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

In the matter of an application for Revision and/or Restitutio in Integrum in terms of the Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA Case No: CA RII 06/2021

DC Matara Case No: L/12371

1. Hewa Wellage Jagath Daminda
   No. 106, Pinidiyagewatta,
   Sri Sunanda Mawatha,
   Walgama,
   Matara.

2. Seetha Nanayakkara
   No. 106, Pinidiyagewatta,
   Sri Sunanda Mawatha,
   Walgama,
   Matara.

**Plaintiffs**

**Vs.**

Hewa Wellage Nishshanka
No. 108, Pinidiyagewatta,
Sri Sunanda Mawatha,
Walgama,
Matara.

**Defendant**

**AND NOW BETWEEN**

Hewa Wellage Nishshanka
No. 108, Pinidiyagewatta,
Sri Sunanda Mawatha,
Walgama,
Matara.

**Defendant Petitioner**

**Vs.**

1. Hewa Wellage Jagath Daminda
   No. 106, Pinidiyagewatta,
   Sri Sunanda Mawatha,
   Walgama,
   Matara.

2. Seetha Nanayakkara
   No. 106, Pinidiyagewatta,
   Sri Sunanda Mawatha,
   Walgama,
   Matara.

**Plaintiff Respondents**

**Before** : **D.N. Samarakoon, J.**
**B. Sasi Mahendran, J.**

**Counsel** : Chathura Galhena with B.Namal Madhusanka for the Defendant- Petitioner
Chandima Muthukumaran for the Plaintiff- Respondents

**Written Submissions** : 04.04.2022 (by the Defendant-Petitioner)
**On** 04.04.2022 (by the Plaintiff-Respondents)

**Argued On :** 03.03.2022

**Order On :** 20.05.2022

**B. Sasi Mahendran, J.**

An application is made by the Defendant-Petitioner (hereinafter referred to as 'the Defendant') seeking the invocation of this Court's restitutionary jurisdiction in order to set aside the terms of settlement entered on 17.07.2020, with the Plaintiff-Respondents (hereinafter referred to as 'the Plaintiffs') and the judgment of the learned District Judge of Matara dated the same.

The background to this application will be set out prior to determining whether the Defendant can invoke the restitutionary jurisdiction of this Court.

The Plaintiffs instituted the case bearing No. 12371/L in the District Court of Matara by Plaint dated 08.07.2013 against the Defendant claiming a declaration of title to the corpus more fully described in the 2nd paragraph of the Plaint and for a further declaration that a strip of land has been encroached by the Defendant and to evict the Defendant from the encroached corpus. Both parties obtained court commissions to survey the land and after the said commissions were executed and the plans were filed of record, the Plaintiff amended the Plaint by an amended Plaint dated 25.08.2014. The Defendant filed an amended Answer dated 02.07.2018 and prayed for a dismissal of the Plaint and for the declaration of title to Lot No.2 of the Plan bearing No. 337 prepared by Mr. M. Widanagamachchi, Licensed Surveyor dated 29.10.1991 in case No. 13690/P. According to the Defendant, the final scheme of partition arose from this plan in which he derived the title to the said partitioned land. The Plaintiff's commission was executed by Mr. B.H.B. Nihal Silva, Licensed Surveyor, and the said commission plan bearing No. 060/14 dated 20.04.2014 and the report thereof was filed of record. This plan marked "C" in the Petition has the following endorsement:

"මා විසින් මනින ලද මායිම් කලුපාට රේඛා වලින්ද මාතර දිසා අධිකරණයේ පී 13690 නඩුවේ පිඹුරු අංක 337 හි කැබලි අංක 2,3,සහ 4 හි මායිම් මාගේ මායිම් සමඟ සමපාත නොවන කල රතු පාටින් පෙන්වා ඇත"

The Defendant objected to the said commission plan and report and a commission was taken out where the Plan bearing No. 5243 dated 11.09.2017 prepared by Mr. M.L.M.

Rasmi, Licensed Surveyor, was filed of record. Both Commissioners have relied on the said Plan bearing No. 337 which is the subject matter of this case.

The trial commenced with the recording of admissions and issues whereupon the 2nd Plaintiff gave evidence. During the said evidence the parties agreed to enter into a settlement and the terms of settlement were recorded in Court on 17.07.2020. The parties agreed to settle upon the boundaries shown in the commission plan of Mr. M.L.M. Rasmi, Licensed Surveyor, bearing plan No. 5243.

After the said terms of settlement were entered the Plaintiff filed the settlement decree and also obtained a writ to execute the said terms of settlement for the purpose of demarcating the boundaries as per the commission plan bearing No. 5243. When the said writ was executed for the purpose of demarcating the boundaries, the Defendant observed a severe disparity in the boundaries shown in the final scheme of partition bearing No.337 and the Commission plan bearing No. 5243 and objected to demarcating the boundaries as per the terms of settlement entered. He then questioned the Surveyor Mr. M.L.M. Rasmi as to this disparity. Mr. Rasmi had reported the disparity to Court by the letter dated 03.02.2021, which has been minuted in the journal entry bearing No. 35 dated 05.02.2021. Thereafter, the Defendant caused to check the case record and discovered that the Plaintiff had submitted a subsequent traced copy of the final scheme of partition bearing No.337 which has been fraudulently or mistakenly certified by the said Licensed Surveyor with incorrect and /or wrong boundaries. The Defendant avers that the said two plans have obvious and visible differences, especially with regard to Lots No. 2,3, and 4 which are the disputed boundaries of the case before the District Court.

It is alleged that due to this error and/or fraud the said terms of settlement entered between the parties cannot stand in the eyes of the law and is prejudicial to the Defendant. On this basis, the Defendant pleads for it to be set aside by application of restitutio in integrum.

When the matter was argued before this Court on 03.03. 2022, the Defendant produced both plans to demonstrate this disparity between the original plan and the plan submitted by the Plaintiff with regard to the Lots.

The plan submitted by the Plaintiff which is marked as "A" has the following endorsement:

"මුල් පිටපත සමඟ පරීක්ෂාකර නිවැරදි බවට සහතික කරන ලදී."

The main contention of the Defendant in this application is that the remedy of restitutio in integrum is available by reason that the said settlement was consented to by the Defendant by mistake to the plan prepared by the Licensed Surveyor superimposing the real plan which was available in the case record. In fact, the superimposition was not done accordingly. To substantiate this contention, Counsel for the Defendant produced the two plans which were marked "A" and "B". Plan "B" was the original plan which was available in the said record. The other plan, marked as "A", in respect of which the dispute arose, is not the original plan.

When we perused both plans, especially plan "A", this Court found someone has induced or had knowledge of that mistake which the Defendant alleges. The Survey Plan marked "A" was directly given to the Surveyor by the Plaintiff. This Plan bears the following endorsement which makes it clear that it is not the original plan.

"මා විසින් මනින ලද මායිම් කලුපාට රේඛා වලින්ද මාතර දිසා අධිකරණයේ පී 13690 නඩුවේ පිඹුරු අංක 337 හි කැබලි අංක 2,3,සහ 4 හි මායිම් මාගේ මායිම් සමඟ සමපාත නොවන කල රතු පාටින් පෙන්වා ඇත"

This Court has to consider whether this is a mistake of fact that goes to the root of the case.

The remedy of restitutio in integrum has taken deep root in our legal system. The following cases elucidate the grounds on which the remedy of restiutio in integrum has been awarded.

In Sri Lanka Insurance Corporation Ltd v. Shanmugam and another [1995] 1 SLR 55 His Lordship Ranaraja J. held,

"Superior courts of this country have held that relief by way of restitution in integrum in respect of judgments of original courts may be sought where (a) the judgments have been obtained by fraud, (Abeysekera-supra), by the production of false evidence, (Buyzer v.Eckert), or non-disclosure of material facts, (Perera v. Ekanaike), or

where judgment has been obtained by force or fraud, (Gunaratne v.Dingiri Banda, Jayasuriya v. Kotelawela). (b) Where fresh evidence has cropped up since judgment which was unknown earlier to the parties relying on it, (Sinnethamby-supra), and fresh evidence which no reasonable diligence could have helped to disclose earlier, (c) Where judgments have been pronounced by mistake and decrees entered thereon, (Sinnethamby-supra), provided of course that it is an error which connotes a reasonable or excusable error, (Perera v. Don Simon). The remedy could therefore be availed of where an Attorney-at-Law has by mistake consented to judgment contrary to express instructions of his client, for in such cases it could be said that there was in reality no consent, (Phipps-Supra, Narayan Chetty v. Azeez), but not where the Attorney-at-Law has been given a general authority to settle or compromise a case, (Silva v. Fonseka)."

His Lordship Nawaz J. in Edirisinghe Arachchilage Indrani Chandralatha v. Elrick Ratnam, CA R.I. Case No. 64/2012 decided on 02.08.2017, reaffirmed these grounds as follows,

*"Any party who is aggrieved by a judgment, decree or order of the District Court or Family Court may apply for the interference of the Court and relief by way of restitutio in integrum if good grounds are shown. The just grounds for restitution are fraud, fear, minority etc. Our Superior Courts have held that the power of the Court to grant relief by way of restitutio in integrum, in respect of judgments of original Courts, is a matter of grace and discretion, and such relief may be sought only in the following circumstances:-*

a) *Fraud*
b) *False evidence*
c) *Non-disclosure of material facts*
d) *Deception*
e) *Fresh evidence*
f) *Mistake*
g) *Fear"*

In the instant application, the Defendant seeks to obtain this remedy on the ground of mistake. Hence, it is germane that judgments of our Courts that have granted the relief of restitution on the ground of mistake be examined in order to determine the types of mistakes that have qualified to invoke this extraordinary remedy.

His Lordship Drieberg J. in Phipps v. Bracegyrdle 35 NLR 302, held that in such cases, "*it could be said in reality that there was no consent". His Lordship also observed, "On the same principle I can understand, though there is no reported case on the point, relief being granted on the ground that both parties have agreed to a settlement under a mistake of fact, for as in the case of contract the element of consensus would be absent."*

In Perera v. Don Simon 62 NLR 118 His Lordship Sansoni J. (as he then was) held, *"Restitutio in integrum can be claimed on the ground of Justus error, which I understand to connote reasonable or excusable error. I am unable to see that such a ground exists in this case. It is, on the contrary, an example of damage arising from carelessness or negligence."*

Their Lordships of the Supreme Court in Mudiyanse v. Bandulahamy [1989] 2 SLR 383, very clearly pronounced that unless the mistake qualifies as a *"justus error"* a mere mistake will not suffice for the grant of restitutio in intergrum.

Their Lordships referred the judgment of Cornelius Perera v. Leo Perera in which case His Lordship Sansoni J. (as he then was) made the following observation,

*"Now the Roman Dutch Law enables a person to avoid an agreement for mistake on his part when the mistake is an essential and reasonable one. It must be essential in the sense that there was a mistake as to the person with whom he was dealing (error in persona) or as to the nature or subject matter of the transaction (error in negotio, error in corpore). A mistake in regard to incidental matters is not enough. The test of reasonableness is satisfied if the person shows either (1) that the error was induced by the fraudulent or innocent misrepresentation of the other party, or (2) that the other party knew, or a reasonable person should have known, that a mistake was being made, or (3) that the mistake was, in all the circumstances, excusable (Justus et probabilis error) even where there was absence of misrepresentation or knowledge on the part 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."*

In the light of the foregoing authorities, this Court must now consider whether the mistake that is pleaded in the instant case qualifies as a "*justus error*".

In the instant case, the Defendant has demonstrated to the satisfaction of this Court that there was a mistake that was prejudicial to him. Accordingly, this Court sets aside the settlement recorded on 17.07.2020 and the judgment of the learned District Judge which was marked as "E" in the Petition. We would, therefore, set aside the proceedings in the District Court leading from the terms of settlement and the ensuing judgment.

**JUDGE OF THE COURT OF APPEAL**

**D.N. SAMARAKOON, J**

**I AGREE**

**JUDGE OF THE COURT OF APPEAL**