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

In the matter of an application for Special Leave to Appeal against the order dated 20.10.2014 in the Court of Appeal of the Democratic Socialist republic of Sri Lanka in Case No: CA/831/99(F).

Case No: SC/APPEAL 44/15

SC/SPL/LA/235/14

CA Appeal No: 831/99/F

DC Avissawella Case No: 16127/P

1. Rupasinghe Arachchige Don Ananda,

Kumara Rupasinghe of Mawalgama, Waga.(Deceased)

1a. Welikala Lalitha

1b. Roshan Chinthala Rupasinghe

1c. Roshan Lakmal Rupasinghe all of

128/A, Miriyawatte, Mawalgama, Waga

2. Rupasinghe Arachchige Don Sarath Kumara Ruupasinghe of Mawalagama, Waga.

3. Rupasinghe Arachchige Don Esonsingho of Kudagama, Avissawella.

3a. Rupasinghe Arachchige Don Robert Rupasinghe.

PLAINTIFF

-VS-

1. Rupasinghe Arachchige Don Jayawardane Rupasinghe.

2. Rupasinghe Arachchige Don Albertsinghe of Mawalgama, Waga.

3. Rupasinghe Arachchige Dona Violet.

4. Hewawasam Puwakpitiyage don Karunarathne.

5. Rupasinghe Arachchige Don Leelarathene, and 15 others Defendants.

DEFENDANTS

1. RupasingheArachchige Don Ananda,

Kumara Rupasinghe of Mawalgama, Waga.(Deceased)

1a. WelikalaLalitha

1b. Roshan ChinthalaRupasinghe

1c. Roshan LakmalRupasinghe all of

128/A, Miriyawatte, Mawalgama, Waga

2. Rupasinghe Arachchige Don Sarath Kumara Ruupasinghe of Mawalagama, Waga.

3. Rupasinghe Arachchige Don Esonsingho of Kudagama, Avissawella.

3a. Rupasinghe Arachchige Don Robert Rupasinghe.

PLAINTIFF-RESPONDENTS

1. Rupasinghe Arachchige Don Jayawardane Rupasinghe.

2. Rupasinghe Arachchige Don Albertsinghe of Mawalgama, Waga.

3. Rupasinghe Arachchige Dona Violet.

4. Hewawasam Puwakpitiyage don Karunarathne.

5. Rupasinghe Arachchige Don Leelarathene

DEFENDANTS -RESPONDENTS

AND BETWEEN

B.A. Piyasena of Mawalagama ,

Waga

DEFENDANT-APPELLANT- PETITIONER

Vs.

Tharanga Sumuduni Rupasinghe of

'Thusitha',Mawalgama, Waga.

Disclosed Defendant Respondent Seeking to be substitution in place of the deceased

Rupasinghe Arachchige Don Jayawardena Rupasinghe (1st Defendant –Respondent) and 20 other Defendant Respondents as per the caption.

AND NOW IN SUPREME COURT BETWEEN

B.A. Piyasena of Mawalagama ,

Waga

9TH DEFENDANT-APPELLANT-PETITIONER-PETITIONER

Vs.

1. RupasingheArachchige Don Ananda,

Kumara Rupasinghe of Mawalgama, Waga.(Deceased)

1a. WelikalaLalitha

1b. Roshan ChinthalaRupasinghe

1c. Roshan LakmalRupasinghe all of

128/A, Miriyawatte, Mawalgama, Waga

2. Rupasinghe Arachchige Don Sarath Kumara Ruupasinghe of Mawalagama, Waga.

3. Rupasinghe Arachchige Don Esonsingho of Kudagama, Avissawella.

3a. Rupasinghe Arachchige Don Robert Rupasinghe.

PLAINTIFF-RESPONDENT-RESPONDENT-RESPONDENTS

1. Rupasinghe Arachchige Don Jayawardane Rupasinghe.

2. Rupasinghe Arachchige Don Albertsinghe of Mawalgama, Waga.

3. RupasingheArachchige Dona Violet.

4. HewawasamPuwakpitiyage don Karunarathne.

5. Rupasinghe Arachchige Don Leelarathene

6. Rupasinghe Arachchige Don Piyasasa Rupasinghe of Mabula, Waga (Deceased)

6a. Rupasinghe Arachchige JanakaRupasinghe of 15 Waga, Kahahena.

