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

In the matter of an Application for Leave to Appeal from the Order of the High Court of the Western Province (exercising Civil/Commercial jurisdiction) holden in Colombo dated 04/09/2015 under an in terms of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Provisions of the Civil Procedure Code.

Merchant Bank of Sri Lanka PLC,
No. 189, Galle Road, Colombo 03
and presently of
No. 28, St. Michael's Road,
Colombo 03.

Plaintiff

SC Appeal No. 193/2015

SC/HC/LA 43/2015

HC Case No. HC/Civil/496/09/MR

Vs

1. Kumarasinghe Ranjith Rajakaruna,
   No. 223, Rajamaha Vihara Road,
   Mirihana,
   Kotte.

2. Albert Nadaraja Manoharan,
   No. 27, Janadhipathi Vidyala Mawatha,
   Rajagiriya.

Defendants

An Application under Sec. 402 of the Civil Procedure Code.

Kumarasinghe Ranjith Rajakaruna,
No. 223, Rajamaha Vihara Road,
Mirihana,
Kotte.

1st Defendant-Petitioner

Vs

Merchant Bank of Sri Lanka PLC,
No. 189, Galle Road, Colombo 03
and presently of
No. 28, St. Michael's Road,
Colombo 03.

Plaintiff-Respondent-Respondent

Albert Nadaraja Manoharan,
No. 27, Janadhipathi Vidyala Mawatha,
Rajagiriya.

2nd Defendant-Respondent

AND NOW

Kumarasinghe Ranjith Rajakaruna,
No. 223, Rajamaha Vihara Road,
Mirihana,
Kotte.

1st Defendant-Petitioner-Appellant

Vs

Merchant Bank of Sri Lanka PLC,
No. 189, Galle Road, Colombo 03
And presently of
No. 28, St. Michael's Road,
Colombo 03.

Plaintiff-Respondent-Respondent

Albert Nadaraja Manoharan,
No. 27, Janadhipathi Vidyala Mawatha,
Rajagiriya.

2nd Defendant-Respondent-Respondent

Before:	Buwaneka Aluwihare, PC, J. L. T. B. Dehideniya J. & P. Padman Surasena J.
Counsel:	Presanna S. Ekanayake with Mrs. Dilekha Weeratunga for the 1st Defendant-Petitioner-Appellant. Suresh Phillips with Ms. Pushpa Damayanthi instructed by Mrs. Theranjanie Attanayake for the Plaintiff-Respondent-Respondent.
Written Submissions:	Appellant- 17th December 2015 and 1st February 2021 Respondent- 18th February 2016
Argued on:	19. 01. 2021
Decided on:	24. 02. 2021

Judgement

Aluwihare PC J.,

The Plaintiff-Respondent-Respondent (hereinafter sometimes referred to as the 'Plaintiff') instituted action in the Commercial High Court of Colombo against the 1st and the 2nd Defendant-Respondent-Respondent (hereinafter sometimes referred to as the '1st and 2nd Defendants respectively') on the premise that they failed to honour the terms and conditions of a Guarantee Bond signed by the 1st and the 2nd Defendants, securing the re-payment of the monies lent to the Principal Debtor by the Respondent Bank.

The Sequence of Events

Court issued summons on the 1st and 2nd Defendants and the summons had been served on the 1st Defendant. On 5th May 2010, when the matter was called before the court, an Attorney-at-Law had appeared on behalf of the 1st Defendant and moved for time to file the Proxy and the Answer.

Accordingly, the matter was fixed for the 17th June 2010, for the filing of the 1st Defendant's Proxy and Answer. When the matter was called on 17th June 2010, both the Plaintiff and the Defendants had been absent, as such there had been no order made by the Court. The journal entry states "*Plaintiff is not present. Defendants are not present. No order.*"

More than three years later, on 7th November 2013 the Plaintiff moved the Court to re-issue summons against the 1st and 2nd Defendants. The Fiscal had reported that he was unable to serve summons, since the 1st Defendant's house was closed. Thereafter, on 4th July 2014 the Plaintiff moved Court to have summons served on the 1st Defendant by way of substituted service, which was allowed.

When this matter came up before the Court on 28th October 2014, a Proxy had been filed on behalf of the 1st Defendant. The 1st Defendant however, did not proceed to

file an answer, but moved court to apply the provisions embodied in Section 402 of the CPC and sought the dismissal of the Plaintiff's case. The Plaintiff filed objections [19th March 2015] against the said application of the 1st Defendant and the matter was fixed for inquiry on 23rd June 2015. The inquiry into the Section 402 application was concluded based on the written submissions filed by the respective parties and the Order was pronounced on 4th September 2015.

The Order of the High Court

The Court by the said order held that Section 402 of the CPC ought not to be applied in the given situation. The learned Trial Judge [predecessor of the learned High court judge whose order is impugned in these proceedings] observed that, although none of the parties was present when the matter came up before Court on the 17th June 2010 and the record was journalized as "*no order*", by motion dated 07th November 2013, the Attorney-at-Law for the Plaintiff, nevertheless, had got the case called on the 13th November 2013 [Journal entry No. 6]. The learned High Court Judge had also observed that, according to the journal entry No. 6, the Plaintiff had obtained an order to have summons re-issued on the 1st Defendant and had taken steps to have summons served on the 1st Defendant.

The learned High Court Judge having formed the view, that his predecessor, by making an order to have the summons re-issued, had thought it fit to entertain the application of the Plaintiff, it would not be appropriate at that juncture for him to exercise the discretion vested with the Court in terms of Section 402 of the CPC in favour of the 1st Defendant and rejected the application of the 1st Defendant.

Aggrieved by the aforesaid order, the 1st Defendant is now canvassing the legality of the same before this court.

This Court granted Leave to Appeal and the question that was raised before us was; "***whether the impugned order is contrary to Section 402 of the CPC in that the learned High Court Judge erred in law by failing to consider the material facts in the correct***

perspective, thus misdirecting himself in law.' [paragraph 2 of the petition of the 1st Defendant]

It was argued on behalf of the 1st Defendant that, since the Plaintiff had failed to take any steps to prosecute the action for a period exceeding three years, the Court ought to have made an order to abate the action in terms of Section 402 of the CPC.

The Learned Counsel for the 1st Defendant-Appellant argued that the Plaintiff defaulted, by not being present in court on 17th June 2010 and did not take any step to prosecute the case until 7th November 2013 thus, satisfying all the conditions for an order of abatement of the action, in terms of Section 402 of the CPC.

If I may refer to the sequence of events, as per the relevant journal entries they are as follows.

On 17th June 2010:

> Neither the Plaintiff nor the Defendant was present, and it was journalized as "*No order*".

On 7th November 2013:

> Plaintiff filed a motion and moved to have summons re-issued on the Defendants and to have the matter called on 17th January 2014 as the summons returnable date.

On 13th November 2013:

> The Court having considered the motion [dated 7th November 2013] ordered to have summons re-issued on the Defendants returnable on 17th January 2014.

Although there appears to be a lack of diligence on the part of the Plaintiff to take necessary steps with regard to the case, the Plaintiff also had faced numerous difficulties in having summons served on the Defendants. The 1st Defendant-Appellant appeared before Court on 3rd September 2014 only after summons were served through substituted service.

Section 402 of the CPC 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.*" [emphasis is mine]

What is significant is that, in terms of Section 402 of the CPC, making an order *'that the action shall abate'*, is discretionary as indicated by the choice of the word 'may'; "*the court* ***may*** *pass an order*". Thus, even in instances where twelve months had lapsed, subsequent to the date of the last entry of an order or proceeding, without the Plaintiff taking any step to prosecute action, there is no compulsion on the court to pass an order to abate the action.

Although the statutory provision does not so stipulate, the jurisprudence developed over the years now requires the court to make an order abating the action, only after due notice to the Plaintiff. The court should never exercise the power (under section 402) *ex mero motu* (*vide* **Fernando v. Peris** 3 NLR 77). In the case of **Supramaniam et al v. Symons** 18 NLR 229 [at page 231] Wood Renton CJ observed "*It is now, I believe the practice in many of the District Courts for the Judge himself to take the initiative and pass orders of abatement under Section 402* ***after having given due public notice of his intention to do so.***" [emphasis added]

The Learned High Court Judge necessarily would have been alive to the fact that more than three years had lapsed since the last entry, when he was called upon to consider the motion of the Plaintiff, moving to have summons reissued. Thus, when he (upon consideration of the motion) permitted the application of the Plaintiff and allowed summons be re-issued, it has to be construed that such permission was given after addressing his judicial mind to the application of the Plaintiff. Thus, it is clear that the Learned High Court Judge, even when he could have exercised his discretion against the Plaintiff under Section 402 and caused the action to abate, decided otherwise. The fact that he did not take steps to inform the Plaintiff (as now required by law) about

any intention to abate the action and that he decided to make an order to reissue summons, is clearly demonstrative of that decision. In my view, the exercise of the discretion by the learned High Court Judge in favour of the Plaintiff is neither unreasonable nor arbitrary, considering the facts and circumstances of this case.

