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

In the matter of an Application for Revision and or Restitution in Integrum in respect of the order dated 05.05.2006 of the District Judge of Mount Lavinia Case No.863/97/L

1. S.L.Dona Siriyawathie.
2. S.L.Dona Pathmawathie

Both of
No.266, Godigamuwa,
Maharagama.

**Defendant-Petitioner-Petitioners**

**C.A.APPLICATION FOR REVISION NO.1871/06**
**D. C. MT. LAVINIA CASE NO.863/97/L**

**VS**

S.K.Samaratunga,
No.169/3, Godigamuwa,
Maharagama.

**Plaintiff-Respondent**

3. S.L.Don Bandusena,
4. S.L.Don Wimalasena

Both of
No.266, Godigamuwa,
Maharagama.

**Defendant- Respondents**

**BEFORE : ERIC BASNAYAKE, J**
**K.T.CHITRASIRI, J**

**COUNSEL** : Jacob Joseph with H.D.Kausi Attorneys-at-Law for the 1st & 2nd Defendant-Petitioner-Petitioners.

Susil Panagoda with Devika Hemanthi, Attorney-at-Law for the Plaintiff--Respondent.

**WRITTEN SUBMISSIONS FILED ON** : 19th March 2010 by the 1st & 2nd Defendant-Petitioner-Petitioners
18th March 2010 by the Defendant-Respondents

**DECIDED ON** : **18TH JANUARY 2011**

**K.T.CHITRASIRI, J.**

1st and 2nd defendant-petitioner-petitioners (hereinafter referred to as the petitioners) by their amended petition dated 08th November 2006 sought to set aside two orders, namely the *ex parte* judgment dated 21st April 2005 and the order refusing to set aside the said *ex parte* judgment dated 5th May 2006 that was delivered by the learned District Judge of Mt. Lavinia.

Two petitioners are the 1st and 2nd defendants to the action filed in the District Court of Mt.Lavinia by the plaintiff-respondent-respondent (hereinafter referred to as the respondent) whilst the 3rd and 4th defendant-respondent-respondents are the added 3rd and 4th defendants in that action. Plaintiff by his plaint sought to obtain *inter alia* a declaration of title to the land described in the First Schedule thereto. He also sought to have a right of way over the land depicted in the Second Schedule in order to reach the aforesaid land described in the First Schedule.

Since the petitioners have stated that there had been unwarranted postponements when it was pending in the District Court causing hardships to the parties as a ground to challenge the impugned orders, I am compelled to refer to a few of those instances mentioned in this revision application.

Even though the action was filed in the month of July 1997, the date first fixed for trial had been on the 30th June 1999, having taken a period of two years for pre-trial steps. Even after the aforesaid date fixed for trial, the case was taken out from the trial roll as there had been an application to add two more persons as defendants. Matter such as an addition of a party should have been made soon after the parties have filed their respective pleadings because they become fully aware of each others case by then. Even the Civil Procedure Code envisages such a position by restricting such applications to be made before the hearing of the case has commenced (Section 18 of the CPC).

However it may have been, **the petitioners even thereafter had moved to have the land in question surveyed which also should have been made at an earlier stage. However, the petitioners have later abandoned the said application too.** Finally the matter was fixed for trial for the 16th November 2001. Again the matter was taken out from the trial roll due to a revocation of the proxy of the respondents and again it was fixed for trial on the 26th July 2002. On that occasion, Court granted a date for the parties to file written submissions on an issue of law and the order in respect of that issue had been delivered on 2nd April 2003. The matter was again fixed for trial on the 28th July 2003.

**On that date, learned Counsel for the petitioners moved for a date** and the case was postponed again for 28th November 2003. On that date too, the matter was not taken up for trial as the Additional District Judge was on leave and then it was re-fixed for the 2nd April 2004. That date having been declared a public holiday, parties were noticed to appear on another date and the matter was again fixed for trial for the 18th October 2004. **Even on that date counsel for the respondents had moved for a date** and the case was then fixed finally for the 28th January 2005.

