjudicate on the claim, and any adjudication at which it may arrive does not require the sanction of the Supreme Court.

Cases in which *restitutio in integrum* is sought very seldom arise, but I am not aware that the practice would differ in any way from that followed in ordinary actions.