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

In the matter of an application for Revision and Restitutio in integrum in terms of Article 138 of the Constitution.

Case No. CA/RII/02/2021

SP/HCCA/TA/LA/01/2019

DC Walasmulla 1103/P

Wickrama Gunaratna Pinidiya Sirisena,
Maha Siyambalagahawatta,
Siyarapitiya,
Katuwana

Plaintiff

Vs.

1. Wickrama Gunaratna Pinidiya Ariyatilaka,
   Maragahawatta, Siyarapitiya,
   Katuwana.

2. Wickrama Gunaratna Pinidiya Kiribandara,
   Maha Siyambalagahawatta
   Siyarapitiya,
   Katuwana

3. Mahakumburage Ariyadasa,
   Wellahandiya,
   Siyarapitiya,
   Katuwana

4. Amarasena Wickrama Gunaratna Pinidiya,
   Maragahawatta, Siyarapitiya,
   Katuwana

Defendants

AND BETWEEN

Wickrama Gunaratna Pinidiya Sirisena
Maha Siyambalagahawatta
Siyarapitiya,
Katuwana

Plaintiff-Petitioner

Vs.

1. Wickrama Gunaratna Pinidiya
   Ariyatilaka,
   Maragahawatta, Siyarapitiya,
   Katuwana.

2. Wickrama Gunaratna Pinidiya
   Kiribandara,
   Maha Siyambalagahawatta
   Siyarapitiya,
   Katuwana

3. Mahakumburage Ariyadasa,
   Wellahandiya,
   Siyarapitiya,
   Katuwana

4. Amarasena Wickrama Gunaratna
   Pinidiya,
   Maragahawatta, Siyarapitiya,
   Katuwana (deceased)

   4A. Wijewickrama Koralage
   Karunawathie,
   Maragahawatta, Siyarapitiya,
   Katuwana

Defendants-Respondents

And Now Between

Wickrama Gunaratna Pinidiya Sirisena
Maha Siyambalagahawatta
Siyarapitiya,
Katuwana

Plaintiff-Petitioner-Petitioner

Vs.

1. Wickrama Gunaratna Pinidiya
   Ariyatilaka,
   Maragahawatta, Siyarapitiya,
   Katuwana.

2. Wickrama Gunaratna Pinidiya
   Kiribandara,
   Maha Siyambalagahawatta
   Siyarapitiya,
   Katuwana

3. Mahakumburage Ariyadasa,
   Wellahandiya,
   Siyarapitiya,
   Katuwana

4. Amarasena Wickrama Gunaratna
   Pinidiya,
   Maragahawatta, Siyarapitiya,
   Katuwana (deceased)

4A. Wijewickrama Koralage
Karunawathie,
Maragahawatta, Siyarapitiya,
Katuwana

Defendants- Respondents- Respondents

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

Counsel: Rohan Sahabandu, PC with Nathasha Fernando and Senanayake for the Plaintiff-Petitioner-Petitioner

Written Submissions: 16.11.2022 (by the Plaintiff-Petitioner-Petitioner)
On

Decided On : 06.12.2022

B. Sasi Mahendran, J.

The Plaintiff-Petitioner-Petitioner (hereinafter referred to as "the Plaintiff"), by Petition dated 1st February 2021, is seeking to invoke this Court's revisionary and/or restitutionary jurisdiction in terms of Article 138 of the Constitution to set aside the Order of the District Court of Walasmulla dated 9th January 2019 ("P16") and the Order of the High Court of Civil Appeals holden at Tangalle dated 10th September 2020 ("P17") and for this matter to be tried de novo. The other parties to this matter did not participate in the proceedings, although notice had been issued to them by the Fiscal.

The Plaintiff, in this case, made an application to the District Court in terms of Section 189 of the Civil Procedure Code on the basis that the judgment of the District Court dated 3rd July 2008 ("P7") was incorrect, due to an accidental slip or omission in excluding two Lots from the corpus. The District Court refused the application. Following

this, the Plaintiff appealed to the Civil Appellate Court which also dismissed the application.

The Plaintiff's main grievance is that the Orders of the District Court and the Civil Appellate Court are made per incuriam and in a manner prejudicial to his property rights. Both Courts refused the Plaintiff's application made in terms of Section 189 of the Civil Procedure Code to correct the purported accidental slips or omissions by amending the judgment, final plan, and final decree in the substantive partition action.

