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

In the matter of an application for *Restitutio-In-Integrum* and Revision under and in terms of Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka

Court of Appeal
Case No: RII/0030/2023

DC Mount Lavinia
Case No: 1092/2016/RE

Lanka Marine Services (Private) Limited,
No. 117, Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

Plaintiff

Vs.

Mohamed Muneer Yoosuf,
No. 28, Inner Fairline Road,
Dehiwela

Defendant

And Now Between

Mohamed Muneer Yoosuf,
No. 28, Inner Fairline Road,
Dehiwela

Defendant-Petitioner

Vs.

Lanka Marine Services (Private) Limited
No. 117, Sir Chittampalam A. Gardiner Mawatha,
Colombo 02

Plaintiff-Respondent

And Now Between

Mohamed Muneer Yoosuf,
No. 28, Inner Fairline Road,
Dehiwela

Defendant-Petitioner-Petitioner

Vs

Lanka Marine Services (Private) Limited
No. 117, Sir Chittampalam A. Gardiner
Mawatha,
Colombo 02

Plaintiff-Respondent-Respondent

Before : R. Gurusinghe J
&
M.C.B.S. Morais J

Counsel : Faiszer Musthapha, P.C. with Vinura Kularatne

for the Defendant-Petitioner-Petitioner

Kanchana Pieris with Chatura Weerasooriya
Instructed by K. Sivaskandarajah

For the Plaintiff-Respondent-Respondent

Supported on : 11-07-2024

Decided on : 19-09-2024

Judgment

R. Gurusinghe

The defendant-petitioner-petitioner (hereinafter referred to as the petitioner) filed this application seeking *inter alia* to set aside the judgment dated 06-09-2018, marked X10 (a), in the case bearing no. 1092/2016/RE in the District Court of Mount Lavinia.

The plaintiff-respondent (hereinafter referred to as the respondent) filed objections against the petitioner's application and resisted the application.

The respondent filed an action against the petitioner before the District Court of Mount Lavinia, seeking a declaration of title to the premises described in the schedule to the plaint and ejectment of the petitioner from the said premises. The summons was duly served on the petitioner and the petitioner filed an answer to the plaint. The case was fixed for trial on 27-10-2017.

The trial was re-fixed for 08-02-2018, as the Learned Judge was on duty leave. On 08-02-2018, Counsel for the respondent was ready for the trial, but the registered attorney for the petitioner informed the court that he had no proper instructions from the defendant-petitioner and the defendant-petitioner had not met the Senior Counsel. As such, the registered attorney for the petitioner made an application to revoke the proxy given to him by the petitioner, and the court allowed the revocation. The petitioner personally appeared before the court and sought to appear with the assistance of a counsel. The court allowed the petitioner's application and gave the petitioner a final date. The case was re-fixed for trial on 14-05-2018.

On 14-05-2018, the respondent was ready for the trial, but the petitioner was absent and unrepresented. Then, the Counsel for the respondent moved that the case be fixed for *ex-parte* trial, and accordingly, the case was fixed for *ex-parte* trial on 28-06-2018, and the respondent was directed to file an affidavit as evidence of the respondent. After that, the Additional District Judge of Mount Lavinia delivered the judgement on 06-09-2018 in favour of the respondents and directed that the decree be served on the petitioner.

The petitioner in this application states that on 14-05-2018, while he was crossing the road to enter the premises of the Mount Lavinia Court, he was involved in an accident at the crossing in front of the court premises. However, despite the difficulty, the petitioner managed to enter the court; by the time the petitioner arrived at the Court, the case bearing no. 1092/2016/RE had already been called and the petitioner was made to understand that the matter had already been taken up. The petitioner took the assistance of an Attorney-at-law to review the case record at the registry of the District Court of Mount Lavinia and became aware that the matter had been fixed for *ex-parte* hearing. The petitioner further states that he was advised that he could only intervene and object to the *ex-parte* trial only upon receiving the decree. The petitioner further states that he did not receive the decree, and also, on several occasions, he attempted to peruse the case record case bearing no. 1092/2016/RE at the registry of the District Court of Mount Lavinia.

The petitioner states in paragraph 19 of the petition that in February 2020, an individual visited his residence in his absence and informed his spouse

that the petitioner and their family would be evicted from the impugned property within a period of 14 days. Even after that, the petitioner tried to peruse the case record at the Mount Lavinia District Court registry but was unsuccessful. On 17-09-2020, around 11.00 a.m., a person named Nishantha, claiming to be a Fiscal of the District Court of Mount Lavinia, contacted the petitioner via phone and informed him that there were some documents to be handed over by the Court. After that the petitioner informed that he was in Galle on the said date. Upon returning home that day, the petitioner discovered the notice dated 17-09-2020 was attached to the gate of the impugned property, which was issued by the Registrar District Court of Mount Lavinia and the said notice states *inter alia* as follows:

a) The Registrar of the District Court of Mount Lavinia was present at the impugned property to execute the Writ of the Decree dated 06th September 2018 of the case bearing number 1092/2016/RE.

b) The Registrar and/or the Assistant Fiscal would return with a break-open order to carry out the execution of the Writ of the case bearing No. 1092/2016/RE.

The petitioner was finally able to examine the case record on 21-09-2020 and became aware that the *ex-parte* trial of the case had concluded and the judgment pronounced on 06-09-2018, and accordingly, the decree had been served on the petitioner. The petitioner states that the fiscal report dated 25-10-2018 was wrongfully reported, stating that the decree dated 06-09-2018 had been served on the petitioner.

Thereafter, the petitioner made an application on 28-09-2020 seeking for leave, to make an application to vacate the *ex-parte* judgment and the decree, and vacate or recall the order for execution of Writ. However, by the order dated 16-03-2022, the Learned District Judge rejected the petitioner's above-mentioned application.

Objections of the plaintiff-respondent

The respondent objected to the petitioner's application in its statement of objections. The respondent states that the petitioner has deliberately and with the intention of misleading the court, presented false testimony in his petition and the affidavit, which is *ex-facie* false and false to the knowledge of the petitioner. The respondent pleads that the petition should be dismissed *in limine* for that reason.

The respondent has also taken up that documents material, to the application have not been produced and annexed by the petitioner, and the

application is accordingly not in conformity with the applicable rules of this court and ought to stand dismissed *in limine*.

The respondent denied the averments contained in the petition and pleaded that the relief paid for in the petition of the respondent are as follows:

(a) A declaration that the Respondent is the rightful owner of the property more fully described in the 1st Schedule to the plaint, inclusive of the right of way more fully described in the 2nd Schedule to the plaint;

(b) An order for the ejectment of the Petitioner from the property more fully described in the 1st Schedule to the plaint;

(c) That until the peaceful and vacant possession of the property is handed over to the Respondent, a sum of Rs. 500,000/- to be paid monthly from 01/07/2016 as loss and/or damage;

(d) Costs;

The respondent also states that averments contained in paragraph 7 of the petition are false and false to the knowledge of the petitioner, which possession *ex-facie* contradicted by the record. The replication of the respondent was filed on 12-06-2017, which was the date nominated for replication by the court. The respondent also pleads that as evident from the record, the decree was duly served on the petitioner.

The respondent denies the averment in paragraph 32 of the petition and states that the petitioner is blatantly misleading the Court. He further pleads that the same Attorney on record who appeared for section 839 application continues to appear as an Attorney on record in the instant application before this court.

The respondent pleads that *ex facie*, the petition itself;

a) The petitioner is guilty of gross suppression and misrepresentation of fact and has sought to deliberately mislead the Court;

b) The petition deals with several disputed factual matters which ought properly to have been determined by the District Court, and which could have been so determined had the petitioner acted with due diligence and without default;

c) There is no basis for the grant of the relief prayed for in the petition;

d) The petitioner himself has not pleaded the grounds on which he is aggrieved by any Order of Court or the basis on which the Learned District Judge has erred;

e) The petitioner is guilty of gross laches.

The respondent instituted an action against the petitioner seeking a declaration of title and ejectment of the petitioner from the subject matter of action and damages for wrongful application. The petitioner filed answers on 22-02-2017 and the case was fixed for trial on 23-08-2017. The trial date was changed to 27-10-2017 on an application made by the respondent's counsel, by way of a motion. On 27-10-2017, the matter was re-fixed for 08-02-2018 as The Learned District Judge was on leave. On 08-02-2018, the registered Attorney for the petitioner made an application to revoke the proxy for the petitioner since the petitioner had failed to give him proper instructions and failed to meet the Senior Counsel who was intended to appear for the petitioner at the trial. The petitioner was present in person and moved for time to obtain fresh legal representation. As the petitioner was not ready for the trial, the Learned District Judge gave the petitioner a final date. The case was fixed for trial on 14-05-2018. The parties are also directed to tender written admissions and issues, 14 days before the next trial date.

The respondents have filed issues and admissions as directed. However, the petitioner has not filed admissions and issues. On 14-05-2018, when the case was taken up for trial, the petitioner was absent and unrepresented, and on application of the respondent, the matter was fixed for *ex parte* trial. The District Judge entered the judgment in favour of the respondents on 06-09-2018, and the decree was served personally on the petitioner on 25-10-2018. (Journal Entry No. 21).

There is no evidence that the petitioner had met with an accident or he had come to court on the trial date. If he had come to court on the trial date after the case had been fixed for ex-parte trial, he could have made an application under section 86 (2 A) of the Civil Procedure Code.

Section 86 (2 A) is as follows;

(2A) *At any time prior to the entering of judgment against a defendant for default, the court may, if the plaintiff consents, but not otherwise, set aside any order made on the basis of the default of the defendant and permit him to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear fit.*

The Civil Procedure Code (Amendment) Act No. 53 of 1980 introduced the above provisions.

The petitioner made an application under Section 839 of the Civil Procedure Code on 28-09-2020 after he was served with a Break Open Notice. After an inquiry, that application was dismissed by Order dated 16-03-2022. The petitioner has not given oral evidence at the inquiry and agreed to dispose of the application by way of written submission. The Learned District Judge observed that though three dates had been given to file written submissions, the petitioner had failed to file any written submissions.

This application was filed before this court on 23-06-2023. The petitioner took up the position that he was unable to peruse the case record from 14-05-2018 up to 21-09-2020, citing various reasons. This court observed that at the hearing of this application, a certified copy of case no. 1092/16/RE in the District Court of Mount Lavinia was issued to the petitioner on 26-04-2019. The day stamp of that court is placed on every page of the certified copy. This clearly indicates that the petitioner's position that he could not peruse the case record from 14-05-2018 up to 21-09-2020 was incorrect and false.

The petitioner took up the position that he was finally able to peruse the case record in the District Court of Mount Lavinia on 21-09-2020, and then only he came to know that the case was decided against him *ex parte* and the decree had been served on him. The petitioner states that he never received the decree or notice related to the decree of the case bearing no. 1092/2016/RE.

The petitioner did not give any evidence to contradict the fiscal report that the *ex parte* decree was served on the petitioner personally. It is necessary for a party who contests a fiscal report to give evidence at such inquiry.The petitioner himself should have testified and availed himself for cross-examination to prove that the decree was, in fact, not served on him.

In the case of *Andradie v. Jayasekera Perera [*1985] SLR 204, it was held as follows;

It has been held in the cases Orathinahamy v. Romants and Gunawardene v Kelaart that the record maintained by the judge cannot be impeached by allegations or affidavits and that "the prospect is an appalling one if in every appeal it is open to the appellant to contest the correctness of the record". Gunawardena v. Kelaart (supra) Thus, in the face of what appears on the record, it is not possible for this court to controvert the record of the District Court unless in the first instance material has been provided before the District Court itself that the entries pertaining to the service of summons and the service of Decree Nisi and entering of Decree Absolute are incorrect and mere fictions and unless the District Judge is invoked in the first instance to set aside all the proceedings and orders made before him on the ground of a fraud that has been perpetrated rendering all those proceedings and orders ultra vires and null and void. All these are questions of fact as is the question of fraud on which evidence will appear necessary and the petitioner herself should be made available for cross-examination and consequently the judge must make his findings on questions of fact before this court can be invited on inferences and conduct to hold that there has been fraud. I am also of the view on the long line of cases quoted by the learned counsel for respondent that the practice has grown and almost hardened into a rule that where a decree has been entered ex parte in the District Court and is sought to be set aside on any ground, application must in the first instance be made to that very court and that it is only where the finding of the District Court on such application is not consistent with reason or the proper exercise of the judge's discretion or where he has misdirected himself on the facts or law will this court grant extraordinary relief by way of Revision or Restitutio in Integrum which are extraordinary remedies.

