

HALIB ABDUL CADER AMEER
v.
DANNY PERERA

SUPREME COURT
G. P. S. DE SILVA, C.J.,
KULATUNGA, J. AND
WIJETUNGA, J.
S.C. APPEAL NO. 41/95
C.A. APPLICATION NO. 789/90
D.C. COLOMBO NO. 5787/ZL
JULY 19TH, 1995

Vindictory suit – Consent decree – Justus error – Jurisdiction of Trial Court to set aside the decree – Restitutio in Integrum.

Held:

1. The District Court has no jurisdiction to set aside a decree entered by consent of parties on the basis of *justus error* committed by a party in consenting to the terms of the settlement. However, *restitutio in integrum* can be claimed on the ground of "justus error" which constitutes reasonable or excusable error.
2. The remedy by way of *restitutio in integrum* is an extraordinary remedy and is given only under very exceptional circumstances.

Cases referred to:

1. *Cornelius Perera v. Leo Perera* 62 NLR 413, 420.
2. *A. K. W. Perera v. G. Don Simon* 62 NLR 118, 120.
3. *Usoof v. Nadarajah Chettiyar* 61 NLR 173, 177.
4. *Menchinahamy v. Muniweera* 52 NLR 409, 413.

APPEAL from the judgment of the Court of Appeal.

Faiz Musthapha PC with *Mahanama de Silva* for plaintiff-appellant.

Ikram Mohamed with *Ian Fernando* for defendant-respondent.

Cur. adv. vult.

October 27, 1995.

G. P. S. DE SILVA, CJ.

The plaintiff instituted these proceedings against the defendant for a declaration of title and ejection from the land described in the third schedule to the plaint and in extent 9.72 perches. The said land described in the third schedule to the plaint is shown as lot C in plan No. 1762 dated 24.7.87 made by P. Sinnathamby, Licensed Surveyor (P4). The plaintiff also prayed for an interim injunction to restrain the defendant from constructing a building on lot C in the said plan marked P4. On being served with the notice of interim injunction, the defendant filed his statement of objections stating, *inter alia*, that the land in suit is depicted as lots 1 and 2 in plan No. 20 dated 10th November, 1948, made by G. A. H. Philipiah, Licensed Surveyor (P6A); that premises No. 88A, Maligawatte Place, Colombo 10, belonged to the defendant by virtue of prescriptive title; that the said premises No. 88A, Maligawatte Place, Colombo 10, fell outside lots 1 and 2 in the said plan No. 20 made by Philipiah, Licensed Surveyor (P6A).

On 10.01.89 the application for the interim injunction was taken up for inquiry. The plaintiff's position before the District Court was that lots 1 and 2 in P6A is shown as lots A, B and C in P4. Both parties agreed to superimpose plan P6A and plan P4 and the defendant agreed to demolish the building or any part thereof if it falls within lots 1 and 2 in P6A. The parties further agreed to issue a commission to a Surveyor for the purpose of obtaining the superimposed plan and to forward to the Surveyor P4 and P6A.

On a joint commission issued to Mr. Saliya Wickremasinghe, Licensed Surveyor, plan No. 766 dated 10.05.89 (plan X) along with the report X1 was forwarded to court. On 26.01.90 the plan X and the report X1 came up for consideration before the District Court. Parties were present and were represented by counsel. Both parties agreed to settle the case, *inter alia*, on the following terms: (a) the defendant agreed to hand over to the plaintiff possession of the strip of land (lot 3 in plan X) which the District Judge marked as A to B in plan X; (b) the defendant agreed to demolish the temporary building on

the said strip of land within one month. The court thereupon entered decree in terms of the settlement.

After the entry of decree, the plaintiff began to have reservations in regard to the settlement arrived at in court on 26.01.90 and had consulted another Licensed Surveyor S. Rasappah who had prepared for him plans 2330 dated 20.7.90 and 2331 dated 20.7.90 which, according to the plaintiff, show that plan X (on which the settlement was arrived at in court) is erroneous. On the basis of the plans of Rasappah obtained privately by the plaintiff, an application for revision and/or *restitutio in integrum* was filed in the Court of Appeal seeking to set aside the settlement and the consent decree, entered on 26.01.90. The plaintiff failed in this application and hence the present appeal to this court.

Leave to appeal to this court was granted on two matters:

(i) Is the District Court vested with jurisdiction to set aside a decree entered by consent of parties on the basis of justus error committed by a party in consenting to the terms of settlements? (ii) Is the plaintiff-petitioner entitled to invoke the revisionary powers and the power of *restitutio in integrum* of the Court of Appeal to obtain relief in respect of 3 perches over and above the extent agreed upon by virtue of the consent order dated 26.01.90?

The answer to the first question is clearly in the negative. The District Court certainly has no power to set aside a "consent decree" on the basis of "justus error". Sansoni, J. (as he then was) in *Cornelius Perera v. Leo Perera*⁽¹⁾ stated ". . . the proper remedy is an application for *restitutio in integrum*". Again at page 422 in the same judgment the learned Judge stated: "The District Judge however had no power to . . . set aside the agreement entered into . . .".

As for the second question, it is to be noted that the plaintiff in his petition filed in the Court of Appeal averred that he "had committed a justus error in consenting to the settlement which was totally based on the plan X". It was on this basis that relief by way of *restitutio in integrum* was sought to have the "consent decree" set aside. Said

Sansoni, J. in *A. K. W. Perera v. G. Don Simon*⁽²⁾, "*restitutio in integrum* can be claimed on the ground of "justus error" which I understand to connote *reasonable or excusable error*" (The emphasis is mine).

Was the "consent decree" in the instant proceedings entered by reason of such an error? The answer, I think, is in the negative. The sole basis upon which the decree is assailed is the plans prepared by Licensed Surveyor Rasappah at the instance of the plaintiff about 6 months after the case was settled in court. As stated earlier, the settlement was reached in the presence of the parties, their counsel and after due consideration.

In refusing relief the Court of Appeal expressed itself thus: "The plan drawn by Mr. Rasappah has not been produced by the petitioner in the District Court at any stage. It is not open to the petitioner to assail the plan drawn upon the commission for the first time in this court, on the basis of a plan which has been privately obtained by him". With this reasoning, I am in entire agreement.

In any event, ". . . the power to grant relief by way of *restitutio in integrum* is a matter of grace and discretion"; (*Usoof v. Nadarajah Chettiar*⁽³⁾); "the remedy by way of *restitutio in integrum* is an extraordinary remedy and is given only under very exceptional circumstances." (*Menchinahamy v. Muniweera*⁽⁴⁾). No such circumstances are to be found in the present case.

For these reasons, the appeal fails and is dismissed but, in all the circumstances, without costs.

KULATUNGA, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal dismissed.