IN 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* under and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Travel Data Tours and Travels (Pvt) Limited,
No. 09,
School Street,
Colombo 03.
Petitioner-Petitioner

CA No. RII/22/2017

D. C. Colombo Case No: DDR/194/2014

Vs.

Softlogic Finance PLC,
No. 01,
Lake Crescent,
Colombo 02.

And Now at,
No. 33, 2nd Floor,
Park Road,
Colombo 03.
Plaintiff-Respondent-Respondent

1. Shan Holidays (Pvt) Limited
2. Nagaraja Sebamalai

3. Sebamalai Steven Krishan Sebamalai

All are at,

No. 27,

Bristol Street,

Colombo 01.

New Address

12/1A, Church Road,

Nayakakanda, Hendala,

Wattala.

Defendant-Respondent-Respondent

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Before : Hon. Justice. D.N. Samarakoon

Hon. Justice Sasi Mahendran

Counsel: Rasika Dissanayake with Sandun Senadhipathi for the Petitioner-Petitioner.

Wasantha Fernando with Kavindya Dharmaratne for the Plaintiff-Respondent-Respondent.

Argued on: 10.01.2022

Written Submissions on: 18.07.2019 by the Petitioner-Petitioner

05.07.2019 & 11.02.2022 by Plaintiff-

Respondent-Respondent

Decided on : 31.05.2022

D.N. Samarakoon,J

Judgment

The petitioner in this revision application is **Travel Data Tours and Travels (Pvt) Ltd.** The plaintiff respondent is **Softlogic Finance PLC.** The present contest is between these two parties.

The position of the petitioner is that the petitioner and the 01st defendant respondent were doing business together for a considerable period of time and as the 01st defendant could not repay a loan obtained from the petitioner for Rs. 50 million, the 01st defendant transferred one of its properties situated in Mundalama, Putlam, to the petitioner by deed No. 1489 dated 22.01.2015.

The present revision application is arising from an application made under section 839 of the Civil Procedure Code in District Court case No. DDR/194/2014 instituted under the Debt Recovery (Special Provisions) Act No. 02 of 1990 as amended, where the 01st defendant is so named together with two other defendants. The plaintiff in that case is the plaintiff respondent in this application. The sum claimed in that case is Rs. 49,736,396.42 together with the interest thereon.

The additional district judge has ordered the defendants in DDR/194/2014 to deposit the entire sum claimed in court as a precondition of filing of the answer, failing which decree absolute has been entered.

The petitioner's claim is that the plaintiff in order to recover this sum has already auctioned a property belonging to the 01st defendant in Mt. Lavinia and several properties belonging to the 01st defendant in Wattala and therefore the

plaintiff was not under a requirement to auction the Mundalama, Putlam property. Hence the petitioner says the plaintiff has unjustly enriched.

But before considering this, there is a matter to be considered. The plaintiff, not in one place, but in several places in its Final Written Submissions reiterate that the decree nisi was served on the defendants on 20.01.2015. Therefore the plaintiff's position is that the deed No. 1489 dated 22.01.2015 in favour of the petitioner is null and void.

The provisions of section 15(2) in the original Debt Recovery (Special Provisions) Act No. 02 of 1990 read,

"

> (2) Where the defendant or his representative in interest alienates any movable or immovable property or otherwise disposes of same in any manner whatsoever after the decree nisi such alienation shall be null and void and of no force or effect in law and shall be open to seizure in whoseverâ€™s hands such property may be :....."

But this provision was amended by the amending Act No. 09 of 1994 which read as,

> **14**. Section 15 of the principal enactment is hereby amended as follows:"
>
> (1) by repeal of subsection (2) of that section and the substitution therefor of the following subsection:-
>
> "(2) Subject to the provisions of subsection (2A),a defendant in an action instituted under this Act or his representative in interest shall not alienate any movable or immovable property or otherwise dispose of the same in any manner whatsoever after the decree nisi entered

in such action is served on such defendant.";

Therefore the phrase "after the decree nisi" was replaced by the phrase "after the decree nisi entered in such action **is served on such defendant**".

This shows that the "service" of the decree nisi on the defendant is material for the nullification of a transfer of property.

In this application, there is no admission by the petitioner or by the 01st defendant as to a date on which decree nisi is served on defendants. Hence this has to be established by the plaintiff who so asserts.

Although the petitioner has maintained that the decree nisi was served on the defendants on 20.01.2015, the learned additional district judge, at page 06 of her order dated 19.09.2017, (which is the order appealed against) stated that the service of the decree nisi on the defendants is on 30.12.2014. Hence there is a discrepancy as to the date of the service of decree nisi on the defendants.

Paragraph 13 of the Statement of Objections of the plaintiff reads,

"The Respondent above named without prejudice to the specific admissions set out above and as further objections on the petitioner's purported application filed misconceived in law states thus;

- *Brief page No. 08 of Your Lordship's Court Brief in this action provides for Journal Entry No. 05 dated 20.01.2015 on the left hand side just above same Journal Entry No. 05,*

  there is an entry in Sinhalese confirming that decree nisi issued against 01st, 02nd and 03rd defendants in that action had been duly handed over by the .....Fiscal and that the Fiscal had reported due service of decree nisi on the defendants being the defendant respondent respondents in this application".

The perusal of the said page 08, which is actually the page 08 of the district court case record shows that the said Journal Entry dated 16.01.2015 and 20.01.2015, which says in Sinhalese "1,2,3 withthikaruwanta nisi theendu prakashaya bhaaradun bawata……..fiscal waartha kara etha", has been "struck off" by a line. Therefore, it is not a valid Journal Entry.

Why the learned additional district judge said that the decree nisi was served on 30.12.2014? If one sees page 931 and 932 of the Brief (case record) one will find a Fiscal's Report. It says the decree nisi was served on the 1,2,3 defendants. The date given appears to be 30.12.2014. But the digits "….14" have been over written and not clear. Therefore it is not prudent to act on the said Fiscal's Report.

Therefore, the only entry acceptable in the Brief (case record) as to the service of decree nisi is, that in page 09, which is the actual Journal Entry No. 05 (not the "struck off" one) which is dated 27.01.2015 and which says "……..1,2,3 withthikaruwanta nisi theendu prakashaya bhaaradun bawa……..fiscal waartha kara etha".

Thus it shows that the entry "struck off" at page 08 dated 20.01.2015 has been correctly entered at page 09 under 27.01.2015. It is also to be noted, that the practice of the clerks in the district court is to enter the date on which a particular clerk receives the papers under the date on which he minutes the same. For example in the "struck off" entry, while the date on which it was made is 20.01.2015, the date under it, the date on which the clerk received the papers is 16.01.2015. Although the "struck off" entry has no validity this is material because the date on which the Fiscal's Report at page 931 and 932 was tendered is on 07.01.2015. Had the clerk used the said report for the "struck off" minute dated 20.01.2015, he would have written 07.01.2015 instead of 16.01.2015. All this makes clear that the only

thing to which the case record bears is that the decree nisi was served sometime before 27.01.2015. The case record is unable to give an exact date of service of the decree nisi. It must be noted that the correct Journal Entry No. 05 does not give a date under 27.01.2015, or a date on which papers were received. Therefore it is not possible to conclude that the deed No. 1489 dated 22.01.2015 in favour of the petitioner is a nullity. The benefit of any doubt must go to the petitioner. It was said in **Alan Wibberley Building Ltd. vs. Insley (1999)** by Lord Hoffman that "Oral evidence will never be admitted to contradict the contents of a deed".

Therefore, this court holds that the petitioner has locus standi to have and maintain the present application.

The learned additional district judge states in page 05 of her order dated 19.09.2017 that although the property in Mt. Lavinia was auctioned for Rs. 75,000,000/- as Rs. 55,000,000/- had to be paid to the Seylan Bank only Rs. 20,000,000/- could be recovered. She also states at the same page although the property at Gampaha (Wattala because it was auctioned by the Fiscal of the district court of Gampaha) was auctioned for Rs. 27,581,000/- as Rs. 23,039,926.09 was paid to the Bank of Ceylon, only Rs. 4,960,073.91 was recovered.

The averments stated at paragraphs 10,11,12 and 13 of the Written Submission of the petitioner dated 18.07.2019 tally with the aforesaid sums.

The learned additional district judge states that the property at Mundalama, Putlam was auctioned for Rs. 26,510,000/-. The petitioner stated in its affidavit filed through Ahamed Fuad dated 24.05.2017 (paragraph 15) that the Fiscal even without entering the property at Mundalama, Putlam has valued it for Rs. 26,500,000/-. In the said affidavit at paragraph 09 the petitioner has maintained that the property in Mt. Lavinia was worth Rs. 95,000,000/- according to the valuation report.

Although there is no valuation report on this, now that the petitioner is the lawful owner of Mundalama, Putlam property it is clear that its auctioning was unjust enrichment of the plaintiff as against the petitioner.

While the facts of the case are as narrated hereinbefore, the plaintiff has raised several objections for the granting of relief.

One is that this court cannot exercise revisionary jurisdiction, when the provincial high court exercising civil appellate jurisdiction is having jurisdiction for leave to appeal or revision. Whereas the provincial high court exercising the civil appellate jurisdiction gets its jurisdiction through Article 154P of the Constitution and section 05 of High Court (Special Provisions) Act No. 54 of 2006, this court is having revisionary jurisdiction conferred on it directly through Article 138 of the Constitution. Therefore the revisionary jurisdiction of this court is not only concurrent with that of the said high court but also more.

It was said in **Sharif And Others Vs. Wickramasuriya And Others (2010) 1 SLR 255**

Held

(1) In terms of Article 138 Court of Appeal shall have and exercise sole and exclusive cognizance by way of appeal, revision. However Article 154 (3) has given the High Court Appellate and revisionary jurisdiction in respect of orders by Magistrates/primary Courts. Hence the Court of Appeal ceased to enjoy sole and exclusive jurisdiction. **Article 154 P did not take away the powers exercised by the Court of Appeal under Article 138**.

Per Eric Basnayake, J.

"High Court is vested with original jurisdiction and is placed lower to the Court of Appeal in the order of Courts on superiority".

(2) **Jurisdiction enjoyed by the Court of Appeal through Article 138 remains intact.** Both Courts enjoy concurrent jurisdiction on matters referred to in Article 154 P (3)

(3) High Court of the Provinces (Sp. Prov) Act 19 of 1990 had made provision for the Court of Appeal either to transfer such appeal or application to High Court or to hear and determine such applications.

Per Eric Baaeyake, J.

"I am of the view that it is more expedient for the Court of Appeal to hear and conclude this case rather than to transfer it to High Court and for the reasons given on the merits I find that the learned Judge has gravely erred in her order.

The other ground is that the petitioner should have preferred an application under section 282 or 241 of the Civil Procedure Code, but not under section 839.

Section 282 reads,

"

and may be set aside for material irregularity.

(2) The decree-holder, or any person whose immovable property has been sold under this Chapter, or any person establishing to the satisfaction of the court an interest in such property, may apply by petition to the court to set aside the sale on the ground of a material irregularity in publishing or conducting it; but no sale shall be set aside on the ground of irregularity unless the

applicant proves to the satisfaction of the court that he has sustained substantial injury by reason of such irregularity, and unless the grounds of the irregularity shall have been notified to the court within thirty days of the receipt of the Fiscal's report".

Section 241 reads,

"

Claims to property to be reported by Fiscal and investigated by court.

241. In the event of any claim being preferred to, or objection offered against the seizure or sale of, any immovable or movable property which may have been seized in execution of a decree or under any order passed before decree, as not liable to be sold, the Fiscal or Deputy Fiscal shall, as soon as the same is preferred or offered, as the case may be, report the same to the court which passed such decree or order; and the court shall thereupon proceed in a summary manner to investigate such claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he were a party to the action;

Provided always that when any such claim or objection is preferred or offered in the case of any property so seized outside the local limits of the jurisdiction of the court which passed the decree or order under which such seizure is made, such report shall be made to, and such investigation shall thereupon be held by, the court of the district or division within the local limits of which such seizure was made, and the proceedings on such report and investigation with the order thereon shall, at the expiry of the appealable time, if no appeal has been within that time taken therefrom, but if an appeal has been taken, immediately

upon the receipt by such court of the judgment or order in appeal, be forwarded by such court to the court which passed the decree or order, and shall be and become part of the record in the action;

Provided, further, that in every such case the court to which such report is made shall be nearer to the place of seizure than, and of co-ordinate jurisdiction with, the court which passed the decree or order".

The position of the petitioner is that one of its agents objected to the auction but the Fiscal has not stopped it. The Fiscal has recorded that the said agent made representations after the auction has been held. Hence there is no report by the Fiscal and section 241 will not apply.

Section 282 cannot oust the jurisdiction conferred under section 839 which reads,

"**839**. **Nothing in this Ordinance shall be deemed to limit or otherwise affect** the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".

The plaintiff has also contended that there are no exceptional circumstances to exercise revisionary jurisdiction. But the Fiscal auctioning a property belonging to the petitioner, a person other than the judgment debtor is itself an exceptional circumstance.

It is also contended, citing cases that restitutio in integrum is available only to a party in a case. While it has been so decided, the petitioner has invoked the jurisdictions of revision and or restitutio integrum and the court is exercising the former.

It is true that in paragraph (d) of the prayer of the petition the petitioner has asked for the restoration of status quo ante. But paragraphs (b) and (c) of the

prayer will show that the main reliefs claimed is to exercise the revisionary jurisdiction and to set aside the order dated 19.09.2017 and to grant reliefs claimed in the petition under section 839.

Considering the present application as an application only for restitutio in integrum because of the term “restore” in paragraph (d) of the prayer reminds the saying of Dean Rosco Pound in his speech to the American Bar Association in 1911, that “**We still try the record, not the case**”.

Therefore exercising the revisionary jurisdiction of this court, the order dated 19.09.2017 is set aside. It is declared under paragraph (c) of the petition under section 839 that the seizure of the Mundalama, Putlam property described in the schedule of the said petition, the auctioning of the said property and all steps taken thereafter in respect of that property are null and void. It is also declared under paragraph (d) of the said petition under section 839 that the Fiscal’s Conveyance executed in respect of that property is null and void.

Hence the revision application of the petitioner is allowed with costs.

Judge of the Court of Appeal.

Hon. Justice Sasi Mahendran

I agree.

Judge of the Court of Appeal.