

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

**In the matter of an Appeal from
the Civil Appellate High Court.**

Ratnayake Mudiyanseelage Heen
Menika of No. 246/30, Soysa
Mawatha, Thewatta Road,
Ragama. (deceased)

Plaintiff

SC APPEAL No.36/2016

SC/HCCA/LA No. 575/2014

WP/HCCA/GPH/12/2004(LA)

D.C.Gampaha Case No. 1228/L

- 1a. Mallawa Arachchige Don Ananda
No. 246/30, Soysa Mawatha,
Thewatta Road,
Ragama.
- 1b. Mallawa Arachchige Dona Pushpa
Kumarihami, No. 27, Lankamatha
Road, Ragama.
- 1c. Mallawa Arachchige Don Samson
Pushpakumara, No. 388, Mahara,
Kadawatha.
- 1d. Mallawa Arachchige Don
Dharmakeerthi, No. 323 F, Christ
King Place, Batagama North,
Ja-Ela.
- 1e. Mallawa Arachchige Don Wijesiri
R 28, Lankamatha Road, Ragama
- 1f. Mallawa Arachchige Don Ranjith
Pathmasiri Pushpakumara,
No. 664/1, Kandaliyadde Paluwa
Ragama.

- 1g. Mallawa Arachchige Dona Sriyani
Malkanthi, No. 28, Kandaliyadde
Paluwa, Ragama.
- 1h. Mallawa Arachchige DonaRanjani
Pushpakanthi, No. 28/1,
Kandaliyadde Paluwa, Ragama.

Substituted Plaintiffs

Vs

1. Weerasuriya Arachchilage Noris
Banda, No. 93, Temple Lane,
Horape, Ragama.
2. Siriwardena Disanayake,
Siri Niwasa, Waragoda Estate,
Kelaniya.

Defendants

AND

- 1b. Mallawa Arachchige Dona Pushpa
Kumarihami, No. 27, Lankamatha
Road, Ragama.
- 1c. Mallawa Arachchige Don Samson
Pushpakumara, No. 388, Mahara,
Kadawatha.
- 1d. Mallawa Arachchige Don
Dharmakeerthi, No. 323 F, Christ
King Place, Batagama North,
Ja-Ela.
- 1e. Mallawa Arachchige Don Wijesiri
R 28, Lankamatha Road, Ragama
- 1f. Mallawa Arachchige Don Ranjith
Pathmasiri Pushpakumara,
No. 664/1, Kandaliyadde Paluwa

Ragama.

1g. Mallawa Arachchige Dona Sriyani
Malkanthi, No. 28, Kandaliyadde
Paluwa, Ragama.

1h. Mallawa Arachchige DonaRanjani
Pushpakanthi, No. 28/1,
Kandaliyadde Paluwa, Ragama.

1b to 1h Substituted Plaintiff Petitioners

Vs

1. Weerasuriya Arachchilage Noris
Banda, No. 93, Temple Lane,
Horape, Ragama.
2. Siriwardena Disanayake,
Siri Niwasa, Waragoda Estate,
Kelaniya .

Defendant Respondents

- 1a. Mallawa Arachchige Don Ananda
No. 246/30, Soysa Mawatha,
Thewatta Road, Ragama.

1a Substituted Plaintiff Respondent

AND THEN

- 1b. Mallawa Arachchige Dona
Pushpa Kumarihami, No.27,
Lankamatha Road, Ragama.
- 1c. Mallawa Arachchige Don Samson

Pushpakumara, No. 388, Mahara,
Kadawatha.

- 1d. Mallawa Arachchige Don
Dharmakeerthi, No. 323 F, Christ
King Place, Batagama North,
Ja-Ela.
- 1e. Mallawa Arachchige Don Wijesiri
R 28, Lankamatha Road, Ragama
- 1f. Mallawa Arachchige Don Ranjith
Pathmasiri Pushpakumara,
No. 664/1, Kandaliyadde Paluwa
Ragama.
- 1g. Mallawa Arachchige Dona Sriyani
Malkanthi, No. 28, Kandaliyadde
Paluwa, Ragama.
- 1h. Mallawa Arachchige DonaRanjani
Pushpakanthi, No. 28/1,
Kandaliyadde Paluwa, Ragama.

