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

In the matter of an application for Revision and *Restitutio in Integrum* in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. Revision No.1542/2006

D.C. Mount Lavinia Case No.1489/P

Walakada Appuhamilage Dona Chandra Vissanthi,

No.90, Samaja Mawatha,

Maharagama.

PLAINTIFF

-Vs-

1. Walakada Appuhamilage Dona Kusumalatha,
2. Walakada Appuhamilage Swarnalatha,

   Both of No.90, Samaja Mawatha,

   Maharagama.
3. Hearaluge Magilin Perera (Deceased),
4. Gamage Uparis Perera (Deceased),

   Both of No. 321, Highlevel Road,

   Makumbura, Pannipitiya.
5. Alhaj Tuwan Aarif Miskin (Deceased),

   No. 456/3, Gangodawila,

   Nugegoda.
6. P.V. Nevil Dhanarathne (Deceased),

6A. Walakada Appuhamilage Dona Pushparani Dhanaratne,

No. 76, S. De S. Jayasinghe Mawatha,
Kalubowila, Dehiwela.

7. Gamage Wimalasiri Perera,
   No. 321, Highlevel Road,
   Makumbura, Pannipitiya.
8. Gamage Chithra Kusumalatha Perera,
9. Gamage Sarath Chandrasiri Perera,
10. Gamage Nihal Tilakasiri Perera,
    All of No. 321, Highlevel Road,
    Makumbura, Pannipitiya.
11. Hajiyani Linda Miskin,
    No. 456/3, Gangodawila,
    Nugegoda.

DEFENDANT

AND NOW

P. Douglus Jayaweera,
No. 115/80, Andiris Mawatha,
Rattanapitiya, Boralesgamuwa.

PETITIONER

-Vs-

Walakada Appuhamilage Dona Chandra Vissanthi,
No.90, Samaja Mawatha,
Maharagama.

PLAINTIFF-RESPONDENT

1. Walakada Appuhamilage Dona Kusumalatha,
2. Walakada Appuhamilage Swarnalatha,
   Both of No.90, Samaja Mawatha,
   Maharagama.
3. Hearaluge Magilin Perera (Deceased),
4. Gamage Uparis Perera (Deceased),
   Both of No.321, Highlevel Road,
   Makumbura, Pannipitiya.
5. Alhaj Tuwan Aarif Miskin (Deceased),
   No. 456/3, Gangodawila, Nugegoda
6. P.V. Nevil Dhanarathne (Deceased),

6A. Walakada Appuhamilage Dona Pushparani Dhanaratne,
   No. 76, S. De S. Jayasinghe Mawatha,
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   No. 321, Highlevel Road,
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8. Gamage Chithra Kusumalatha Perera,
9. Gamage Sarath Chandrasiri Perera,
10. Gamage Nihal Tilakasiri Perera,
    All of No. 321, Highlevel Road,
    Makumbura, Pannipitiya.
11. Hajiyani Linda Miskin,
    No. 456/3, Gangodawila,
    Nugegoda.

DEFENDANT-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL	:	Gamini Hettiarachchi for the Petitioner Gamini Marapana, PC with Naveen Marapana for the 7th, 8th, 9th and 10th Defendant-Respondents
Decided on	:	18.06.2019

A.H.M.D. Nawaz, J.

The Petitioner has invoked the revisionary jurisdiction and *Restitutio in Integrum* to have the interlocutory and final decrees entered in this case set aside. In consequence of the said decrees, the Petitioner was evicted from the subject-matter of the partition action on 16.09.2006 and not having been a party to the partition action, the Petitioner seeks an annulment of the interlocutory decree and final decree on several grounds among which is the complaint that the learned District Judge of *Mount Lavinia* in her judgment dated 30.04.2004 has not investigated the title of parties in a complete and effectual manner.

Having supported this application for the extraordinary relief of Revision and *Restitutio in Integrum*, the Petitioner obtained an interim order restraining the Plaintiff-Respondent and the Defendant-Respondents from alienating, selling, leasing, mortgaging or creating any encumbrances.