**When the matter was taken up on that date namely, 28th January 2005, Attorney-at-Law appearing for the petitioners had again moved for a date** due to personal reasons of his senior counsel. However, as that date being the final date given to the defendant-petitioners the matter was then fixed for *ex parte* trial for the 11th February 2005. *Ex parte* trial was taken up on that date and accordingly the judgment was delivered on 21st April 2005. Upon entering the *ex parte* decree, it was served on the two defendants. Thereafter, petitioners filed an application to vacate the *ex parte* decree and the judgment. The 1st defendant-petitioner gave evidence on the date when the said application to vacate the *ex parte* decree and the judgment was taken up for inquiry. Consequently, the Additional District Judge made order refusing the application to vacate the *ex parte* decree and the judgment. Being aggrieved by the said decision of the learned District judge petitioners without filing an appeal or leave to appeal application, filed this revision application.

The petitioners have contended that the manner, in which the Attorneys-at-Law who held the proxy on behalf of the petitioners themselves were acting, had resulted in fixing the case for *ex parte* trial. In the amended petition to this Court the petitioners have stated that the Attorneys-at-Law who appeared for them acted in a highly

irresponsible manner which led to the detriment of the petitioners. (Vide paragraph 23 of the amended petition). They also have stated that even the learned Additional District Judge postponed the matter on many occasions on the request of the Attorneys-at-Law for the petitioners causing much prejudice to them. (Vide paragraph 24 of the amended petition).

As mentioned in paragraph 23 of the amended petition, if the attorneys who appeared for the petitioners themselves were acting to the detriment of their rights, they could have at any time revoked the proxy given to them and appointed different attorneys to appear. Appointment of registered Attorneys and the termination of such appointments are purely in the hands of the person who needs their services and therefore nothing was prevented the petitioners in doing so. This is evident by the provision, namely section 27 (1) of the Civil Procedure Code, relevant to appointment and termination of services of attorneys in a civil suit. It reads thus:-

> *"The appointment of a proctor to make any appearance or application, or do any act as aforesaid, shall be in writing signed by the client, and shall be filed in court; and every such appointment shall contain an address at which service of any process which under the provisions of this Chapter may be served on a proctor, instead of the party whom he represents, may be made."*

The aforesaid section empowers a party to appoint an Attorney-at-Law to appear in Courts, make any application or to act in any Court on his/her behalf. Termination of such authority also rests with the party who appointed the Attorney-at-Law. Therefore, when an Attorney-at-Law does not perform his or her duty according to the wishes of a party to an action, such party has the right to terminate the authority given to the Attorney-at-Law at any time, by revoking the proxy filed. In this instance too the petitioners could have made an application to revoke the proxy of their Attorney; if the

matters referred to in paragraphs 23 and 24 in the amended petition had been so. Instead of making such an application to Court at the proper time, it is not possible for the Court to act on its own disregarding the applications made by the registered attorneys to the case. Therefore, had the petitioners acted as reasonable persons they would have revoked the proxy at the proper time without complaining after the conclusion of the case: this time it is even after the execution of the decree. Therefore, this Court at this juncture cannot consider matters referred to in paragraphs 23 and 24 in the amended petition and over turn the orders made in the original court.

The petitioners have also contended that the *ex parte* judgment entered on the 21st April 2005 is contrary to evidence and/or erroneous. In support of his contention, learned counsel for the petitioners had referred to the case of **Sirimavo Bandaranayake Vs Times of Ceylon. [(1995) 1 S.L.R. 22]** Dispute in the said case was the non-service of summonses on the defendants. In this instance, there was no dispute at all as to the service of summonses on the defendant-petitioners. In fact they were represented by lawyers in Court from the time they were to appear in courts. Therefore, the case of Sirimavo **Bandaranayake Vs Times of Ceylon (supra)** is not applicable in this instance.

Moreover, learned Judge in his judgment had carefully evaluated the evidence of the respondent as to the way in which the respondent became entitled to the land and to the right of way claimed by him. Only thereafter, the learned judge had decided to grant the relief prayed for in the plaint. In the circumstances, I do not see any error of law in the decision neither do I find anything contrary to the evidence in the impugned judgment or in the order.

The petitioners referring to the case of **Fernando v. Sybil Fernando [1997 (3) S.L.R. 1]** had urged that the petitioners were not able to act in the way they wished since they have given authority to the lawyers by way of a proxy to act on their behalf. The issue that was discussed in the aforesaid case was the right of an Attorney-at-Law when a proxy is filed on behalf of a party. In that case the issue was the signing of a notice of appeal by the party concerned when a proxy is in force filed on behalf of that party. In such a situation Court held that not placing the signature of the Attorney on record in the notice of appeal was a fatal irregularity and that it was not a curable lapse as well. Similarly, the acts done by the Attorneys-at-Law who held the proxy on petitioners' behalf in this instance too cannot be made invalid unless those are based on illegal applications. Specifically, applications for postponements as alleged in this instance cannot make the orders of Court invalid. Accordingly, the petitioners will have to bear the consequences of the orders made upon the applications made by their Registered Attorneys in this instance.

Learned Counsel for the petitioners also have referred to the following paragraph in the book titled **"Law of Contract" [Vol. I, Pg.1007 Para. 1022] by Prof. Weeramanthry** and argued that an aggrieved party could seek the remedy of *restitutio in integrum* and to have the matter restored to the original position under the circumstances referred to in their petition to this Court. The aforesaid **paragraph 1022** reads thus:

> *"The remedy of restitutio has been invoked in Ceylon to set aside such Decree as those obtained by fraud, entered by MISTAKE, consented to under threat of dismissal of the action by the Judge or embodying a compromise by a Proctor action contrary to his Client's instructions."*

In terms of the above mentioned paragraph, it is necessary to establish that there had been fraud or mistake or any threat by the judge to dismiss a plaint or a compromise by a proctor to his client's instructions, in order to set aside a decree. In this instance, petitioners have not specifically referred to any such element neither they have averred any act done by the Attorneys contrary to their instructions. Therefore, the aforesaid law mentioned in the cited quotation has no bearing on this application.

More importantly, when an application is made under section 86 of the Civil Procedure Code, as in this instance, it is the duty of the applicant of such an application to satisfy Court that he or she had reasonable grounds for the default that they wished to purge. In the application to the District Court made by the petitioners to vacate the *ex parte* decree they have stated that on the day of the trial namely, 28th January 2005, the 1st petitioner had suddenly fell ill and could not attend Court though all the four defendants were to attend Court on that date. However, not a single defendant was present in Court on that date even though the 2nd and 3rd defendants were living in the same house with the 1st defendant. Cause for the absence of the 1st defendant petitioner had been a stomachache that he had on the day prior to the trial date but without support of a medical certificate to that effect.

In the circumstances, it is seen that basically the contention of the petitioners to make an application to vacate the ex parte decree had been the illness of the 1st defendant-petitioner. Learned Judge had adequately addressed his mind to this fact in his order made on 05th May 2006 and then only he rejected the reasons given by the 1st defendant-respondent for his absence on the trial date. I do not wish to interfere with those findings of the learned District Judge as he has made his decision upon analyzing the evidence before him correctly.

On the day in question, a Junior Counsel had moved for a date on behalf of his Senior Counsel without mentioning the said illness of the 1st defendant. However, the learned Additional District Judge refusing this application of the Junior Counsel has clearly stated that the date on which the trial was to be taken up was the date fixed finally for the trial. Also, he has referred to the other applications made earlier for postponements by the petitioners when he decided to fix the matter for trial *ex parte*. In such a situation, learned Judge had no option than to take up the matter and proceed with the *ex parte* trial. Therefore, I am of the view that it is the correct decision that the learned trial Judge had come to, considering all the circumstances of the case. Hence, I am in agreement with the reasons of the learned Additional District Judge for not allowing the application of the petitioners made in terms of section 86(2) of the Civil Procedure Code. It also seems to me that the order refusing to vacate the *ex parte* decree is in accordance with the law referred to in the aforesaid section 86(2) of the Civil Procedure Code.

For the aforesaid reasons the revision and/or *restitution in integrum* application filed by the petitioners in this Court is dismissed with costs.

**JUDGE OF THE COURT OF APPEAL**

**ERIC BASNAYAKE,J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**