1958 *Present:* **H. N. G. Fernando, J., and Sinnetamby, J.**

A. E. M. USOOF, Petitioner, *and* NADARAJAH CHETTIAR, Respondent

S. C. 490—Applicaion for Conditional Leave to appeal to the Privy Council in D. C. Colombo 3,140/MB.

Privy Council—Application for restitutio in integrum—*Order of Supreme Court—Right to appeal therefrom to Privy Council—" Final judgment in a civil suit or action "—Appeals (Privy Council) Ordinance (Cap. 85), s. 3, Schedule, Rule 1.*

An order of the Supreme Court granting or refusing an application for *restitutio in integrum* in respect of a decree alleged to have been obtained by fraud is not a final judgment from which leave to appeal to the Privy Council can be claimed as of right under Rule 1 of the Schedule to the Appeals (Privy Council) Ordinance.

Dodwell v. Rawther (1899) 3 N. L. R. 325, not followed.

APPLICATION for conditional leave to appeal to the Privy Council.

C. Thiagalingam, Q.C., with *C. Chellappah* and *T. Parathalingam*, for the defendant-appellant petitioner.

E. B. Wikramanayake, Q.C., with *V. Arulambalam*, for the plaintiff-respondent.

Cur. adv. vult.

January 17, 1958. H. N. G. FERNANDO, J.—

This is an application for conditional leave to appeal to Her Majesty in Council against an order of this Court dismissing an application by way of *restitutio-in-integrum* in which the present petitioner sought to have

vacated a decree entered of consent on 21st December 1953 in action *No. 3,140 D. C. Colombo*. In that action, which was for the recovery of sums alleged to be due on a mortgage bond, the petitioner was the defendant and the respondent was the plaintiff. The ground of the application for *restitutio* was that the present petitioner had consented to the terms of the consent decree (whereby judgment was entered for the plaintiff subject to certain conditions as to execution) on the faith of an (unrecorded) undertaking by the plaintiff which the plaintiff had thereafter fraudulently refused or neglected to implement.

The only ground of objection to the application for conditional leave is that the former proceedings for *restitutio* are not a civil suit or action and that no appeal lies to the Privy Council from the judgment of this Court in those proceedings. Counsel for the petitioner appeared to think that if he succeeded in showing that an application for *restitutio* in the Supreme Court is a " civil suit or action," a right of appeal would necessarily lie against the order of this Court thereon. But section 3 of the Appeals (Privy Council) Ordinance (Cap. 85) does not itself confer a right of appeal; it merely provides that the right of appeal shall be subject to, *inter alia*, the limitations and restrictions prescribed by the 1st Rule in the Schedule to the Ordinance. In the case therefore of every application for leave to appeal, the provisions in that Rule are brought into consideration and the question of law which must always be determined is whether the relevant order of this Court is a *final judgment in a civil suit or action*. That in my opinion is the substantial question which has been raised in the objection taken by the respondent.

The principal argument for the respondent has been based on the decision of a majority of a bench of five Judges in the case of *The Silverline Bus Company Limited v. Kandy Omnibus Company Limited* [1], to the effect that an application to this Court for a writ of certiorari is not a " civil suit or action " within the meaning of section 3 of the Appeals (Privy Council) Ordinance. Since the jurisdiction of the Supreme Court to grant relief by way of *restitutio* is of a different nature to the jurisdiction in *certiorari*, it is necessary to consider first the subject of *restitutio* before examining the bearing which the decision relied on may have on the present case.

The history of the remedy of *restitutio-in-integrum* was considered by Wood Renton, J. in *Abeysekere v. Haramanis Appu* [2]. In Roman Law the remedy was granted by the Praetor who himself conducted the proceeding in which a *judicium rescindens* might ultimately be granted, and by the time it was received into the Roman Dutch Law, *restitutio* might be granted to any party on the ground of *metus, dolus, absentia*, or minority, as well as to a partial extent on the ground of *laesio enormis*. The learned Judge cites a sketch of the subject by Burge in his Chapter on Guardianship of Minors (Vol. IV—2nd Edition). Burge refers to the proceeding as an action to undo what legally had been done but emphasizes that the granting of such relief could not be claimed as a matter of right but was an act of grace in the exercise of the Royal Prerogative. Wood Renton, J. cites a number of earlier cases in Ceylon and reaches the conclusion that in the then state of the law it was too late for a

[1] *(1956) 58 N. L. R. 193.* [2] *(1911) 14 N. L. R. 353.*

bench of two Judges or probably even for the Full Court to hold that the remedy of restitution ought no longer to be recognised, and he laid down what seemed to him to be the appropriate procedure to be followed in the case of an application to the Supreme Court for restitution. He himself appears to have thought, like Wendt, J. and Middleton, J. in the earlier case of *Silindu v. Akura* [1], that where relief is claimed from a decree alleged to have been improperly obtained, what this Court should do if a *prima facie* case for relief is made out, is to direct the original Court which passed the decree to hear all necessary parties and to determine whether the relief should be granted. In the Full Bench case of *Sinnetamby v. Nallatamby* [2], where a consent decree was alleged to have been entered by mistake, the same view that this Court if it chose to act would give a direction to the lower Court to investigate the matter, had also been expressed. That too was the view expressed in *Gunaratne v. Dingiri Banda* [3]. Neither the submissions of Counsel nor my own somewhat limited researches have revealed any decision of this Court in which an application for restitution against a decree alleged to have been obtained by fraud has met with success, and I have therefore no precedent as to the actual action to be taken by this Court upon a favourable view of such an application. But in the absence of any such precedent I feel quite entitled to assume the correctness of the procedure envisaged in the judgments to which I have referred, namely that this Court would merely direct the Court which entered the decree to hear the parties and to determine whether or not the *status quo* before decree should be restored. If such be the order which this Court would make, it would be difficult to claim for it the character of a final judgment within the meaning of the 1st Rule in the Schedule to the Privy Council Appeals Ordinance. Lord Atkinson when considering in the Privy Council the question what is a "final judgment" (*Tata Iron and Steel Co. Ltd. v. Chief Revenue Authority, Bombay* [4]) cited with approval the opinion of Lord Selbourne that "nothing more is necessary than that there should be a proper *litis contestatio* and a *final adjudication between the parties on the merits*. Applying this test in a case where restitution is sought through the aid of this Court, it seems clear that what would be final if at all is the judgment of the original Court after hearing the parties, or, in the context of an appeal to the Privy Council, the judgment of this Court on an appeal from a determination of the original Court setting aside or refusing to set aside its decree. The direction of this Court requiring the original Court to review its own decree would be nothing more than an order putting the original Court in motion with a view to its making a final adjudication. It is true that the present application is for leave to appeal *after a failure to obtain such a direction from this Court*, but if a successful termination in this Court of an application for relief is not a final judgment, I can see no reasonable basis for the opinion that an unsuccessful termination would constitute a final judgment. On this aspect of the matter alone, namely, having regard to the fact that the authorities contemplate merely the making of an order by this Court directing a District Court to review its own decree if proper grounds are made out, I would hold that the order which this Court

[1] (1904) 7 *N. L. R.* 296.
[2] (1903) 7 *N. L. R.* 139.
[3] (1898) 4 *N. L. R.* 249.
[4] (1923) *A. I. R.* (*P. C.*) 148.

would have to make upon application for restitution, whether it be favourable or unfavourable to the applicant, is not a final judgment, and that leave to appeal to the Privy Council therefrom cannot be claimed as of right. But there are other reasons which lead me to the same conclusion.

In *The Silverline Bus Co. Ltd. v. Kandy Omnibus Co. Ltd.*[1] Basnayake, C.J., distinguished cases of *regular actions* for damages or trespass in respect of the unlawful assumption of jurisdiction by a tribunal from cases where an aggrieved party invokes the aid of the High Court by way of *certiorari* or otherwise to correct the error of a tribunal. The fact that in the former cases the decision of the Court which tries the action for damages or trespass would be subject to an appeal does not in the opinion of the learned Chief Justice render the alternative proceedings in the High Court a civil suit or action. I shall state why it seems to me that this reasoning is applicable to the present case.

In *Obeysekere v. Gunasekera* [2] it was held that a District Court has jurisdiction to set aside a judgment obtained by fraud but that a separate suit would have to be instituted for the purpose. In *Sinnetamby v. Nallatamby* [3] (which was a case of alleged mistake), Middleton, J. while saying that fraud in securing a decree gives rise to a cause of action, thought that the remedy is by way of action if the fraud is discovered after the lapse of time. The case itself was a partition action in which the plaintiff relied on a decree entered of consent in an earlier action, and the question which the Court had to decide was whether the Judge hearing the partition action could entertain the counter-claim that the earlier consent decree was entered *by mistake*. The Full Court decided that the proper course was not to make such a counter-claim, or even to institute a separate suit to correct the mistake, but to apply to this Court by way of *restitutio* for an order on the lower Court to review the consent decree. There was the additional circumstance that in any event, a Court exercising special jurisdiction under the Partition Ordinance had no power to entertain the counter-claim against the validity of an existing decree. While two of the three members of the Bench expressed themselves in terms which are open to the construction that in their opinion the only means of setting aside a decree improperly obtained, including a decree obtained by fraud, would be by the process of *restitutio-in-integrum* in the Supreme Court, the case itself was one where only mistake was alleged and any reference purporting to cover cases of fraud was therefore *obiter*. In fact Middleton, J. makes the distinction between the two types of cases quite clear. In the later case of *Abeysekere v. Haramanis Appu* [4] Wood Renton, J. cites without disapproval the case of *Obeysekere v. Gunasekera* [2] and that of *Perera v. Ekanaike* [5] where two Judges had held that a judgment obtained by fraud might be set aside by a regular action, as well as his own similar observations in *Buyzer v. Eckert* [6]. Wood Renton, J. also refers to the South African case of *Peale v. National Bank of South Africa Ltd.* [7] which held that an action for restitution may be brought before the tribunal which pronounced the judgment.

[1] *(1956) 58 N. L. R. 193.*
[2] *(1884) 6 S. C. C. 102.*
[3] *(1903) 7 N. L. R. 139.*
[4] *(1911) 14 N. L. R. 353.*
[5] *(1897) 3 N. L. R. 21.*
[6] *(1910) 13 N. L. R. 371.*
[7] *(1908) 26 S. A. L. J. 230.*

These decisions establish in my opinion that two alternative courses are open as a means of setting aside a decree alleged to have been obtained by fraud, one course being the institution of a separate action in the self-same Court. If, as would seem to be the case, such an action is a proceeding for the redress of a wrong, then the judgment, if any, pronounced *in appeal by this Court* would appear to be a final judgment and therefore appealable under the Privy Council (Appeals) Ordinance. But it does not follow that an appeal would lie *if the alternative course of applying* to this Court for restitution were to be adopted. One reaches therefore a similar conclusion as that to which the present Chief Justice arrived in regard to the distinction between the order of this Court made in a civil action for an excess of jurisdiction, and the order of this Court in a proceeding by way of *certiorari* or prohibition.

One further ground which impresses me is that the power to grant relief by way of *restitutio-in-integrum* is a matter of grace and discretion. It is difficult to accept the contention that an appeal lies as of right against a refusal to grant relief by way of grace in the exercise of a jurisdiction originally vested in the Sovereign.

The case of *Dodwell v. Rawther et al.* [1] in which Withers, J. sitting alone granted leave to appeal to the Privy Council against a refusal by this Court to allow restitution should not in my opinion be followed. There is nothing in the judgment to indicate that the objection taken in the present case was considered or agitated.

I would hold that the order against which leave to appeal is now sought is not a final judgment from which there is an appeal as of right. It was not argued that the case raises any question of great general or public importance. I would accordingly refuse the application with costs.

SINNETAMBY, J.—I agree. *Application refused.*