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

In the matter of an Application for Revision and/or Restitutio-in-Integrum.

D Agnes Meraya Fernando
No. 19, Mangala Mawatha, Kalutara North.

Plaintiff

Case No. C. A. (Rev). 558/2001
D. C. Kalutara Case No. 5457/P

Vs.

1. Sukkangirige Caroline Fernando
   No. 36, Beach Road, Kalutara North.

2. Francisku Fernandolage Kamalawathie
   No. 36/4A, Beach Road, Kalutara North.

3. Francisku Fernandolage Karunawathie
   No. 36/4B, Beach Road, Kalutara North.

4. Francisku Fernandolage Oliver Vincent Fernando
   No. 36/4D, Beach Road, Kalutara North.

5. Kanaththahewage Evlin Silva
   No. 14/1A, Mangala Mawatha, Kalutara North.

6. Weerakonda Arachchige Secilia Silva
   No. 36/3, Beach Road, Kalutara North.

7. Hewa Fonsekalage Mili Meraya Silva
   No. 19, Morahathuduwa Road, Wadduwa.

8. Nainabaduge Ariyadasa Fernando
   No. 36/3, Beach Road, Kalutara North.

9. Nainabaduge Dickson Fernando
   No. 36/3, Beach Road, Kalutara North.

Defendants

AND

2. Francisku Fernandolage Kamalawathie

3. Francisku Fernandolage Karunawathie

4. Francisku Fernandolage Oliver Vincent Fernando (Deceased)

   All of No. 36/4B, Beach Road, Kalutara North.

4A. Francisku Fernandolage Tharanga Pradeep Fernando
No. 36/4D, Beach Road, Kalutara North.

2nd, 3rd and 4A Defendant-Petitioners

Vs.

D Agnes Meraya Fernando (Deceased)
No.19, Mangala Mawatha,
Kalutara North.

Plaintiff-Respondent

Pitipanage Aruna Emil Fernando
No. 19/2, Mangala Mawatha, Kalutara North.

Substituted Plaintiff-Respondent

1. Sukkangirige Caroline Fernando (Deceased)
   No. 36, Beach Road, Kalutara North.

1A. Francisku Fernandolage Kamalawathie

1B. Francisku Fernandolage Karunawathie

   Both of No. 36/4B, Beach Road, Kalutara North.

5. Kanaththahewage Evlin Silva
   No. 14/1A, Mangala Mawatha, Kalutara North.

6. Weerakonda Arachchige Secilia Silva
   No. 36/3, Beach Road, Kalutara North.

7. Hewa Fonsekalage Mili Meraya Silva
   No. 19, Morahathuduwa Road, Wadduwa.

8. Nainabaduge Ariyadasa Fernando (Deceased)
No. 36/3, Beach Road, Kalutara North.

8A. Halpawattage Susil Hemalatha Pieris

8B. N. Ruwan Day Fernando

8C. N. Prasad Shanaka Fernando

8D. N. Priyangika Fernando

8E. N. Rishanthi Pieris Fernando

9. Nainabaduge Dickson Fernando
No. 36/3, Beach Road, Kalutara North.

Defendant-Respondents

Before: Janak De Silva J.

Counsel:

Rohan Sahabandu P.C. with Athula Perera for 2nd, 3rd and 4A Defendant-Petitioners

L. Amerasinghe with N. Malkumara for 8A, 8C, 8D and 8E Defendants-Respondents

Written Submissions tendered on:

2nd, 3rd and 4A Defendant-Petitioners on 20.05.2014

8A, 8C, 8D and 8E Defendants-Respondents on 13.05.2014

Decided on: 24.01.2020

Janak De Silva J.

The 2nd – 4th Defendant-Petitioners by petition dated 04.05.2001 invoked the revisionary and/or restitutionary jurisdiction of this Court and sought *inter alia* to set aside the judgment of the learned District Judge of Kalutara dated 15.10.1990 (P5), the interlocutory decree and the final decree in D.C. Kaluthara case No. 5457/P.

The Plaintiff instituted the action bearing No. 5457/P in District Court of Kalutara to partition the land called "Parangiyawatte" containing in extent about Two (02) Roods morefully described in the schedule to the plaint dated 30.04.1987 (P1) and claimed an undivided 107/360 share.

The 2nd – 4th Defendants filed their Statement of Claim (P2) on 17.01.1990.

The 6th – 9th Defendants intervened and filed their Statement of Claim (P3) on 21.03.1990.

On 15.10.1990, the trial was held and the Plaintiff, the 1st Defendant and the 3rd – 8th Defendants were present. All parties were represented by their Attorneys-at-Law (P4). The Plaintiff gave evidence according to a settlement between the parties. Her evidence was not disputed and she was not cross-examined by any of the Defendants. Judgment was delivered on the same day. Consequently, an interlocutory decree was entered.

A commission was issued to prepare the Final Scheme of Partition. On 28.10.1991, the Plaintiff sought to amend the plan No. 2493 dated 26.08.1991 made by G. Ambepitiya, Licensed Surveyor (X3). On 24.06.1992, the amended plan No. 2493A dated 14.06.1992 made by G. Ambepitiya, Licensed Surveyor (X5) was produced. An alternative Final Scheme of Partition depicted in plan No. 560 dated 26.03.1993 made by B. K. P. W. Gunawardena, Licensed Surveyor was submitted by the 2nd – 4th Defendants (X6).

On 16.07.1993, the Attorney-at-Law for the 2nd – 4th Defendants informed the Court that he was unable to object to the Final Scheme of Partition during the inquiry due to an oversight. The 2nd – 4th Defendants were afforded an opportunity to file written submissions on their objections to the Final Scheme of Partition. By the Written Submissions dated 10.11.1993 (P6), the 2nd – 4th Defendants submitted that the judgment dated 15.10.1990 is contrary to the provisions of section 25 of the Partition Law and sought to set aside the said judgment and the Interlocutory decree in terms of section 839 of the Civil Procedure Code.

The learned District Judge, by the Order dated 07.12.1993, rejected the application of the 2nd – 4th Defendants to set aside the judgment and the Interlocutory decree. Also, the amended plan No. 2493A dated 14.06.1992 made by G. Ambepitiya, Licensed Surveyor was approved since the 2nd – 4th Defendants did not prefer any objections to the same. A final decree was entered accordingly.

Being aggrieved, the 2nd – 4th Defendants preferred an appeal to this Court by instituting the case bearing No. 735/1993(F). On 20.07.2000, the judgment was delivered (P10) and the appeal was dismissed with costs. Hence, the instant application.

Revision like an appeal is directed towards the correction of errors but it is supervisory in nature and its object is the due administration of justice and not primarily or solely the relieving of grievances of a party [*Attorney General v. Gunawardena* (1996) 2 Sri.L.R. 149]. Revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive

miscarriage of justice [*Vanik Incorporation Limited v. Jayasekara* (1997) 2 Sri.L.R. 365]. The object of revision is the due administration of justice and correction of errors [*Kayas v. Nazeer and Others* (2004) 3 Sri.L.R. 202].

In *Siripala v. Lanerolle and Another* [(2012) 1 Sri.L.R. 105], Sarath De Abrew, J. observed that the following tests have to be applied before the discretion of this Court is exercised in favour of a party seeking the revisionary remedy –

(a) The aggrieved party should have no other remedy.

(b) If there was another remedy available to the aggrieved party, then revision would be available if special circumstances could be shown to warrant it.

(c) The aggrieved party must come to the Court with clean hands and **should not have contributed to the current situation.** (emphasis added)

(d) The aggrieved party should have complied with the law at that time.

(e) The acts complained of should have prejudiced his substantial rights. (emphasis added)

(f) The acts or circumstances complained of should have occasioned a failure of justice.

As I observed earlier, during the trial before the learned District Judge, the Plaintiff, the 1st Defendant and the 3rd – 8th Defendants were present. Even though the 2nd Defendant was absent, she and all the other parties were represented by their Attorneys-at-Law. When the evidence of the Plaintiff was led, none of the Defendants objected to or disputed her evidence, both oral and documentary. Neither was the Plaintiff cross-examined even though the opportunity was given. Furthermore, it must be noted that the 2nd – 4th Defendants didn't object to the interlocutory decree entered. It is only when the inquiry regarding the Final Scheme of Partition was held on 16.07.1993, almost three (03) years after the Judgment was delivered, the 2nd – 4th Defendants sought permission of the Court to object to the Final Scheme of Partition. However, when the opportunity was afforded, the 2nd – 4th Defendants requested to set aside the Judgment and the Interlocutory decree in terms of Section 839 of the Civil Procedure Code without objecting to the Final Scheme of Partition.

Where a party by its own conduct has acquiesced in or approbated the defective proceedings, the Court will not exercise its discretion to set aside the impugned proceedings. For it is not the function of the 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* (70 N.L.R. 8)].

In view of the above, I'm of the opinion that the Petitioners acquiesced in or approbated the alleged defective proceedings.

The contention of the Petitioners is that the deeds marked by the Plaintiff-Respondent (i.e. '6වි2' and '7වි1') to establish the title of the 6th – 9th Defendant-Respondents were not produced before the learned District Judge for verification and the 6th – 9th Defendant-Respondents have obtained a larger share to which they are not entitled. Also, the Petitioners claim that '6වි2' and '7වි1' are not registered in the correct folio at the Land Registry. They seek to keep the undivided 190/360 share allotted to the 6th – 9th Respondents unallotted on the ground that the 6th – 9th Defendant-Respondents have obtained an undivided 190/360 share by fraud and the Judgment should be set aside for the reason that there has been an abuse of process of the Court.

In the case of *Sri Lanka Insurance Corporation Ltd v. Shanmugam and Another* [(1995) 1 Sri.L.R. 55)], Ranaraja, J. observed –

> *"Fraud is defined by Labeo as any craft, deceit or contrivance employed with a view to circumvent, deceive or ensnare another person. (Lee – Introduction to Roman Dutch Law 5th Ed. p225). Learned President's Counsel endeavoured to convince this Court that the Respondents had deceived the Original Court into giving an ex parte judgment on the suppression of evidence and misrepresentations referred to. Clearly, the grounds relied on by the Petitioner to prove fraud do not fall within Labeo's definition of fraud.*
>
> ***The principle on which this Court has to act is not whether the Court that gave judgment was tricked into it, but whether one party to action was deceived by the conduct of the opposing party.*** *Clearly it was not the case in this instance. It was entirely due to the lack of due diligence on the part of the Petitioner that it took no steps to file the Answer. Thereafter, it failed to file the necessary papers within the stipulated period to have the decree set aside. Had the Petitioner filed its answer at the proper time, it could have taken up all the defenses which it claims would have deprived the Respondents of the Judgment obtained in their favour. Thus, it cannot now complain of a denial of justice. It has failed to avail itself of the opportunity offered to present its case, not once but twice. When the Court or the provisions of any law requires a party to adhere to specific mandatory time limits, they should be complied with if due administration of justice is to be ensured. Those who choose to ignore the time limits imposed, do so at their peril. They cannot be heard to complain of injustice later.* ***The remedy of restitutio in integrum is not available to a party that has been guilty of a blatant lack of due diligence.***" [emphasis added]

As I observed earlier, during the trial, the 3rd and 4th Defendants were present and all of them were represented by their Attorney-at-Law. But they did not object to or dispute the evidence led by the Plaintiff nor was she cross-examined. The 2nd – 4th Defendants never objected to the Interlocutory decree. Neither did they object to the Final Scheme of Partition when the opportunity was given even when they sought permission of the Court after three (03) years.

Revision is a discretionary remedy and the conduct of the defendant is a matter which is intensely relevant [*Perera v. People's Bank* (1995) 2 Sri.L.R. 84].

In the aforesaid circumstances, I hold that the negligent conduct of the Petitioners disentitles them to relief by way of revision and/or restitutio in integrum.

It must also be noted that the Petitioners were collectively allotted an undivided 63/360 which is exactly what they claimed in their Statement of Claim dated 17.01.1990. Therefore, it is clear that the Petitioners are not substantially prejudiced by the judgment of the learned District Judge of Kalutara dated 15.10.1990, the interlocutory and the final decrees in case bearing No. 5457/P.

For all the foregoing reasons, I hold that the Petitioners are not entitled to invoke the jurisdiction of this Court by way of revision and/or restitutio in integrum and I see no reason to interfere with the judgment of learned District Judge of Kalutara dated 15.10.1990.

The application of the Petitioners is dismissed with costs fixed at Rs. 75,000/=.

Judge of the Court of Appeal