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

In the matter of an application for Restitutio-
In-Intergrum and or Revision under Article 138
Of the Constitution.

CA. Application for Restitutio- In- Intergrum and
Or Revision No: 14/2016(RI)
D.C.Kurunegala No. 3930/M

**1 B.** Denipitiya Thudawa Hewage Danni
3rd Lane, Jayantthipura, Kurunegala.

**1B Substituted Defendant-Petitioner**

Vs

**1.** Hewagama Liyanage Ranjith Wickramapala,
No.337, Colombo Road,
Kurunegala.
And five others

**Substituted Plaintiff-Respondents**

**1C.** Denipitiya Thudawa Hewage Dayananda,
Nanda Niwasa, Jayanthipura, Kurunegala.
And 7 others.

**Substituted Defendants-Respondents**

BEFORE : A.H.M.D. NAWAZ J
E.A.G.R. AMARASEKARA J

COUNSEL : Jacob Joseph with Sandamali Madurawa for the Petitioner
Geffrey Alagaratnam P.C, with Harindi Senavirathne and S. de Silva for the substituted Plaintiff Respondent

Decided On : 15.02.2018.

## E.A.G.R. Amarasekara J

The 1B substituted Defendant Petitioner (here in after sometimes referred to as the petitioner or 1B Defendant Petitioner) presented this application dated 02.12.2008 to this court invoking the jurisdiction for revision and/or restitutio in integrum conferred upon this court by article 138 of the Constitution. He has prayed inter alia;

1) to revise and set aside the order made by the District court of Kurunegala on 09.09.2016 in case No. 3930/M and the writ issued on 09.11.2016 by the same court.

2) Grant restitutio-in-integrum in rectifying the error in granting relief not prayed for in the plaint.

It seems the writ of execution was issued as per the amended decree marked P2(A) with the petition. As per the contents of P2A, it is clear that amended decree was entered following a decision taken by this court on 16.07.2007 in an appeal made to this court over the judgment dated 07.05.1985 of the district court No D.C. 3930/M.

As per the stance taken by the 1B Defendant Petitioner he has objected to the execution of the writ in issue and placed his objections before the district court by way of oral & written submissions. The said written submission has been annexed to the petition as P3. As per the said document marked P3 the objection to the execution of writ was based on following grounds, namely,

1) that there is a delay of 8 years from the decree in filing an application to execute the writ.

2) that the Plaintiff respondents have not shown due diligence in executing the writ.

3) that the said application to execute the writ was made without giving notice to the 1B Defendant Petitioner.

As per the order dated 9.9.2016 (P4) the learned district Judge has overruled the objection of the 1B Defendant Petitioner and has allowed the application to execute the writ. The learned district judge has correctly found that application was tendered within 10 years period figured in section 337(1) of civil procedure code. Furthermore, the learned district judge has given reasons to his finding to demonstrate that the plaintiff respondents are not guilty of not showing due diligence in filing application to execute the writ. The learned district judge has correctly referred to the delay caused by appeal as well as revision application filed against the orders in relation to the earlier application to execute the writ. The Plaintiff respondents have also brought to the notice of this court the time taken due to the loss of part of the case record and its reconstruction. On the other hand, notice of the application to execute the writ need not be given, if the application is made within one year from the last order made against the judgment debtor passed on any previous application for writ. (vide section 347 of the Civil Procedure Code). It is clear from

the documents referred to by the substituted plaintiff respondents in their objections, namely PR14,PR14(a),PR14(b),PR14(c),P9 and P6 the Supreme Court refused the petitioners' leave to appeal application which is related to the previous application for writ only on 22.10.2015.The Supreme court order must have been read over in the District Court on a date that fell after 22.10.2015. As the impugned order was made on 09.09.2016,it is clear that the application to execute the writ was within the one year period from the last order made against the judgement debtor. On the other hand, the journal entry dated 15.06.2016{vide PR3(a)} and the impugned order marked P4 reveal that the 1B Defendant petitioner somehow or other had the notice of the application and filed objection against the execution of the writ. Furthermore, 1B Defendant Petitioner's lawyers have appeared before the learned district judge and made submissions in respect of their objections before making the impugned order dated 09.09. 2016.Therefore, even if no notice was given, no prejudice would have been caused to the petitioner. This court too cannot find fault with the learned district judge on the reasons given in the order dated 2016.09.09 on the objections taken by the 1B Defendant Petitioner.

Notice of appeal tendered by the 1B Defendant Petitioner was rejected by the learned district judge but the 1B Defendant Petitioner has evaded from revealing the reason for such rejection in his application to this court. (vide paragraph 4 of the petition as well as paragraph 4 of the accompanying affidavit). As per the document marked PR3 tendered by the Plaintiff Respondent among other reasons the rejection of notice of appeal was due to the fact that it was submitted to court through a lawyer who is not the registered attorney. IB Defendant Petitioner should have revealed this before getting a stay order in his favour. However, the rejection of notice of appeal too cannot be found fault with under the circumstances.

In his petition, at paragraph 5, the 1B Defendant Petitioner challenge the validity of the writ on following grounds.

(i) Original plaint was in respect of a dissolution of a Partnership and for an accounting,

(ii) there was no prayer for a declaration of title to an immovable property,

(iii) that there was no schedule in terms of section 41 of the civil procedure code,

(iv) that there was no issue raised as to the said premises bearing No: 14 and 16,

(v) and it was only in the judgement delivered by this court in CA Appeal No. 345/85(F) dated 16.07.2007, this court expressed that the substituted plaintiffs should be at liberty to regain possession of premises in question from the partnership and or from the substituted Defendants. That statement has been made per incuriam, and or obiter.

(vi) that acting on the said Obiter Dicta expressed by this Court the substituted- plaintiff tendered an amended decree which was entered by the District court on 02.03.2009

(vii) the writ of execution in respect of immovable property could not be executed as the premises Nos. 14 and 16 were not really on the ground and that there was no schedule in terms of section 41 of the civil procedure code and the fiscal reported back to the District Court,

(viii) the substituted-Plaintiffs-Respondents and the 1B Defendant Petitioner made claims under section 325 of the civil procedure code and the District court of Kurunegala made orders on 13.01.2010 and 28.10.2011 and issued writ of execution despite the absence of a schedule to the immovable property in the plaint and in the absence of a prayer for Declaration of title and ejectment of the Defendant and the said premises were not part of the Partnership.

Though the 1B defendant Petitioner prayed for to revise the order dated 09.09.2006 of District court of Kurunegala, it seems most of the aforesaid grounds challenging the writ of execution were not raised before the learned District Judge before he made the impugned order dated 09.09.2016 (Vide P3) but some of them had been raised in various previous application.

It is common ground that the action was for a dissolution of a partnership and for accounting. There is no need of a prayer for declaration of title to any immovable property or schedule of a land to be included as per section 41 of the Civil Procedure Code which is relevant to land actions. In an action of this nature court may have to issue directions to take accounts and issue commissions to find out the assets belongs to the entity. (vide section 202,430 of the Civil Procedure Court). The court may have to issue commission or direction to demarcate lands or to realize assets. (section 508 of the Civil Procedure Code). At the end as per the settlement of account it may have to distribute and hand over the assets. Though parties are at liberty to reveal assets they know in a schedule to the plaint it cannot be said that it is an essential requirement in a plaint of this nature. It should be noted that averment in the objections filed indicating that the relevant property had been included as a property related to the partnership in the scheduled to the plaint is not specifically denied by the petitioner in his counter objection. Thus, I do not see any reason to allow the application on the following grounds urged by the petitioner; namely that,

1. there was no prayer for a declaration of title to an immovable property,
2. there was no schedule in terms of section 41 of the civil procedure code.

1B Defendant Petitioner has taken up the stance that there were no issues raised with regard to the assessment no 14 and 16 but it is clear that there had been an admission, using their old numbers as well, with regard to them that they are not partnership property and belong solely to the plaintiff. Furthermore, there had been an issue raised by the defendants on the ground that in the event the partnership being dissolved *they* are entitled to the benefits of the Rent Law and that issue was decided against the defendants and which was confirmed in appeal by this court. Therefore, this court cannot agree with the 1B Defendant petitioner's contention placed before this court challenging the writ of execution on the

ground that there was no issue raised with regard to assessment numbers 14 and 16 and that they are not really on the ground.

The 1B defendant petitioner states that it was only in the judgement delivered by this court in CA Appeal No. 345/85(F) dated 16.07.2007, this court expressed that the substituted plaintiffs should be at liberty to regain possession of premises in question from the partnership and or from the substituted Defendants. He further states that that statement was made per incuriam, and or obiter. His position is that acting on the said Obiter Dicta expressed by this Court the substituted- plaintiff tendered an amended decree which was entered by the District court on 02.03. 2009. It must be noted that as said before the action was an action for accounting too. After settling the accounts, it is the duty of the court to hand over or deliver the remaining assets to the relevant parties. When there is a prayer for accounting, I do not see any need for a specific prayer to deliver the possession of any specific property. As mentioned before in a case for accounting some properties may have to be identified, collected and recovered during the action through commissions, necessary directions and orders. On the other hand, if the 1B defendant petitioner was not satisfied with the judgment dated 16.07.2007 of this court made in the appeal to this court (P 12 A) he could have vigilantly taken steps to challenge it in the superior court. Without giving any plausible reason for not challenging the judgement of this court, now after about a lapse of 10 years the 1B Defendant petitioner should not be allowed to challenge the propriety of that judgment now.

