

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

*In the matter of an Application for
Revision/Restitutio-In-Integrum
under Article 138 of the
Constitution of the Republic of Sri
Lanka.*

C.A. (Rev/Restitutio)

Application No. 185/2013

E.C Kalutara Case No. 5833/L

Enderage Don Wansanath
Jayananda of St. Vincenti Road,
Maggona.

Plaintiff

-Vs-

Enderage Don Luxman Ravindranath
of Diyalagoda, Maggona Through his
Power of Attorney W. Ramya
Sanjeevani Alwis of Diyalagada,
Maggona.

Defendant

AND

Enderage Don Luxman Ravindranath
of Diyalagoda, Maggona Through his

Power of Attorney W. Ramya
Sanjeevani Alwis of Diyalagada,
Maggona.

Defendant – Petitioner

-Vs-

Enderage Don Wansanath
Jayananda of St. Vincenti Road,
Maggona.

Plaintiff – Respondent

AND BETWEEN

Enderage Don Luxman Ravindranath
of Diyalagoda, Maggona Through his
Power of Attorney W. Ramya
Sanjeevani Alwis of Diyalagada,
Maggona.

Defendant – Petitioner – Petitioner

-Vs-

Enderage Don Wansanath
Jayananda of St. Vincenti Road,
Maggona.

Plaintiff – Respondent – Respondent

Before : P.R. Walgama, J

**Council : Harsha Soza PC with Athula Perera and Ajith
Munasinghe for the Defendant – Petitioner –
Petitioner.**

**: Faiza Marker for the Plaintiff – Respondent –
Respondent.**

Argued on : 26.01.2016

Decided on: 28.10.2016

CASE-NO- CA/ 185/2013- JUDGMENT- 28.10.2016

P.R. Walgama, J

The Defendant – Petitioner – Petitioner launched the instant application seeking to set aside the order of the Learned District Judge dated 27.05.2013, and to set aside or vary the terms of settlement entered on 15.03.2012, accordingly.

According to the settlement as stated above both parties had admitted that the land more fully described in the 2nd schedule to the plaint belongs to the Defendant. Further it was admitted by both parties that the subject land is depicted in plan bearing No. 819 made by L.W.Perera license Surveyor dated 31.03.2001.

It is to be noted that in said impugned order the Learned Magistrate has made order to the following effect, in that it is stated after resurveying the land described in the 2nd schedule which is in the possession, of the Defendant, the plaintiff will be entitled to possess the same. The above contents of the said terms do not sound logical.

After the Court has entered the terms of settlement on 15.03.2012, the Defendant – Petitioner has lodged the petition in the District Court of Kalutara, seeking to amend the settlement or to vacate the settlement accordingly and had stated the following;

That the Plaintiff and the Defendant are brothers who became entitled to the land in suit. It is stated, that the plaintiff by virtue of deed bearing No. 381 dated 10.04.2004 has gifted a portion of said land described in the 2nd schedule to the plaintiff to the Defendant – petitioner. It is the position of the Plaintiff that except for the 9 perches given to the Defendant, that he is entitled to the balance portion of the land described in the schedule to the plaintiff and more fully depicted as lot 2 in the final plan 320.

Further it is alleged by the plaintiff that the Defendant encroached a part of the land belonging to the plaintiff which is in extent in 2 or 3 perches.

It is common ground that the property described in the 2nd schedule to the plaintiff is owned by the

Defendant and for the purpose of the above settlement both parties have admitted the plan No. 819 dated 31.03.2001 made by L.W.Perera license surveyor.

Further it was agreed between the parties that the Defendant shall vacate any encroachment of the property described in the 2nd schedule belonging to the Plaintiff and the Plaintiff agreed to vacate any encroachment of a portion of the property described in the 2nd schedule belonging to the Defendant.

As per terms of settlement entered thereto the decree was entered accordingly.

Thereafter the Defendant - Petitioner tendered the Petition seeking to amend or set aside the said settlement, which application was opposed by the Plaintiff - Respondent.

The Learned District Judge after the inquiry in to the above application of the Defendant- Petitioner made order dismissing the application had made the following observation.

That the Defendant was aware of the contents of the said plan No. 2011/28, and the above settlement was entered inter parties, and the Defendant was aware of the contents of the above plan and now he is estopped from rejecting the same.

Being aggrieved by the said order the Defendant - Petitioner tendered the application for Restitutio in Integrum to this Court.

The Plaintiff - Respondent had opposed the said application in limine and had raised the issue as to the maintainability of the present application, for the petitioner has failed to mention the specific relief viz. Restitution in integrum.

To buttress the above position the Plaintiff- Respondent's counsel had cited many decided cases. In the case of INAYA AND ANOTHER .VS. FATHIMA 2006 (2) SLR 124

The above case was an application for Leave to Appeal, the Court of Appeal inter alia held that the absence of a specific prayer for Leave to appeal from a specific order made by the original court, was fatal to the maintainability of the application. The Court of Appeal inter alia held that as well as in the affidavit it is stated that the instant application is for leave to appeal from an order of the District Court Kalutara dated 3rd September 2004 or from any other order made by the District Court of Kalutara.'

Therefore it is stated by the Plaintiff - Respondent that the Defendant - Petitioner's caption of the application seeks to invoke the jurisdiction of this Court by way of Restitutio in Integrum in respect of the order of the District Court of Kalutara dated 27.05.013 does not appear as required by law.

The above legal position was also observed in the case of WICKRAMASINGHE .VS. KULASINGHE- 2006-(2)-SLR- 51 and has upheld the preliminary objection inter alia that the failure to specifically pray in the prayer to the petition 'to admit the appeal notwithstanding laps of time ' is fatal to the maintainability of the application'.

Therefore it is ostensible in the light of the above determination it is vital to mention in the prayer, the relief sought by the petitioner.

It is also contended by the Plaintiff- Respondent that Restitutio in Integram is granted only if no other remedy is available to the party aggrieved.

It is salient to note that the Defendant -Petitioner has stated in the petition that he will be filing a petition of appeal against the said impugned order.

It was opined by Their Lordships in the case of SINNA VELOO .VS. MESSERS LIPTION LTD- 66 NLR. 214 , 'that once terms of settlement as agreed upon are presented to Court and notified thereto and recorded by Court, a party cannot resile from the settlement even though the decree has not been entered' (emphasis added).

Further it has also been considered in the case of SRI LANKA INSURANCE CORPORATION .VS. SHAMUGAM

AND OTHERS- 1995, (I) SLR 63- HIS LORDSHIP
Ranarajah. J has observed thus;

“Restitution is granted only if no other remedy is available to the party aggrieved. The petitioner has made two applications in revision and also filed a final appeal against the orders complained of.”

Further it has been also observed thus;

That the relief by way of Restitutio in Integrum of original courts may be sought only;

- a. Where judgments have been obtained by fraud by the production of false evidence, non-disclosure of material facts, or by force; or
- b. Where fresh evidence has cropped up since judgments which were unknown earlier to the parties relying on it or where no diligence could have helped to disclose earlier ;or
- c. Where judgments have been pronounced by mistake and decree entered thereon provided of course it is an error which connotes a reasonable and excusable error.

Therefore it is explicitly stated the grounds on which that a party could resort to the above relief.

Hence it is crystal clear no fraud or misrepresentation of facts occurred for the parties to arrive at the settlement concerned.

Thus in the above legal and factual matrix this court is compelled to dismiss the application of the Defendant-Petitioner.

Accordingly application is dismissed subject to a costs of Rs. 10,000/.

JUDGE OF THE COURT OF APPEAL