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 Article 138 of the Constitution.

Seylan Merchant Bank Limited
No. 69, Janadhipathi Mawatha, Colombo 01.

Presently at –
Land Mark Building, No. 385,
Galle Road, Colombo 03.

Plaintiff

C. A. Application for Restitution-in-Integrum and Revision No. 15/2016
High Court Case No. WP/HCCA/COL 99/11(F)
D. C. Colombo Case No. 36408/MR

Vs.

1. Suneth Indika Nawagamuwa
   No. 29/2, Udugampola Road, Kotugoda.

2. Akmeemanage Jawood Roshan
   No. 295/2, Udugampola Road, Kotugoda.

3. Priyanthage Aruna Shantha
   Mihindupuraya, Pellawala.

Defendants

AND

Seylan Merchant Bank Limited
No. 69, Janadhipathi Mawatha, Colombo 01.

Presently at –
Land Mark Building, No. 385,
Galle Road, Colombo 03.

Plaintiff-Appellant

Vs.

1. Suneth Indika Nawagamuwa
   No. 29/2, Udugampola Road, Kotugoda.

2. Akmeemanage Jawood Roshan
   No. 295/2, Udugampola Road, Kotugoda.

3. Priyanthage Aruna Shantha
Mihindupuraya, Pellawala.

Defendant-Respondents

AND NOW

1. Suneth Indika Nawagamuwa
No. 29/2, Udugampola Road, Kotugoda.

Appearing by his Power of Attorney Holder Jayaweera Patebendige Achala Sajeewani of No. 78/12, Welikadamulla, Wattala.

1st Defendant-Respondent-Petitioner

Vs.

Seylan Merchant Bank Limited
No. 69, Janadhipathi Mawatha, Colombo 01.

Presently at –
Land Mark Building, No. 385,
Galle Road, Colombo 03.

Plaintiff-Appellant-Respondent

Vs.

2. Akmeemanage Jawood Roshan
No. 295/2, Udugampola Road, Kotugoda.

3. Priyanthage Aruna Shantha
Mihindupuraya, Pellawala.

2nd and 3rd Defendant-Respondent-Respondents

Before: Janak De Silva, J.

Counsel:

Jacob Joseph for 1st Defendant-Respondent-Petitioner

Vindya Kumari for Plaintiff-Appellant-Respondent

Written Submissions tendered on:

1st Defendant-Respondent-Petitioner 20.06.2018

Plaintiff-Appellant-Respondent on 06.03.2018

Decided on: 28.02.2020

Janak De Silva J.

The 1st Defendant-Respondent-Petitioner(Petitioner) by petition dated 15.12.2016 invoked the revisionary and/or restitutionary jurisdiction of this court and sought *inter alia* to revise and set aside the judgment of the learned High Court Judges of the High Court of Civil Appellate of the Western Province holden in Colombo dated 30.08.2016 in Case No. WP/HCCA/COL/99/2011(F) and to affirm the judgment of the learned Additional District Judge of Colombo dated 03.06.2011 in Case No. 36408/MR.

The Plaintiff-Appellant-Respondent (Respondent) instituted the case bearing no. 36408/MR in the District Court of Colombo praying for a judgment and a decree jointly and severally against the Petitioner and 2nd and 3rd Defendants-Respondents-Respondents in a sum of Rs. 829,205/= with interest at 60% per annum from 22.06.2002 until payment in full and for the return and delivery of the lease property or the payment of its value in a sum of Rs. 500,000/=.

The Petitioner filed his answer on 10.11.2005 and denied liability to pay the Respondent on the basis that the leased property was seized by the original owner on 25.01.2002 (who is not the Respondent) and moved for a dismissal of the action.

After trial, the learned Additional District Judge delivered judgment dated 03.06.2011 dismissing the action and ordered costs at 250% in terms of section 211 of the Civil Procedure Code.

Being aggrieved, the Respondent preferred an appeal to the High Court of Civil Appellate of the Western Province holden in Colombo and the learned High Court Judges, by the judgment dated 30.08.2016, allowed the appeal of the Respondent. The Petitioner filed this application against the said judgment.

The contention of the Petitioner is that –

a. The date reserved by the learned High Court Judges to deliver the judgment (i.e. 25.05.2016) was inadvertently taken down as 25.10.2016 by both the counsel and the power of attorney holder of the Petitioner;
b. On 25.05.2016, the judgment was re-fixed for 30.08.2016;
c. The judgment was finally pronounced on 30.08.2016 and the Petitioner was absent and unrepresented;
d. On 25.10.2016, the counsel and the power of attorney holder of the Petitioner discovered about the judgment delivered on 30.08.2016;
e. The Petitioner could not make an application to the Supreme Court for leave to appeal as the appealable time period was already lapsed.

The remedy by way of restitutio in integrum is an extraordinary remedy and is given only under very exceptional circumstances and the power of the court should be most cautiously and sparingly exercised [*Perera et al v. Wijewickreme* (15 N.L.R. 411), *Menchinahamy v. Muniweera et al* (52 N.L.R. 409), *Sri Lanka Insurance Corporation Ltd v. Shanmugam and Another* (1995) 1 Sri.L.R. 55].

The Petitioner contends that the absence on the part of him on the date of judgment (i.e. 30.08.2016) was due to the mistake made by the instructing Attorney-at-Law, the counsel and the power of attorney holder of the Petitioner [paragraphs 15 and 23 of the written submissions dated 20.06.2018]. In support of his case the Petitioner has annexed marked 'F' an affidavit of the counsel who appeared for him in the High Court of Civil Appellate of the Western Province holden in Colombo.

The Respondent points out that even though an affidavit affirmed by the counsel was annexed to the petition, no evidence was produced before this court to show that the instructing Attorney-at-Law and the power of attorney holder have also "mistakenly" taken down the date of judgment as 25.10.2016.

In the case of *Jinadasa and Another v. Sam Silva and Others* [(1994) 1 Sri.L.R. 232], Amerasinghe, J. held –

> *"Since the petitioners had duly appointed a registered attorney they were obliged to act through their registered attorney and not personally and, in general they were bound by the acts and omissions of their registered attorney. As far as the registered attorney in this case was concerned, the binding effect of his actions was based on the powers conferred by the terms of a standard, printed proxy in terms of Form 7 of the First Schedule to the Civil Procedure Code. It was neither extended expressly or impliedly, as it might have been, nor was it restricted.*
>
> *If the parties are required by law or by the court to be present, then they must be present. In the case before court they did not have to be present once the registered attorney had been duly appointed. In the circumstances, the petitioners were under no obligation to explain their absence. It was the default of the attorney that had to be considered. If the attorney, without sufficient excuse, was absent on the date appointed for hearing, the court, if it dismissed the application, is entitled to refuse to reinstate the matter. Where no sufficient cause is shown for the absence of the attorney who was under a duty to appear, there are no grounds for an application ex debtor justitia of any inherent power to reinstate the matter."*

It was further held that –

> *"If counsel retained and instructed by the registered attorney fails to appear on the appointed date, it is for counsel, and not the registered attorney to explain his absence in seeking reinstatement. Once the registered attorney has done his duty of appointing counsel i.e. retaining and instructing him, counsel assumes full control of the case, and becomes the 'conductor and regulator' of the whole thing. If, as in the case before Court, the registered attorney had not retained and instructed another attorney as counsel, then it was the duty of the registered attorney to keep a track of the dates fixed, for then it was he, and he alone who was entitled in terms of the law, and obliged in terms of the proxy, to appear and conduct the case."*

In view of the above, I hold that the affidavit affirmed by the counsel is sufficient evidence to show that a mistake was made in taking down the date of the judgment.

But the question to be considered is whether such mistakes warrant the exercise of the revisionary and/or restitutionary jurisdiction of this court.

Rule 16 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988 reads as follows –

> "Where the services of an Attorney-at-Law have been retained in any proceedings in any court, tribunal or other institution established for the administration of justice, it shall be the duty of such Attorney-at-Law to appear at such proceeding, *unless prevented by circumstances beyond his control."* [Emphasis added]

In the case of *Samarasekera v. Indrani* [(2007) 1 Sri.L.R. 241 at 247] Chandra Ekanayake, J. observed as follows –

> *"A mistake with regard to taking down of the wrong date (for delivery of the judgment) by a party and his Attorney-at-Law cannot be considered as a ground that falls within the purview of causes not within his control."*

In *Attorney General v. Herath and Another* [(2003) 2 Sri.L.R. 162] it was held that whilst a mistake could be excused, the negligence of a counsel is not a reasonable ground to set aside proceedings. This position is was also adverted to in *Jinadasa and Another v. Sam Silva and Others* (Supra), where Amerasinghe, J. observed as follows –

> *"As much the petitioners would enjoy the fruits of the success of their attorney's endeavours, they must take the consequences of his defaults and failures."*

In view of the above, I hold that the Petitioner has failed to discharge the burden of demonstrating to this court that non-appearance on the date of judgment was as a result of circumstances beyond his control.

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)]. The remedy of restitutio in integrum is not available to a party that has been guilty of a blatant lack of due diligence [*Sri Lanka Insurance Corporation Ltd v. Shanmugam and Another* (1995) 1 Sri.L.R. 55]. 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 view of the above, I hold that that the Petitioner has failed to establish any grounds which entitles him to relief by way of revision and/or restitutio in integrum.

For all the foregoing reasons, I hold that the Petitioner is not entitled to invoke the jurisdiction of this court by way of revision and/or restitutio in integrum.

This application is dismissed without costs.

Judge of the Court of Appeal