We will set out the facts prior to determining whether the Plaintiff is entitled to the relief prayed for. These reliefs prayed for are as follows:

"

a. To issue notices to the Respondents,
b. To Hear this application,
c. Acting in revision and/or restitutio in integrum to set-aside order dated 09.01.2019 of the Learned District Judge of Walasmulla and the Judgment dated 10.09.2020 of the Learned High Court Judges of the Civil Appellate High Court of Tangalle.
d. Send the case back to trial de-novo before the District Court of Walasmulla.
e. Grant costs, and
f. Any such further reliefs as Your Lordships' Court shall seem meet."

The factual background is as follows. The Plaintiff instituted a partition action in the District Court of Walasmulla by Plaint dated 5th September 2001 ("P1") to partition a land called "Mahasiyambalawewatta". Mr. H.P.P. Jayawardena, Licensed Surveyor, prepared a preliminary plan (No. 3892 dated 7th December 2003 – "P2") consisting of ten Lots marked "A" to "J". In his report ("P3"), it was recommended that Lots "G", "H", and "I" be excluded from the corpus since those Lots were respectively, a Pradeshiya Sabha road, a stream reservation, and not belonging to the corpus. The parties filed their statements of claim. The matter proceeded to trial with the recording of five admissions. No issues were raised. The admissions recorded on 19th March 2008 ("P5") were as follows:

"**පිළිගැනීම්**

01. අයි, එච්, ජී අක්ෂර විෂය වස්තුවෙන් ඉවත් විය යුතු බව පිළිගනී.
02. ඒ,බී, සී,එෆ්,ජේ අක්ෂර වලින් දැක්වෙන ඉඩම විෂය වස්තුව බව පිලිගනී.
03. ඊ සහ ඩී අක්ෂර වලින් දැක්වෙන පාර දැනට 2,4 වගඋත්තර කරුවන් විසින් ගමන් කරන පාර බව පිලි ගනී.

04. ඊ.ඩී අක්ෂරවලින් දැක්වෙන මාගර්ය වෙනුවට විෂය වස්තුවේ දකුණු මායිම දිගේ අඩි 8 ක පොදු පාරක් ලබා දීමට පාශර්වකරුවන් එකඟ බව පිළිගනී.

05. පෙළපත පිළිබඳව තකර්යක් නොමැති බවට පිළිගනී."

Thus, the parties agreed that Lots "G", "H", and "I" would be excluded from the corpus (which was admitted to include only Lots "A", "B", "C", "F" and "J") and that a common road on the southern boundary of the corpus would be granted, instead of the roads that were used by the 2nd and 4th Defendants depicted as Lots "D" and "E". It was only the Plaintiff that gave evidence. He was not cross-examined. The matter was fixed for judgment as the Defendants did not wish to give evidence. The judgment was delivered on 3rd July 2008 ("P7") and, consequently, the interlocutory decree was entered. Mr. Jayawardena prepared the final plan No. 4793 dated 28th October 2008 and thereafter the final decree was entered. The Plaintiff contends that he was unable to properly execute the writ owing to some mistakes found in the said judgment and the final plan.

Therefore, he filed a motion in terms of Section 189 of the Civil Procedure Code, which was supported on 3rd October 2018, to correct the purported mistakes. These mistakes included, among other things, that the learned Trial Judge erred in holding that the corpus contained only Lots "A", "B", "C", "F" and "J" when the corpus should have included Lots "D" and "E" as well and that Lots "D" and "E" were erroneously treated as a common road and therefore excluded. However, the learned District Judge by the impugned Order dated 9th January 2019 ("P16") dismissed the application. The learned District Judge observed that the Plaintiff himself had admitted that the corpus consisted of Lots "A", "B", "C", "F" and "J", which he reiterated in his evidence too. Further, the application did not concern 'mistakes' which were merely accidental slips or omissions rather the amendment sought was fundamental and went to the root of the matter. The relevant parts of the Order read:

"එකී පිළිගැනීම් සටහන් කර ඇත්තේ, පාශර්වයන්ගේ එකඟත්වය මත වන අතර, එකී පිළිගැනීම් සම්බන්ධයෙන් වූ දෝෂයක් හෝ එය සටහන් කිරීම සම්බන්ධයෙන් වූ දෝෂයක් කිසිසේත්ම සිවිල් නඩු විධාන සංග්‍රහ පනතේ 189 වගන්තිය යටතේ නිවැරදි කළ නොහැක. එකී පිළිගැනීම් සටහන් කිරීමෙන් අනතුරුව, අද දින මෙම ඉල්ලීම කරනු ලබන පැමිණිලිකරු එදිනම සාක්ෂි ලබා දී ඇත. එදින සාක්ෂි සටහන් වල දෙවන පිටුවේ, පහල සිට ඉහළට තුන්වන පේලියේ, අදාළ පිඹුරේ ඒ,බී,සී,එෆ්,ජේ අක්ෂර වලින් මෙම නඩුවේ විෂය වස්තුව නිරූපනය වන බවට, පැමිණිලිකරු විසින්ම සාක්ෂි ලබා දී ඇත. අදාළ සාක්ෂි ලබා දීම සිදු කරන අවස්ථාවේදී හෝ දෝෂයක් තිබුනේ නම්, ඔහුට නිවැරදි කිරීමේ හැකියාව තිබුණි. එමෙන්ම ඔහු පැහැදිලිව සාක්ෂි ලබා දෙමින්, විෂය වස්තුවේ ඊ සහ ඩී අක්ෂර වලින් දක්වා ඇති පාරක්, ඉඩමේ දකුණු මායිම දිගේ අඩි අටක් පමණ පහලට ලබා දීමට තමන් එකඟ බවටද ප්‍රකාශ කර ඇත.

මා ඉහතින් දක්වා ඇති පරිදි, අදාළ පිඹුරේ ඊ සහ ඩී දරණ කැබලි මාගර්යක් වශයෙන් භාවිතා වන බවට තුන්වන පිළිගැනීමේ පැහැදිලිව සඳහන් කර ඇති බව උගත් පූර්වගාමී විනිසුරුතුමන් සිය තීන්දුවෙහිදී පැහැදිලිව දක්වා ඇති අතර, පාශර්වකරුවන්ගේ හතරවන පිළිගැනීම අනුව, දකුණු මායිම දිගේ අඩි අටක පොදු පාරක් ලබා දීමට ද පාශර්වයන් එකඟ වී ඇත. සිය සාක්ෂිදී ද පැමිණිලිකරු විසින් පැහැදිලිව එය ලබා දීමට එකඟ බවට, 2008.03.19 වන දින සාක්ෂි සටහන් වල සඳහන් කර ඇත. ඉදිරිපත්ව ඇති පිළිගැනීම් සහ සාක්ෂි සහ ලේඛන මත පදනම්ව උගත් පුවර්ගාමී විනිසුරුතුමන් විසින් ස්වකීය තීන්දුව ප්‍රකාශයට පත් කර ඇති අතර එතුමාගේ තීන්දුවෙහි කිසිදු ආකාරයක පැමිණිල්ලෙන් පවසන ආකාරයේ දෝෂයන් පවතින බවට, ඉදිරිපත්ව ඇති කරුණු මත කිසිදු නිගමනයකට එළඹිය නොහැක. එමෙන්ම පැමිණිලිකරුගේ ඉල්ලීම අනුව පැමිණිලිකරු ඉල්ලා සිටින්නේ, උගත් පුවර්ගාමී විනිසුරුතුමා විසින් නිකුත් කරන ලද තීන්දුවේ හරයටම බලපාන්නා වූ කොටස් සංශෝධනය කිරීමට විනා, හුදු අතවැරදීමකින් හෝ ප්‍රමාද දෝෂයකින් සිදු වූ දෝෂයන් සංශෝධනය කිරීමට නොවේ.”

Aggrieved by this Order the Plaintiff filed a leave to appeal application in the Civil Appellate Court, holden at Tangalle. Leave was granted. However, the learned Judges ultimately dismissed the appeal, by impugned Order dated 10th September 2020 (“P17”). The learned Judges were of the view that the Plaintiff had admitted that the corpus contains Lots “A”, “B”, “C”, “F” and “J”. Nevertheless, the decision of the learned Trial Judge to exclude Lots “D” and “E” although erroneous, was not an accidental slip or omission falling within the ambit of Section 189. It was deliberate. The learned Judges concluded that the remedy sought should have been by way of an appeal or restitution and not an application under Section 189. The relevant parts of the Order read:

“නඩු විභාගය ආරම්භයේදී පාශර්වයන් පිළිගෙන ඇත්තේ අයි.එච්.ජී. යන කැබලි විෂය වස්තුවෙන් ඉවත් විය යුතු බවටත් විෂය වස්තුව සමන්විත වන්නේ, ඒ,බී,සී,එෆ්,ජේ යන කැබලි වලින් බවටත් ය. මෙම පිළිගැනීම් පැමිණිලිකරුගේ සාක්ෂියේදී ද ප්‍රකාශ කර ඇති අතර, එහිදී ඔහු ප්‍රකාශ කර ඇත්තේ, අයි,එච්,ජි කැබලි විෂය වස්තුවෙන් ඉවත් විය යුතු බවටත්, ඊට අමතරව ඩී සහ ඊ කැබලි 2,4 විත්තිකරුවන් දැනට ගමන් කරන මාගර්ය බවත්, ඒ වෙනුවට විෂය වස්තුවේ දකුණු මායිම දිගේ අඩි 8 ක පොදු පාරක් ලබා දීමටත්ය. ඒ අනුව මෙම කරුණු පැමිණිලිකරුගේ සක්ෂියේදී ද ප්‍රකාශ කර එය තහවුරු කර ඇත.

ඒ අනුව ඊ හා ඩී කැබලි විෂය වස්තුවෙන් ඉවත් විය යුත්තේ මන්දැයි දීසර් වශයෙන් සාකච්ඡා කර එම කැබලි විෂය වස්තුවෙන් ඉවත් විය යුතු වීමට හේතු දක්වා එම කැබලි විෂය වස්තුවෙන් ඉවත් විය යුතු බවට නිගමනයකට එළඹී ඇති විය. එය කිසිසේත්ම අහම්බෙන් සිදු වූ වරදක් හෝ අත්වැරැද්දකින් සිදු වූ වරදක් ලෙස සැලකිය හැකි නොවේ. එය සිතා මතාම හේතු සහිතව ගන්නා ලද තීරණයකි. එබැවින් සිවිල් නඩු විධාන සංග්‍රහයේ 189 වගන්තිය යටතේ නිවැරදි කිරීමකට එය ලක් කල නොහැක. එහෙත් පැහැදිලි වශයෙන්ම උගත් දිසා විනිසුරුවරයාගේ මෙම නිගමනය දෝෂ සහගත බව පෙනේ. එහෙත් එය සිවිල් නඩු විධාන සංග්‍රහ පනතේ 189 වගන්තිය යටතේ නිවැරදි කල හැක්කක් නොවේ. පාශර්වයන් කිසිවෙකුත් ඩී සහ ඊ කැබලි විෂය වස්තුවෙන් ඉවත් විය යුතු බව එකඟ වී හෝ පිළිගෙන නැත . සාක්ෂි වලින්ද එවැන්නක් මතු නොවේ.

මානකවරායාද දක්වා ඇත්තේ ඩී සහ ඊ කැබලි විෂය වස්තුවේ කොටස් බවයි. ඒ අනුව පැහැදිලිවම ඩී සහ ඊ කොටස් විෂය වස්තුවේ කොටස් බවට නිගමනය කල යුතුව තිබුණි.

ඒ අනුව උගත් දිසා විනිසුරුවරයා කැබලි අංක සී සහ ඊ විෂය වස්තුවෙන් ඉවත් කර තිබීම පැහැදිලි වශයෙන්ම දෝෂ සහගත තත්වයකි. එහෙත් පෙත්සම්කරුවන්ගේ ඉල්ලීම අසාථර්ක වන්නේ ඔවුන්ගේ ඉල්ලීම සිවිල් නඩු විධාන සංග්‍රහ පනතේ 189 වගන්තිය යටතේ කරන ලද බැවිනි.

උගත් දිසා විනිසුරුවරයාගේ මෙම තීරණය දෙස බලන විට එය අහම්බෙන් සිදු වුවක් බවට හෝ අත්වැරදීමක් නිසා සිදු වුවක් බවට කිසිසේත් සැලකිය නොහැක. හිතාමතා ඊට හේතු දක්වමින් එළඹෙන ලද නියෝගයකි. ඒ අනුව එවැනි තීරණයක් සිවිල් නඩු විධාන සංග්‍රහ පනතේ 189 වගන්තිය යටතේ නිවැරදි කල හැකි එකක් නොවේ."

On a perusal of the record, it appears that the learned Trial Judge erred when he excluded Lots "D" and "E" from the corpus. Those Lots should have formed part of the corpus as well. The Plaintiff's conduct is not irreproachable either. As the learned District Judge correctly identified, it was by the parties' own admission the corpus was said to consist of Lots "A", "B", "C", "F" and "J". No attempt was made to correct this during the course of giving evidence either. This is a mistake on the Plaintiff's part, which he admits in Paragraph 5 of the Petition as well.

Nevertheless, we are mindful of the settled law that an imperative duty is cast on a trial judge to investigate the title and to carefully examine and analyse the totality of the evidence placed before him or her. To that effect, the learned District Judge's aforesaid Order is wrong.

It must be noted that the present case is not to impugn the admissions recorded by the parties' own volition, which the law permits to do so only if it is an admission of law, and not an admission of fact. This application deals with the allegation of breach of the imperative duty cast on the trial judge to go beyond the recorded admissions and investigate the title and correctly identify the corpus.

We are now tasked with determining whether this mistake is one that falls within the ambit of Section 189 of the Civil Procedure Code and whether the learned Judges were correct in their findings that it did not fall within the ambit of Section 189.

Section 189(1) of the Civil Procedure Code reads:

The court may at any time, either on its own motion or on that of any of the parties, correct any clerical or arithmetical mistake in any judgment or order or any error arising therein from any accidental slip or omission, or may make any amendment which is necessary to bring a decree into conformity with the judgment.

This Section was analysed in the case of Mohamed Iqbal v. Mohamed Sally [1995] 2 SLR 310. His Lordship Ranaraja J. (with his Lordship S.N. Silva J. (as he then was) agreeing) observed thus:

"Section 189 of the Civil Procedure Code permits Court on its own motion or on an application by any of the parties to an action;

(1) to correct any clerical or arithmetical mistake in any judgment or order,

(2) to correct any error arising in any judgment or order from any accidental slip or omission,

(3) to make any amendment which is necessary to bring a decree into conformity with the judgment.

Section 189 is exhaustive of the causes for which a decree may be amended."

We are of the view that the learned Judges of the District Court and the Civil Appellate Court were correct in their views that the type of 'mistake' that is sought to be rectified in the present application is not one falling within the ambit of Section 189. It appears to be conscious and deliberate. A matter such as the redistribution of the shares, which arises now with the inclusion of two new Lots (and as explained below an exclusion of one Lot i.e. Lot "J" from the corpus) unlike, for example, an arithmetic mistake in the share allocation, cannot be treated as falling within one of the three limbs set out in Mohamed Iqbal (supra). We cannot stretch the parameters of Section 189 to include the present mistake within its ambit, even if there appears to be an injustice, and thereby cause ambiguity in this area of law, when there are clear avenues that can be taken such as an application for revision to revise the judgment of the learned Trial Judge dated 3rd July 2008 and the consequent orders thereon.

Further, the Plaintiff has not prayed for the setting aside of the judgment dated 3rd July 2008 ("P7"), instead, the prayers, as set out above, deal with setting aside the Orders concerning the application under Section 189 and for the matter to be reheard afresh so that the District Judge can re-determine whether the mistake falls within the sphere of Section 189. Even in his leave to appeal Petition to the Civil Appellate Court (on page 10 of the Brief) there was no prayer to set aside the judgment dated 3rd July 2008. There too it was only to set aside the Order dated 9th January 2019 of the District Court.

In Surangi v. Rodrigo [2003] 3 SLR 35 his Lordship Gamini Amaratunga J. observed:

"No Court is entitled or has jurisdiction to grant reliefs to a party which are not prayed for in the prayer of the plaint".

It must also be noted that in his written submissions, although not raised in the Petition, the Plaintiff has alleged that the learned Trial Judge had included Lot "J" in the corpus when it should not form part of the corpus. The Surveyor's Report ("P3") notes that Lot "J" does not belong to the corpus. This also fortifies our view that the mistakes alleged are not those falling within the ambit of Section 189. In this application, we are concerned with examining whether the learned Judges were right or wrong in determining whether the mistakes alleged fell within the ambit of Section 189. We cannot conflate the two in order to do justice as there are more suitable avenues and remedies available. This is not a case where there is no other remedy.

For these reasons, the application is dismissed. This dismissal must not be construed as a bar to the Plaintiff to file an application for revision if so advised.

JUDGE OF THE COURT OF APPEAL

D. N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL