MUDIYANSE AND OTHERS
v.
BANDULAHAMY

SUPREME COURT
H. A. G. DE SILVA, J., G.P.S. DE SILVA, J. AND FERNANDO, J.
S.C. APPEAL No. 5/87
C.A. APPLICATION No. 251/86
D.C. EMBILIPITIYA No. 1011
JANUARY 31, 1989

Vindicatory action – Settlement order under Land Settlement Ordinance – Settlement to abide by survey – Mistake – Amendment of consent decree – Civil Procedure Code, Section 189 – Revision - Restitutio-in-integrum

In this vindicatory suit the parties arrived at a settlement that when Plan 1410 (prepared for the case) was superimposed on FVP 600 if Lot No. 331 was within the corpus claimed by the plaintiff (tracing his title to Settlement Order No. 402 under the Land Settlement Ordinance) he would give up such portion of it as fell within the corpus shown in Plan 1410 to the defendant. Upon the survey the Commissioner reported that Lot No. 331 was not within the corpus depicted in Plan 1410. After consideration of the Commissioner's survey report, decree was entered in terms of the settlement and report. Three months later the defendants-appellants' applied to have the decree set aside on the ground that they had mentioned Lot 331 by mistake whereas their claim was to Lot 335. The District Judge refused to amend the decree in terms of section 189 of the Civil Procedure Code. The defendants applied to the Court of Appeal for revision of that order and/or for restitutio-in-integrum. The Court of Appeal dismissed the application and an appeal was preferred to the Supreme Court.

Held –

(1) Revision does not lie as the defendants-appellants do not base their application on any alleged illegality of that order. What they allege is that the settlement is vitiated by mistake. Revision does not lie where there is no question regarding the legality or propriety of the decree or the regularity of the proceedings.

(2) To avoid an agreement for mistake the mistake must be an essential and reasonable one. The test of reasonableness is satisfied if the person shows either (1) that the error was induced by the fradulent or innocent misrepresentation of the other party or (2) that the other party knew or a reasonable person should have known, that a mistake was being made, or (3) that the mistake was, in all the circumstances excusable even where there was absence of misrepresentation or knowledge on the part of the other party.

Restitutio-in-integrum can be claimed on the ground of *justus error* which connotes reasonable or excusable error.

The mistake of the defendants does not pass the test of reasonableness nor can it be said that there was *justus error*. The mistake here could be deliberate and no damage appears to have been caused to the defendants.

Cases referred to:-

(1) *Perera* v. *Don. Simon* 62 NLR 118, 120

(2) *Cornelius Perera* v. *Dep Perera 62 NLR 413, 420*

(3) *Mapalathan* v. *Elaywan* 41 NLR 115

(4) *Phipps* v. *Bracegirdle* 35 NLR 302

(5) *Luckow* v. *De Silva* 70 CLW 65

APPEAL from judgment of the Court of Appeal

W. Dayaratne with *A. Panditharatne* for defendants-appellants.

B.D.G. Bakmiwewa for the plaintiff-respondent.

Cur. adv. vult.

March 30, 1989.

H.A.G. DE SILVA, J.

The Plaintiff-Respondent instituted this action for a declaration of title to an undivided 3/4 share of a land called Ambagahadeniya Godawatta 3 seers kurakkan sowing extent, for ejectment of the Defendants-Appellants and for the recovery of damages and costs. He claimed title to the said land by virtue of the interest he had purchased on Deed 6194 of 8.1.1969 from H.A.M. Punchimahatmaya; the source of title referred to in that deed were Deeds Nos 8266 of 10.1.1945 and 22193 of 23.9.1935. According to a Settlement Order No 402 (Ratnapura) dated 12.8.1948 (P4) under the Land Settlement Ordinance, sub-divisional Lot No 331, 2 roods and 3 perches in extent, was settled on Punchimahatmaya, but this Lot number is not referred to in Deed 6194, or in the plaint. The Plaintiff-Respondent further averred that he and his predecessors in title had acquired prescriptive title to the said land and alleged that the Defendants-Appellants had unlawfully entered the land and caused damage to his plantation. The Defendants-Appellants filed answer averring that the land described in its schedule was a part of F.V.P. 600 and claimed the entirety by paternal inheritance; no Lot number was mentioned in the answer, although F.V.P. 600 was listed in the answer as a document relied on.

At the trial, on the motion of the Plaintiff-Respondent's counsel, a commission was issued for the survey of the land in dispute, and Plan No 1410 was prepared showing the corpus as Lot 1. In consequence of this plan an amended plaint was filed without objection, and finally on 24.2.1982 the parties entered into a settlement. The terms of settlement were to the effect that Plan No

1410 should be superimposed on F.V.P. 600, and if Lot No 331 (which particular Lot the Defendants-Appellants expressly and specifically claimed was within the corpus claimed by the Plaintiff-Respondent, the latter undertook to give up that portion to the Defendants-Appellants. Accordingly, another commission was issued for that purpose, and the report of the Commissioner is to the effect that Lot No 331 is not within the corpus in Plan No 1410. After the Commissioner's report and the superimposition were filed, consideration thereof was fixed for 24.10.1984; and on that date, consideration was postponed for 23.1.1985. On that day, in the presence of the Plaintiff-Respondent and the 2nd Defendant-Appellant, the report was accepted by both sides, and decree was entered in terms of the settlement and report.

On 24.4.1985, an application was made by the Defendants-Appellants to have the decree set aside on the ground that the Defendants-Appellants had mentioned Lot No 331 by mistake, and that in truth and in fact the portion that they had possessed and enjoyed, and had title to by paternal inheritance, was Lot No 335 of the aforesaid Settlement Order. In effect, it was their position that by Settlement Order No 402, the sub-divisional Lot No 335, in extent 3 roods and 22 perches, had been settled in 1948 on K.G. Appuhamy, and therefore the terms of settlement arrived at in Court should have been that when F.V.P. 600 was superimposed on Plan No 1410, if Lot No 335 fell within the corpus, then that portion of the corpus should go to the Defendants-Appellants. On 28.11.1985, after consideration, the learned District Judge refused the application to amend the decree in terms of section 189 of the Civil Procedure Code. The Defendants-Appellants then applied to the Court of Appeal for the revision of that order of the District Court and/or for *restitutio in integrum*. That application was dismissed by the Court of Appeal, and hence this appeal.

It is quite clear that an application to revise the learned District Judge's order does not lie as the Defendants-Appellants do not base their application on the alleged illegality of that order. What they do allege is that the settlement is vitiated by mistake. In *Perera v Don Simon*(1), it was held *inter alia* that no application for revision lay since no question arose regarding the legality or propriety of the decree or the regularity of the proceedings.

The main contention of the Defendants-Appellants in this appeal was that the remedy of *restitutio in integrum* was available by reason

of the fact that the settlement was consented to by the Defendants-Appellants by their mistake in mentioning Lot No 331, when in truth and in fact their inheritance was from K.G. Appuhamy who had been settled Lot No 335 in the 1948 Settlement Order.

To substantiate this contention that there was a mistake on their part, they averred that they were well aware that the land which was the subject matter of this case was allotted to their father in that Settlement Order, and they were quite certain that Lot Nos 1 and 2 in Plan No 1410 would fall within the lot in the F.V.P. which had been allotted to their father. Unfortunately, by accidental error or by an oversight, instead of mentioning Lot No 335 of the F.V.P., they had consented to the inclusion of Lot No 331 as the lot claimed by the Defendants-Appellants in the terms of settlement entered into in the proceedings in this case. Further, the 2nd Defendant-Appellant is the only resident of the land in suit, and if the order of the learned District Judge is given effect to, grave and irreparable loss would be caused to the 2nd Defendant-Appellant.

The Surveyor's report of 24.4.1981 shows that Lot No 1 in Plan No 1410, in extent one acre and 20 perches, is a garden claimed and possessed by the 2nd Defendant-Appellant though disputed by the Plaintiff-Respondent, and the two houses standing thereon have both been claimed and possessed by the 2nd Defendant-Appellant. The cultivation on it too was claimed by the 2nd Defendant-Appellant. Lot No 2, in extent 13 perches, and its cultivation has been claimed by the 2nd Defendant-Appellant.

It is clear that the Defendants-Appellants were well aware that the land they claimed by paternal inheritance was Lot No 335, and since the terms of settlement were in the hands of the Defendants-Appellants's Counsel, an error, if any creeping into the terms of settlement could have been avoided by due diligence; had due diligence been exercised, both in the preparation of the case and in the consideration of the Commissioner's report and Plan, and such error would not have remained undiscovered for over three years, until April 1985. Further, the material before us does not indicate whether the error was that of the Defendants-Appellants or of their Counsel, nor how exactly such error occurred. There is no suggestion that the Plaintiff-Respondent induced, or had knowledge of, the Defendants-Appellants's alleged mistake.

In *Cornelius Perera v Leo Perera*(2) Sansoni, J, summarised the principles governing the grant of *restitutio in integrum:*

> "...the Roman-Dutch Law enables a person to avoid an agreement for mistake on his part when the mistake is an essential and reasonable one. It must be essential in the sense that there was a mistake as to the person with whom he was dealing *(error in persona)* or as to the nature or subject matter of the transaction *(error in negotio, error in corpore).* A mistake in regard to incidental matters is not enough. The test of reasonableness is satisfied if the person shows either (1) that the error was induced by the fraudulent or innocent misrepresentation of the other party, or (2) that the other party knew, or a reasonable person should have known, that a mistake was being made, or (3) that the mistake was, in all the circumstances, excusable *(justus et probabilis error)* even where there was absence of misrepresentation or knowledge on the part of the other party. An agreement entered into in the course of an action, like any other agreement, may be set aside on these grounds."

Although Counsel for the Appellant relied heavily on that decision, Sansoni, J., held that *restitutio* was available because he found that the test of reasonableness had been satisfied: the other party knew that a mistake was being made. In the instant case, that test has not been satisfied.

In *Mapalathan v Elayavan*(3), it was held that relief by way of *restitutio* 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 *Perera v Don Simon*(1), Sansoni, J., observed:

> "*Restitutio in integrum* can be claimed on the ground of *justus error*, which I understand to connote reasonable or excusable error. I am unable to see that such a ground exists in this case. It is, on the contrary, an example of damage arising from carelessness or negligence.....The case is all the worse if the error is due to the act of the [applicant] himself...."

In *Phipps v Bracegyrdle*(4), it was pointed out that *restitutio* can be granted –

> "....on the ground that both parties have agreed to a settlement under a mistake of fact, for as in the case of contract, the element of consensus would be absent. It would be a dangerous extension of the law to hold that a party to an action can obtain

relief from any and every mistake which he may make through lack of knowledge of facts available to him, and that he is entitled to have all steps taken under the mistaken belief set aside and begin again from the point where he erred.

The mistake here was not induced by misrepresentation of the defendant nor is it a question of mutual error....."

One cannot say in this case that there has been *justus error* as enunciated by Sansoni, J. The Defendants-Appellants knew that the land they possessed and claimed was that which was theirs by paternal inheritance, and that too it was Lot No 335 settled on their father; why did they then advert to Lot No 331 to which they had no manner of right, title or interest? As the learned Judges of the Court of Appeal have queried, was it deliberately done or was it by reason of an excusable error or mistake ? It appears to me that, as has been stated in the Court of Appeal judgment, the inclusion of Lot No 331 has been deliberate in order to show that the Plaintiff-Respondent was disentitled to the land he claimed, viz. Lot No 1 in Plan No 1410.

It is an accepted principle that *restitutio in integrum* would not be granted unless the person seeking it could show that damage has been caused to him as a result of the error or mistake: *vide Luckow v de Silva*(5) and *Phipps v Bracegyrdle*(4). It is the contention of the Plaintiff-Respondent that the 2nd Defendant-Appellant has sold her rights to a third party. On 19.3.1986, as evidenced by R1 produced at the argument in the Court of Appeal.

Further the Plaintiff-Respondent claims his rights from H.A.M. Punchimahatmaya, while Lot No 335 has been given to the Defendants-Appellants's father K.G. Appuhamy. The settlement in Court does not in any way affect Lot No 335 as that was not the lot allotted to Punchimahatmaya, the Plaintiff-Respondent's predecessor in title. Therefore there does not appear to be any damage caused to the Defendants-Appellants.

For these reasons, both remedies sought by the Defendants-Appellants fail. I dismiss the appeal with costs.

G.P.S. de SILVA, J. – I agree.

FERNANDO, J. – I agree.

Appeal dismissed.