**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

**In the matter of an Appeal from the Judgment of the Civil Appellate High Court of Colombo dated 03.11.2011.**

**S.C. Appeal No. 91/2012**

H.C.C.A. L.A. 523/2011
WP/HCCA/COL/13/2010 (RA)
D.C. Colombo No. 8867/M

Union Trust and Investments Ltd.,
No. 347, Union Place,
Colombo 02.

**Plaintiff**

**Vs.**

1. Madagodage Thusitha Wijesena.
   52, Ward Place, Colombo 7
   And now at Nlo. 32/1D,
   Barnes Place, Colombo 07.

2. Swarna Wijesena
   51, Ward Place,
   Colombo 07
   And now at No. 32/10D,
   Barnes Place, Colombo 07.

3. Wadisinghe Arachchige Kapilaratne
   301/3, Gamunu Mawatha,
   Kiribathgoda.

**Defendants**

**And**

1. Madagodage Thusitha Wijesena.
   then of M and M Centre,
   2nd Floor, No. 431/5,
   Kotte Road, Welikada,
   Rajagiriya.

2. Swarna Wijesena
then of Ward Place, Colombo 07
and 32/10D, Barnes Place, Colombo 07
Both presently of
10/1, Reid Avenue,
Colombo 7.

**1st & 2nd Defendant-Petitioners**

**Vs.**

Union Trust and Investments Ltd.,
No. 347, Union Place,
Colombo 02
And presently of No. 30-2/1,
2nd Floor, Galle Road,
Colombo 06.

**Plaintiff-Respondent**

Wadisinghe Arachchige Kapilaratne
301/3, Gamunu Mawatha,
Kiribathgoda.

**3rd Defendant-Respondent**

**And Now Between**

Union Trust and Investments Ltd.,
No. 347, Union Place,
Colombo 02
And presently of No. 30-2/1,
2nd Floor, Galle Road,
Colombo 06.

**Plaintiff-Respondent-Appellant**

**Vs.**

1. Madagodage Thusitha Wijesena.
then of M and M Centre,
2nd Floor, No. 431/5,
Kotte Road, Welikada,
Rajagiriya.

2. Swarna Wijesena
then of Ward Place, Colombo 07
and 32/10D, Barnes Place, Colombo 07

Both presently of 10/1, Reid Avenue,
Colombo 7.

**1st & 2nd Defendant-Petitioners-Respondents**

Wadisinghe Arachchige Kapilaratne
301/3, Gamunu Mawatha,
Kiribathgoda.

**3rd Defendant-Respondent-Respondent**

*** * * * * ***

**Before** : **Eva Wanasundera, PC,J.**
**Sarath de Abrew, J. &**
**Priyantha Jayawardena, PC.J.**

**Counsel** : Senura Abeywardena with D. Ratnayake for Plaintiff-Respondent-Petitioner.

J.C. Boange for 1st and 2nd Defendants-Petitioners-Respondents.

**Argued On** : **29.10.2014**

**Decided On** : **06.03.2015**

* * * * *

**Eva Wanasundera, PC.J.**

The Leave to Appeal application was supported on 22.05.2012 and this Court has granted leave on the questions set out in paragraph 15(a), 15(b), 15(c) and 15(d) of the Petition dated 07.12.2011.

The said questions are as follows:-

15(a) Did the Provincial High Court of Civil Appeal of the Western Province err in law by holding that the order dated 15.02.2010 of the Learned District Judge, constitutes a miscarriage of justice and/or has occasioned a failure of justice?

(b) Did the Provincial High Court of Civil Appeal of the Western Province err in law by holding that the application to execute the decree cannot be permitted in terms of Section 337 of the Civil Procedure Code?

(c) Did the Provincial High Court of Civil Appeal of the Western Province err in law by exercising revisionary jurisdiction with regard to the said application of the 1st and 2nd Respondents?

(d) Did the Provincial High Court of Civil Appeal of the Western Province err in law by setting aside the said order of the learned Additional District Judge of Colombo dated 15th February, 2010 and the application made by the Petitioner to execute the decree?

The facts pertinent to this appeal in summary are as follows:-

The 1st Defendant- Petitioner- Respondent (hereinafter referred to as the 1st Respondent) entered into a hire purchase agreement with the Plaintiff-Respondent-Appellant on 10.10.1986 and he bought two Single post Lifts, two Air Compressors, two tyre inflators, two grease lubricators and two car washing machine accessories from the Appellant. The 1st Respondent agreed to pay the purchase price in 22 monthly instalments of Rs.85000/-. The conditions included that if the 1st Respondent failed to pay as agreed, the aforementioned goods were to be returned in good condition or to pay the value of the goods to the Plaintiff- Respondent-Appellant. (hereinafter referred to as the Appellant)

The 2nd and 3rd Defendant-Petitioner-Respondents (hereinafter referred to as the 2nd and 3rd Respondents) were guarantors to the hire-purchase agreement. The 1st Respondent failed to pay as agreed and action was filed by the Appellant in the District

Court of Colombo on 22.01.1990 against all three Respondents making them the Defendants in the case, praying for the recovery of Rs.1,873,850/90 with interest from 28.02.1989. The 1st and 2nd Respondents filed one answer on 02.07.1993 and the 3rd Respondent also filed answer separately on 02.07.1993. On the next calling date, the 1st and 2nd Respondents were absent. Court ordered that notices be sent to them, giving notice of the date of trial. Many times thereafter by registered post and through the fiscal, the notices were sent to them informing of the next date. They did not appear in Court. Court fixed the case finally for trial on 25.07.1995. On that date, the 1st and 2nd Respondents were absent. 3rd Respondent took part in the trial. Ex-parte trial was taken up against the 1st and 2nd Respondents. Thereafter the 3rd Defendant also did not come to Court. Again the ex-parte trial against the 3rd Respondent was also taken up and concluded on 08.02.1996. Ex- parte judgment against the 1st and 2nd Respondents was delivered on 25.07.1995. Ex-parte decree was entered. Many attempts were made by the Plaintiff to serve the ex-parte decree against her 1st and 2nd Respondents and it was finally served by way of substituted service in May 1997.

Thereafter the Appellant had made an application to execute the writ in the District Court but was unable to serve the writ as the Respondents were not in the given addresses in the court record and could not be found in those addresses. At last, in January, 2007, the Appellant made another application to execute writ and the 1st and 2nd Respondents objected to the same. An inquiry was held by the Additional District Judge of Colombo with regard to the objection taken up by the said Respondents with regard to the lapse of time of 10 years from the date of the decree and Court held that the Petitioner should be allowed to execute the writ by order dated 15.02.2010.

The Respondents filed a revision application in the Provincial High Court of the Western Province Holden in Colombo and sought to revise the order of the District Court. The Provincial High Court by its judgment dated 03.11.2011 set aside the District Court order dated 15.02.2010 and dismissed the application to execute the decree on the basis that 10 years had lapsed from the date of the decree in terms of Section 337 of the Civil Procedure Code and therefore writ could not be executed. The Petitioner has invoked the jurisdiction of this Court to set aside the judgment of the Provincial High Court dated 03.11.2011.

Section 337 of the Civil Procedure Code as amended by Act No. 53 of 1980 reads as follows:-

Sec.337 (1) No application (whether it be the first or a subsequent application) to execute a decree, not being a decree granting an injunction, shall be granted after the expiration of ten years from –

(a) the date of the decree sought to be executed or of the decree, if any, on appeal affirming the same; or

(b) where the decree or any subsequent order directs the payment of money or the delivery of property to be made on a specified date or at recurring periods, the date of the default in making the payment or delivering the property in respect of which the applicant seeks to execute decree.

(2) Nothing in this Section shall prevent the Court from granting an application for execution of decree after the expiration of the said term of ten years, where the judgment debtor has by fraud or force prevented the execution of the decree at some time within ten years immediately before the date of the application.

(3) Subject to the provisions contained in sub section (2) a Writ of Execution, if unexecuted , shall remain in force for one year only from its issue, but-

(a) such writ may at any time before its expiration, be renewed by the judgment-creditor for one year from the date of such renewal and so on from time to time; or

(b) a fresh writ may at any time after the expiration of an earlier writ be issued,

till satisfaction of the decree is obtained.

Accordingly, by law, Court is not prevented from granting the application for execution of a decree, “if the judgment debtor has by fraud or force prevented the execution of the

decree at some time within ten years immediately before the date of the application". I am of the view that if any party to a case intentionally avoids the service of papers from Court, that would amount to "fraud". In the case of *Fernando Vs Latibu 18 NLR 95*, it was held that " the systematic evasion of service by a judgment - debtor is ' fraud ' within the meaning of that term used in the proviso to Section 337 of the Civil Procedure Code, and it prevents the expiry of the statutory time limit from operating as a bar to a reissue of writ ".

The facts in this case are somewhat special. It is not a case where summons were served and the parties on whom the summons were served did not come to court. It is a case when summons were served, the parties came before court and filed answer and later failed to come to court which means that they were living in those addresses which were recorded in the pleadings filed in court, at the time exparte decrees were entered by court against them. Then, they avoided accepting the notice of decrees many times and according to the report of the fiscal, contained in the journal entries dated 20. 05.1996 and 04.10.1996, they were intentionally avoiding the service of the decree and court ordered substituted service. Finally notice of decree was served by substituted service in May, 1997.

The next step was to serve notice of the writ of execution. The Petitioner made an application to execute the decree on 27.06.1997.The journal entries show that upto 08.12.2000 the fiscal could not find the Respondents in the given addresses. It is only on 17.01.2007 that the Petitioner had filed papers again for notice of the writ of execution on the Respondents after tracing their new addresses.

It is my view that the Respondents owe a duty to inform court of any change of address since they appeared before court after receiving summons in the first instance when the case was initially filed and summons were served on them. If they never appeared in court, I would say that they do not owe a duty to inform court of any change of address. The Civil Procedure Code is fashioned in such a way that in every step of the way till execution of writ is concluded, the judgment debtor has to be notified by the judgment creditor so that the judgment debtor gets a chance to stop execution of writ against him and pay off as decreed. Parties before court should corporate with the provisions of

procedure of court and not abuse the process of court. The Respondents objected to the application for a writ of execution made by the Petitioner in 2007 and court held an inquiry and allowed the application for writ to be executed.

In a District Court case, when the notice of decree is served on the party against whom the judgment is given, then that party is put on notice of what is coming next, which means that the notice of the writ of execution would be the next to reach that party. If the said party wants to avoid the writ of execution, under Section 337 of the Civil Procedure Code, it would not be very difficult to do so by changing the address. The winning party of the case will have to chase behind the party who lost the case, searching for him in the whole country or in the whole world. According to our law, notice of the writ of execution has to be served before getting the writ executed through court.

The High Court Judge in his reasoning, overturning the District Court judgment which granted permission to execute the writ notwithstanding the lapse of ten years has mentioned that, “any person has a right to live wherever he wants and therefore the changing of address should not be found fault with”. I am of the view that the learned High Court Judge has gone wrong in his determination here, simply because if someone does not want a writ executed, all that he has to do is to move out of that address which is in the court record and avoid the notice of writ of execution being delivered to him, only for ten years.

Furthermore I am of the opinion that if the notice of decree is served to a party resident in a particular place, the notice of the writ of execution served at the said residence should be accepted in law as having served the notice of the writ of execution unless the party who receive the notice of decree informs court of his new address promptly by way of an affidavit or motion. It is at that point of receiving the notice of decree that the party receiving notice of decree gets bound to court, to inform a change of address. If he does not do so, he is giving a challenge to court, to say “ find me if you can” . The law as it is, puts the burden on the winning party or the judgment creditor in the case to find the new address, to serve the notice of writ of execution and then execute the writ to get what court has adjudicated upon. In my view, moving out of an address after

receiving the notice of decree, without informing court, amounts to " fraud " in the context of Section 337(2) of the Civil Procedure Code.

I am of the opinion that, upon a party filing a proxy and giving its address to court, any change in such address should be promptly notified to court. It is the bounden duty of such party to notify court of a change in its address. The other party cannot be faulted or made to suffer as a result of a change of address being not notified to court.

In the case of *Cross World (Pvt.) Ltd. Vs Union Trust and Investment (SC Appeal No. 36/2010 )* SC Minutes of 16.05.2011, delivered by Justice Imam with the then Chief Jutice J.A.N. de Silva and the present Chief Justice K.Sripavan agreeing, it was held that , " consequent to filing of proxy and entering an appearance in court, the parties before court had a duty to inform court of the change of address". In the said case, as the journal entries revealed that court had tried to serve notice on the judgment debtor on numerous occasions, court permitted the execution of the decree despite the lapse of the ten year period set out in Section 337 of the Civil Procedure Code.

I further note that the Respondents have invoked the revisionary jurisdiction of the Provincial High Court. It is settled law that the revisionary jurisdiction of a court exercising appellate powers cannot be invoked merely because there is an error of law or fact in an order or judgment, but could only be done where there are exceptional circumstances and / or extraordinary grounds that shock the conscience of court. In the present case the Respondents have neither disclosed the exceptional grounds or pleaded extraordinary grounds disclosing such grounds to invoke the revisionary jurisdiction of the Civil Appellate High Court. The learned High Court Judge has on his own , wrongly accepted the delay as given, being due to a wrong date having been noted down in the diary of the lawyer and the purported error in the judgment as described by the Respondents as " extraordinary grounds " and entertained the revision application filed by the Respondents. I am of the opinion that those grounds which were not even pleaded as extraordinary grounds do not qualify to be good enough to come under "grounds that shock the conscience of court "to invoke the revisionary jurisdiction of an appellate court.

For the reasons given above, I answer the questions of law mentioned at the beginning of this judgment in favour of the Petitioner and conclude that the Petitioner is entitled to execute the writ against the Respondents. I set aside the judgment of the High Court dated 03.11.2011 and affirm the judgment of the District Court of Colombo dated 15.02.2010. I order taxed costs against all the Respondents.

**Judge of the Supreme Court**

**Sarath de Abrew, J.**

I agree.

**Judge of the Supreme Court**

**Priyantha Jayawardena, PC.J.**

I agree.

**Judge of the Supreme Court**