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- Intergrum in terms of Article 138 and 145 of the Constitution Sri Lanka against the Judgment dated 17.02.2022 of the Kalutara High Court of the Civil Appellate case No 225/2014 (F).

Case No:
CA/RII/14/22

Case No:
HCCA/WP/KAL/225/14 (F)

DC. Panadura
Case No: 1038/P

Morawaka Koralage Harsha
Kumara Fonseka Abeykoon
No 93/B, Kolamuna
Piyadasa

Plaintiff

1. Upali Alwis Weerasinghe
   No. 93/2,
   Artigala Mawatha
   Kolamunna
   Piliyandala

2. Dona Leena Abeysinghe
   No 93/2,
   Artigala Mawatha
   Kolamunna
   Piliyandala

Defendants

AND NOW BETWEEN

1. Upali Alwis Weerasinghe
   No. 93/2,
   Artigala Mawatha
   Kolamunna
   Piliyandala

2. Dona Leena Abeysinghe
   No 93/2,
   Artigala Mawatha
   Kolamunna
   Piliyandala

Defendant Appellants

Vs.

Morawaka Koralage Harsha Kumara
Fonseka Abayakon
No. 93/B
Kolamunna
Piliyandala

Plaintiff Respondents

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

Counsel: J.M. Wijebandara with K. Kuruwitaarachchi and Vimukthi Jayawardana for the Defendant Appellant- Appellant.

Written Submissions : 17.10.2022 (by the Defendant- Appellant-Appellants)
On

Supported On : 12.09.2022

Order On : 28.10.2022

B. Sasi Mahendran, J.

The Defendant-Appellant-Appellants (hereinafter referred to as "the Appellants"), by Petition dated 6th April 2022, instituted this application to invoke this Court's restitutionary jurisdiction in terms of Article 138 of the Constitution to, inter alia, revise and set aside the admissions 'erroneously' recorded by the District Court of Panadura, to revise and set aside both judgments of the District Court ("P7"- dated 29th September 2014) and the High Court of Civil Appeals holden at Kalutara ("P18" - dated 17th February 2022). This Order pertains to whether notice ought to be issued on the Plaintiff-Respondent-Respondent.

The key issue before this Court is whether the admissions that have been duly recorded at the trial stage can be set aside by this Court exercising its restitutionary jurisdiction.

Abdul Majeed's, 'A Commentary on Civil Procedure Code and Civil Law in Sri Lanka' (on page 459) notes,

"*When a case is taken up for trial and before the issues are framed, if there are any admissions in the pleadings of the parties, those admissions must be recorded as 'admissions'. The recording of the admitted facts is not in accordance with any provisions of the Civil Procedure Code. However, the recording of admissions has become a long-established practice in civil trials…… It is settled law that the facts which are admitted by the parties need not be proved.*"

(It must be noted that this was prior to the introduction of the pre-trial stage)

The case of Mariammai v. Pethrupillai 21 NLR 200 is authority for the proposition that once an admission is made it cannot be resiled from thereafter. That admission "ties the hands of" the Petitioner. His Lordship Bertram C.J. held:

"*If a party in a case makes an admission for whatever reason, he must stand by it; and it is impossible for him to argue a point on appeal which he formally gave up in the Court below."*

The case Uvais v. Punyawathie [1993] 2 SLR 46 held that it is sometimes permissible to withdraw admissions on questions of law but admissions on questions of facts cannot be withdrawn. His Lordship Fernando J. further observed:

"*Quite apart from any question of estoppel or prejudice, to permit admissions to be withdrawn in these circumstances would subvert some of the most fundamental principles of the Civil Procedure Code in regard to pleadings and issues. Section 75 not only requires a defendant to admit or deny the several averments of the plaint, but also to set out in detail, plainly and concisely, the matters of fact and law, and the circumstances of the case upon which he means to rely for his defence ; sections 146 (2) and 148 oblige the Court upon the pleadings, or upon the contents of documents produced, and after examination of the parties if necessary, to ascertain the material propositions of fact or of law upon which the parties are at variance, and thereupon to record issues on which the right decision of the case depends ; section 150, explanation (2), prohibits a party from making at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet; the facts proposed to be established by a party must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings."*

In Sivaratam v. Dissanayake [2004] 1 SLR 144 at 147 his Lordship Amaratunga J. held:

