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

C.A.(Rev)No.1447/2006

D.C.Colombo 19092/RE

Asoka .Wanniarachchi.Kuruppu

No. 12 1/1 Station Lane

Nugegoda

Plaintiff

Vs

1. Vajira.Swarnapali.Palliyaguru
   101Galle Road, Colombo 3
2. The Registrar General
   Registrar General's Department,
   Colombo 3
3. The Registrar,
   Land Registry, Colombo 7

Defendants

AND NOW BETWEEN

1. V.S. Palliyaguru
101 Galle road, Colombo 3
1st Defendant Petitioner

Vs

A.W. Kuruppu

12 1/1 Station Lane, Nugegoda

Plaintiff Respondent

BEFORE : Deepali Wijesundera J.,

M.M.A.Gaffoor J.,

COUNSEL : Lakshman Perera P.C with N. Subasinghe for the 1st Defendant Petitioner

Priyantha Alagiyawanna with Asanka Ranawala for the Plaintiff Respondent

ARGUED ON : 04.09.2015

DECIDED ON : 28.01.2016

Gaffoor J.,

The Defendant Petitioner has filed this Petition together with her Affidavit dated 21st September 2006, praying inter alia for setting aside of the judgment of the District Court dated 21.10.2004 and for restitutio in integrum, for an order on the District Court to hear this case de novo and in the alternative to dismiss the action of the Respondent(the Plaintiff).

The Petitioner further states that the averments in paragraph 29 of the Petition are exceptional circumstances to invoke the revisionary jurisdiction of this Court.

FACTS OF THE CASE IN BRIEF

The Plaintiff Respondent (hereinafter referred to as "the Plaintiff") instituted this action on 01.12.2000 stating that she became the owner of premises No. 27, Havelock road, Colombo 5, which is morefully described in the schedule to the Plaint, by Deed No. 1708 dated 05.03.1997 which she mortgaged to the Peoples' Bank in order to settle a loan taken by the Defendant Petitioner (hereinafter referred to as "the Defendant") but owing to the conduct of the defendant she informed the Peoples Bank to cancel the said mortgage bond; that on 27.10.2000 she left home at 3.30 a.m to go to Australia with the net ball team and returned to the island on 14.11.2000 and on her return she became aware that her signature had been forged and the deed of transfer bearing No.956 dated 27.10.2000 had been executed in favour of the Defendant in respect of the property described in the Plaint. The Plaintiff further says that she was not available in the island on 27.10.2000; that she did not sign the said deed No. 956 and did not receive any consideration though the property was worth 17 Million, and that deed No. 956 was a forgery and prayed for the following reliefs :

(i) A declaration that deed No. 956 dated 27.10.2000 attested by P. Sathiyaseelan, Notary Public, was null and void and fraudulent;

(ii) Cancellation of the registration of the said deed No, 956 in Folio No.A/945/257 and A 980/119 at the Land Registry of Colombo;

The Defendant's case was (as stated in her Answer) that the said Deed No. 956 was executed on 20.10.2000 in the presence of the Notary Public, the Plaintiff signed on the Deed and she paid the Plaintiff 1.3 Million although the consideration on the deed was said to be

One(1) Million and also she paid later a further sum of rs. 169,000/- and she categorically denied that the said deed was a forgery.

Originally the Plaintiff has filed the action against the above Defendant (as 1st Defendant) and the Registrar General and the Registrar of Lands, Colombo, as 2nd and 3rd Defendants respectively, but subsequently, the 2nd and 3rd Defendants had been discharged from the proceedings.

On a perusal of the proceedings marked "X6" filed of record, it appears that on 13.03.2003 trial had commenced in this case and Issues had been framed by both parties, and thereafter the Plaintiff had given evidence on the same day. The Plaintiff's further evidence had been recorded on 05.05.2003 (see "X7") and on 24.09.2000 ("X8"). The Plaintiff's cross examination had commenced on 24.09.2000 but thereafter on 11.12.2003 and 31.05.2004, the Plaintiff's cross examination was not done as the Defendant's Attorney at Law was not ready. Hence, the court had fixed the case for further trial on 01.07.2007 as the last date. On this date, the Defendant's Attorney at Law stated to court that he informed the Defendant by his letter dated 27.06.2004 to get her instructions from her but as there was no reply from her, he was not appearing for the defendant. When the application was made, the Plaintiff's attorney had moved court to give judgment on the evidence already led in the case. Upon these applications, the court has fixed the case for judgment and finally judgment was entered on 21.10.2004 in favour of the Plaintiff.

When the Court granted two dates previously, i.e 11.12.2003 and 31.05.2004 for the defendant to proceed with the further trial, the Defendant was not ready. From 01.07.2004, the record shows that the defendant never appeared in the case. She had not taken any steps through her attorney to continue with the case. This is a serious lapse on her part.

Section 145 of the Civil Procedure code states *"If any party to an action to whom time has been granted, fails to produce his evidence, or to cause the attendance of his witnesses or to perform any other act necessary to the further progress of the action, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the action forthwith (underline emphasized).*

The Defendant had been granted two dates to get ready for the further cross examination of the Plaintiff. But she failed. Her only excuse was that from 27.05.2004 she was in remand custody till 24.12.2005 in respect of various cases. But this did not prevent her from communicating with her lawyer through her husband or any relative who come to see her in remand prison. She could have even told the prison officers that she had a civil case in the District court of Colombo and to speak to the lawyer. She could have also informed the Magistrate when she was produced before him that she had a civil case. All these steps any

ordinary person could have done. But the Defendant had not cared to take any interest in the civil case. Her lethargy and negligence cannot be acceptable as reasonable excuse.

On a perusal of the journal entries marked "R" and filed in this record, it reveals that though on 01.07.2004 the Plaintiff's Attorney moved court to accept the evidence alr3ady led and make its judgment, the court did not make the judgment forthwith, but granted an adjournment. The judgment was postponed to 26.8.2004 and again to 21.10.2004 and only on 21.10.2004 the judgment was given. If the defendant was taken into custody on 27.05.2004, she had enough time till 21.10.2004 to contact her Attorney to inform him of her condition and to take appropriate action to proceed with the civil case. But she had not done that also.

Her attorney at Law on 1.7.2004 had informed court that he had sent a letter to her on 27.6.2004 but the letter has returned to him with the note that she was not living there. If she had taken any steps to contact her lawyer as stated above, she would have had some information as to the progress of the case from him.

The District Court had granted, as per the journal entries "R" two dates to the Defendant to take steps or to get ready with the further cross examination of the Plaintiff.

These dates were granted as her Attorney at Law was not ready on those dates. If the Plaintiff's further cross examination was done or not done, it was a necessary act for the further progress of the action as stated in Section 145 of the Civil Procedure Code. If the party who has been granted time has defaulted , court has to proceed to decide the case forthwith. This is the step the trial Judge has taken in this case.

In those circumstances the Defendant cannot blame the Court to have entered Judgment against her. As provided in section 145 of the Code, the court has acted legally. Even Section 144 of the Code says that "the Court may dispose of the action in one of the modes directed in that behalf by chapter X11 or make such other order as it thinks fit." (emphasized)

For keeping away from the case, the Defendant must be blamed for herself. No Court will wait for any party. Her lackadaisical attitude is also evident in making this belated application for revision. The Defendant says that she was discharged from remand custody on 25.12.2005. Though she had been released from remand custody on 25.12.2005, as stated in her written submissions (page 7). The defendant has filed this Revision application 21.09.2006 almost 9 months later. Her story that she had no money and she had to put her affairs into order are unacceptable reasons for the delay.

Now I wish to deal with the judgment entered in this case. The learned District Judge has accepted the evidence of the Plaintiff. That on 27.10.2000 she left for Australia with the netball team and returned to the island on 14.11.2000. This is evidenced by the endorsement

on her passport. The impugned deed No. 956 had been executed on 27.10.2000. In that event, she may not have possibly signed the said deed. The Report of the Examiner of Questioned Documents marked P17 establish that the signature on the deed is not of the Plaintiff.

The Defendant states in her answer in the lower court and in the Petition and written submissions that the said Deed No. 956 was executed by the Plaintiff not on 27.10.2000 but on 20.10.2000 in the presence of the witnesses and Notary.

Section 31(20)(c) of the Notaries Ordinance states that *"the Notary shall state in his attestation the day, month and year on which and the place where the said Deed or instrument was executed"*. If the Notary has inserted 27.10.2000 as the date of execution and attestation, the court has to accept that statement as the date of execution and not 20.10.2000. If the defendant contradicts this position, she should have produced the original of the Deed before court. She failed to produce it before the lower court nor before this court. As stated above, if the attestation of the Notary is true, the deed was a forgery and the Plaintiff had not signed it on 27.10.2000.

The special circumstances mentioned in paragraph 29 of the Petition and the corresponding paragraph 30 of the affidavit of the Defendant Petitioner cannot be accepted as sufficient grounds for granting reliefs in this case. Furthermore, "the remedy for restitution in integrum is an extra ordinary remedy and is given only under very exceptional circumstances. The remedy must be sought forthwith or with the utmost promptitude" – Manchinahamy vs Munaweera et el 52 NLR 409. It is also held by the Supreme Court in Perera vs Don Simon 61 NLR 118 that "No restitutio in integrum can be granted where there has been negligence or delay on the part of the Petitioner."

The Application for revision is misconceived, since no question arises regarding the legality or the regularity of the proceedings in this case.

I would therefore dismiss the application for revision with costs.

JUDGE OF THE COURT OF APPEAL

Wijesundera J.,

I agree.

JUDGE OF THE COURT OF APPEAL