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

In the matter for an application for *Revision and/or Restitutio in Integram* under and in terms of Article 138 of the Constitution and the Rules of the Supreme Court.

C.A. RI 16/2018

D.C. Attanagalle Case No. 1885/D

Hapuwalanage Don Edward
No. 23/17,
Western Park,
Kalagedihena.
PLAINTIFF

-Vs-

1. **Dissanayake Mudiyanselage Malani Dissanayake**
C/O K. Jayarathne,
2nd Lane,
Baduwatte,
Sundarapola Road,
Yanthampalawa,
Kurunegala.
DEFENDANT

2. **Rankothege Rathnasooriya**
No. 92-A,
Rathmalegama,
Nagollagama,
Kurunegala.
CO -DEFENDANT

AND NOW BETWEEN

Dissanayake Mudiyanselage Malani Dissanayake
C/O K. Jayarathne,
2nd Lane, Baduwatte,
Sundarapola Road,
Yanthampalawa,
Kurunegala.
DEFENDANT-PETITIONER

-Vs-

Hapuwalanage Don Edward
No. 23/17, Western Park,
Kalagedihena.
PLAINTIFF-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J. (P/CA) &
Sobhitha Rajakaruna, J.

COUNSEL : Mohan Walpita for the Defendant-Petitioner
B.U. Ratnayake for the Plaintiff-Respondents

Decided on : 25.11.2020

A.H.M.D. Nawaz, J. (P/CA)

The Plaintiff-Respondent (hereinafter referred to as the Plaintiff) filed this action on 24.02.2011 against the Defendant-Petitioner (hereinafter referred to as the Defendant) and the Co-defendant, claiming divorce against the Defendant on the ground of constructive malicious desertion and adultery on the part of the Defendant with the Co-defendant and damages in a sum of Rs 2 Million from the Defendant and

Rs 3 Million from the Co-defendant and the legal and physical custody of the child named Achini Shashikala Edward who was born out of the wedlock of the Plaintiff and the Defendant.

The Defendant filed her answer on 18.08.2011 denying the several averments in the plaint including the allegation of adultery and prayed for dismissal of the Plaintiff's action.

It must be noted that prior to this divorce action, the Plaintiff had also filed a land case bearing No. 644/L against the Defendant in the District Court of *Attanagalla* seeking a declaration of title for a house and land and a permanent injunction preventing the Defendant and all others claiming under her from entering the house and the land and causing damage to it. The Defendant filed answer in this case denying the averments in the plaint and seeking a dismissal of the action and in the alternative, if the case were decided in favour of the Plaintiff, to grant her the present value of her contribution for the purchase of the said house and land and the improvements effected thereto. Her position was that the said house and land was purchased jointly by the Plaintiff and the Defendant out of their earnings from Italy.

Both these cases were pending for trial before the District Judge at the same time. While the cases were thus pending, a proposal for settlement of the cases was put forward by the Plaintiff and finally on 14.12.2017 which was a calling day, the terms of settlement were produced in court and both parties and their respective Registered Attorneys set their signatures to it. The terms of settlement are set down in the document marked P6 filed of record in both cases. An affidavit of the Defendant's Registered Attorney marked P5 is also filed of record.

A summary of the terms of settlement are as follows:

1. The Plaintiff agrees to pay the defendant a sum of Rs Forty Lakhs (Rs.4,000,000/=) and out of this amount the Plaintiff pays today (14.12.2017) a sum of Rs Thirty Seven Lakhs (Rs.3,700,000/=) to the Defendant by a cheque

bearing No. 583790 and dated 13.12.2017. The cheque was drawn on Commercial Bank.

2. Both parties agree that the Plaintiff may be granted a divorce on the ground of marital fault and constructive malicious desertion on the part of the Defendant as prayed for in paragraph (a) of the prayer of the plaint of the Plaintiff dated 11.2.2011.
3. The Defendant also agrees that in terms of the following conditions the defendant shall hand over peaceful and vacant possession of the subject matter of the land in case No.644/L filed in the court on or before 31.8.2018 to the Plaintiff and the party added and the Defendant shall not claim that property either by way of marital right or any legal right.

The conditions referred to in paragraph 3 above are given thereafter. According to them;

(i) The Plaintiff agrees to pay the balance sum of Rs. 300,000/- on 31.08.2018 when the Defendant vacates and hands over peaceful possession of the land in case No.644/L to the Plaintiff. If not so paid, the Defendant has the right to remain in the house and land.

(ii) When the Defendant leaves the house, which is the subject matter in case No.644/L, she should not remove any permanent fixtures except the items mentioned therein which she is permitted to take with her.

(iii) During the time she stays in the house, she agrees not to cause any destruction to the house.

(iv) If the Defendant fails to receive the sum of Rs. 300,000/- and leave the property in case No.644/L on or before 31.08.2018, the Plaintiff is entitled to obtain a writ without notice after depositing the said amount in favour of the Defendant to the credit of the said case.

(v) The Plaintiff agrees not to file any case against the Defendant claiming damages in respect of the maintenance case No.3756 filed by the Defendant against the Plaintiff in the Magistrate's Court, *Gamapaha*.

Admittedly in terms of the settlement, the plaintiff had given a cheque for Rs. 3,700,000/- on 14.12.2017 on which date the parties had signed the terms of settlement and the Defendant had encashed the cheque on 20.12.2017 according to the evidence of a Commercial Bank representative and the document marked "C".

When the case was taken up on 19.03.2018, almost three months later for further trial, neither the Defendant nor her Attorney-at-law made any objection with regard to the terms of settlement which she had signed on 14.12.2017. Furthermore, on 19.03.2018, the Plaintiff had given further evidence with regard to the terms of settlement and payment of Rs. 3,700,000/- to the Defendant and the signing of the terms of settlement by the parties and their respective Attorney-at-law. At the end of this evidence the Plaintiff the Defendant's Attorney-at-law stated "No cross-examination". This manifests an agreement on the part of the Defendant to grant a divorce to the Plaintiff.

In this regard I have borne in mind the document marked P13 which is filed in the brief in the connected case bearing No.CA/RI 17/2018, which is the proceedings dated 15.12.2017 in case No.644/L wherein it is clearly mentioned that the Defendant's Attorney-at-law Mr. Siyapath Wickramasinghe stated in open court to the Judge that the Defendant consented to the terms of settlement in writing. Nevertheless she was given an opportunity to read this again. After reading the terms both parties stated that they had agreed to the terms. On this statement the court accepted the terms of settlement to be filed of record.

The above proceedings make it clear that the Plaintiff and the Defendant had signed the terms of settlement after having understood the consequence of the settlement without any compulsion. But it is surprising to note that the Defendant, who had had ample opportunity to read and understand the terms of settlement during the three months

time before 19.03.2018, now says that she did not have the mind to read and understand the terms of settlement which is in the Sinhala language.

This application for *restitutio in integrum* and or revision has been filed by the Defendant on 17.08.2018. She has also filed a separate application for *restitutio in integrum* and or revision bearing No. RI/17/2018 on the same day (17.08.2018). After filing these two applications, the Defendant made an application before the learned District Judge, *Attanagalla* seeking permission of court to deposit the sum of Rs. 3,700,000/- she had received from the Plaintiff in terms of the settlement. But the court informed her by its order dated 13.12.2018 that it cannot make any order either to allow the deposit or to reject.

Restitution reinstates a party to his original legal condition which has been deprived of by the operation of law. It is an extraordinary remedy and will be granted under exceptional circumstances. The remedy can be availed of by one who is actually a party to the legal proceeding. A party seeking restitution must act with the utmost promptitude. The court will not relieve parties of the consequences of their own folly, negligence or laches. In this application the Defendant has failed to establish what damages she has undergone or what exceptional circumstances prompted her to make this application.

This remedy was available, under Roman Law, to a litigant who has suffered a legal prejudice by the operation of law, the Praetor having personally inquired into the matter (*causa ecognitio*) in the exercise of his *imperium* which enabled him to consider all the actual facts of the case, might issue a decree re-establishing the original position, that is to say replacing the person injured in his previous position.

OBJECT OF RESTITUTION

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 been earlier. Primarily this remedy was intended under the Roman-Dutch law for relief

from contracts on the ground of minority, mistake, fraud and duress. The Defendant has not shown any of these wrongs.

The object of the action was to recover any property lost through the contract or compensation in damages or damages generally, but actual damage had to be proved. Relief was also granted in judicial proceedings as for instance, when circumstances showed that the applicant should be permitted a fresh opportunity of proof or to bring new facts to the notice of the court. (Voet 4,1,34). It was also allowed in the case of certain incidents of judicial proceedings on the ground of absence from the country and has been granted in South Africa in other cases of defaults.

This remedy was nearly the same as rescission in English Law. It has been held that direct application may be made to the Supreme Court (now Court of Appeal) to grant it and to enable to do so, to refer the applications to the lower courts for inquiry and report. Considering the early judgments of the Supreme Court it is clear that this remedy was not liberally granted. At the early stage the information was very limited as to the exact procedure to be adopted in investigations necessary to give effect to it. Since this is an extraordinary relief the Supreme Court exercised its jurisdiction most cautiously and sparingly.

In *Lucy Hamy vs. Alwis* (1924) 26 N.L.R. 123 it was held that where the defendant against whom a judgment has been entered alleges that the judgment has been obtained by fraud, the court may stay the execution of the decree and give him time to apply for *restitutio in integrum.* The court must enter an order of abatement of the earlier case pending the second action.

In this case the Defendant has failed to give any valid reason as to how she is entitled to restitution. The judgment entered in the divorce case was not given fraudulently. It was a judgment based on consent of parties. There was no compulsion exerted on the Defendant when she signed the terms of settlement. If she was forced to sign the settlement or if she had not properly understood the seriousness and consequences of

the terms, she should have filed this application at the earlier opportunity. Furthermore, if at all, she should have filed this application before the encashment of the cheque to prove her *bona fides*. But she has made use of the money paid by the Plaintiff and waited until the time to hand over vacant possession of the house and land (31.08.2018) to make this application. This is nothing but a delaying tactic by the Defendant.

The Defendant cannot be heard to say that she could not understand the terms of settlement. She was given an opportunity on 19.03.2018 by the court to read and understand the terms. Having done so, she had stated to court that she consented to the terms. Her Attorney-at-law was also present on that occasion. On this date the learned District Judge entered Decree Absolute in the divorce action. She had not made any objection or appeal against this order.

It is abundantly clear that the terms of settlement referred to above had been entered into with the consent and full knowledge of the Defendant. Her sudden sickness was never a ground for her plea of inability to understand the contents thereof. The Defendant had agreed to vacate the house on or before 31.08.2018 with full knowledge. Therefore this court cannot consider her application for restitution as it has no merit. In *Lameer vs. Senaratne* 1995 (2) Sri L.R. 13 it was held that the court cannot grant relief by way of restitution to a party who has agreed in court to sell the property at a lesser price with the full knowledge of its true value.

Having agreed to grant a divorce to the Plaintiff as prayed for in his plaint {Prayer (a)} in the divorce action filed by him, on the ground of marital fault and constructive malicious desertion on the part of the Defendant, as she had been living in adultery with another person, the Defendant cannot now be heard to say that the learned District Judge has erred and/or misdirected himself when he entered the judgment subject to conditions. This contention is a misconception of law. The decree entered in the divorce action is really upon a consent judgment against which no party has a right of appeal.

Since the Defendant had agreed to grant a divorce to the Plaintiff as prayed for by him, the court has no alternative but to grant it. It is clearly recorded that on 19.03.2018 at the end of the proceedings the Plaintiff's evidence was not cross-examined. It was in those circumstances that the court entered decree nisi. Similarly the trial in the land case bearing No. 644/L was postponed to 31.08.2018, which was the final date fixed to hand over possession by the Defendant in terms of the settlement.

Bertram C.J. in the case of *Fernando vs. Singhoris Appu* (1924) 26 N.L.R.469 was of the opinion that the objection could not be sustained as the Proctor having apparent authority to compromise, his client will be bound by a compromise effected under that apparent authority. His Lordship in his judgment in dealing with the position before the decree had been passed expressed himself thus:

> *"To this there is one exception – if the order, i.e., the decree, has not in fact been drawn up and if the Court is satisfied there is some equitable ground such as mistake or surprise, then the Court will not direct the order to be drawn up but will take steps to correct the mistake and restore the case to the list."*

In the instant case, the Defendant did not undergo any of the circumstances given above.

The terms of settlement entered in case No. 644/L is applicable to the divorce case No.1885/D as well as the Plaintiff and the Defendant in both cases are the same and the facts in both cases are interconnected. The terms of settlement clearly state that the Plaintiff and the Defendants are bound by the terms stipulated in the settlement. The proceedings of 13.12.2018 in Case No. 1885/D before the learned District Judge of *Attanagalla* support this position. (See Document marked (D)). In this proceeding it is stated that "the 1st Defendant had asked for permission of Court to deposit Rs. 37 lakhs received from the Plaintiff in terms of the settlement arrived at in case No. 644/L." Having thus connected the divorce case No. 1885/D with the land case No.644/L, the defendant now cannot be heard to say that "the decision in matrimonial actions being necessarily based on matrimonial fault, the District Judge erred and or misdirected

himself when he made order creating a nexus between the decision in the present divorce action with the decision in the case No.644/L".

It must be noted that the party invoking the extraordinary powers of the court must display honesty and frankness in seeking this remedy. Where a party by its own conduct has acquiesced in or approbated the defective proceedings in the lower court the Court of Appeal or the High Court will not exercise its discretion to set aside the impugned proceedings. For it is not the function of court in the exercise of its jurisdiction in restitution to relieve the party of the consequences of its own folly, negligence or laches. *See* ***Don Lewis vs. Dissanayake*** (1967)70 N.L.R. 8

I therefore hold that the terms of settlement entered in case No. 644/L are valid and equally applicable to the divorce case bearing No. 1885/D as these two cases are between the same Plaintiff and the same Defendant and the nexus between the two cases is legally permissible. The procedure followed by the learned District Judge in entering the judgment is justified.

In an application for *restitutio in integrum* the applicant must act without inordinate delay and without laches. In this case the applicant is subject to undue delay for which no valid reasons have been given. She has also failed to give exceptional grounds which entitle her to the relief asked for. The material before court does not disclose exceptional circumstances which warrant the intervention of this court in revision. In ***Menchina Hami vs. Muniweera*** 52 N.L.R. 353 it was held that the remedy by way of *restitutio in integrum* is an extraordinary remedy and is given only under very exceptional circumstances and this remedy must be sought with utmost promptitude.

For the aforesaid reasons, the application for *restitutio in integrum* and/or revision of the applicant is dismissed with costs. Since this application No. CA/RI/16/2018 in respect of the divorce action No. 1885/D and the application for *restitutio in integrum* and/or revision CA/RI/17/2018 in respect of the land case No. 644/L are filed by the same applicant against the same plaintiff (the parties are the same in both cases), I am of the

view that a separate judgment is not necessary in case No. CA/RI/17/2018. In other words this judgment is also applicable to the application filed in this court in case No. CA/RI/17/2018. The Registrar of this court is hereby directed to file a copy of this judgment in the latter case.

PRESIDENT OF THE COURT OF APPEAL

Sobhitha Rajakaruna, J.

I agree.

JUDGE OF THE COURT OF APPEAL