1b to 1h Substituted Plaintiff Petitioner
Petitioners

Vs

- 1. Weerasuriya Arachchilage
Noris Banda, No. 93, Temple
Lane, Horape, Ragama.
- 2. Siriwardena Disanayake,
Siri Niwasa, Waragoda Estate,
Kelaniya .

Defendant Respondent Respondents

1a. Mallawa Arachchige Don Ananda,
No. 246/30, Soysa Mawatha,
Thewatta Road, Ragama.

1a Substituted Plaintiff Respondent
Respondent

1b. Mallawa Arachchige Dona Pushpa
Kumarihami, No. 27, Lankamatha
Road, Ragama.

1b Substituted Plaintiff Petitioner
Respondent

AND NOW BETWEEN

1c. Mallawa Arachchige Don Samson
Pushpakumara, No. 388, Mahara,
Kadawatha.

1d. Mallawa Arachchige Don
Dharmakeerthi, No. 323 F, Christ
King Place, Batagama North,
Ja-Ela.

1e. Mallawa Arachchige Don Wijesiri
R 28, Lankamatha Road, Ragama

1f. Mallawa Arachchige Don Ranjith
Pathmasiri Pushpakumara,
No. 664/1, Kandaliyadde Paluwa
Ragama.

1g. Mallawa Arachchige Dona Sriyani
Malkanathi, No. 28, Kandaliyadde
Paluwa, Ragama.

1h. Mallawa Arachchige DonaRanjani
Pushpakanthi, No. 28/1,
Kandaliyadde Paluwa, Ragama.

**1c to 1h Substituted Plaintiff Petitioner
Petitioner Appellants.**

1b. Mallawa Arachchige Dona Pushpa
Kumarihami, No. 27, Lankamatha
Road, Ragama.

**1b Substituted Plaintiff Petitioner
Respondent Appellant**

Vs

1. Weerasuriya Arachchilage
Noris Banda, No. 93, Temple
Lane, Horape, Ragama.
2. Siriwardena Disanayake,
Siri Niwasa, Waragoda Estate,
Kelaniya .

**Defendant Respondent Respondent
Respondents**

1a. Mallawa Arachchige Don Ananda,
No. 246/30, Soysa Mawatha,
Thewatta Road, Ragama.

**1a Substituted Plaintiff Respondent
Respondent Respondent**

BEFORE

**: S. EVA WANASUNDERA PCJ. ,
PRASANNA JAYAWARDENA PCJ. &
MURDU FERNANDO PCJ.**

COUNSEL

: Ms. Sudarshani Cooray for the 1c to 1h
Substituted Plaintiff Petitioner Petitioner
Appellants and 1b Substituted Plaintiff
Petitioner Respondent Appellant.

D.H.W. Kirinde for the 1st and 2nd
Defendant Respondent Respondent
Respondents.

S.N. Vijithsingh for the 1a Substituted
Plaintiff Respondent Respondent
Respondent.

ARGUED ON : 05.04.2018.

DECIDED ON : 18.05.2018.

S. EVA WANASUNDERA PCJ.

Ratnayake Mudiyanseelage Heen Menike was the mother of eight children, namely Ananda, Pushpa Kumarihami, Samson Pushpakumara, Dharmakeerthi, Wijesiri, Ranjith Pathmasiri Pushpakumara, Sriyani Malkanthi and Ranjani Pushpakanthi. The said Heen Menike lived with her son Ananda, his wife and children in the house on the land which is the subject matter of this action. The extent of the land in question is 0.0259 Hectares, approximately about 15 Perches within the Municipal Council limits of Ragama in the Gampaha District. The house on the property was one in a housing scheme named Soysa Housing Scheme along Thewatta Road, Ragama.

In the year 2007 when Heen Menike filed action before the District Court of Gampaha, she had valued the land for Rs. 40 lakhs. Heen Menike has narrated in the Plaint how she had got title to the said land. A large extent of land was vested with the National Housing Development Authority under Sec. 73(a) of the National Housing Development Act No. 17 of 1979 as amended by Act No. 20 of 1988 and the said NHDA had got the Surveyor General to prepare the Plan No. 1087 dated 07.01.1987. Lot number 80 of the said Plan No. 1087 was allocated to Heen Menike and she got title to the same by Deed 1621 dated 14.07.2000 and Deed No. 2680 dated 11.12.2002 attested by Manori Olabotuwa Notary Public. There is a house on the land in which Heen Menike lived with one of his sons, namely Ananda.

In 2002 June, Ananda, the son of Heen Menike had wanted some money to go abroad for an occupation and they had a family friend named Noris Banda who offered Rs. 250,000/- at the interest of 6% per month. In addition, Heen Menike had to transfer the land and premises bearing assessment number 4 of Thewatta Road, Ragama, the property in question to the said Noris Banda and she did so, on the promise that he gave to Heen Menike that it will be re-transferred to her at her request when the money taken on loan is repaid. The interest of Rs. 15000/- per month had been paid continuously but possession had never been granted to the said Noris Banda. In 2003 November, Heen Menike requested Noris Banda to retransfer the land and premises but he had failed to do so. Thereafter, Heen Menike had found out that Noris Banda had transferred the property to Siriwardena Dissanayake by Deed number 220 dated 19.10.2005.

Heen Menike then filed action in the District Court against Noris Banda and Sirwardena Dissanayake on the cause of action that they held the property in trust under the Trusts Ordinance and as such the said property should be retransferred to Heen Menike. In the said case, it was also claimed that the Defendants were unjustly enriched and under the concept of laesio enormis the Deed of Transfer No. 3615 in favour of the 1st Defendant, Noris Banda should be held invalid.

Before the case was fixed for trial, parties had arrived at a settlement in court. The 1st and 2nd Defendants had agreed to the terms on 08.12.2009 but the **2nd Defendant had failed to sign** the court record containing the terms due to the fact that he was not present in court on that day but only represented by his lawyer. In the mean time the Plaintiff, Heen Menike had passed away. Her son, Ananda with whom Heen Menike was living in the house on the land in question had informed court about the same and requested Court to substitute all his siblings, seven in number and himself as heirs of the Plaintiff. Court had made order that all of them, the children of Heen Menike **be substituted** in the room and place of the deceased Heen Menike, in the District Court action and had named them as **1a to 1h Plaintiffs**. The caption was amended accordingly, **at the instance of the son Ananda** who was by then the **1a Plaintiff**. Court made order that **those seven heirs**, other than Ananda **be sent notice** informing them about the case.

The said case had been called in open court on 24.11.2010 and the lawyer for the 1a Plaintiff had made an application to 'lay by the case', even though the case was called on that day for notices to the other substituted Plaintiffs. The 'notices to be sent' was moved by the 1a Plaintiff, Ananda when the other Plaintiffs were duly substituted and that was due to be done by 24.11.2010. It had not been done. The case was laid by with the journal entry which read as 'take steps and move'.

On 22.05.2012, **the 2nd Defendant** had made an application to court invoking the provisions in Sec. 402 of the Civil Procedure Code. He had prayed that the case be abated due to no steps having been taken for one and a half years by the Plaintiffs. Objections were filed by the 1a Plaintiff, Ananda stating that he had been continuously sick during that period and was hospitalized at the Ragama Teaching Hospital quite often during that period and that it is due to that reason that he could not take action to send notice to the other Plaintiffs. The other Plaintiffs, the siblings of the 1a Plaintiff also came before court at that time and filed objections against the application for abatement stating that they were quite unaware of the action due to no fault of theirs and as they inherit from the deceased Plaintiff, their mother, it is quite unjust and unreasonable to allow the application of the 2nd Defendant.

However, the Additional District Judge had made order at the end of the inquiry **allowing the application for abatement**. The Plaintiffs appealed from that order and the Civil Appellate **High Court dismissed the Appeal**. Now the Appellants are before this Court **praying** that the **order for abatement of the case be set aside** so that they can proceed to get the District Court case **be heard on its merits**.

This Court has granted leave to appeal on the following questions of law:-

- (a) Did the learned High err in failing to appreciate that the 1b to 1h substituted Plaintiff Petitioners were under no duty to take any steps in the District Court as they were not notified parties nor a proxy had been filed on behalf of them?
- (b) Did the learned High Court err in failing to appreciate that the court cannot arrive at the presumption that 1b to 1h Substituted Plaintiff Petitioner Petitioners were aware of the pending District Court Action on the basis that they were children of the deceased original Plaintiff?

- (c) Did the learned High Court err in failing to appreciate that the application to lay by the case was not made on behalf of the 1b to 1h Substituted Plaintiff Petitioner Petitioners?
- (d) Did the learned High Court err in failing to appreciate that 1b to 1h Substituted Plaintiff Petitioner Petitioners did not have any step to be taken in the action in the District Court of Gampaha and that they are not guilty under Section 402 of the Civil Procedure Code?

The order challenged is one which is based on Section 402 of the Civil Procedure Code. Section 402 reads as follows:-

“ If a period exceeding twelve months in the case of a District Court or Family Court, or six months in a Primary Court, elapses subsequently to the date of the last entry of an order or proceeding in the record without **the plaintiff** taking any steps to prosecute the action where any such step is necessary, the **court may** pass an order that the action shall abate.”

I observe at this stage that this is a case where the mother and one child, namely Ananda, out of 8 children of the mother, lived in the house and property which is the subject matter of this action. The mother, the original Plaintiff had obtained a loan of a relatively small amount compared to the value of the house and property for Ananda to go abroad from the 1st Defendant who was a friend of the family. As security, the house and property was transferred to the 1st Defendant. When it was requested from the 1st Defendant to re transfer the property on payment of the loan , he did not do so. Later it was found that the 1st Defendant had transferred the house and property to the 2nd Defendant. It is only then that the Plaintiff filed action to get the property back. At a later stage of the case, the matter was settled. The 2nd Defendant had not signed the case record when it was settled. He had then revoked the proxy given to the lawyer and had filed a fresh proxy of his new lawyer. The Plaintiff had died by that time and the person living in the house and property, informed court about the same and got his siblings substituted in place of the Plaintiff. Yet, Ananda who got the siblings substituted in the room and place of the original Plaintiff **had not got the notices sent through court** to the substituted siblings who lived in different parts of this country.

The position at the time of making the order under Sec. 402 of the Civil Procedure Code by the District Court, was that the 1a Plaintiff, Ananda who was living with

the original Plaintiff, the mother knew about the case at all times and when the mother died, he had promptly got the deceased mother substituted by all the children who are the legal heirs of the original Plaintiff. Just the fact that their names were placed as substituted 1b to 1h Plaintiffs is not enough to enable them to be playing the role of plaintiffs because they were not properly notified by 1a Plaintiff through the proper legal process of getting notices sent through courts informing them that they are parties to the action as Plaintiffs even though 1a Plaintiff had acted promptly to get all of them entered as Plaintiffs as soon as the mother died. It may be that the children of the original Plaintiff were not in good terms with each other or not in good terms of 1a Plaintiff, the brother. We cannot assume that 1a Plaintiff has informed everybody that they are now Plaintiffs in the case. None of them had entered the case by filing proxies on their behalf. Since notices had not gone from courts to the 1b to 1h Plaintiffs they cannot be held liable for inaction in not having taken steps to prosecute the case filed by their mother, the deceased. In fact, if at all, **it is the fault of the 1a Plaintiff not to have taken steps to file notices to be sent by courts to 1b to 1h Plaintiffs.**

The 1a Plaintiff, Ananda had made an application to lay by the case on 24.11.2010. By then he had failed to send notices to the other substituted plaintiffs through courts as undertaken by him to do so when directed by court on an earlier occasion. The lawyer who had been continuously been appearing on his behalf had submitted to court that he had been ill and hospitalized. The learned trial judge had harped on the matter that no medical reports were produced at the inquiry and considered that fact as a reason for making the order for abatement under Sec. 402. Assuming that 1a Plaintiff, whose duty it was to take steps to send notices to 1b to 1h Plaintiffs through courts, has failed to do so, it is obvious that the 1b to 1h Plaintiffs had no hold in the matter. If the rights of 1b to 1h Plaintiffs are affected by the lapse on the part of only the 1a Plaintiff, it is quite unjust and unlawful and against the intentions of the legislature when Sec. 402 was included in the Civil Procedure Code when it was enacted.

The said section 402 gives the discretion to the trial judge in the wording of the section as “ **the court may pass an order** that the action shall abate”. It is not an order to be made as and when ‘any party’ does not take steps to prosecute. It is an order to be made when more than one year lapses from the last entry in the record of the case without **the Plaintiff** taking any steps to prosecute the action where any such step is necessary. In the case in hand the Plaintiff is dead. One of

the heirs , i.e. the 1a substituted Plaintiff had informed that the heirs should be substituted. As a result the trial court had legally substituted all the heirs including himself as one of the Plaintiffs. Thereafter court directed the 1a substituted Plaintiff to send notices to the other substituted Plaintiffs, namely 1b to 1h substituted Plaintiffs which he had failed to do. The 1b to 1h substituted Plaintiffs' rights are affected by the order of the learned trial judge to abate the action, due to no fault of theirs. ***It cannot be presumed that all the substituted plaintiffs were aware of the case and all of them are responsible for not getting notices filed for all of them to be informed about the case through the courts.*** Then it would sound absurd. The court had directed the 1a substituted Plaintiff to send notices through the court registry informing the other substituted Plaintiffs to be present before courts and/or file their proxies as usual. The trial judge had erred in having presumed that the 1b to 1h substituted Plaintiffs had been aware that they were made Plaintiffs and that they are responsible for not having taken steps to file notices to themselves in the court registry, which was the expected next step after 24.11.2010. In fact there is no order of court on record for the 1b to 1h Substituted Plaintiffs to take any steps in prosecuting the action which was filed by their deceased mother and as such their legal rights should not be thrown out of the window just because 1a substituted Plaintiff had failed to file the notices which were due to be dispatched to them by courts.

In the case of **Selamma Achie Vs Palavasam 41 NLR 186**, the Supreme Court held that “ A court has no power to enter an order of abatement under Section 402 of the Civil Procedure Code where the failure to prosecute the action for twelve months after the last order was due to the death of the plaintiff within that period”.

In the case in hand also the Plaintiff had died at an unexpected juncture when the parties had agreed for terms of settlement. The son, the 1a Substituted Plaintiff who was living with the Plaintiff had come before court and done his duty of substituting all his seven other siblings in place of the deceased Plaintiff. The Attorney at Law who had appeared for the original Plaintiff had taken steps to do the substitution at the instance of one of the heirs who had sought the services of the lawyer to get that step done for the purpose of prosecuting the action. The only step which he had not been able to get done, is filing the notices to the other substituted heirs for a period of over one year.

I am of the view that the trial court should not look at the small picture of 'steps not being taken for over one year' and act rapidly in making an order for abatement at the instance of the defendants. The instance of the Plaintiff passing away is something unexpected. The next step of substituting the heirs also had been done in this instance. But the heirs were to be notified through court. The court should also have considered whether, the said step not done, is a step rendered necessary by the law to prosecute the action to be done by the Plaintiff. There was no Plaintiff. The Plaintiff mother was dead and gone. It was a step undertaken to court by one of the heirs. One of the heirs does not mean the Plaintiff. At this occasion, all the heirs did not have a role to play. The notices had to be lodged by one of the heirs to be sent to the other heirs at the registry of the trial court. All the heirs cannot be penalized for the lapse on the part of only one of the heirs.

I have gone through the submissions made by the counsel for the 1st and 2nd Defendant Respondent Respondent Respondents and considered them. I have considered the submissions of the counsel for the 1b to 1h Substituted Plaintiff Petitioner Petitioner Appellants as well as the counsel for the 1a Substituted Plaintiff Respondent Respondent Respondent.

I am of the opinion that the District Court and the High Court have erred in failing to appreciate firstly that the application to lay by the the District Court case was not made on behalf of the 1b to 1h Substituted Plaintiff Petitioner Petitioner Appellants and secondly, as such, they did not have any step to be taken in the District Court action and therefore they cannot be found fault with under Section 402 of the Civil Procedure Code. The High Court has erred in not having considered that 'the District Court **cannot arrive at the presumption** that the Appellants were aware of the pending District Court action on the basis that they were children of the deceased original Plaintiff', when it was apparent that they were not notified through court that they were substituted as heirs at the instance of the 1a substituted Plaintiff in the District Court.

I have answered the questions of law in the affirmative in favour of the Appellants. The judgment of the Civil Appellate High Court of Gampaha dated 22.09.2014 is hereby set aside. The Order of the Additional District Judge dated 07.02.2014 is also hereby set aside. The 1a to 1h Plaintiffs who are the heirs of the original Plaintiff in the District Court of Gampaha are allowed to proceed with the action in the District Court Case of Gampaha Case No. 1228/L.

The Appeal is allowed. However I order no costs.

Judge of the Supreme Court

Prasanna Jayawardena PCJ.
I agree.

Judge of the Supreme Court

Murdu Fernando PCJ
I agree.

Judge of the Supreme Court