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 Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

WanasinghePedigeSumanawathi,
Ihala Haththiniya,
Marawila.

CA Case No: CA/RII/10/22

NWP/HCCA/KUR 59/2018

DC Marawille Case No:92/CL

DC Chilaw Case No: 3524/09 MDR

Claimant-Petitioner

Vs.

Richard Pieris Finance Ltd,
Conducting Business at,
No.69, Arpico Complex,
Colombo 2 (Head Office)
No.44 A, Kurunegala Road,
(Chilaw Branch Office)

Plaintiff-Respondent

AND NOW BETWEEN

Richard Pieris Finance Ltd,
Conducting Business at,
No.69, ArpicoComplex,
Colombo 2 (Head Office)
No.44 A, Kurunegala Road,
(Chillaw Branch Office)

Plaintiff-Respondent-Appellant

Vs.

Wanasinghe Pedige Sumanawathi,
Ihala Haththiniya,
Marawila.

Claimant-Petitioner-Respondent

AND NOW

Wanasinghe Pedige Sumanawathi,
Ihala Haththiniya,
Marawila.

Claimant-Petitioner-Respondent-Petitioner

Richard Pieris Finance Ltd,
Conducting Business at,
No.69, Arpico complex,
Colombo 2 (Head Office)
No.44 A, Kurunegala Road, (Chillaw Branch Office)

Plaintiff-Respondent-Appellant-Respondent

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

Counsel : Pubudu de Silva with D.P.P. Dasanayake for the Claimant-Petitioner-Respondent-Petitioner

Argued On : 25.03.2022

Decided On :30.05.2022

B. Sasi Mahendran, J.

The main grievance of the Claimant-Petitioner-Respondent-Petitioner (hereinafter referred to as the "Petitioner") to invoke this Court's jurisdiction, under Article 138(1) of the Constitution, is that the Civil Appellate High Court of the North Western Province holden at Kurunegala is devoid of jurisdiction to hear and determine the appeal because the learned Judges have misdirected themselves by treating the Order of the learned District Judge of Marawila dated 25.01.2018, as a judgment, when in fact the Order is neither a judgment nor final Order within the meaning of "judgment" as defined in Section 754(1) of the Civil Procedure Code. It is argued that the Plaintiff- Respondent-Appellant- Respondent (hereinafter referred to as the "Respondent") ought to have filed a leave to appeal application against the said Order. The said Order made by the learned District Judge of Marawila directed the Fiscal to release properties that had been seized. That is to say, the Order was made after the inquiry of Section 241 of the Civil Procedure Code.

It should be noted that this objection should have been taken by the Petitioner at the Civil Appellate Court when she was noticed to appear. When we perused the Petition, we found that this objection was not taken at any stage at the Civil Appellate Court.

It is trite law that the objection to the jurisdiction of the court should be taken at the earliest possible opportunity. Nonetheless, in the instant case the argument of the Petitioner, that the Respondent ought to have obtained the leave of Court to appeal, only creates a latent want of jurisdiction. Where there is latent want of jurisdiction, it can be validated by the conduct of parties, such waiver, acquiescence, and inaction, unlike in the case of total or patent want of jurisdiction no such conduct will confer jurisdiction on the Court (Vide Rodrigo v. Raymond [2002] 2 SLR 78). By participating in the appeal and not raising this objection the conduct of the Petitioner constitutes a waiver of objection with regard to the lack of jurisdiction of the Court.

This Court has to consider whether the judgment delivered by Civil Appellate High Court Kurunegala could be set aside under the restitutionary jurisdiction of this Court.

The grounds on which an applicant must claim this exceptional remedy are expounded in case law.

In Sri Lanka Insurance Corporation Ltd v. Shanmugam &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, (Buyzerv.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"*

None of the aforesaid grounds have been proved to the satisfaction of this Court.

Further, we have to consider whether this Court can and should exercise its revisionary powers when there is a right of appeal to the Supreme Court conferred by statute. This is found in Section 5C(1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, as amended by Act No. 54 of 2006. Section 5C of the said Act deals with the subject of appeals from the judgments and orders of the High Court of Civil Appeal. Accordingly, there is only one direct appeal to the Supreme Court, with leave having been obtained, but the Petitioner has come before this Court against the said judgment of the High Court of Civil Appeal by way of revision and/or restitution in terms of Article 138 of the Constitution. By doing so, Section 5C is rendered nugatory and the intention of the Legislature will be blatantly defeated. This was discussed by his Lordship Mahinda Samayawardhana J. in C.A. R.I. 15/2018 decided on 02.11.2018. His Lordship held that,

"*The question whether the Court of Appeal has jurisdiction to sit on Judgments and Orders made by the High Courts of Civil Appeal was particularly dealt with by Justice Salam (with Justice Rajapaksha agreeing) in the Court of Appeal case of Stephan Gunaratne v. ThusharaIndika Sampath (CA (PHC) APN 54/2013(REV)) decided on 23. 09.2013.*

That is a case where the plaintiff-petitioner in a partition action came before this Court by way of revision against the judgment of the High Court of Civil Appeal at Ratnapura. Dismissing the application in limine without issuing notice, Justice Salam stated:

"The question that now arises for consideration is whether the Court of Appeal can exercise its revisionary powers under Article 138 of the Constitution in respect of a judgment of the High Court pronounced under the provisions of Act No. 54 of 2006 when the proper remedy is to appeal to the Supreme Court. Appreciably, Section 54 of Act No. 54 of 2006 quite specifically states that all relevant written laws applicable to an appeal, in the Court of Appeal are applicable to the High Court as well. This undoubtedly

demonstrates beyond any iota of doubt that the scheme provided by Act No. 54 of 2006 to facilitate an appeal being heard by the Provincial High Court is nothing but a clear transfer of jurisdiction and in effect could be said that as far as appeals are concerned both the High Court and the Court of Appeal rank equally and are placed on par with each other. Arising from this statement of law, it must be understood that if the Court of Appeal cannot act in revision in respect of a judgment it pronounces in a civil appeal, then it cannot sit in revision over a judgment entered by the High Court in the exercise of its civil appellate jurisdiction as well, for both courts are to be equally ranked when they exercise civil appellate jurisdiction."

Reasons are not forthcoming as to why the Petitioner opted not to avail this right of appeal and instead filed an application for revision and/or restitution in this Court. Nevertheless, the Petitioner has not been successful in amply demonstrating to this Court the existence of any exceptional circumstance that warrants the invocation of this Court's revisionary jurisdiction.

The circumstances that would qualify as 'exceptional' are amply demonstrated by our case law.

In Attorney General v. Podisingho 51 NLR 385, his Lordship Dias J. held,

"*The powers of the Supreme Court are wide enough to embrace a case where an appeal lay but which for some reason was not taken. I agree with the observations...... that in such cases an application in revision should not be entertained save in exceptional circumstances. In my view, **exceptional circumstances would be (a) where there has been a miscarriage of justice, (b) where a strong case for the interference of this Court has been made out by the petitioner, or (c) where the applicant was unaware of the order made by the Court of trial.** These grounds are, of course, not intended to be exhaustive*". [emphasis added]

In Rustom v. Hapangama [1979] 1 SLR 352, his Lordship Ismail J. held,

"The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked the practice has been that these powers will be exercised if there is an alternative remedy available only if the existence of special circumstances are urged necessitating the indulgence of this Court to exercise these powers in revision. If the existence of special circumstances does not exist then this Court will not exercise

its powers in revision. In the present case the appellant has not indicated to Court that any special circumstances exist which could invite this Court to exercise its power of revision, particularly, since the appellant had not availed himself of the right of appeal under Section 754(2) which was available to him."

In the instant application, the Petitioner has been unable to satisfy this Court of the existence of any exceptional circumstances, especially since there exists a right of appeal to the Supreme Court, in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, as amended.

Thus, we dismiss the application without costs.

JUDGE OF THE COURT OF APPEAL

D.N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL