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 in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA RII 10/2021

DC Nugegoda Case No:
RE 162/17

Nirosha Lakmini Premaratne,

No.49, Hena Road,
Mount Lavinia.

Appearing by the duly appointed attorney Ranasinghe Arachchilage Palitha Ranasinghe of Megalawa, Kurapettiyawa.

Plaintiff

Vs.

Champa Indumathi Kumari Marambe,
No. 208/4, Borella Road,
Depanama,
Pannipitiya.

Defendant

And Now Between

Champa Indumathi Kumari Marambe,
No. 208/4, Borella Road,
Depanama,
Pannipitiya.
Presently at Via Antonio, Aldini 16,
Milano 20157, Italy

Appearing by her duly appointed attorney Galamadale Hitti Bandaralage Marambe Shammi Chamari Devindika Bandara.

No.208/4, Borella Road,
Depanama,
Pannipitiya

Defendant-Petitioner

Vs.

Nirosha Lakmini Premaratne

No.49, Hena Road,
Mount Lavinia.

Appearing by the newly appointed attorney Ranasinghe Arachchilage Palitha Ranasinghe of Megalawa, Kurapettiyawa.

Plaintiff Respondent

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

Counsel: Mahinda Nanayakkara with Sudharma Gamage for the Petitioner

Haritha Adikary with Uditha Haripitiya, Dhanushika Dissanayaka for the Plaintiff- Respondent

Written Submissions On : 29.07.2022 (by the Defendant-Petitioner)
04.07.2022 (by the Plaintiff-Respondent)

Argued On : 23.05.2022

Order On : 05.08.2022

B. Sasi Mahendran, J.

The Defendant - Petitioner (hereinafter referred to as "the Defendant") seeks to invoke the revisionary and/or restitutionary jurisdiction of this Court in terms of Article 138 of the Constitution to set aside the Order of the District Court of Nugegoda dated 26th January 2021 in Case bearing No. RE 162/17 and the judgment of the same court dated 18th August 2021. In the interim, the Defendant prays for an Order staying the execution of the writ in Case bearing No. RE 162/17 to prevent a grave miscarriage of justice and irreparable loss and damage to the Defendant. This Order pertains to whether notice ought to be issued to the Plaintiff-Respondent and whether the Defendant is entitled to the relief prayed for.

The dispute stems from a Lease Agreement entered into between the Defendant and the Plaintiff-Respondent (hereinafter referred to as "the Plaintiff") on 10th March 2015 for a period of two years commencing from 25th January 2015 and ending on 24th January 2017. The Plaintiff instituted an action in the District Court of Nugegoda (through her Attorney by Plaint dated 08th November 2017) to evict the Defendant, who has become the overholding licensee of the premises following the demise of the lease, and to obtain vacant possession of the premises. The Defendant filed her Answer (dated 05th April 2018). In her Answer, the Defendant took up the position that the Lease Agreement was not in compliance with Section 2 of the Prevention of Frauds Ordinance, and thereby what was created was a monthly tenancy agreement. It was also stated that the Plaintiff had failed to give proper notice to quit (The said notice dated 3rd October 2017 is marked "P4").

The trial commenced on 05th November 2019, following the recording of admissions and issues (08 on behalf of the Plaintiff and 06 on behalf of the Defendant). The Attorney of the Plaintiff was permitted to submit his evidence-in-chief by way of an affidavit (marked "P3"). The said Attorney was cross-examined, and evidence of the Plaintiff concluded by reading in documents marked P1 to P4. The Defendant was given ample time to present her evidence-in-chief by way of an affidavit. As evinced by Journal Entry No. 8 (dated 26th January 2021) when the Defendant failed or neglected to produce her evidence on the final date granted for that purpose (i.e. 26th January 2021), the learned

Trial Judge acted under Section 145 of the Civil Procedure Code and, by the impugned Order dated 26th January 2021, reserved the matter for judgment. The said Journal Entry also notes that Counsel for the Plaintiff objected to granting of further dates. This was on the ground that the Defendant was unjustly enriched by remaining on the premises years after the termination of the lease without paying rent. The relevant part of the said Order states:

"විත්තිය වෙනුවෙන් ඉල්ලා සිටින්නේ විභාගයට තවත් දිනයක් ලබා දෙන ලෙසයි. නමුත් එසේ දිනයක් ලබා දීම සඳහා කිසිදු සාධාරණ හේතුවක් අද දින අධිකරණයට ඉදිරිපත් නොකරන අතර විශේෂයෙන්ම විත්තියට අද දින අවසාන වශයෙන් දින ලබා දීමද සැලකිල්ලට ගනිමි. අද දිනයේ යම්කිසි අපහසුතාවයක් පැවතියත් අද දිනයට මාසයකට පෙර විත්තියට මූලික සාක්ෂි දිවරුම් ප්‍රකාශයකින් ඉදිරපත් කිරීමට නියම කර ඇත. නමුත් ඒ සම්බන්ධයෙන් ද පියවර ගෙන නැති අතර ඊට හේතුවක්ද විත්තියෙන් ඉදිරිපත් නොකරයි. විත්තිකාරියද අධිකරණයට ඉදිරිපත් නොවේ. එම නිසා සියලු කරුණු සැලකිල්ලට ගෙන විත්තියේ නඩුව සඳහා තවදුරටත් දින ලබා ගැනීමට කරන ලද ඉල්ලීම ප්‍රතික්ෂේප කරමි. ඒ අනුව සිවිල් නඩු විධාන සංග්‍රහයේ 145 වගන්තිය යටතේ විත්තියේ සාක්ෂි අවසන් කරමි. නඩුව තීන්දුවට නියම කරමි."

It should be noted that rent has not been paid since the termination of the lease in 2017.

The Defendant, by Petition dated 09th February 2021, filed a leave to appeal application against this Order at the High Court of Civil Appeal of the Western Province holden at Mount Lavinia. However, the Defendant withdrew the application as the learned District Judge delivered judgment on 18th August 2021. The learned District Judge held in favour of the Plaintiff.

The Defendant is now before this Court, seeking revision and/or restitution in order to set aside the Order (dated 26th January 2021) and the judgment of the District Court.

Restitution

The remedy of restitutio-in-integrum which is deeply rooted in our legal system is now a Constitutional remedy found in Article 138 of the Constitution. Abdul Majeed in his treatise, 'A Commentary on Civil Procedure Code and Civil Law in Sri Lanka' (Volume II Revised Second Edition at p. 1592) explains the object of this remedy thus:

"The primary object of this remedy is to undo a wrong that has occurred in the order of the original Court and to restore the party affected by that order in the position he had earlier."

Therefore, this remedy is granted under exceptional circumstances and the power of the court should be most cautiously and sparingly exercised. Accordingly, if there are alternative remedies that are more appropriate and suitable restitutio in integrum will not lie.

This was made clear in Perera v. Wijewickreme 15 NLR 411. His Lordship Pereira J. held:

"It was not granted unless no other remedy was available to the applicant or unless restitution was the more effectual remedy"

A position echoed by his Lordship Ennis J. in the same case:

"This is an application for restitutio in integrum. It appears clear that such an application is not granted in Ceylon if any other remedy is available."

Similarly, in Menchinahamy v. Muniweera 52 NLR 409 his Lordship Dias J. held:

"Restitutio in integrum is not available if the petitioner has another remedy open to her."

In the instant case, as discussed below, there is a statutory right of appeal that the Defendant ought to have exercised.

Another factor that disentitles the Defendant to claim this extraordinary remedy is her conduct. If a party intends to claim a remedy such as restitutio in integrum which has the power to wipe the slate clean, then that party's conduct must be of such standard that entitles that party to this remedy. Honesty and fairness are expected of a person seeking to invoke the extraordinary powers of this Court. (Vide M.A. Don Lewis v. D.W.S. Dissanayake 70 NLR 8, and Sri Lanka Insurance Corporation v. Shanmugam [1995] 1 SLR 55)

In the instant application, there are no cogent reasons forthcoming, for the Defendant's non-appearance and failure to adduce her evidence on time. Instead, the

application makes it seem that the learned Trial Judge had decided to proceed with the action on a mere whim and fancy and that the conduct of the Defendant is without fault.

This Court also considered the fact that the Defendant continues to enjoy possession of the land after the termination of the lease, without paying rent.

The duty of a litigant seeking relief was set out in Jayasinghe v. The National Institute of Fisheries and Nautical Engineering [2002] 1 SLR 277. His Lordship Hector Yapa J. held:

"When a litigant makes an application to this Court seeking relief, he enters into a contractual obligation with the Court. **This contractual relationship requires the petitioner to disclose all material facts correctly and frankly**. **This is a duty cast on any litigant seeking relief from Court……** Any party who misleads Court, misrepresents facts to Court or utters falsehood in Court will not be entitled to obtain redress from Court. It is a well-established proposition of law, since Courts expect a party seeking relief to be frank and open with the Court" [emphasis added]

In the instant case, as mentioned above, the Defendant has not offered an explanation for her conduct in the lower court.

If the party seeking restitution is entitled to claim it, such party must be able to satisfy this Court of the existence of any one of the grounds on which it will issue. These grounds have been set out in the following cases:

In Sri Lanka Insurance Corporation v. Shanmugam, (supra), his Lordship Ranaraja J. held:

"Superior courts of this country have held that relief by way of restitutio 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)"

Recently, 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"

In the instant case, none of these grounds have been canvassed before this Court to issue restitutio in integrum.

For those reasons, the Defendant is not entitled to claim restitution.

Revision

Abdul Majeed (supra) at page 1563 notes:

"Revision is an extraordinary remedy granted by Court under special circumstances. Any party to an action or a proceeding in any Court of First Instance, tribunal or other institution, whose rights are affected by an error of fact or law committed

by such Court of First Instance, tribunal or other institution, may, make an application to the Court of Appeal…. for the correction of errors of fact or law committed in such actions or proceedings."

Revisionary jurisdiction is conferred on this Court in terms of Article 138 of the Constitution and Section 753 of the Civil Procedure Code. When the court's revisionary jurisdiction is invoked, the court has the power to make orders necessary in the interests of justice (Vide Senanayake v. Koehn [2002] 3 SLR 381).

The object then is the due administration of justice. As held by his Lordship Chitrasiri J. in Kulatilake v. Attorney General [2010] 1 SLR 212:

"Moreover, it must be noted that the Courts would exercise the revisionary jurisdiction, it being an extra ordinary power vested in Court, especially to prevent miscarriage of justice being done to a person and/or for the due administration of justice."

It is trite law that revisionary jurisdiction is distinct from appellate jurisdiction.

In Mariam Beebee v. Seyed Mohamed 68 NLR 36, his Lordship Sansoni C.J. held:

"The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result."

This dictum was cited with approval in the judgments of Somawathie v. Madawela [1983] 2 SLR 15 and Gunaratne v. Thambinayagam [1993] 2 SLR 355. (See also Leslie Silva v. Perera [2005] 2 SLR 184)

Recently, in Wijersiri Gunawardane & Others v. Chandrasena Muthukumarana & Others, SC Appeal No. 111/2015 decided on 27.05.2020, his Lordship Aluwihare PC. J. having analysed the authorities in this area clearly differentiated the two. His Lordship held:

"**One basic distinction would be that while the appellate rights are statutory, the exercise of revisionary power is discretionary**. Although revisionary jurisdiction shares characteristics with the appellate jurisdiction, they are not one and the same……"

However, in cases where there exists an alternative remedy such as a right of appeal, this Court exercises its revisionary jurisdiction although that alternative remedy has not been availed of, only if there are exceptional circumstances. This position is buttressed by a clear line of authorities. In addition to that the conduct of the party seeking this remedy is also relevant in this regard.

In the case of 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 of Akbar J. in Inspector of Police, Avissawella v. Fernando 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]

Indeed, as observed by his Lordship Vythialingam J. in Rustom v. Hapangama [1979] 2 SLR 225:

"It is not possible to define with precision what matters would amount to exceptional circumstances and what would not. Nor is it desirable, in a matter which rests so much on the discretion of the Court to categorise these matters exhaustively or to lay down rigid, and never to be departed from, rules for their determination."

In the Supreme Court (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." [emphasis added]

In Hotel Galaxy v. Mercantile Hotels [1987] 1 SLR 5 his Lordship Atukorale J. held:

"It is now settled law that the exercise of the revisionary powers of the appellate court is confined to cases in which exceptional circumstances exist warranting its intervention."

The reason why exceptional circumstances are insisted upon, even though it is not laid down in Article 138 or Section 753, was explained in the clearest of terms by his Lordship Amaratunga J. in Dharmaratne v. Palm Paradise Cabanas [2003] 3 SLR 24. His Lordship held:

"Thus the existence of exceptional circumstances is the process by which the Court selects the cases in respect of which this extra-ordinary method of rectification should be adopted. **If such a selection process is not there revisionary jurisdiction of this Court will become a gateway for every litigant to make a second appeal in the garb of a revision application or to make an appeal in situations where the legislature has not given right of appeal**." [emphasis added]

His Lordship Weeramantry J. in K. A. Potman v. Inspector of Police, Dodangoda, 74 NLR 115 referring to the judgment of Nagalingam J. in Ehambaram v. Rajasuriya observed that **the Court cannot and should not entertain a revision application filed with the object of re-arguing a case already decided**. His Lordship distinguished Ehambaram on the ground that in Potman there was "an obvious error of fact based on an all important item of evidence not having been brought to the notice of Court at the hearing of the appeal."

In Potman a revision application was filed after the right of appeal had been exercised (although the appeal was dismissed). His Lordship Weeramantry J. held:

"This Court would no doubt be extremely hesitant and cautious before it makes any order in revision which is contrary to an order which this Court itself has made upon appeal, but there would appear to be a precedent for orders of this kind **where the original order is based upon a manifest error.**" [emphasis added]

This Court in the judgment of Bank of Ceylon v. Kaleel [2004] 1 SLR 284 insisted on exceptional circumstances, where there was an alternative remedy. His Lordship Wimalachandra J. held:

"There is a right of appeal against the said order with the leave of this Court in terms of section 754(2) of the Civil Procedure Code. However the plaintiff has not exercised this right……In the circumstances this Court will not interfere by way of revision when the law has given the plaintiff an alternate remedy and when the plaintiff has not shown the existence of exceptional circumstances warranting the exercise of revisionary jurisdiction."

Further, his Lordship observed:

"In any event, for this Court to exercise revisionary jurisdiction **the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it. In other words the order complained of is of such a nature which would have shocked the conscience of Court**." [emphasis added]

This is in line with earlier authorities. For instance, in Vanik Incorporation v. Jayasekara [1997] 2 SLR 365 his Lordship Edussuriya J. referring to the judgments of Perera v. Muthalib 45 NLR 412, and Attorney General v. Podisingho (supra) held:

"Although both those cases were decided long before the present Constitution was promulgated (incorporating Article 145) and the amendment to section 753 of the Civil Procedure Code in 1988, **the Supreme Court expressed the view that its revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of judicial procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice.**" [emphasis added]

Recently, in SC Appeal 210/2015 decided on 18.12.2020, her Ladyship Murdu N.B. Fernando PC. J. held:

"Thus, the ratio of the decisions of the Appellate Courts lays down the principle, **whether an appeal lies or not, the revisionary jurisdiction of a court can be exercised only when there are exceptional grounds that shocks the conscience of court or which merits the intervention of the appellate court.** The Athukorale case referred to above emphatically states the basis to resort to filling a revision application is not to render the

appeal nugatory, when exceptional circumstances exist. Hence, the underlying requirement in a revisionary jurisdiction is exceptional grounds and circumstances." [emphasis added]

Her Ladyship referring to the judgment of Attorney General v. Gunawardena [1996] 2 SLR 149 held:

"Hence, when exercising this special mechanism, the revisionary jurisdiction, the pivotal issue and the most essential element a court should evaluate and ascertain is 'exceptional circumstances' in order to duly administer justice.

Thus, my considered opinion is that the learned Judges of the High Court exercised the revisionary jurisdiction where no exceptional circumstances existed; and which necessitated such a course of action to be followed to administer justice and hence acted in a palpably wrong and erroneous manner **especially, when the essential element of facts that shocks the conscience of court or which would make an appeal nugatory were not in existence**." [emphasis added]

In the present application, the Defendant opted to file an application seeking restitution and/or revision instead of exercising the ordinary right of appeal. Neither are there any exceptional circumstances that shock the conscience of this Court that would warrant this Court to exercise its revisionary jurisdiction. All that has been claimed is that the learned Trial Judge had failed to consider the validity of the notice to quit and that in the impugned Order the learned Trial Judge had not acted fairly by the Defendant and had erred in law by concluding the case of the Defendant under Section 145 of the Civil Procedure Code. These are legal submissions made to show that the learned Trial Judge's Order and judgment are erroneous. The Defendant has failed to establish how these shocks the conscience of the Court to invoke the revisionary jurisdiction when a right of appeal is available.

Further, the Defendant contends that the learned Trial Judge violated Section 184 of the Civil Procedure Code by not giving notice to the Defendant or her Attorney-at-Law of the date of delivery of judgment and pronouncing the same in the absence of the Defendant and her Attorney-at-Law. The case of David v. Choksy [1996] 1 SLR 302 is relied on for support. There is no doubt that Section 184 casts a mandatory duty on the trial judge.

In the instant case, we find it difficult to accept the contention that the Defendant was unaware of the date of the judgment. It is seen that the date of judgment is set for the **19th of May 2021** as per Journal Entry No. 17 dated 26th January 2021. On that day, the Defendant was represented in Court. The learned Counsel for the Defendant sought a further date to submit the Defendant's evidence by way of an affidavit. However, due to the Covid-19 pandemic, the judgment could not be delivered on 19th May, and thus was postponed to 23rd June 2021, by a Circular (JSC/SEC/COR/12), and further, on 23rd June 2021, it was postponed to 18th August 2018 by Circular (JSC/SEC/COR/12) for the same reason. On 18th August 2018, the judgment was delivered. There have then been two postponements over a period of about three months, quite unlike the case of David (supra) in which the case had not been called for a period of two years. That was held to have a significant bearing on the matter. When there is such an inordinate delay the Supreme Court observed that it would not be easy even for the Attorney-at-Law to ascertain the actual date of delivery of the judgment. With respect, the case of David (supra) will not be applicable to the facts of this case as the date of judgment which was announced in Open Court was postponed by two publicly available notices. Further, the proceedings in the leave to appeal application against the impugned Order were ongoing at the High Court of Civil Appeal of the Western Province holden at Mount Lavinia.

It must also be noted that the Defendant filed the instant application on the 22nd of November 2021, three months after the judgment of the District Court of Nugegoda. An explanation has been offered in the Petition for the delay. It is stated that the Defendant took time to find all the relevant documents to be filed with the application and the Covid-19 pandemic caused further delays.

However, when there is a statutory right of appeal available, her failure to explain why she did not exercise that right, raises a doubt whether this application was filed to circumvent the statutory time limit for filing an appeal. Even if the Defendant failed to file an appeal on time, **Section 765 of the Civil Procedure Code** provides for an appeal notwithstanding lapse of time. This too has not been availed of.

This factor together with the Defendant's failure or neglect in submitting her evidence in the lower Court disentitles her to successfully invoke this Court's revisionary jurisdiction, in the absence of pleading exceptional circumstances that shock the conscience of this Court.

As his Lordship G.P.S. De Silva C.J. held in Perera v. People's Bank [1995] 2 SLR 84:

"Revision is a discretionary remedy and the conduct of the defendant is a matter which is intensely relevant."

This application is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

D. N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL