

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

S.C. Appeal 146/2014
Leave to Appeal Application SC/HCCA/LA/280/2014
WP/HCCA/Col/07/2009/RA
DC/Colombo/1396/DR

Nations Trust Bank PLC
No. 242, Union Place,
Colombo 2.

PLAINTIFF

Vs.

Pulukkuttige Don Dinesh Shammika
Kumara Piyathilake
No. 493, Old Kottawa Road,
Udahamulla.
Nugegoda.

DEFENDANT

Then

In the matter of an application for
revision under and in terms of Article
138 and 145 of the Constitution read
with Section 5A of the High Court of the
Provinces (Special Provisions)
Amendment Act No. 54 of 2006 of an
order of the District Court of Colombo in
case No. 1396/DR

Nations Trust Bank PLC
No. 242, Union Place,
Colombo 2.

PLAINTIFF-PETITIONER

Vs.

Pulukkuttige Don Dinesh Shammika
Kumara Piyathilake
No. 493, Old Kottawa Road,
Udahamulla.
Nugegoda.

DEFENDANT-RESPONDENT

AND NOW

Nations Trust Bank PLC
No. 242, Union Place,
Colombo 2.

PLAINTIFF-PETITIONER-PETITIONER

Vs.

Pulukkuttige Don Dinesh Shammika
Kumara Piyathilake
No. 493, Old Kottawa Road,
Udahamulla.
Nugegoda.

**DEFENDANT-RESPONDENT-
RESPONDENT**

BEFORE: B.P. Aluwihare P.C., J.
Upaly Abeyratne J. &
Anil Gooneratne J.

COUNSEL: Chandaka Jayasundera with Rehan Almeida
For the Plaintiff-Petitioner-Petitioner instructed by Nalin Peiris

Defendant-Respondent-Respondent is absent and unrepresented

ARGUED ON: 18.07.2016

DECIDED ON: 05.10.2016

GOONERATNE J.

This was an action filed in the District Court of Colombo by the Plaintiff-Petitioner-Petitioner, in terms of the Debt Recovery Act No. 2 of 1990 as Amended, and bearing case No. 1396/DR seeking a judgment in a sum of Rs. 861,600/27. The District Judge had on 18.09.2006 issued Order 'Nisi' in compliance with the provisions of Debt Recovery Act, returnable for 02.11.2006. The Respondent however without obtaining Leave to appear and defend the action, on 29.08.2006 filed a statement of objection, incorporating inter alia the following main points.

- (a) Petitioner instituted Case No. 60787/MR on 22.11.2007
- (b) Case No. 60787/MR was withdrawn on 11.03.2008 without reserving the right to institute a fresh action.
- (c) This action instituted after case No. 69787/MR. As such Petitioner has no right to file a fresh action.

However with the above matters urged by Respondent the learned District Judge by his Order of 25.03.2009 held that the Petitioner had no right to file the present action, having withdrawn case No. 69787/MR without reserving the right to institute a fresh action against the Respondent. Petitioner's position

was that the action under the Debt Recovery Act, action was filed before filing case No 60787/MR. Petitioner made an application to the District Court to set aside the above order as it is made per incuriam. This application of the Petitioner was also refused by the learned District Judge by his Order dated 22.04.2009 (D). Aggrieved by the above Order the Petitioner filed a revision application in the High Court to revise the above Order. However by Order dated 12.05.2014 learned High Court Judge affirmed the Order of the District Court and dismissed the revision application. This court on 28.08.2014 granted leave on the following questions of law.

“Was the learned High Court Judge in error in finding that the withdrawal of D.C. Colombo Case No. 60787/MR is a bar to the continuation of the District Court of Colombo Case No. 1396/DR filed prior to the withdrawal”.

The material furnished to this court is to the effect that the Debt Recovery Case bearing No. 1396/DR was filed on 13.07.2006. An amended plaint filed on 29.05.2008 in the Debt Recovery case. The other case alleged to be withdrawn was instituted on 22.11.2007. This is about 17 months after the filing of the Debt Recovery Case 1396/DR. The Order ‘nisi’ in the Debt Recovery Case had been issued by the District Court on 18.09.2006. That is also about 15 months prior to the institution of case No. 60787/MR. Learned High Court Judge also states and finds in the Judgment of the High Court that Case No. 1396/DR

was instituted on 13.07.2006 and case No. 60787/MR instituted on 22.11.2007. Order 'nisi' issued on 13.09.2006 over 14 months before institution of Case No. 60787/MR.

In these circumstances the question is whether the provisions contained in Section 406(2) of the Civil Procedure Code would apply.

Section 406(2) reads thus:

If the plaintiff withdraw from the action, or abandon part of his claim, without such permission, he shall be liable for such costs as the Court may award, and shall be precluded from bringing a fresh action for the same matter or in respect of the same part.

The emphasis in the context of this case should be "fresh action" in relation to the action which was withdrawn. The action withdrawn (Case No. 60787/MR) was the subsequent suit. As such there appears to be some misunderstanding that led both courts to hold against the Petitioner.

On the other hand the District Court having issued order 'nisi' the Defendant should strictly follow the available statutory provisions in terms of the Debt Recovery Act and the Respondent should obtain Leave to appear and defend the action. The requirement to do so are spelt out in Section 6 of the said Act which reads:

Thus:

1. In an action instituted under this Act the defendant shall not appear or show cause against the decree nisi unless he obtains leave from the court to appear and show cause.
2. The court shall upon the filing by the defendant of an application for leave to appear and show cause supported by affidavit which shall deal specifically with the plaintiff claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it, and after giving the defendant an opportunity of being heard, grant leave to appear and show cause against the decree nisi, either –
 - (a) Upon the defendant paying into court the sum mentioned in the decree nisi; or
 - (b) Upon the defendant furnishing such security as to the court may appear reasonable and sufficient for satisfying the sum mentioned in the decree nisi in the event of it being made absolute; or
 - (c) Upon the court being satisfied on the contents of the affidavit filed, that they disclose a defence which is prima facie sustainable and on such terms as to security, framing and recording of issues, or otherwise as the court thinks fit.
3. Where the defendant either fails to appear and show cause or having appeared, his application to show cause is refused, the court shall make the decree nisi absolute. For this purpose, the judge shall endorse the words “Decree nisi made absolute” (or words to the like effect) upon the decree nisi and shall date and sign such endorsement.

Provided that a decree nisi, if it consists of separate parts, may be discharged in part and made absolute in part and nothing herein enacted shall prevent any order being made by consent of the plaintiff and the defendant on the footing of the decree nisi.

It is imperative for the Defendant to have resorted to Section 6 of the said Act and show cause as in Section 6(2) (a) or (b) or (c) above. The failure to do so would result in decree 'nisi' being made absolute. The learned Counsel for the Petitioner in his submission drew the attention of this court to the following decided cases, and assisted this court in all respects.

Ramanayake v. Sampath Bank Ltd. 1993 (1) SLR 145

“The defendant shall not appear or show cause against the order nisi unless he obtains leave from the court. Leave to appear and defend has to be granted upon the defendant paying into court the sum mentioned in the decree or furnishing reasonable and sufficient security for satisfying the decree. Leave may be granted unconditionally where the court is satisfied that the defendant’s affidavit and other material raise an issue or question which ought to be tried (section 6(2) (c) of the Act). The purpose of section 6 is to prevent frivolous or untenable defences and dilatory tactics”.

Furthermore it was held that the Court has to first:

“Decide which of the alternatives under section 6(2) – whether (a), (b) or (c) – has to be followed and the court has to exercise its discretion judicially. The court must briefly examine the facts of the case, set out the substance of the defence and disclose reasons in support of the order”.

W.K.M.D. Perera vs. People's Bank 1994 (2) SLR 344

“A defendant has no status in terms of Section 6 of the Debt Recovery (Special Provisions) Act No. 2 of 1990 to participate in proceedings in an action instituted under the Act until such time he obtains leave of Court. He has first to make an application for the purpose. If he seeks to apply for leave to appear unconditionally, he has to file an affidavit which -

- (a) Deals specifically with the plaintiff's claim stated in the plaint.
- (b) Sets out his own defence to the plaintiff's claim; and
- (c) States what the facts are on which he relies to support his defences.

There is no provision to lead oral evidence on any of these matters at this stage. It is only upon court being satisfied on the material placed before it by the defendant that there is an issue or a question in dispute which ought to be tried that leave to appear and show cause against the decree nisi will be granted”.

The learned High Court Judge takes the view that Petitioner withdrew the case (No. 60787/MR) without reserving the right to file a fresh action. It is also stated that 18 months later thereafter the Petitioner has taken steps in respect of the original case 1396/DR by tendering an amended plaint. High Court observes that duly signed amended order 'nisi' has been served on the Respondent.

I wish to observe that Section 406(2) contemplates the filing of a fresh action. High Court is in error by stating that the Petitioner has taken steps in respect of the original case 1396/DR by tendering amended plaint. The taking of steps and filing a fresh action are not one and the same thing required by law.

Having filed plaintiff parties could move court to file amended plaintiff according to law. If the Plaintiff moves to file amended plaintiff it would be subject to objection of the Defendant and one cannot express the view that filing an amended plaintiff is to file a fresh action.

The material placed before court does not indicate that Defendant objected to the amended plaintiff. Amending pleadings is a right available to parties in the process of a step taken in an action subject to the provisions contained in the Civil Procedure Code. The bar contemplated in Section 406(2) is the filing of a fresh action. Is it fundamental to amendment of pleadings that an amendment of pleadings is not allowed which has the effect of converting an action of one character into an action of another or inconsistent character *Wijewardena vs. Lenora 60 NLR 457; 66 NLR 285*. An amendment is permissible in the same action for the purpose of raising the real question between parties and that an amendment which works an injustice to the other side should not be allowed. High Court misunderstood and erred in law by attempting to equate amendment of plaintiff as a fresh action. Law recognises the rules governing amendment of pleadings in one and the same action and a variety of rules are based on the provisions of the Civil Procedure Code and Section 93 of the Code.

In *Ordiris Silva & Sons Ltd. Vs. Jayawardena 55 NLR 355* where a plaintiff mistakenly named the Defendant as “*Ordiris Silva & Sons*” where in fact,

the Defendant was *Odris Silva & Sons Ltd.* and the court allowed the Plaintiff to amend the caption of the plaint – held for the purpose of reckoning the period of prescription, the action against the company must be taken to have been instituted on the date of the original plaint and not upon the amendment of the caption of the plaint.

When a plaint is returned for amendment and is duly amended, the date of institution of the action is the date on which the plaint was first presented to court. But when the plaint is rejected and a new plaint is filed date of institution of action is the date of new plaint. In the case in hand there is no new plaint or a plaint, but an amended plaint, which action survives from the original date of plaint.

In all the facts and circumstances of the case, Section 406 of the Civil Procedure Code does not apply to the circumstances of the case in hand as action was filed in the Debt Recovery case before case No. 60787/M. Respondent cannot utilise an incorrect procedure. The provisions of the Debt Recovery Act must be strictly complied with in the context of the case in hand.

The only question of law is answered in the affirmative and this appeal is allowed as per the relief prayed for in the Petition of Appeal.

Appeal allowed.

JUDGE OF THE SUPREME COURT

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

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne J.

I agree.

JUDGE OF THE SUPRME COURT