"*At anytime before the hearing of the action, the parties are at liberty to admit in writing any fact to be determined at the trial (Section 58 Evidence Ordinance). Such admissions are also formal admissions made outside Court. At the commencement of the trial the parties may state to Court the facts they admit and then such admissions are recorded by Court.*"

All the admissions in the instant case, concern questions of fact and not law. The admissions ("P5" - page 90 of the Brief) recorded at the trial were as follows:

පිළිගැනීම්

1. ප්‍රාදේශීය අධිකරණ බලය පිළිගනී.
2. පැමිණිල්ලේ දෙවන වේදයේ සඳහන් මොරවකි කෝරලගේ එලිසබෙත් චාලට් පොන්සේකා යන අය පැමිණිල්ලේ උප ලේඛණයේ සඳහන් ඉඩමේ අයිතිකාරිය බව පිලි ගනී.
3. එකී ඉඩම වෂර් 1985.02.19 වෙනි දිනැති අංක 1873 දරණ බලයලත් මිනින්දෝරු වයි. බි.කේ. කොස්තා මහතා විසින් මැන සාදන ලද පානදුර දිසා අධිකරණයේදී 17938 දරණ බෙදුම් නඩුවට අදාල මුලික පිඹුරේ කැබලි අංක 'සී' ලෙස මැන පෙන්වා ඇති බව පිලි ගනී.

4. එම 'සී' අක්ෂරය දරණ ඉඩම 17938 බෙදුම් නඩුවේ බෙදීමට යෝජිත විෂය වස්තුවෙන් ඉවත් කරන ලද බව පිළි ගනී.

5. එකී ඉඩම ඉලිසබෙත් වාලටි පොන්සේකා අබේකෝන් යන අය නිරවුල්ව බුක්ති විඳ ගෙන එන ලද බව පිලි ගනී.

6. එලිසබෙත් පොන්සේකා යන අය බෙදීමට යෝජිත ඉඩම කාලාවරෝධි අයිතිවාසිකම් ලබා ඇති බව පිලි ගනී.

7. පැමිණිල්ලේ 5 වන වේදයේ සඳහන් කර ඇති ආකාරයට පැමිණිල්ලේ උප ලේඛණයේ සඳහන් බෙදීමට යෝජිත ඉඩමෙන් 56 න් පංගු 20 ක් විත්තිකරුට අයිති බව පිලි ගනී.

8. පැමිණිලිකරු අයිතිවාසිකම් ලද අංක 235 දරන ඔප්පුව එම්.2380/29 දරන පත් ඉරුවේ ලිය පදිංචි කර ඇති බව පිලි ගනී.

9. විත්තිකරු අයිතිවාසිකම් ලද අංක 12373 දරන ඔප්පුව එම. 1790/65 දරන පත් ඉරුවේ ලිද පදිංචි කර ඇති බව පිලි ගනී.

10. විත්තිකරුගේ උත්තරයෙන් වීනා අබේසිංහ පාශර්වකරුවෙකු ලෙස හෙළිදරව් කරන ලද බව පිලි ගනී."

It appears that a Court does not have discretion in refusing to record an admission of a party, since by the very meaning of the term, it is a matter admitted by the parties themselves. The Court merely records the same. At this juncture the observation of his Lordship E.A.G.R. Amarasekara J. in Kekul Kotuwage Don Aruna Chaminda v. Janashakthi General Insurance Limited SC/ Appeal No. 134/2018 decided on 09.10.2019 is apposite:

"*Thus, one can still argue that admissions represent the mutual agreement or the meeting of minds of the parties with regard to the undisputed facts or law of the case before court and, as such, fraud, mistake, misrepresentation, duress, undue influence etc., when proved would still be a ground to allow the withdrawal of an admission*."

Restitution, which is a powerful remedy conferred on this Court by Article 138 of the Constitution is one that must be exercised sparingly and with caution because of the far-reaching consequences that can result from the grant of the remedy. The grounds

which have to be made out by a litigant in order to claim this remedy successfully have been set out by his Lordship Ranaraja J. in Sri Lanka Insurance Corporation v. Shanmugam, [1995] 1 SLR 55 thus:

"*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)*"

The absence of a suggestion of the existence of any of these grounds will preclude us from granting this relief.

The Appellants (at paragraph 13 of the Petition) also aver that the main issue of priority by registration had not been sufficiently dealt with by scrutinizing correct and precise registration folios. This, it is alleged, has occasioned a serious miscarriage of justice.

