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 in terms of Article 138 and 145 of the Constitution of Sri Lanka against an Order dated 25.10.2022 and the judgment of same Court of the Learned District Judge of Moratuwa in Case No: 177/RE.

CA/RII/ 22/2022

DC of Moratuwa

Case No: 177/RE

M.V.R. Perera
No.10
Weera Mawatha, Bangalawatta,
Pannipitiya.(deceased)

Plaintiff

Vs.

W.O. Krishan De Mel,
No. 19/3/A, Uyana,
Moratuwa.

Defendant

AND NOW BETWEEN

W.O. Krishan De Mel,
No. 19/3/A,
Uyana, Moratuwa.

Defendant-Petitioner

Vs.

1. Amali Elisebeth Shamaleen Perera,

No: 10/1, Weera Mawatha, Bangalawatta,
Kottawa, Pannipitiya.

2. Rita Lilamanie Roshanthi Perera
of No.3, Radstock Grove, Churton Park,
Wellington,
New Zealand.

Appearing Through her Power of Attorney

Amali Elisebeth Shamaleen Perera
No: 10/1, Weera Mawatha, Bangalawatta,
Kottawa, Pannipitiya.

Substituted-Plaintiff-Respondents

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

Counsel: J.M. Wijebandara with K. Kuruwita Arachchi for Defendant- Petitioner

Support On : 28.11.2022

Order On : 21.02.2023

B. Sasi Mahendran, J.

The Defendant-Petitioner (hereinafter referred to as "the Petitioner") instituted this application seeking revision and/or *restitutio in integrum*, inter alia, to set aside the judgment of the learned District Judge of Moratuwa dated 28th February 2019 ("Z5"), by which the Petitioner was ordered to be ejected from the land in dispute subject to the Petitioner being compensated for the improvements carried out thereon, and to prevent the Substituted-Plaintiff-Respondents (hereinafter referred to as "the Respondents") from obtaining the benefit of that judgment, which it is argued, could not survive the death of

the Original Plaintiff. This Order pertains to whether notice ought to be issued to the Respondents.

This dispute commences when the Original Plaintiff (the father of the Respondents) instituted an action in the District Court of Moratuwa by Plaint dated 14th December 2011 ("Z1") to eject the Petitioner from the land in dispute; a land in which the Original Plaintiff was a co-owner along with his wife's siblings (The Original Plaintiff's wife gifted him her 1/11th undivided share in the land by Deed of Gift No. 2019 dated 16.02.1988 attested by one K. Poobalasingam, Notary Public - "පැ1"). It was claimed that the Petitioner possessed the land as a licensee under the Original Plaintiff, on the undertaking that the Petitioner was to purchase the land. The Petitioner, in his Answer ("Z2"), denied this contention and by way of a claim in reconvention prayed for a declaration that he had obtained prescriptive title to the land. This was on the basis that he had possessed the land for a period of forty-nine years prior to the date of the Plaint.

The trial commenced with the recording of one admission and the raising of nine and eight issues on behalf of the Original Plaintiff and the Petitioner, respectively. The learned District Judge concluded that the Original Plaintiff was entitled to eject the Petitioner as the Petitioner had failed to prove adverse possession. This was because his possession was not in denial of the title of the true owner. It was found that the Original Plaintiff's father-in-law, who originally owned the land, had permitted the Petitioner to possess the land, and thereafter once the Original Plaintiff became a co-owner of the land he had, as alluded to above, permitted the Petitioner to possess the land as a licensee. The Petitioner was entitled to be compensated for the improvements he had made to the land. The relevant excerpt of the judgment ("Z5") reads:

"විත්තිකරු කාලාවරෝධය මත පිහිටමින් අවසර ලාභියෙකු ලෙස රැඳී සිටින දේපලෙහි හිමිකම ලබා ගැනීමට දරණ උත්සාහයේදී ඉඩම මිලට ගැනීම සඳහා තමන් ගත් වෙහෙස සැහවීමට පැහැදිලිවම කටයුතු කොට ඇති බව පෙනේ. ඒ අනුව දීර්ඝ කාලයක් තිස්සේ පදිංචිව සිටිමින් අදාළ දේපළ සංවර්ධනය කරමින් එකී දේපළේ රැඳී සිටියත්, එසේ රැඳී සිට ඇත්තේ , පැමිණිලිකරුගේ සහ අනෙකුත් හවුල් අයිතිකරුවන්ගේ පූර්වගාමීන්ගෙන් ද පසුව පැමිණිලිකරුගෙන් සහ හවුල් අයිතිකරුවන්ගෙන් ද අවසරය මත බව පෙනී යන හෙයින් කාලාවරෝධය මත අයිතිවාසිකම් ඉල්ලා සිටීමේ හැකියාවක් විත්තිකරුට නොලැබෙන බවට තීරණය කරමි. හවුල් අයිතිකරුවකු වන පැමිණිලිකරුට ආරවුල් ගත ඉඩමේ සෑම තැනකම හවුල් අයිතිය පැවතීම මත නීත්‍යානුකූල අයිතිවාසිකමක් නොමැතිව රැඳී සිටින විත්තිකරු නෙරපා නිරවුල් සහ සාමකාමී භුක්තිය හිමි කර ගැනීමේ අයිතිවාසිකම ඇත."

In a rather strange occurrence, the Petitioner claims that although he had appealed this decision to the High Court of Civil Appeal holden at Mount Lavinia, he later withdrew his appeal because an officer of the Registry of the Civil Appellate Court required him to sign a letter withdrawing the appeal. Journal Entry No. 13 (dated 16th December 2020 – on page 327 of the Brief) notes that the Appellant appeared without legal representation and moved to withdraw the appeal. Notwithstanding this oddity, the Petitioner contends that the benefit of the judgment which is personal in nature would not accrue to the heirs of the Original Plaintiff i.e., the Respondents.

The Original Plaintiff passed away on the 5th of July 2021 (vide Death Certificate on page 342 of the Brief). An application was then made by the Respondents to substitute them in place of their deceased father. The Petitioner objected to this substitution. The learned Additional District Judge by an Order dated 25th October 2022 refused the Petitioner's application.

The Petitioner is thus before this Court seeking to invoke revision and/or restitution on the grounds that the Respondents are not entitled to claim the fruits of the judgment as the right to possession did not survive and was not capable of transmission or devolution to another person; that there was no evidence before the District Court to conclude that the Petitioner was a licensee.

In addition, the Petitioner avers that subsequent to the judgment of the District Court the Petitioner had obtained and is presently registered with a First Class Title of Absolute Ownership under the Title Registration Act No. 21 of 1998 (vide page 382 of the Brief) of the land in concern. As a result of this, it is argued, the District Court has no jurisdiction to issue a writ of execution to oust a person holding a First Class Title of Absolute Ownership in respect of that land concerned.

We are unable to consider the fact of the Petitioner's registration as an owner of the land with a First Class Title since that arose well after the impugned judgment of the District Court which is sought to be revised. At the time of that impugned judgment, the Petitioner was not registered as such.

Our task is confined to determining whether the learned District Judge had erred in a manner that shocks the conscience of this Court, the threshold criterion for this Court to exercise revision, or whether any of the grounds on which restitution is granted has been made out. Regrettably, no ground on which restitution can be claimed had been made out.

Further, there is no reason for us to revise the judgment because, on a perusal of the record, it appears that the learned District Judge was correct in holding that the Petitioner was unable to prove prescriptive title to the land. It is apparent from the evidence that the Petitioner had engaged in discussions to purchase the land from the Original Plaintiff and the other co-owners of the land (the siblings of the Original Plaintiff's wife who owned the remaining 10/11th undivided share of the land). The Petitioner had driven some of the co-owners to Wennappuwa to discuss the matter of purchasing the land with another co-owner who lived in Wennappuwa as well. Such conduct does not amount to conduct that is hostile or adverse to the owners' rights.

The words of his Lordship Sharvananda J. (as he then was) in De Silva v. Commissioner General of Inland Revenue (1978) 80 NLR 292 are worth re-iterating at this juncture:

> "The principle of law is well established that a person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In order to constitute adverse possession, the possession must be in denial of the title of the true owner. The acts of the person in possession should be irreconcilable with the rights of the true owner; the person in possession must claim to be so as of right as against the true owner. Where there is no hostility to or denial of the title of the true owner, there can be no adverse possession."

Citing this passage in a recent judgment his Lordship L.T.B. Dehideniya J. reiterated that the possessor claiming prescriptive title must demonstrate with **compelling evidence** possession that is hostile to the original owner (Nandawathie v. Piyadasa SC Appeal 175/2016 decided on 18.11.2022).

For the foregoing reasons, we refuse to issue notice to the Respondents. This application is dismissed.

JUDGE OF THE COURT OF APPEAL

D. N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL