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

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

CA Application No: RII/13/2020

DC Jaffna Case No. L/198/14

Kamaladevi Widow of Kulathurai Kuvarajaseen
of Saiva School Lane,
Thirunelvely North, Jaffna.

Plaintiff

Vs.

Sribaskaran Sivanantham of "Mangos Restaurant" of 359/3, Nallaluxmy Avenue,
Nallur, Jaffna.

Defendant

AND

Kamaladevi Widow of Kulathurai Kuvarajaseen
of Saiva School Lane,
Thirunelvely North, Jaffna.

Plaintiff-Judgment-Creditor-Petitioner

Vs.

Sribaskaran Sivanantham of "Mangos Restaurant" of 359/3, Nallaluxmy Avenue,
Nallur, Jaffna.

Defendant-Judgment-Debtor-Respondent

AND NOW BETWEEN

Sribaskaran Sivanantham of "Mangos Restaurant" of 359/3, Nallaluxmy Avenue, Nallur, Jaffna.

Defendant-Judgment-Debtor-Respondent-Petitioner

Vs.

Kamaladevi Widow of Kulathurai Kuvarajaseen of Saiva School Lane,
Thirunelvely North, Jaffna.

Plaintiff-Judgment-Creditor-Petitioner-Respondent

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

Counsel : N.R. Sivendran and Renuka Udumulla with V. Selvarajah for the Defendant-Judgment-Debtor-Respondent-Petitioner
K.V.S. Ganesharajan with Y. Deepiga, Sriranganathan Ragul, K. Nasikethan and S. Sutheshana for the Plaintiff-Judgment Creditor-Petitioner- Respondent

Written Submissions On : 09.05.2022 (by the Defendant-Judgment-Debtor-Respondent-Petitioner)
17.05.2022 (by the Plaintiff-Judgment Creditor- Petitioner-Respondent)

Argued On : 09.05.2022

Decided On : 25.05.2022

B. Sasi Mahendran, J.

In the instant application, the Defendant-Judgment-Debtor-Respondent-Petitioner (hereinafter referred to as the "Defendant") seeks, inter alia, this Court's intervention to exercise its restitutionary and/or revisionary jurisdiction to set aside and vacate the Order of the learned District Judge of Jaffna dated 15.09.2020 in Case No. L/198/2014 and in the interim for an Order to restrain the Plaintiff- Judgment-Creditor- Petitioner-Respondent (hereinafter referred to as the "Plaintiff") from taking any steps consequent to or under the said Order.

The factual matrix will be dealt with in order to understand the background of this application.

The Defendant entered into a Lease Agreement with the Plaintiff on 01.09.2007 for a period of three years, at the end of which, it was extended for a further three-year period. The Defendant (i.e., the lessee of the property concerned) allegedly breached his obligations under the Lease Agreement by failing to pay the advance and monthly rents and demolishing the toilet, tank as well as the boundary wall of the property, without obtaining prior permission. Following continuous demands for losses to be made good, a letter of demand, dated 30.05.2013, was sent to the Defendant requiring him to vacate the premises. Notwithstanding the said letter, the Defendant continued to be in possession. On 20.01.2014, the Plaintiff instituted an action in the District Court of Jaffna against the Defendant on the basis that he failed to pay rent from 24.05.2012 onwards. The Defendant in his Answer has taken the position that he constructed a building with the consent of the Plaintiff's husband and demanded a sum of Rupees 11,753,579/-. The matter then proceeded to trial following the recording of issues and admissions. Evidence was led on behalf of the Plaintiff. After the conclusion of the Plaintiff's evidence, a date was granted for the Defendant to lead his evidence. The date granted was 18.06.2018. On that day, the Defendant was absent as he was overseas. The Court refixed it to 21.08.2018, on which date the Defendant continued to be overseas. When the case was taken up on 28.11.2018, the Defendant's Attorney-at-Law informed the Court that the Defendant was unwell and therefore unable to attend Court. On 28.11.2018, the learned District

Judge fixed the matter for judgment on the basis that the Defendant had not provided cogent reasons for the continuous postponements.

According to the journal entries, a number of dates were taken by the Defendant to postpone the case.

The Defendant filed a leave to appeal application against the said Order of the District Judge's refusal to give a date on the basis that this has caused him grave prejudice as he was of ill health. It was argued that the learned District Judge ought to have granted a date for him to lead evidence in compliance with the 'Audi Alteram Partem' principle encapsulated in the principles of natural justice. In the leave to appeal application filed in the Civil Appellate High Court of the Northern Province holden at Jaffna, the Defendant prayed for a stay of further proceedings in the District Court pending the determination of the leave to appeal application. In the meantime, the learned District Judge held in favour of the Plaintiff and delivered the judgment on 20.02.2019, ejecting the Defendant. Leave before the Civil Appellate High Court of Jaffna was then refused on the basis that judgment had already been delivered.

Being aggrieved by the judgment, the Defendant filed a Notice of Appeal and Petition of Appeal in the Civil Appellate High Court of Jaffna. A Revision application was also filed in the same court as well. The Plaintiff made an application in the District Court for the execution of the decree of the District Court on 20.02.2020, after a lapse of one year from the date of the judgment. According to the journal entries, a number of dates were given because of the Covid-19 lockdowns. After serving notice, Counsel for the Defendant appeared on 17.06.2020 and moved for a date to file objections and the Court granted that request. The case was fixed for 15.09.2020. As per the Petition and the journal entries, the said Attorney was instructed to move for a further date for objections as the Defendant was unable to return to the island to hand over pertinent documents since the Sri Lankan airports continued to remain closed, due to the Covid-19 lockdowns.

When the case was called on 15.09.2020, the Counsel for the Defendant made an application to move for a date to file objections. However, the Counsel for the Plaintiff brought to the notice of the Court that the Defendant had altered the structure of the premises and caused damages to the property. According to the document marked "K", the proceedings dated 15.09.2020, the Court considered the submissions made by both parties, especially the fact that a number of dates were taken by the Defendant, and allowed the writ to be executed on the basis that if the writ is not executed severe hardship would be caused to the Plaintiff.

This Court observed from the brief that the Defendant had appointed one Shanmugam Pahitharan as his Attorney, through a Special Power of Attorney, attested by Raatnam Raguraajah, Notary Public on 10.10.2019, to attend to and appear for him before any court in Sri Lanka. It is the same Power of Attorney holder who has given an affidavit on behalf of the Defendant to file the present application as well. This shows that at the writ pending appeal stage there was a Power of Attorney holder on behalf of the Defendant who could have appeared on his behalf and could have informed the Registered Attorney to appear on his behalf.

The Defendant in his written submissions has stated the reason for the Power of Attorney holder to not participate in the writ pending appeal inquiry was that the holder did not have personal knowledge of this matter. On the other hand, the present application is filed by the said Power of Attorney holder who has given the affidavit on behalf of the Defendant. This is tantamount to misleading the Court. Further, the same Power of Attorney holder has in his affidavit indicated, in Paragraphs 36,37,38, and 39 that the Defendant was abroad, and therefore he could not appear. It is true that the Defendant was abroad but, his Power of Attorney holder, who was in the country could have appeared on his behalf. There was a valid Power of Attorney which authorised him to appear, which for some reason he did not do so. This may be indicative of them not wanting to conclude the proceedings so that the status quo remains in their favour.

The Defendant is now before this Court on the ground that the aforesaid judgment and Order of the learned District Judge is a grave and positive miscarriage of justice primarily due to the Defendant being deprived of giving evidence on two occasions when he was not at fault on both occasions. An allied grievance raised by the Defendant is that the District Court has not considered his ill health when the Counsel for the Defendant had brought it to the notice of the learned District Judge.

When we perused the judgment, it was evident that the learned District Judge has considered the Defendant's conduct, in his continuous pushing for postponements and not producing the relevant medical certificate. This was the basis for the learned District Judge to refuse to give a further date. Even in the instant application, the Defendant has not filed any supporting documents, such as a medical certificate, to prove he was unwell at that time.

The present application is also based on the contention that the learned District Judge had given the Order to execute the decree without summons having been served on him. It should be noted that when the case was called on 15.09.2020, the Attorney- at -Law who appeared on behalf of the Defendant, who was the Registered Attorney, did not inform Court that he had no instructions. Neither did he inform Court that the Defendant did not receive notice. He himself made an application to indicate to the Court that the Defendant is residing in Canada and due to the closure of airports he could not travel back to Sri Lanka and produced an e-mail marked "x". The learned District Judge in his Order has stated that notice has been served to the Defendant. Nonetheless, it must be reiterated that at the time there was a valid Power of Attorney holder, which the Defendant had not disclosed to the Court through his lawyer.