However, on a perusal of the judgment, the issue of priority of registration has been sufficiently dealt with. The relevant portion of the judgment of the High Court of Civil Appeal (on page 9) reads:

"ඒ අනුව අභියාචකයන් විශ්වාසය තබන සිය හිමිකම් ඔප්පු ලෙසට සලකුණු කර ඇති සහ ඉඩමට සම්පූර්ණ අයිතිවාසිකම් ලැබුනා යැයි පවසා සිටින වී. 3 'අ' සහ වී. 7 'අ' දරණ ඔප්පු වල අයිතිවාසිකම් සම්බන්ධයෙන් පැහැදිලි විස්තරයක් උගත් අතිරේක දිසා විනිසුරුතුමිය සිය තීන්දුවේ 21,22,23,24,25 පිටු වල දක්වා ඇත. එම සම්පූර්ණ පැහැදිලි කිරීම සාරාංශ කොට ගත් කල පෙනී යන්නේ ඉහත කී ඔප්පු සහ අභියාචකයින් අයිතිවාසිකම් අයදින වී.6 'අ' දරණ ඔප්පුව යන හිමිකම් ඔප්පු වල දැක්වෙන ඉඩම් එකිනෙකට සමාන ඉඩම් නොවන බවයි. ඒ අනුව එකී ඉඩම් ලියාපදිංචි වූ පත් ඉරු සම්බන්ධයන් වූ හබයද සිය තීන්දුවේ

පැහැදිලිව වෙන් කොට පෙන්වා දී ඇති අතර, කෙසේ වෙතත් මෙම නඩුවට ගොනු කරන්නට වී ඇති අංක 12373 දරන ඔප්පුවෙන් ලද අයිතිවාසිකම පමණක් අභියාචකයන්ට හිමිවන බව සෙසු හිමිකම් ඔප්පුවල ඉඩම් වල මායිම් විමශර්නය කිරීම මඟින් තීන්දු කර ඇත. ඒ අනුව නිවැරදි පත් ඉරුවේ එකී ඔප්පු දෙකම ලියාපදිංචි වුවද එහි දැක්වෙන්නේ සාමාන ඉඩමක් නොවන බවත්, ඒ මත පූර්වතාවයක් පිලිබඳ ප්‍රශ්නයක් මෙම නඩුවේ බෙදීමට යෝජිත ඉඩම සම්බන්ධයෙන් අදාල නොවන බවත්, විනිසුරුතුමිය සිය තීන්දුවේ පැහැදිලිව දක්වා ඇත. තවද, ප්‍රතිෂ්ඨා මුදලක් මත අයිතිවාසිකම් ලබා ගැනීම සම්බන්ධයෙන්වූ කාරණාව පිළිබඳව දිසා විනිසුරුතුමිය සිය තීන්දුව ප්‍රකාශයට පත් කිරීමේදී අවධානය යොමු කර නැත ලෙසට තර්ක කර සිටියද සිය තීන්දුවේ 18 වන පිටුවේ ඒ බව පැහැදිලිව දක්වා ඇත.''

Further, as restitution is an equitable remedy granted only to those litigants that exercise due diligence and act with utmost promptitude, we are of the view that the Petitioner's belated application to impugn the admissions recorded by the District Court on 15th March 2005 amounts to laches.

In Perera v. Don Simon 62 NLR 118 his Lordship Sansoni J. (as he then was) held:

"*I would refer in this connection to Mapalathan v. Elayavan and Dember v. Abdul Hafeel. In those cases it was held that restitutio would not be granted where there has been negligence on the part of the applicant for relief. The case is all the worse if the error is due to the act of the plaintiff himself, as would appear to be the case here. .....Over three years had elapsed between the entering of the decree and the filing of the present application, and it was therefore filed too late.*"

In M.A. Don Lewis v. D.W.S. Dissanayake 70 NLR 8 his Lordship Tennekoon J. (as he then was) held:

"*.... the first question that arises for consideration is whether this court should exercise its extraordinary powers of revision or by way of Restitutio in Integrum in favour of the applicant.....It is not the function of this court in the exercise of the jurisdiction now being invoked to relieve parties of the consequences of their own folly, negligence and laches. The maxim Vigilantibus, non dormientibus, jura subveniunt provides a sufficient answer to the petitioner's application on the ground now under consideration.*"

It is well established law that revision is applicable only if there are exceptional circumstances that shocks the conscience of this Court. In the absence of any exceptional circumstances, we cannot revise the judgments of both Courts.

For those reasons, we refuse to issue notice.

JUDGE OF THE COURT OF APPEAL

D. N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL