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

Shirani Buffin

No.7 King Charles Walk

Wimbledon Park,

London SW196, JA

England.

Presently at No.71G

Polhenwatte, Housing Scheme

Kelaniya

SC Appeal 63/16

SC(HC)CALA/308/2014

WP/HCCA/COL/22/2011/LA

DC Colombo Case No. 16493/L

PLAINTIFF- RESPONDENT-APPELLANT

Vs.

1. M.A. Anthony Neville

   No.275/01,Old Kandy Road,
   Dalugama, Kelaniya

2. M. A. Rohan Dulip
   No.57, 6th Lane, Kotahena
   New address,
   No.47/A 9th Lane,
   Ethul Kotte, Kotte

DEFENDANT – PETITIONER - RESPONDENTS

Before : Priyasath Dep, PC.CJ
B.P. Aluwihare, PC, J
Vijith K. Malalgoda PC, J

Counsel : Ikram Mohamed, PC with Farhath Hussain for the Plaintiff – Respondent – Appellant

M.U.M. Ali Sabry, PC with Nuwan Bopage and Naamiq Natash for the Defendant – Petitioner – Respondent

Argued on : 20.11.2017

Decided on : 14.06.2018

Priyasath Dep, PC. CJ

The Plaintiff – Respondent – Appellant (Hereinafter sometimes referred to as the " Plaintiff - Appellant") instituted action against the Defendant – Petitioner – Respondents (Hereinafter sometimes referred to as the "Defendants -Respondents") in the District Court of Colombo in Case No. 16493/L.

The Plaintiff (Plaintiff -Respondent -Appellant) in her Plaint dated 23rd November 1993 sought the following reliefs:

1. Declaration of title to the two allotments of land described morefully in the 1st and 2nd schedule to the Plaint.
2. Ejectment of the Defendants from the said land on the ground that the 1st Defendant unknown to the Plaintiff had executed a forged deed of transfer in favour of the 1st Defendant purporting to be a transfer from the Plaintiff while the Plaintiff was abroad and thereafter transferring the same to the 2nd and 3rd Defendants.
3. Damages in a sum of Rs.900,000/= and Rs. 25,000/= per month from 1991 upto the date of handing over peaceful possession.

The District Court thereafter made order for the service of summons on the Defendants. However the Fiscal had reported that the Defendants had sold the land and had left the address and the Court ordered the Plaintiff to take steps to serve summons to the present address returnable on 5th October 1994. According to Journal entry No. 4 dated 05/10/1994, the Plaintiff has not taken any steps, the Court ordered the case to be laid by. Thereafter Plaintiff had filed a motion dated 01/12/1994 moving that the earlier proxy be revoked and Court has accordingly made order revoking the same.

After a lapse of almost 16 years, on 2/09/2009, the Plaintiff filed a fresh proxy with a motion moving Court for permission to proceed only against the 2nd and 3rd Defendants since the 1st Defendant has died and had transferred all his purported rights to the 2nd and 3rd Defendants. The Court considered the applicability of Section 402 of the Civil Procedure Code in view of the fact that a period of 16 years have lapsed in terms of the last journal entry dated 01/12/1994 and ordered summons be issued to the Defendants enabling them to be heard before an order for abatement of action is made.

The learned District Judge having considered the written submissions of the Plaintiff and objections filed by the Defendants refused to enter an order of abatement and held that the Appellant is entitled to proceed with the case.

The Defendants being aggrieved by the said order, made an appeal to the Civil Appellate High Court holden in Colombo and the learned judges of the High Court set aside the order of the learned District Judge and held that the case should be abated.

The Plaintiff- Appellants sought Leave to Appeal to the Supreme Court against the said order of the High Court and obtained leave on following questions of law;

1. Is the said order wrong in law and contrary to provisions of Section 402 of the Civil Procedure Code in view of the motion filed by the Petitioners[Plaintiff-Appellants] dated 01/09/2009 and subsequent proceedings held in District Court of Colombo.

The learned President Counsel for the Defendant-Respondents with the permission of the Court raised the following question of law.

2. For the purpose of application of Section 402 of the Civil Procedure Code should the order or proceedings made in journal entry No. 4 dated 05/10/1994 be considered as a material fact?

The learned President Counsel for the Plaintiff- Appellant with the permission of Court in addition to the question No.1, raised the following question of law.

3. For the purpose of making an order under Section 402 of the Civil Procedure Code should an application be made by a party or should the court *ex mero motu* make an order under the said section.

The Section 402 of the Civil Procedure Code in terms of which an order of abatement could be made is 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*"

The Plaintiff-Appellant submitted that under Section 402 of the Civil Procedure Code entering an order of abatement is not mandatory but discretionary and that the period required to elapse is a period exceeding 12 months and the said period should have lapsed from the date of the last entry made in the record without the Plaintiff taking any steps to prosecute the action where any such step is necessary.

The Plaintiff-Appellant submitted that the last journal entry prior to question of abatement was raised by Court is the Journal entry No.06 dated 02/09/2009 whereby the Plaintiff-Appellant filed a motion with a new proxy moving to issue summons to the 2nd and 3rd Defendant-Respondents. Moreover, before Defendant-Respondents moved for abatement of the action several entries have been made in the record including tendering of written

submissions by the Plaintiff-Appellant, Court making order to hear the 2nd and 3rd Defendant-Respondents. Therefore Plaintiff- Appellant's contention is that 12 months haven't lapsed from the last entry in the record for the purpose of Section 402.

The Plaintiff- Appellant submitted that the entry made on 05/10/1994 cannot be taken as the last entry as no application has been made by any party or any step taken by court to abate the Plaintiff- Appellant's action beforePlaintiff- Appellant took steps on 02/09/2009 to proceed only against the 2nd and 3rd Respondents.

Plaintiff-Appellant further submitted that journal entry No. 4 dated 05/09/1994 does not make any order for steps to be taken by the Plaintiff-Appellant as the Court has ordered to lay by the case. [This submission is incorrect . The Court on 05/09/1994 ordered the Plaintiff to take steps].

In view of the submissions made by the Learned President Counsel for the Plaintiff-Appellant, this the Court has to consider the following matters.

(a) what is the date of the last entry of an order or proceeding in the record
(b) did the plaintiff fail to take necessary steps to prosecute the action
(c) whether a period of twelve months has lapsed after the date of the last entry of the order or the proceeding in the record

The Learned Counsel for the Plaintiff-Appellant vehemently argued that the last date to be considered is 02/09/2009 and not 05/10/ 1994. It is necessary to examine the proceedings prior to 05/10/1994 to decide this question. According to the journal entry dated 10/08/94 the fiscal had reported that the present occupants of the premises informed him that the defendants had sold the premises and left the place. The Court had directed the Plaintiff to take steps. When the case was mentioned on 05/10/1994 it was recorded that no steps were taken by the Plaintiff. On 01/12/94 a motion was filed to revoke the proxy which was allowed. (Journal entry No. 5). On 02/09 2009 nearly 16 years after the order directing the Plaintiff to take steps, the Plaintiff filed a fresh proxy and move to issue summons on the 2nd and 3rd Defendants since the 1st Defendant is dead. At this stage the learned District Judge having realized that long period had lapsed after the date given for steps, noticed the parties to decide the question as to whether the action was abated or not. After considering the submissions of parties, the learned District Judge held that the action was not abated. The 2nd and 3rd Defendants appealed against the order and the High Court (Civil Appellate) set aside the order and against that order the Plaintiff- Respondent-Appellant filed a Leave to Appeal application and obtained leave.

The Plaintiff-Appellant submitted that the period in excess of 12 months relevant for the application of Section 402 of the Civil Procedure Code should necessarily be from the last entry of the record prior to the application for the abatement is made or prior to the 1st date on which the court ex mero motu considered the question of abatement. In this case

the court ex mero motu considered the question of abatement only on 10/09/2009 prior to which the last journal entry was on 02/09/2009, whereby the Plaintiff- Appellant took steps by filing a motion to proceed only against the 2nd and 3rd Defendant-Respondents which was 8 days before the question of abatement was raised by Court for the first time.

The Plaintiff- Appellant further submitted that Defendant-Respondents' application for abatement was made by their objection dated 22/07/2010 and prior to that date there have been several journal entries whereby Plaintiff-Appellant has taken numerous steps.

It is the contention of the Plaintiff-Appellant that the fact that the Plaintiff-Appellant had not taken any steps from 05/10/1994 cannot form the basis for abatement since that particular entry does not make any order for the Plaintiff Appellant to take the steps.

The 2nd and 3rd Defendant-Respondents stated that the journal entry No.4 dated 05/10/1994 should be considered as a material date for the purpose of Section 402 of the Civil Procedure Code.

In the journal entry No. 3 dated 10.08.1994, the Court had directed the Plaintiff-Appellant to take steps to issue summons as the fiscal was unable to serve summons as the Defendants were not at the given addresses as they had left the premises. Once again on 05/10/1994 the Court had directed the Plaintiff-Appellant to take steps (Journal Entry No.4)

Thereafter no action has been taken by the Plaintiff-Appellant to facilitate the service of summons and prosecute the action till 02/09/2009 which establishes the fact that Plaintiff-Appellant has not taken steps required by law to proceed with the action.

Having considered the submissions, I am of the view that the date given to take steps was 05/10/1994.This is the relevant date to consider whether the action was abated or not.

The next question is whether the Plaintiff failed to take a necessary step to prosecute the action. Both parties have submitted comprehensive written submissions and cited relevant authorities. We have to consider whether the step that was required to be taken is by the Court or by the Plaintiff. If it is by the Plaintiff whether the step is a necessary step to prosecute the action.

I will refer to the authorities submitted by the parties.

In Lorensu Appuhamy v.Paaris 11 NLR 202- 204 (reversing the order of the District Judge) the Supreme Court held *"that the order of abatement was wrongly made, as the plaintiffs had not failed to take any necessary step in the action, and the said order should be vacated"*

In this case the defendants had filed their answers. The next step is to fix the date for trial. It was held that *' In the present case the appellants had done all that the law required of*

them. The duty of fixing the day of trial rested, under section 80 of the Civil Procedure Code, on the court''

It was held that the word necessary means "*rendered necessary by some positive requirement of the law. We ought not to interpret it as if the section ran without taking any steps to prosecute the action which a prudent man will take under the circumstances*."

It was further held that the Court could act ex mero motu to abate a case as there is no fetter imposed by section 402 of the Civil Procedure Code to prevent the Court making an order ex mero motu.

In Suppramaniam Vs Symons 18 NLR 229 the case was struck off the roll as parties were negotiating for a settlement. It was held that it was necessary for the plaintiff to get the case restored to the roll before there was any further obligation on the Court

Further it was held that the *" A Court has the power under section 402 of the Civil Procedure Code to make an order of abatement ex mero motu".*

In *Associated Newspapers Limited Vs Kadirgama* (1934) 36 NLR 108 Wood Renton J at page 204 stated

"*The Appellants had within the meaning of Section 402 taken every step incumbent upon them with a view to the prosecution of the action. I think that when that section uses the word 'necessary' it means rendered necessary by some positive requirement of the law'. We ought not to interpret it as if the section ran without taking any steps to prosecute the action which a prudent man would take under the circumstances'. In the present case, the Appellant had done all that the law required of them*

In *Chittambaram Chettiar Vs Fernando* 49 NLR 49 Thambiah J held that:

"both on principle and authority it seems to us that unless the Plaintiff has failed to take steps rendering necessary by the law to prosecute his action an order of abatement should not be made under Section 402 of the Civil Procedure Code."

The Plaintiff- Appellant had cited the case of *Samsudeen Vs Eagle Star Insurance* 64 NLR 372 in support of his position.

It was held by the Supreme Court that :

"the order of the Court laying by the case cast no duty on the Plaintiff to restore it to the roll and therefore the order of abatement wrongly made. The duty of fixing the day of the trial rested on the Court. Unless the plaintiff had failed to take a step rendered

necessary by the law to prosecute his action, an order of abatement could not be made under section 402 of the Civil Procedure Code".

The Court further held that:

"the long line of decisions reviewed favours the view that an order of abatement could be made under Section 402 of the Civil Procedure Code only if the Plaintiff has failed to take a step rendered necessary by law.

Therefore it is the contention of the Plaintiff- Appellant that unless the Plaintiff is mandated by law to take steps required, non-prosecution for a period in excess of 12 months from the last entry does not entitle a court to enter an order of abatement.

In *Bank of Ceylon Vs Liverpool Marine & General Insurance Co. Ltd* 66 NLR 472 his Lordship Justice L.B. De Silva having considered the conflicting views adopted in previous cases and referring to the judgment in of *Samsudeen Vs Eagle Star Insurance* 64 NLR 372 stated:

"We see no reason to depart from the view taken in that case. We hold that the order of abatement was wrongly entered by the District Judge in this case as there was no step that was necessary to prosecute the action, which the Plaintiff was required to take."

It is the submission of the Defendant-Respondents that Journal entry 3 and 4 imposes a 'positive' requirement in terms of the law on the Plaintiff to take steps to serve summons and proceed with the action. The Defendant-Respondents referred to Journal entries No.3 & 4 both state as follows:

"පැමිණිල්ලේ පියවර"

Therefore it is the contention of the Defendant-Respondents that this case could be clearly distinguished from instances where the Court has failed to take steps to serve summons.

It was submitted by the Defendant-Respondents that since the Journal entry No. 5 dated 01/12/1994 whereby the Plaintiff-Appellant filed a motion to revoke the proxy which was subsequently granted, no steps were taken by the Plaintiff-Appellant to prosecute the action until 01/09/2009'. The question that has to be considered is whether the next step should be taken by Court or by the Plaintiff. It is the position of the Respondents that Plaintiff should have filed a new proxy to proceed with the action and in the circumstances the case could not have proceeded without a step on the part of the Plaintiff-Appellant.

The Respondents further submitted that the Appellant had also failed to act vigilantly to prosecute the action. "Vigiliantibus non dormientibus acquitas subvenir; equity aids the vigilant, not the ones who sleep over their rights"

In this case, the order of abatement made by the Court is not an order made ex mero motu. The court had given an opportunity for both the Plaintiff-Appellant and the Defendant-Respondents to make their submissions and thereafter made an order.

Therefore the question of Court making an order ex mero motu will not arise in this case. However it was held in series of cases that the Court could make an order ex mero motu though it is desirable that the Court should issue notice on the parties and after hearing an order for abatement is made.

In this case the last journal entry that has to be considered is 05/10/1994. Thereafter the Plaintiff- Appellant had failed to take steps until 01/09/2009. Prior to 05/10/1994 fiscal had reported that the Defendants had sold the land and left the premises. In order to proceed with the action the Plaintiff is required to ascertain the present addresses of the Defendants and file papers and move for summons which step the Plaintiff failed to take until 2009 which is almost after the lapse of 16 years. This step is an essential and a necessary step to be taken by the Plaintiff. The Plaintiff had failed to take a necessary step to prosecute her case before a lapse of 12 months from 05/10/1994. Therefore her action was liable to be abated and the District Judge should have made an order to the effect that the action was abated. The judgment of the High Court (Civil Appeals) holding that the Plaintiff's action was abated under section 402 of the Civil Procedure Code is in accordance with the law.

We uphold the order of abatement made by the High Court (Civil Appeals) and dismiss the Appeal. No Costs.

Chief Justice.

B.P.Aluwihare, P.C. J.

I agree

Judge of the Supreme Court

Vijith Malalgoda, P.C. J.

I agree

Judge of the Supreme Court