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

C.A. No. 1386/2000(F)

D.C.Kalmunai No. 1146/D

Kalaivaani Thevasahayam,

Beach Road, Thirukkovil

Plaintiff

Vs

Kunchithamby Rajaretnam,

Pillayar Kovil Road, Paandiruppu – 2

Defendant

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Kalaivaani Thevasahayam,

Beach Road, Thirukkovil

Plaintiff-Appellant

Vs

Kunchithamby Rajaretnam,

Pillayar Kovil Road, Paandiruppu – 2

Defendant-Respondent

BEFORE: Deepali Wijesundera J.,

M.M.A. Gaffoor J.,

COUNSEL: S. Kumarasingham for the Plaintiff-Appellant.

Defendant Respondent absent and unrepresented

ARGUED ON : 21.05.2015

DECIDED ON : 05.11.2015

Gaffoor J.,

The Plaintiff-Appellant instituted this action by way of regular procedure against the husband praying for a divorce a vinculo matrimonii on the sole ground that her husband on his part had committed constructive malicious desertion, and for the recovery of goods worth Rs. 150,000.00 that were taken by the Defendant-Respondent from the Plaintiff-Appellant or to the amount equivalent to that, and to have permanent custody of a child namely Lorind Raj born to the parties.

The Defendant Respondent filed his Answer denying the averments contained in the Plaint, and set up a claim in reconvention in his Answer and prayed inter alia, for the dissolution of the marriage between the parties and for the refund of Rs. 941,000.00 that the Defendant had remitted to the Plaintiff-Appellant to construct a house, and to have the custody of the said child, Lorind Raj.

At the trial, on 26.04.2000 the parties moved the court to wind up the proceedings by way of entering into a settlement. Accordingly, the learned District Judge entered the Judgment thereof on the following terms :

a) The Plaintiff to donate the land and premises on which the Defendant has given to build a house to their son;

b) The Plaintiff to pay Rs. 75,000.00 to the Defendant;

c) To allow the Defendant to see the child two times a month;

d) The decree to be entered upon the Plaintiff paying the said sum of Rs. 175,000.00 to the Defendant;

On 08.11.2002, upon issuing a notice on the Defendant Respondent an application made by the Plaintiff-Appellant to have the decree amended on the ground that the land on which the house was constructed is not yet donated to the parties by the mother of the Plaintiff-Appellant, and therefore the term that the Plaintiff to pay Rs. 175,000.00 to the Defendant to be expunged from the decree. The Defendant Respondent objected to the application made by the Plaintiff-Appellant and submitted that since the Plaintiff-Appellant's application is malice and therefore that the decree nisi should not be made absolute without paying a sum of Rs. 175,000.00 being as a part of the decree by the Plaintiff-Appellant.

On 03,01.2013, after consideration the learned District Judge refused the application to amend the decree leaving a part of it and to make the rest to be absolute reasoning out his order under Section 615(1)1 of the Civil Procedure Code. In terms of the judgment - Buddhadasa Kaluarachchi vs Nilami Vijyewikrama – (1990) (1) SLR page 262. The Plaintiff Appellant then applied to this court to have set aside the judgment and the order made by the learned District Judge in this case.

The Plaintiff Appellant has come before this Court by way of appeal in respect of judgment and the subsequent order made by the learned District

Judge in a single application. It is legitimate that she has a right available to resort to the revisionary jurisdiction of this court only for the subsequent order – Mudiyanse and others vs Bandulahamy – 1989(2) SLR page 383.

It is obvious that appeal to set aside the judgment and the order does not lie as the Plaintiff-Appellant does not genuinely base her appeal on the alleged illegality of the judgment and the order, what she alleges is that settlement cannot be enforced as the owner of the land is not made a party to this action hence that the terms of settlement is vitiated by mistake – Perera vs Don Simon. 62 NLR 118, 120. It was held inter alia that no application for revision lay since no question arose regarding the legality or propriety of the decree or the regularity of the proceedings.

It is reiterated in judgment of Mudiyanse and others vs Bandulahamy to avoid an agreement for mistake the mistake must be an essential and reasonable one. The test of reasonableness is satisfied if the person shown either.

i) That the error was induced by the fraudulent or innocent misrepresentation of the other party;

ii) That the other party knew or a reasonable person should have known, that a mistake was being made, or;

iii) That the mistake was, in all the circumstances excusable even where there was absence of misrepresentation or knowledge on the part of the other party;

iv) Restitutio-in-integrum can be claimed on the ground of Justus error which connotes reasonable or excusable error;

v) The mistake of the Defendant does not pass the test of reasonableness nor can it be said that there was Justus error. The mistake here could be deliberate and no damage appears to have been caused to the Defendants;

It is clear that the Plaintiff-Appellant was aware that the land on which the house built was still belonging to the mother of the Plaintiff-Appellant and since the terms of the settlement were in the hands of the Plaintiff-Appellant, an error, if any creeping into the terms of settlement could have been avoided by diligence, had due diligence exercised, and material placed before the court does not indicate that the Plaintiff-Appellant or of her counsel, know how exactly such error occurred, and also there is no suggestion that the Defendant Respondent induced or had knowledge of it, but Plaintiff-Appellant assumes it as a mistake.

In Cornelius Perera vs Leo Perera – 62 NLR 413, 420 it was held that the test of the reasonableness is satisfied if the person shows either (i) that the error was induced by the fraudulent or innocent misrepresentation of the other party, or (ii) that the other party knew, or a reasonable person should have known, that a mistake was being made or (iii) that the mistake was, in all the circumstances, excusable (*Justus et probabilis error)* even where there was absence of misrepresentation or knowledge on the party of the other party. An agreement entered into in the course of an action, like any other agreement, may be set aside on these grounds.

Further, it cannot be perceived that the error occurred in this case attracted Justus error as delineated by Justice G.P.S.de Silva, in the case of Mudiyanse and others vs Bandulahamy. The Counsel for the Plaintiff-Appellant had not tendered any documents pertaining to the ownership of the land on which the house built in evidence before the learned District Judge when he supported his application for the amendment of the decree on 03.01.2003, and therefore the Court surmises that this error or mistake is not one excusable but it is a deliberated one in order to evade the liability of making the payment of Rs. 175,000.00 as agreed to be paid to the Defendant-Respondent. It also seems to the court that veracity of the Application made before the learned District

Judge to amend the decree is uncertain and therefore no prejudice or any damage is caused to the Plaintiff-Appellant.

In the premises, I affirm the Judgment and the Order of the District Court and I dismiss the appeal but make order as to costs.

JUDGE OF THE COURT OF APPEAL

Wijesundera J.,

I agree.

JUDGE OF THE COURT OF APPEAL