Though the 1B defendant petitioner has prayed for in prayer 'D' relief of restitutio in integrum to vacate the part of the judgment of this court that allows the plaintiff respondents to regain possession of the premises in issue, as already decide by this court in **CA No.02/2016 Rajapakse Mudiyanselage Karunaratne Vs. Illuktenna Arachchilage Piyasena** and **CA.RI Application No. 10/2017Mackwoods Tea (Private) Limited Vs Agalawatte Plantation** ,this court has no jurisdiction under Article 138 of the constitution to revisit a judgment in appeal of this court under the powers given for restitutio in integrum. Jurisdiction given by Article 138 for restitution is only a part of supervisory jurisdiction over steps, directions and orders etcetera made by a lower court. Therefore, not only the factual circumstances, even the law does not allow to quash the part of the judgment of this court that allows the plaintiff respondent to regain the possession using the Jurisdiction for Restitutio in Integrum. As far as this court's judgment in appeal is intact, the district court has to enter decree and enforce it accordingly. On the other hand, the 1B defendant Petitioner should not be allowed to challenge the applications for writs in piecemeal on grounds which existed even at the time he objected to the previous application for writ. As well, he should not be allowed to repeat the same objections he took in previous occasions including his application to the supreme court as it will amount to a second bite of the same cherry.

Since the action in the district court was for a dissolution of a partnership and for accounting, the 1B defendant petitioner's position that this court's expression in its judgment that the substituted plaintiffs

should be at liberty to regain possession of premises in question from the partnership and or from the substituted Defendants is made per incuriam cannot be accepted. *Since* at the end of such action if any asset or property was found to be belong to some party there is nothing wrong in making suitable order to deliver that property to that party. The following passage extracted from the judgment of this court given in appeal will elucidate the intention of this court in making the aforesaid statement which is alleged to be made per incuriam.

**"In dealing with the above issue, the learned district judge had to state as follows;**

> **With regard to issue 14 according to the admissions and evidence it is the partnership which the tenant of the premises 101/2,101/3,101/4 & 101/4A (which admittedly now bear No. s 14 and 16 Wilbawa Road) and if the partnership is to be dissolved the substituted defendants clearly have no rights to the tenancy of the premises.**

**The above finding of the learned district judge is consistent with the evidence and in harmony with the law. If the substituted plaintiff appellants are to file an action once again to regain possession of the property in which the business of the partnership was conducted, that will not only lead to an absurd situation and tantamount to failure of justice since the question as to possession has already been put in issue in this case.**

**In the circumstances, it is my considered view that the issue raised as to whether the partnership should be dissolved needs to be answered in the affirmative and the accounting prayed for should accordingly be allowed.**

**The question as to whether the substituted defendants are protected tenants under the Rent Act should be answered in the manner as has been chosen by the learned district judge."**

Afore quoted paragraphs of the judgment of this court amply proves that alleged statement that followed them is not a statement made per incuriam but a well-considered one by the learned judge of this court who heard it in appeal. It is this court of appeal by its judgment varied the dismissal of plaintiff's action and allowed the dissolution of the partnership and accounting. Therefore, there is nothing wrong in providing for the distribution of assets and property belonging to the parties and it was admitted at the beginning of the trial in the district court that the premises in issue belongs to the plaintiff respondents. When the partnership was dissolved and the claim for tenancy rights of the petitioner failed, as this was a case for accounting, the property belongs to the plaintiff respondents must be delivered to the plaintiff

respondents. Therefore, arguments of the 1B Defendant petitioner based on per incuriam concept cannot hold water.

The counsel for the 1B defendant petitioner argues that by granting liberty to regain possession is not a granting of a right. Thus, the 1B defendant petitioner is not under a duty to yield up the possession of the immovable property. But the word" Liberty" used by the learned Court of Appeal Judge in his judgment should not be interpreted out of context. The alleged statement that contains the word "Liberty" follows the afore quoted paragraphs of the judgement. In that context, it is clear, what the learned judge of the court of appeal who delivered the judgment in appeal intended was that the plaintiff respondent is free to regain the property in issue through this action or waive his right. This statement does not confer a right on the 1B Defendant petitioner to object when the plaintiff respondent decided to execute his right to regain the property which was admitted to be his in a case filed for accounting.

For the forgoing reasons I dismiss the application of the 1B Defendant petitioner with cost.

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I agree.

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A.H.M.D. Nawaz J