All these acts of the Petitioner were called into question by Mr. Gamini Marapana, PC the learned Counsel for the 7th, 8th, 9th and 10th Defendant-Respondents. The learned President's Counsel contended at the outset that this Court should desist from exercising its extraordinary jurisdiction of Revision and *Restitutio in Integrum* owing to some overriding considerations that are rife in this case. The learned President's Counsel set out *in extenso* several non-disclosures that the Petitioner had deliberately sought to perpetuate and thus he had not come with clean hands to this Court in order to obtain the notice and interim relief.

The argument of the learned President's Counsel harked back to the words of Pathirana, J. in ***Alphonso Appuhamy v. Hettiarachchi*** (1973) 77 N.L.R 131 at page 135:-

"I must at this stage observe that had the Petitioner made a full disclosure of all material facts in the Petition and Affidavit and apprised the Court thereof, this Court may not have issued notice in the first instance".

In the context of an injunction Pathirana, J. quoted at page 138 of the judgment the words of Wigram V. C. in the case of ***Castelli v. Cook*** (1849) 7 Hare 89 at 94.

"A plaintiff applying ex parte comes (as it has been expressed) under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction, that any material fact had been suppressed or not properly brought forward, the plaintiff is told that the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go."

In other words, so stringent is the requirement for a full and truthful disclosure of all material facts that the Court will not go into the merits of the application, but will dismiss it without further examination, once the Court finds that the Petitioner has been guilty of willful suppression or misrepresentation of a material fact.

Though Pathirana, J. so eloquently echoed the requirement of full disclosure in the context of an application for mandamus, this necessity for a candid disclosure also holds good in the two appellate remedies-Revision and *Restitutio in Integrum.*

The principle is that, *"when a party is seeking discretionary relief....he enters into a contractual obligation with the Court when he files an application in the Registry and in terms of that contractual obligation, he is required to disclose uberrima fides and disclose all material facts fully and frankly to this Court....When the Petitioner....has been remiss in his duty....and obligation to Court...the Court is entitled to raise the matter in limine and to dismiss the application without investigating into the merits of the application"*-see F.N.D. Jayasuriya, J. in ***Blanca Diamonds (Pvt) Ltd v. Wilfred Van Els*** (1997) 1 Sri L.R 360, 362-3. A part of this dictum of Jayasuriya, J. was cited and followed by Marsoof, J. in ***Dahanayake v. Sri Lanka Insurance Corporation Ltd.***, (2005) 1 Sri L.R 67, 79; *see also* ***Fernando v. Ranaweera, Secretary of Ministry of Cultural and Religious Affairs*** (2002) 1 Sri L.R 327, 334-5, where the Supreme Court referred to the

principle in dismissing an application made under Article 126(2) of the Constitution for the alleged violation of the petitioner's Fundamental Right under Article 12(1).

So what are those non-disclosures that would disentitle this Petitioner to the extraordinary remedies of this Court-namely Revision and *Restitutio in Integrum*? Germane to this question is the relevant background to this litigation.

The 1st Partition Action

Initially an interlocutory decree and final decree had been entered in respect of a part of the corpus-the part being called *Talgahawatte* in the District Court of *Mount Lavinia* in Case No.1489/P. The Plaintiff-Respondent and the 1st and 2nd Defendant-Respondents filed this partition action in respect of a portion called *Talgahawatte* and were indeed successful in obtaining the partition decrees, which the learned President's Counsel was quick to pinpoint and classify as fraudulent and illusory, obtained behind the back of one Andy Perera-the real owner of the corpus. Andy Perera's children petitioned the Court of Appeal in Revision and *Restitutio in Integrum* complaining that they had no notice of the institution of the action or of the proceedings. A.C. Gooneratne Q.C. for the Respondents conceded before S.N. Silva, J. and D.P.S Goonesekara, J. on 15.03.1993 that the Petitioners should have been made parties and issued with notice.

Accordingly, the interlocutory decree dated 25.07.1986 and the final decree dated 27.10.1986 were both set aside and the Court of Appeal directed the District Court of *Mount Lavinia* to permit the petitioners (Andy Perera's Children) to intervene in the action and file a statement of claim. In other words, a trial *de novo* was ordered.

Mr. Gamini Marapana, PC pointed out that if the Petitioner had any claim in *Talgahawatte* which was collusively partitioned in the abortive trial, he must have intervened in the action but the Petitioner chose not to do so.

There was indeed an ongoing litigation around this time in the same Court where one Mrs. Haajiani Linda Miskin was suing the Petitioner for ejectment from *Talgahawatte* on the basis that the Petitioner had become an overholding lessee. I will presently turn to

this litigation as the facts pertaining to the case and the answer filed by the Petitioner in that cases are quite germane to this application for Revision and *Restitutio in Integrum*.

I will once again focus on what happened to the first partition suit. I adverted to the fact that Andy Perera's children were ordered by this Court to be added to this partition action in the trial *de novo*. After the case was sent back to the District Court of *Mount Lavinia* for a trial *de novo*, Gamage Wimalasiri Perera (the son of the owner of the corpus Andy Perera) filed his statement of claim and took up the position that the Plaintiff who had filed this abortive partition action and the 1st, 2nd, 5th and 6th Defendants had no right or claim in the land. He pointed out that *Kongahawatte*-the contiguous land must also be brought into the partition action and that the larger land comprising the two contiguous lands called *Kongahawatte* and *Talgahawatte* formed the corpus for the trial *de novo*.

The said Gamage Wimalasiri Perera (the son of the owner Andy Perera) became the 7th Defendant in the trial *de novo*. His siblings became the 8th, 9th and 10th Defendants. At the trial *de novo*, the substituted Plaintiff gave evidence and the matter was settled among the parties. Interlocutory and final decrees were entered and a writ was issued after the Petitioner was served with notice and the Petitioner was ejected on 16.09.2006.

In October 2006, the Petitioner filed this application for Revision and *Restitutio in Integrum* seeking an annulment of both the interlocutory and final decrees. In this application before this Court, the Petitioner states that he had been in occupation of "*Kongahawatte*" in *Gangodawila* for more than thirty years and had thus acquired prescriptive title to the property.

But despite this assertion taken up rather belatedly for the first time in the petition before this Court, he states that he was not made a party even at the trial *de novo*. As I said before, his complaint is that he was never noticed of either the abortive trial wherein the Court of Appeal set aside the decrees or the trial *de novo* which took place subsequently. He complains that he was wrongly ejected from *Kongahawatte* and no investigation of title has taken place. As I said, I find a reference to prescriptive title for the first time only in

the instant case though he had an opportunity to stake this claim in the case filed against him by Haajiani Linda Miskin whose name appears as the 11th Respondent in this application.

I must state that this claim of a prescriptive title appears to be an afterthought. Let me go back to the litigation where Haajiani Linda Miskin sued him in the District Court of *Mount Lavinia* Case No.1410/01/Land for ejectment on the basis that she had leased the land namely a portion of the land *Talgahawatte* where the garage run by the Petitioner had stood. According to her plaint dated 06.02.2001 in the District Court of *Mount Lavinia* Case No.1410/01/Land, she averred that she had let the Petitioner a portion of *Talgagawatte* on lease which terminated on 01.07.1999. In other words, Mrs. Miskin who claimed ownership on a deed over this portion of *Talgahawatte*, sought to eject the Petitioner from the land for unlawful possession and non-payment of rent. In other words the status of Priyankarage Douglas Jayaweera (the Petitioner) was admittedly a lessee under Mrs. Miskin.

In the answer filed by this Petitioner on 23.04.2001, no assertion of prescriptive title was made by him. Even though the character of the litigation was one between a lessor and an overholding lessee, it does not preclude the Petitioner from having pleaded a superior title such as prescription. On the contrary, the Petitioner admitted the title of Andy Perera (the father of the 11th Defendant-Respondent in this application) and stated further that the said Andy Perera had given his brother, one Jayaweera, leave and license to operate a garage somewhere in 1956 and the Petitioner began to help his brother as a factotum or a handyman in the running of the garage.

After the brother had left the place for a job in 1966, the Petitioner averred in his answer that he had been on a lease in the premises and he sought the relief of a monthly tenant in his cross claim.

So here was a person who was seeking the status of a tenant. He also alleged that he was a *bona fide* occupier who was entitled to compensation for improvements.

These assertions made to the District Court in 2001 are certainly inconsistent with a plea of prescription and quite consistent with a subordinate character or dependent title. The admissions made by the Petitioner in the answer filed by him in 2001 would operate as estoppel and these admissions would bind the Petitioner-*see* Section 17(1) of the Evidence Ordinance.

This admission that he was on a portion of *Talgahawatte* as a lessee of Mrs. Miskin is an acknowledgment that he was staying in the land on a dependent title and his possession was not *ut dominus* at all. When he claims as a lessee or a tenant, by necessary implication this is an admission that he is not an owner.

The absence of any plea of prescription from the answer dated 06.02.2001 and filed in the District Court of *Mount Lavinia* Case No.1410/01/Land quite conclusively establishes this fact and even under Section 18(3)(a) of the Evidence Ordinance this statement made in the answer will bind him as a statement made against his proprietary interest.

In the course of the argument of this application in this Court a poser was put to the Counsel for the Petitioner as to what right the Petitioner had in the land and the constant response was that it is the prescriptive title of the Petitioner that gives him proprietary interest in the property.

From the above, it is quite clear that the admission of a subordinate or a dependent title debunks the so-called proprietary interest of the Petitioner. There are other factors in the answer filed by the Petitioner that militate against the assertion of title in the land. In the aforesaid answer, the Petitioner also claimed compensation as a bona fide occupier. An assertion of a claim for compensation *qua* a bona fide occupier would go contrary to an assertion of prescriptive title or title *per se*. Moreover, the Petitioner claimed statutory tenancy under Mrs. Miskin and since Miskin got no rights under the decrees that were entered in the trial de novo, the Petitioner could not have an enforceable interest in the land. All these factors show that the Petitioner has no title in the land. One could observe the Petitioner claiming tenancy rights under persons who did not get soil rights under

the decrees. Therefore, it would be preposterous for the Petitioner to seek to attack the decrees in this case by way of this Revisionary application.

Mr. Gamini Marapana, PC submitted that he would treat the admissions made in the answer more as non-disclosures for the purposes of this application. As the learned President's Counsel submitted, there is barely a murmur in this petition about this previous District Court case filed against him. As the answer filed by him in that case revealed the true nature of his interest in the land, a non-disclosure of that case would amount to a willful suppression of a material fact. As to what are "material facts", *see* Atukorale, J. in ***Hotel Galaxy (Pvt) Ltd v. Mercantile Hotels Management Ltd*** (1987) 1 Sri L.R 5, 35-36.

If the title of Andy Perera is admitted in paragraph 3 of the answer and the Petitioner's brother had been a licensee of Andy Perera, he would have had no right to claim as a statutory tenant and he does not explain as to how he paid rent to one Saibudeen, if Andy Perera was the owner of these premises. None of these matters that were brought to the notice of the District Court in 2001, were ever brought to the notice of this Court in 2006 when this Petitioner made this application to this Court. In the Petition dated 13.10.2006 for Revision and *Restitutio in Integrum*, the Petitioner states that he had been in occupation of *Kongahawatta* but in the case filed against him by Mrs. Miskin, he was sued for ejectment from *Talgahawatte*. A question was posed in the course of the argument as to how this Petitioner shifted from *Talgahawatta* to *Kongahawatta* which is a contiguous land of *Talgahawatte*. There was no satisfactory response to this looming question given in the petition nor submissions.

In these circumstances, there is strong merit in the argument of the learned President's Counsel that there has been gross non-disclosure before this Court. It has to be remembered that in the trial *de novo*, both *Kongahawatte* and *Talgahawatte* constituted the corpus for partition and I am of the firm view that the Petitioner does not enjoy sufficient *locus standi* to invoke the jurisdiction of this Court for Revision and *Restitutio in Integrum*. The non-disclosure becomes more pronounced in light of the fact that nobody knows as

to who the landlord of this Petitioner would be, if he was claiming tenancy rights. In any event, the irregularities that he complains of in the petition such as the absence of his name from a Section 12 declaration cannot be agitated since Section 12 declaration would not be expected to contain the name of a tenant.

From the foregoing, it is as plain as a pikestaff that this Petitioner who has no title whatsoever to this land does not demonstrate any exceptional circumstances that would entitle him to invoke the revisionary jurisdiction of this Court. By having obtained a notice and an interim order on suppression of material facts the Petitioner has sought to frustrate the enjoyment of the fruits of the interlocutory and final decrees and it would be an abuse of process of this Court to permit this state of affairs to be perpetuated with impunity.

In the circumstances this Court deems it condign to dismiss this application *in limine*. Accordingly, I uphold the preliminary objection raised by the learned President's Counsel and dismiss this application.

JUDGE OF THE COURT OF APPEAL