The Learned Counsel for the 1st Defendant-Appellant drew the attention of court to the case of **Buffin v. Anthony Neville and Another** SC Appeal 63/16 SC Minutes 14. 06. 2018. The circumstances of the case of **Buffin** (*supra*) can be clearly distinguished from the case before us. The facts were these. In October 1994 the case was laid by for the reason that the Plaintiff had not taken any steps. In December of the same year (1994) the Plaintiff moved to have the proxy revoked and the court permitted the same. In 2009, almost 16 years later, by way of a motion the Plaintiff, filing a fresh proxy, moved to proceed against two of the Defendants.

When this motion came up for consideration, the court gave its mind to whether Section 402 of the CPC should be applied in view of the fact that the Plaintiff had been dormant for sixteen years and ordered summons on the Defendants affording them also an opportunity to place their position with regard to abating the action of the Plaintiff in terms of Section 402 of the CPC.

Thus it is seen [in the case of **Buffin**], that there had been an uninterrupted gap of sixteen years between the date on which the Plaintiff got the proxy revoked (December 1994) and the date on which the court took into consideration the Plaintiff's application to proceed against some of the Defendants in 2009. Furthermore, the court did not consider the application of the Plaintiff nor did the court make "any entry" relating to the application of the Plaintiff, moving to accept the new proxy. The court, however, gave its mind as to whether that was a fit instance to make an order of abatement in terms of Section 402 of the CPC.

The questions of law that were raised in the case of **Buffin** [*supra*] was quite different to the question of law raised in the present case. The main question that was raised in the case of **Buffin** [*supra*] was whether the motion [fresh proxy] filed by the Plaintiff in that case in 2009 which was journalized as journal entry No.6 should be

considered as the ***'last entry'*** from which the period of 12 months should be counted for the purposes of Section 402 of the CPC.

This was rightly rejected by the Supreme Court for the reason that, the journal entry No.6 referred to above remained merely as an administrative or clerical act which was not visited with a 'judicial mind'. [see the case of **Kumarihamy v. Keerthirathne** 12 Times Law Report pg. 80]

As opposed to that, in the present case the court had considered the application of the Plaintiff on the13th November 2013 and made an order [an entry] allowing the application of the Plaintiff without proceeding to act under Section 402 of the CPC. Thus, it is clear that the Plaintiff had taken "**a step"** in 2013, to prosecute the action and by the order dated 13th November 2013, the court had permitted it.

When the Defendant made the application to abate the action of the Plaintiff on the 28th of October 2014, in terms of Section 402 of the CPC, the learned High Court Judge was required consider;

(1) Whether there was an entry of an order or proceeding in the record in the 12-month period, immediately preceding 28th October 2014.
And if so,

(2) Whether such entry relates to any step taken by the Plaintiff to prosecute the action.

Having given his mind to the conditions referred to above, the learned High Court Judge correctly held that although three years have elapsed between 7th November 2010 and 28th October 2014, by allowing the Plaintiff's application on 13th November 2013, his predecessor had permitted the Plaintiff to take a step to prosecute the action. Therefore, the relevant date for computing the period of 12 months referred to in Section 402 of the CPC is 13th November 2013. Hence, when the learned High court judge was called upon to apply section 402 of the CPC, the Plaintiff had, within a period of 12 months, taken a step rendered necessary by a positive requirement of the law.

In the case of **Samsudeen v. Eagle Star Insurance Co LTD.** 64 NLR 372, Justice Tambiah, after considering a long line of cases held that; *"Both on principle and on authority it seems to us that unless the plaintiff has failed to take a step rendered necessary by the law to prosecute his action, an order of abatement should not be made under section 402 of the Civil Procedure Code".*

Considering the above I am of the view that the Learned High Court Judge had not erred in overruling the preliminary objection raised on behalf of the 1st Defendants and I answer the question of law in the negative.

Accordingly, the appeal is dismissed, and the Respondents would be entitled to the costs of this application.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE L. T. B. DEHIDENIYA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA

I agree.

JUDGE OF THE SUPREME COURT