1939

Present : **Soertsz J.**

MAPALATHAN *v.* ELAYAVAN.

15—C. R. Point Pedro, 28,262.

Revision or restitutio in integrum*—Mistake in translation of a document—Decision in appeal—Materiality of error—Civil Procedure Code, s. 753—Courts Ordinance, ss. 19, 36, and 37 (Cap. 6).*

The Supreme Court has no power to revise or review a case decided by itself.

Relief by way of restitution on the ground of *justus error* will not be granted to a party who has failed to place before the Court matter, which was at his command, if reasonable diligence had been exercised.

In order to succeed in an application for restitution the petitioner must show that the fact was not merely material but of such vital and essential materiality that it must have altered the whole aspect of the case.

THIS was an application for *restitutio in integrum* or revision.

S. J. V. Chelvanayagam (with him *A. Muttucumaru*), for petitioners.

N. Nadarajah, for respondent.

Cur. adv. vult.

March 19, 1939. SOERTSZ J.—

In this matter the petitioners pray that by " way of *restitutio in integrum* or by way of revision ", the judgment of this Court pronounced by de Kretser J. on May 31, 1938, be set aside and that the judgment of the Court of Requests dated September 30, 1937, be restored and affirmed.

This prayer is based on the allegation that my brother reached the conclusion he did, because the translation of document D 2 filed in the copy supplied to him at the argument of the appeal, led him to think that there were only two transferors on that deed, whereas, in point of fact, the original deed filed of record shows that there were four transferors. The implication of this allegation is that, but for this misapprehension of the effect of deed D 2 my brother must inevitably have reached a conclusion in favour of the petitioners. For it is only on that basis that the application can succeed if at all.

Before I examine the facts, I would point out that this application, in so far as it purports to be an application for the exercise of this Court's revisionary powers, cannot be entertained. I respectfully share the view taken by Withers J. in *Loku Banda v. Assen.*[1] The combined effect of sections 19, 36, and 37 of the Courts and their Powers Ordinance and of section 753 of the Civil Procedure Code is to give the Supreme Court power to deal by way of revision with cases tried or pending trial in original Courts, and not with cases, decided by the Supreme Court itself.

Withers J. however, took the view that the Supreme Court could review its judgment passed in appeal. For this he relied on *Ex parte Gordon re Gordon v. Assignees of Brodie & Co.'s estate.*[2] That case was decided in 1879, ten years before the Civil Procedure Code. It takes for granted that in certain circumstances the Supreme Court has power to review its own judgment.

[1] *2 N. L. R. 311.*

[2] *2 S. C. C. 108.*

In *Thamotheram v. Hensman,*[1] Wendt J. doubted this view of Withers J. and I venture to share that doubt. It is significant as pointed out by Withers J. himself that our Code of Civil Procedure enacted in 1889 did not take over the provisions in the Indian Code of 1882 in regard to the review of judgments, while it took over substantially the provisions in regard to revision. Perhaps this was due to the fact that it was thought that the object which the provisions relating to the review of judgments aimed at could be attained in our Courts by proceedings for *restitutio in integrum.*

It is true that at one time the question was raised whether *restitutio in integrum* could be properly held to form part of the law of Ceylon in the absence from the Courts Ordinance and the Code of Civil Procedure of any provision enabling the Supreme Court to grant relief by way of *restitutio in integrum,* and in view of the power of revision enjoyed by the Supreme Court. But in *Abeyesekere v. Haramanis Appu,*[2] it was held by Wood Renton and Grenier JJ. that the remedy of *restitutio in integrum* is one which has taken deep root in the practice and procedure of our Courts and that it is too late that this remedy ought no longer to be recognized.

I, therefore, address myself to the present petition only to consider the application for *restitutio in integrum.* Now, in the words of *Voet* " restitutio in integrum is *extraordinarium remedium,* not to be given, (*a*) where there is some other remedy available to the person seeking *restitutio. Sed nec tunc plerumque restitutioni locus datur, cum alind ordinarium aeque pingue ad indemnitatem remedium a jure comparatum est;* (*b*) It is not to be given for the mere asking *non tamen cuivis restitutionem petente, causamque alleganti, ea promiscue concedenda est, sed causa demum cognita, an nempe vera an justa, an satis gravis sit;* (*c*) It is not to be given unless it is sought within a certain period. *Nec omni tempore ad restitutionis remedium patet aditus".* In regard to (*b*) *Voet* goes on to say that "*causae justae restitutionis sunt, metus, dolus, minor, aetas, capitis, diminutio, absentia, alienatio judicii mutandi causa, justus error*". In addition to these, the discovery of fresh evidence, *res noviter veniens ad notitiam* is recognized as a good ground for giving this relief provided, of course, it is evidence which no reasonable diligence would have helped to disclose earlier. (*Voet IV. 1, passim.*)

So far as the present application is concerned, Counsel for the respondent takes no objection to it on the ground either that there is some other remedy available to the petitioner or on the ground that the application is not made within reasonable time. But, he contends that the mistake which the petitioner relies on is not such a mistake as falls within the meaning of *justus error.* He says that the mistake referred to was a mistake which would not have occurred if the petitioner had presented his case with due care, and also that the petitioner is not in a position to show that but for the mistake the Judge who heard the appeal could not but have reached a conclusion in his favour.

The judgment delivered on the appeal makes it quite clear that the argument proceeded on the footing that only two of the four *thombu* holders were transferors on deed D 2. The learned Commissioner had

[1] *4 Bal. 68.*

[2] *11 N. L. R. 353.*

stated definitely in his judgment that all four of them had transferred. This, in my opinion, should have put the petitioners' Counsel on inquiry as to the reason for that statement of the Commissioner, and the least he could have done was to examine the original of deed D 2. If he had done that, he would have seen at a glance that all four had put their marks to that deed. He was, however, content to acquiesce in the view taken by the Judge on appeal, who went on the assumption that the translation of deed D 2 in the copy furnished to him was correct, and that according to the translation only two of the four were transferors. These facts are similar to those in the case before Wendt J. to which I have already referred (*Thamotheram v. Hensman*). In that case Wendt J. refused to interfere by way of *restitutio in integrum* because as he said: "It is not suggested that my conclusions are not warranted by the materials placed before me. The parties are themselves to blame for having put before the Court only part of the evidence which they had at their command. There is no suggestion of any fraud". Here too, there is no suggestion of fraud, and the matter now relied upon must be regarded as a matter at the command of the petitioners if reasonable diligence had been exercised. It was not *res noviter veniens ad notitiam*. Moreover, in this case, I am not satisfied, that if the fact that all the *four thombu* holders were parties to D 2 had been put before the Judge on appeal he would necessarily have reached a different conclusion. D 2 was an unregistered deed of 1804 and as such it could not be relied upon for the purpose of creating or transferring the rights of the transferors. Indeed, D 2 was produced expressly for the purpose of serving as a starting point for a prescriptive title the petitioner relied upon. In the result, the most that can be said on behalf of the petitioners is that, in view of the inadequate translation of D 2 furnished to the Appeal Judge, he overlooked a material fact. But for the petitioners to succeed in an application for *restitutio in integrum* they must show that the fact was not merely material but of such vital and essential materiality that it must have altered the whole aspect of the case.

I therefore refuse this application with costs.

Application refused.