*In Vannakar V Urhumalebbe [1996] 2 Sri LR 73,CA,*F.N.D. Jayasuriya J held as follows;

"Justice Dias in King v Jayawardena 48 NLR 489 has considered the earlier line of decisions laying down the cursus curiae with regard to the legality of filing convenient and self-serving affidavits in appeal to vary and contradict the record or with a view to purge a default which had taken place before the Court of first instance. After a review of these decisions, he held that no party ought to be permitted to file a belated self-serving and convenient affidavit to contradict the record, to vary the record or to purge a default where they have not taken proper steps to file such affidavits before the Judge or President of the Court of first instance or tribunal respectively."

The petitioner, having been in possession of the case record since 26-04-2019, has filed an application before the District Court only on 28-09-2020.

In this regard, the averments contained in the petition are incorrect and proven to be false. The petitioner seeks to blame the fiscal officer for the petitioner's negligence and delay in taking steps in the action.

The petitioner took up the position that the delay of fifteen months from the section 839 Order to the filing of this action was due to his Counsel migrating from Sri Lanka without informing him. However, this court observed that the Registered Attorney on Record for the petitioner is the same for section 839 petition, as is for this *Restitutio in Integrum* application. Therefore, the reason given for the delay in instituting this application cannot be accepted.

Sri Lanka Insurance Corporation Limited v. Shanmugam and another [1995] 1 SLR 55, Ranaraja J. held as follows:

Restitutio in integrum is an extraordinary remedy; it is not to be given for mere asking or when there is some other remedy available, Mapalathan v. Elayavan. It is a remedy which is granted under exceptional circumstances and the power of court should be most cautiously and sparingly exercised, (Perera-supra). A party seeking restitution must act with utmost promptitude, Babun Appu v. Simon Appu), (Menchinahamy - supra), and before a change has taken place in the position of the parties, (Sinnethamby v. Nallathamby) . Where there has been negligence on the part of the applicant seeking relief or his attorney-at-law, restitution will not be granted (Wickremasoodya v. Abeywardene). The party invoking the extraordinary powers of this court must display honesty and frankness. Thus, where a party by its own conduct has acquiesced in or approbated the defective proceedings, court will not exercise its discretion to set aside the impugned proceedings. For it is not the function of court in the exercise of its jurisdiction in restitution to relieve the parties of the consequences of their own folly, negligence or laches. (Don Lewis v. Dissanayake)

The petitioner has not acted after the service of decree nor upon receipt of the case record in 2019. He only acted upon receipt of the Break Open notice in September 2020. This instant action was instituted one and a half years after the delivery of the order in inquiry under section 839 of the Civil Procedure Court. One of the reasons for the delay cited by the petitioner was the unavailability of legal representation. However, the same Registered Attorney was on record for both applications.

The defendant, having in possession of the case record, knowledge as to the *ex parte* judgement, and service of the decree, misrepresented the court,

stating that he was not able to peruse the case record or obtain a copy of it as reasons for his delay in filing this application.

The defendant did not give evidence at section 839 inquiry. He has failed to place any evidence that would corroborate his position that he was not able to peruse the record or obtain a copy of it. The defendant was well aware of the service of the decree from April 2019 and failed to take any steps. The petitioner did not ask to set aside section 839 order dated 16-03-2022. Without seeking that relief, the petitioner asked to set aside the *ex parte* judgment dated 06-09-2018. The petitioner has failed to establish the grounds he relied on to set aside the ex-parte decree. He failed to establish any ground required for the extraordinary remedy granted under *Restitutio in Integrum*. Furthermore, the conduct of the petitioner mentioned here precludes him from seeking this extraordinary remedy.

The application of the petitioner is dismissed with costs.

Judge of the Court of Appeal.

M.C.B.S. Morais J.
I agree.

Judge of the Court of Appeal.