Our Courts have held that parties summoned by Court owe a duty to even indicate the status of their change of address. This was discussed by Her Ladyship Eva Wanasundera J. in the judgment of Union Trust & Investments Ltd. v. Madagodage Thusitha Wijesena, S.C. Appeal 91/2012 decided on 06.03.2015. Her Ladyship held,

"*I am of the view that if any party to a case intentionally avoids the service of papers from Court, that would amount to "fraud" ……*

It is my view that the Respondents owe a duty to inform court of any change of address since they appeared before court after receiving summons in the first instance when the case was initially filed and summons were served on them. If they never appeared in court, I would say that they do not owe a duty to inform court of any change of address. The Civil Procedure Code is fashioned in such a way that in every step of the way till execution of writ is concluded, the judgment debtor has to be notified by the judgment creditor so that the judgment debtor gets a chance to stop execution of writ against him and pay off as decreed. Parties before court should corporate with the provisions of procedure of court and not abuse the process of court……

I am of the opinion that, upon a party filing a proxy and giving its address to court, any change in such address should be promptly notified to court. It is the bounden duty of such party to notify court of a change in its address. The other party cannot be faulted or made to suffer as a result of a change of address being not notified to court"

Her Ladyship referred to the judgment of Cross World (Pvt.) Ltd. v. Union Trust & Investment SC Appeal No. 36/2010 SC Minutes of 16.05.2011, delivered by His Lordship Imam J., in which it was held that, "*consequent to filing of proxy and entering an appearance in court, the parties before court had a duty to inform court of the change of address*".

We observe that the conduct of the Defendant in so far as he was avoiding the service of summons displays dishonesty on his part.

In the instant case, the Registered Attorney himself had appeared and moved for a date to file objections. According, to the document marked "K", the proceedings dated 15.09.2020, Counsel for the Defendant appeared and made an application stating that he could not file objections as the Defendant was abroad, and then moved to file objections on another date. As alluded to above, neither is

there any indication that he did not have instructions nor is there any indication that the Defendant did not receive notice. According to the Order made by the learned District Judge, notice had been served and Counsel for the Defendant appeared on 17.06. 2020, to move for a further date to file objections, which request Court acceded to. However, the Defendant informed this Court that he had not received notice.

The question arising in this context is whether it is necessary for notice to be served on Defendant when his Registered Attorney has taken notice?

Section 29(1) of the Civil Procedure Code provides for these types of scenarios. This Section reads as follows,

Any process served on the registered attorney of any party or left at the office or ordinary residence of such registered attorney, relative to an action or appeal, except where the same is for the personal appearance of the party, ***shall be presumed to be duly communicated and made known to the party whom the registered attorney represents****; and, unless the court otherwise directs, shall be as effectual for all purposes in relation to the action or appeal as if the same had been given to, or served on, the party in person* [emphasis added]

This provision was discussed in the case of Rasiah v. Ranmany & Others (1978-79) 2 SLR 88. It was held that in terms of the aforesaid provision, a notice served on the Attorney-at-Law for the Appellant was sufficient notice to the Appellant.

We are mindful that when parties file the Notice and Petition of Appeal our courts have held that the papers should be filed by the Instructing Attorney and no one else. The writ of execution is a corollary of the judgment delivered. On that basis, the proxy given to the Registered Attorney-at-Law, will continue until revocation, and he will be an agent of the Defendant. Therefore, we hold that there is no impropriety in the instant case.

The Defendant has invoked the revisionary and restitutionary jurisdiction of this Court. It is settled law that the revisionary jurisdiction of a court exercising

appellate powers cannot be invoked merely because there is an error of law or fact in an order or judgment but could only be done where there are exceptional circumstances and/or extraordinary grounds that shock the conscience of Court (Vide Union Trust and Investments Ltd (supra)). The conduct of the Defendant insofar as he was avoiding the service of summons is what shocks the conscience of this Court.

Our Courts have consistently held that in order to succeed in an application for restitutio in integrum, a Constitutional remedy, which is an extraordinary one, the applicant seeking relief must display honesty and frankness.

One such case is M.A. Don Lewis v. D.W.S. Dissanayake,70 NLR 8, in which His Lordship Tennekoon J. (as he then was) held,

"Further even in his present application to this court the petitioner does not display the honesty and frankness which is expected of a person seeking to invoke the extraordinary powers of this court."

(This passage has been referred to in Sri Lanka Insurance Corporation v. Shanmugam [1995] 1 SLR 55, and most recently in C.A. RI 04/2018 decided on 25.11.2020)

In the instant case, the Defendant's silence on the existence of the Power of Attorney is a fatal lapse on his part.

The conduct of the Defendant shows that the Defendant has been the defaulter since the very beginning. Therefore, this Court cannot intervene to grant the desired remedy of restitutio-in-integrum for want of honesty and frankness on the part of the Defendant.

In order for this Court to exercise its revisionary jurisdiction, there must be exceptional circumstances warranting such an intervention. The Defendant has not been successful in proving to the satisfaction of this Court the existence of any such circumstance.

An observation that I would venture to make at this stage is the importance of guarding against an abuse of the process of courts.

What amounts to an abuse of process has been analysed in detail by the Indian Courts.

One such case is Ranipet Municipality v. M. Shamsheerkhan 1998 (1) CTC 66, in which the Madras High Court held,

"What is 'abuse of the process of the Court'? Of course, for the term 'abuse of the process of the Court' the Code of Civil Procedure has not given any definition. A party to a litigation is said to be guilty of abuse of process of the Court, in any of the following cases:-

(1) Gaining an unfair advantage by the use of a rule of procedure.

(2) Contempt of the authority of the Court by a party or stranger.

(3) Fraud or collusion in Court proceedings as between parties.

(4) ……..

(5) Resorting to and encouraging multiplicity of proceedings.

(6) Circumventing of the law by indirect means.

(7) ……..

(8) Institution of vexatious, obstructive or dilatory actions……."

In Kishore Samrite v. State of U.P., (2013) 2 SCC 398, the Indian Supreme Court clearly elucidated principles that govern the obligations of a litigant as follows,

"(i) Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the Courts, initiated proceedings without full disclosure of facts and came to the courts with 'unclean hands'. Courts have held that such

litigants are neither entitled to be heard on the merits of the case nor entitled to any relief.

(ii)….

(iii) The obligation to approach the Court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court….."

Their Lordships of the Supreme Court further observed,

"The person seeking equity must do equity. It is not just the clean hands, but also clean mind, clean heart and clean objective that are the equi-fundamentals of judicious litigation……Wide jurisdiction of the court should not become a source of abuse of the process of law by the disgruntled litigant. Careful exercise is also necessary to ensure that the litigation is genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose the true facts and approach the court with clean hands. No litigant can play 'hide and seek' with the courts or adopt 'pick and choose'. True facts ought to be disclosed as the Court knows law, but not facts."

Recently, His Lordship Nawaz J. in Sankapala Arachchilage Siriwardena v. Don Kithsiri Ranjith Athukorale, C.A. Case No. 955/2000 (F) decided on 24.03.2016, held,

"The provisions of law cannot be used at the whims and fancy of a litigant to abuse the process of Court. It appears to me that the Defendant is on a voyage of discovery of some legal loophole of the provisions of the law to abuse the process of the Court."

In the instant case, the Plaintiff successfully litigated the case and obtained judgment in her favour in 2019. After winning the battle, to date, she is deprived of the fruits of that. Is it not an abuse of process to simply file an application for restitutio-in-integrum asking for a stay order depriving the Plaintiff of the fruits of her successful litigation?

We are of the view that the conduct of the Defendant, in seeking to deprive the Plaintiff of the fruits of her successful litigation, is resorting to conduct that constitutes an abuse of the process of the Court.

In the words of Justice Bhagwati (as he then was) in Bandhua Mukti Morcha v. Union of India 1984 AIR 802 "the Court must be ever vigilant against the abuse of its process." The Court does not do justice to the other parties to the proceedings in question if it allows its process to be abused.

Therefore, we dismiss the application with costs.

JUDGE OF THE COURT OF APPEAL

D.N.SAMARAKOON,J

I AGREE

JUDGE OF THE COURT OF APPEAL