7. Keerthisena Jayasinghe of Mawalgama, Waga.

8. Don Thomas Rupasinghe of Mawalagama, Waga.

10. Rupasinghe Arachchige Dona Susilawathie Nee Bamunu Arachchige Thilakarathne of 30/3, Mawathagama, Homagama.

11. RupasingheArachchigeLilinona of School Lane, Galagedara, Padukka.

12. Rupasinghe Archchige Dona Kuralinenona of Ihala Kosgama, Kosgama.

13. Don Ernest Rupasinghe of Mawalgama,(Deceased)

13a. Rupasinghe Arachchige Don Hemachandra Rupasinghe of Mawalgama, Waga.

14. D.T. Rupasinghe

15. A.Robert

16. B.A.Piyasena

17. Keerthisena Jayasinghe of Kahahena, Waga

18. Welikanna Mohottige Jayawardhane of Kahahena, Waga.

19. Welikanna MohottigePiyadasa of Kahahena, Waga.

DEFENDANT-RESPONDENT-RESPONDENT-RESPONDENTS.

Before: Priyantha Jayawardena, PC, J.

L.T.B Dehideniya J.

M.N.B. Fernando, PC.J.

Counsel: Dharmasiri Karunarathne for the Defendant – Appellant - Petitioner

B.O.P. Jayawardena for the 1(a), 1(b), 1(c) and 2nd Plaintiff- Respondent-Respondent-Respondents.

S. Arachchige with G.R.D.Obeysekara for the 6A Defendant-Respondent-Respondent-Respondents.

Argued on: 07/09/2018

Decided on: 14/12/2021

L.T.B. Dehideniya, J.

The Defendant-Appellant-Petitioner-Petitioner (hereinafter some time called and referred to as the 'Appellant') is the 9th defendant in the Partition case No 16127/P in the District Court of Avissawella. The Appellant has presented a statement of claim seeking the prescriptive title of the house marked "B" and Lavatory Marked "A" in Lot 2 of the preliminary plan. After the trial Learned District Judge of Avissawella, by the judgement dated 24th September 1999, dismissed the petitioner's prescriptive claim and ordered a partition in accordance with

the pedigree, set out by the Plaintiff-Respondents- Respondents- Respondents (hereinafter sometimes referred to as the 'Respondents') and accepted by the other defendants.

Being aggrieved by the said judgement the Appellant had made an Appeal to the Court of Appeal. While this appeal was being heard, the Court was informed the death of the first Plaintiff-Respondent on 16th May 2011.On that occasion, however, the Appellant had taken six dates to correct the record by substituting on behalf of the deceased.

On 28th June 2013 it was brought to the notice of Court that the 1st Defendant – Respondent also dead. The case had been down for seven days for substitute since then.

28.06.2013 – 1st Defendant –Respondent died

30.08.2013- moves further date to take steps

30.09.2013- moved date to tender additional documents

08.11.2013- move for date to support

12.11.2013- moved further date for required documents

09.12.2013- moved date to support with certified copies

13.12.2013- Appeal is abated.

When the case was called on 13th December 2013 for the substitution, the Defendant-Appellant was absent and unrepresented and application for substitution was not supported. Therefore, the Court abetted the appeal.

Appellant had made an application to relist the appeal stating that, he was present in Court at the time and the Counsel for the Appellant was not available due to sickness. The Counsel arranged to appear was late. He further submits that the certified copies of the relevant documents had been tendered to Court by way of a motion prior to that date. His argument is that once the documents are tendered it need not be supported and the Court is duty bound to take necessary action to do the substitution. Therefore, the Appellant claims that the order to Abate was *per incuriam* and suffered him tremendous hardship and irreparable loss through no fault of his own.

The Court of Appeal promptly directed the registrar not to return the records to District Court. But after inquiry Court observed that there was no affidavit in support of the above position at least from the Appellant or from the Counsel, who was arranged to appear on that day. Therefore on 20.10.2014, the relisting application was rejected and the Court affirmed the abatement. The Appellant made an Appeal against the said order, which claimed to be *per incuriam.*

Court granted leave to appeal on the following questions of law.

1. Did the Court of Appeal err in law and in facts resulting in a serious miscarriage of justice when it held that it was justifiable and lawful to abate the Appeal under the circumstances of this case depriving the right of the appellant to get his Appeal heard and it is not *per incuriam* order to abate the Appeal?
2. Did the Court of Appeal err in law and in facts in applying Sec. 760 A of the Civil Procedure Code and its relevant provisions read with Supreme Court Rules and the case law relating to substitution?
3. Did the Court of Appeal err in law in facts by not recording a descriptive Journal Entry and by confining to a short and shrewd Journal entry like "Counsel Moves for a further date" when the evidence generated/ documents filed in the record and what really happened are totally different to what is stated by the Journal Entry?
4. Did the Court of Appeal err in law and in facts on 08.11.2013 by not issuing Notice to the Daughter to be substituted based on the documents already filed in the record and when the counsel supported the matter on that basis in accordance with the legal requirements?
5. Did the Court of Appeal err in law and in facts by maintaining 2 different standards variable according to the wish of the judge?

The first question of law is whether the Appellant's legal right to have his appeal heard is being disregarded by the said abate. The Appellant claimed that the Court of Appeals erred in dismissing the case when he had already submitted certified copies of all relevant documents relating to the substitute on behalf of the deceased 1st Defendant- Respondent.

Although an aggrieved party has the right of appeal, the Court of Appeal acted on Rule 13 of the Court of Appeal Rules 1990, In this case, the applicant had failed to prosecute the appeal with appropriate diligence.

"*13. It shall be the duty of the petitioner to take such steps as may be necessary to ensure the prompt service of notice, and prosecute his application with due diligence."*

The Appellant's duty and legal obligation is to support and move Court to obtain the remedies requested for in the written applications. It will not be absolved by just filling of papers or sending motions. If the application is not supported the Court may hold that the applicant is not prosecuting diligently and the Court had determined that the Appellant did not act with due diligence. The Appellant was not present and unrepresented on 13thDecember 2013. He acted in the same manner on multiple occasions, before the abatement. Despite the fact that the Appellant claims that another lawyer has been engaged to represent him, no affidavit from that lawyer has been submitted to the Court. The Appellant has not named the lawyer, who he claims has been arranged to represent him. The presumption raised in these circumstances is that the Appellant has not been truthful to the court.

Wood Renton CJ held as follows in ***Supramanium Vs Symons*** [18 NLR 229],

"People may do what they like with their disputes as long as they do not invoke the assistance of the Courts of Law. But whenever that step has been taken they are bound to proceed with all possible and reasonable expedition, and it is the duty of their legal advisors and of the Courts themselves to seek that this is done. The work of the Courts must be conducted on ordinary business principles, and no Judge is obliged, or is entitled to allow the accumulation upon is cause list of a mass of inanimate or semi animate actions."

Wood Renton CJ has clearly held in the above-mentioned Judgment that a party is obligated to take actions and proceed with all possible and reasonable dispatch to prosecute an action without allowing it to accrue the case list. Courts should not be overburdened with cases. Cases should be resolved as soon as possible. In this case, I am inclined to concur with the Court's decision to dismiss the matter.

On the other hand the grounds for relisting the appeal was that the order was *per incuriam,* which can be overturned by the same court. Concerning the meaning of the *per incuriam,* Wijetunga, J. observed in ***Gunasena v Bandaratillake*** [2000] 1 Sri LR 292 at page 302:

'The phrase per incuriam has been defined in Whertons' Law Lexicon. 13th edition at page 645, as thorough want of care. An order of the court obviously made through some mistake or under some misapprehension is said to be made per incurriam. Classen's Dictionary of Legal Words and Phrases, 1976 edition defines per incurriam at page 137 as by mistake or carelessness, therefore not purposely or intentionally."

Considering the above - mentioned definitions, and the fact that it has asserted *per incuriam* in instances that do not fall within this scenario. Even though the previous judgment contained a clear error, the Court of Appeal had inherent authority to correct it so that a party would not suffer as a result of a lapse on the part of the court. The Court of Appeal followed the method it deemed most suitable under the circumstances. As a result, the Court order to abate cannot be *per incuriam*. It was correct and lawful.

Another question of law arises in fact by not recording a descriptive Journal Entry and by confining to a short and shrewd journal entry. The Journal is the primary record of all acts and impotent events under Section 92 of the Civil Procedure Code.

"*92. With the institution of action a court shall commence a journal entitled as of the action, in which shall be minutes as they occur, all of the course of the action...*"

This section passes a burden on preceding judge to record all of the course of the action as occur. It is an official act that the judicial officer has to perform. Under Section 114 of the Evidence Ordinance the Journal Entry is presume to be correct. It has been held in ***Seebert Silva vs. Aronona Silva*** [60 NLR 272] that the Court is entitled to presume that the Journal Entries made in a case are in compliance with the requirements of Section 92 of the Civil Procedure Code. Further at Page 275 it has been held that,

"*A Journal has been maintain in this action and the Court is entitled to presume that it was regularly kept this presumption which arises under Section 114 of the evidence ordinance is based on the maxim 'Omnia praesumuntur rite et solemniter esse acta' this presumption is of course rebuttable but the respondents, of whom is the burden, have not placed before the court sufficient material to rebut it."*

In the present action though, the Counsel complained that the Judge had not entered the situation that had happened in the open Court correctly, the presumption of the correctness of the Journal Entry cannot be rebutted by just an allegation made from the bar table. It must be established - where the burden lies on the person who challenges the correctness of the Journal Entry - with proper evidence. In this case the Appellant has not tendered sufficient evidence to establish that Journal Entry is incorrect.

The other question of law concerns the applicability of Section 760 A of the Civil Procedure Code and its relevant provisions in conjunction with Supreme Court Rules and case law relating to substitution. Whether the court could request the original documents of the substitution without acting on photocopies.

Section 760A of the Civil Procedure Code provides that if, at any time during the pendency of an Appeal, one of the parties to the Appeal dies or changes his legal status, the Court before which the appeal is pending may determine, in the manner provided in the Supreme Court Rules.

> *"..... who, in the opinion of the court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who had died or undergone a change of status, and the name of such person shall thereupon be deemed to be substituted or entered on record as aforesaid." (Emphasis added)*

In accordance with Rule 38 of the Supreme Court Rules, that determination must be based on "sufficient material" submitted to the Court establishing that the person who seeks to be substituted is the "appropriate person."

Thus, it is demonstrated that applying Sec. 760 A of the Civil Procedure Code and its relevant provisions read with Supreme Court Rules and case law relating to substitution and issuing Notice to the legal hairs, is not an obligation of courts. It is the Appellant's responsibility to furnish all essential documentation with proper diligence.

The next legal question is maintaining two different standards that are variable according to the judge's wishes. In this case, it indicates that one judge allowed photocopies while the other did not.

It is common knowledge that original documents or a duly certified copy of the document (in the absence of the original) are normally presented before the Court. The phrase "duly certified copy" must imply that the authority responsible for its issue certified the copy submitted to Court as a copy duly obtained from the original. Only then Court can rely on and act on such a document. Because Courts make orders based on such documents can occasionally have serious consequences for people. People who are affected by a case are not always limited to the parties involved. If the Court issues such orders on a set of papers whose legitimacy is later called into question, severe consequences may result. It would be relevant at this stage to quote the following paragraph from the judgment of this Court in the case of ***Attorney General Vs Ranjith Weera Wickrema Charles Jayasinghe***. [CA (PHC) APN /74/2016] After considering the significance and underlying reasons for the demand on rigorous conformity, this Court said in that matter as follows:

> " ..... *Moreover, the above rule underlines the importance of the presence of an authoritative and responsible signatory certifying such copies taking their responsibility for the authenticity of such documents. Insisting on tendering to Court, such duly certified copies of relevant proceedings is not without any valid and logical reasons. Courts make orders relying on such documents. They may sometimes have serious effects on people. The persons who may be so affected might sometimes be not limited to parties of the case only. Drastic repercussions may ensue in case the Court makes such orders on some set of papers, authenticity of which would subsequently become questionable*."

So, if a judge is dissatisfied with the photo copies, he has the authority to request the original documents instead. The court gave the applicant four days to furnish the required documentation and to take steps to gain the Court authorization, but the applicant did not submit it until 13th December 2013, and was unrepresented in court. In such cases, the Court's only option is to decide whether and how much time should be provided for timely filing of papers or to dismiss the matter. The Court had taken the latter option. It is not *per incuriam*.

I answer the questions of law as followings,

1) No

2) No

3) No

4) No

5) No

I dismiss the appeal with the cost fixed at Rs. 25000.00

Judge of the Supreme Court

Priyantha Jayawardena, PC. J.

I agree.

Judge of the Supreme Court

M.N.B. Fernando, PC.J.

I agree

Judge of the Supreme Court