

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

**In the matter of an Application for Leave to Appeal**

Henry Perera Samarakoon,  
No.200, Batahena Road, Sooriyagama,  
Kadawatha.

**Plaintiff**

SC Appeal No. 95/2015  
SC/ HCCA/ LA No. 117/2013  
WP/HCCA/ GPH/ 25/2012 (LA)  
D.C. Gampaha Case No. 1126/L

**-Vs-**

1. Abeysinghe Pathiranage Indrani,  
No.166 / 2 / B, Weboda Road, Kirillawala,  
Kadawatha.
2. Rupasinghe Jayasundara Muhandhiram  
Tilak Pathmasiri Rupasinghage,  
I.G.Gold House, Super Market, Borella,  
Colombo 08.
3. Padma Alwis,  
No.715/1/a, Erawwala Road, Pannipitiya.
4. Sandaradura Nihal Lakshman Silva,  
No. 3/7, Ragama Road, Mahabage.
5. Cader Meedin Mohamed Anzar,  
No.464/2, Kasawatte, Batagoda, Kandy.

**Defendants**

**AND BETWEEN**

5. Cader Meedin Mohamed Anzar,  
No.464/2, Kasawatte,Batagoda, Kandy.

**5<sup>th</sup> Defendant Petitioner**

**-Vs-**

Henry Perera Samarakoon,  
No.200, Batahena Road, Sooriyagama,  
Kadawatha.

**Plaintiff - Respondent**

1. Abeysinghe Pathiranage Indrani,  
No.166/2/B, Weboda Road, Kirillawala,  
Kadawatha.
2. Rupasinghage Jayasundara Muhandhiram  
Tilak Pathmasiri Rupasinghage,  
I.G. Gold House, Super Market, Borella,  
Colombo 08.
3. Padma Alwis,  
No.715/1/a, Erawwala Road, Pannipitiya.
4. Sandaradura Nihal Lakshman Silva,  
No. 3/7, Ragama Road, Mahabage.

**Defendants - Respondents**

**AND NOW BETWEEN**

5. Cader Meedin Mohamed Anzar,  
No.464/2, Kasawatte, Batagoda, Kandy.

**5<sup>th</sup> Defendant – Petitioner - Appellant**

**- Vs-**

Henry Perera Samarakoon,  
No. 200, Batahena Road, Sooriyagama,  
Kadawatha. (Deceased)

Solanga Arachchige Wimalawathie Perera,  
No.200, Batahena Road, Sooriyagama,  
Kadawatha.

**Substituted Plaintiff-Respondent-  
Respondent**

1. Abeysinghe Pathiranage Indrani,  
No.166/2/B, Weboda Road, Kirillawala,  
Kadawatha.
2. Rupasinghage Jayasundara Muhandhiram  
Tilak Pathmasiri Rupasinghage,  
I.G. Gold House, Super Market, Borella,  
Colombo 08.
3. Padma Alwis,  
No.715/1/a, Erawwala Road, Pannipitiya.
4. Sandaradura Nihal Lakshman Silva,  
No. 3/7, Ragama Road, Mahabage.

**Defendants- Respondents -Respondents**

**Before:** S. Eva Wanasundara PC. J.,  
Vijith. K. Malalgoda PC. J. and  
Murdu N.B. Fernando PC. J.

**Counsel:** Rohan Sahabandu PC for the 5<sup>th</sup> Defendant- Petitioner - Appellant  
Sudarshani Cooray for the Substituted Plaintiff-Respondent – Respondent

**Argued On:** 02.07.2018

**Decided On:** 12.12.2018

**Murdu N.B. Fernando, PC. J.**

This appeal before us pertains to an Order rejecting the application to abate an action filed in the District Court of Gampaha. Civil Appellate High Court of Gampaha affirmed the Order of the District Court and the 5<sup>th</sup> Defendant- Petitioner- Appellant (hereinafter referred to as the Appellant) sought leave to appeal from the Civil Appellate High Court Judgment which was granted by this Court on 28.05.2015 on the following questions of law,

- i. Did the Learned High Court Judge as well as the Learned District judge appreciate the due interpretation and meaning of section 402.
- ii. Is there a duty cast on the plaintiff to take steps as ordered by Court and make appropriate application to Court, seeking further assistance and orders to prosecute his action, if he finds that he is not able to proceed according to Law.
- iii. In the circumstances of this case were there any steps taken by the plaintiff to prosecute the action for over 12 months from 21.06.2010.
- iv. Did the Learned High Court Judge fail to appreciate that, what is referred to in Section 402 is to prosecute the action and not action against any single defendant.
- v. In the circumstances of the case, were there laches on the part of the plaintiff which has occasioned a failure of justice.

Thus the pivotal matter to be decided by this Court is whether the learned District Judge was correct in rejecting the application dated 21.02.2012 to lay by the case under Section 402 of the Civil Procedure Code as no steps had been taken by the plaintiff for a period exceeding 12 months after Court made order on 21.06.2010 “to take steps against the 3<sup>rd</sup> and 4<sup>th</sup> defendants and move.”

To set out the factual background, the plaintiff (now deceased and substituted before this Court by the Substituted Plaintiff-Respondent-Respondent) instituted action dated 19.06.2006 against four defendants upon the basis that the four defendants were holding the “land” (more fully described in the schedule to the plaint) on a constructive trust in favour of the plaintiff and sought an Order **(i)** directing the 4<sup>th</sup> defendant to execute a deed and transfer the land to the plaintiff accepting the sum referred to in the plaint with interest, **(ii)** in the event of the failure of the defendant to transfer the land to the plaintiff, order the Court Registrar to transfer the land, **(iii)** an alternative remedy for a declaration that the four deeds referred to in the plaint are deemed to be cancelled, and **(iv)** damages in a sum of Rs. 1,000,000 against the 4<sup>th</sup> defendant.

The plaintiff also alleged, that the land referred to in the schedule to the plaint was transferred by way of a deed in the year 1995 by the plaintiff to the 1<sup>st</sup> defendant as security for a loan obtained, but not specifically stated in the deed, thereafter the land was transferred by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant and the 2<sup>nd</sup> defendant to the 3<sup>rd</sup> defendant and then by the 3<sup>rd</sup> defendant to the 4<sup>th</sup> defendant upon deeds as security for further loans obtained by the plaintiff and being aware that the 4<sup>th</sup> defendant was taking steps to alienate the land the plaintiff made a request to redeem the land and on the failure of the 4<sup>th</sup> defendant to accede to the request of the plaintiff, plaint was filed in the year 2006.

Journal entries in the District Court Record, indicates that summons were initially served only on the 2<sup>nd</sup> defendant and thereafter the plaintiff moved Court to serve notice of interim injunction on the 4<sup>th</sup> defendant but Summons nor notice was served, and in October 2007, the present Appellant moved the District Court to be added as a defendant on the basis of a bona fidae purchaser of the land which application was permitted by Court and the present Appellant was added as the 5<sup>th</sup> defendant to the District Court Case. Thereafter answer was filed by the 5<sup>th</sup> defendant praying for a declaration of title to the land on the basis of a bona fidae purchaser and damages against the plaintiff. Replication was filed by the plaintiff in 2009. Journal entries also reveal that although the Court has made order on numerous occasions to take steps pertaining to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants (by providing the correct addresses, stamps, envelopes) the plaintiff has failed to do so. I observe that the 5<sup>th</sup> defendant in his answer has stated that the 1<sup>st</sup> defendant is dead and on 08.03.2010, the plaintiff informed Court that action will not be pursued against the deceased 1<sup>st</sup> defendant and the case against the 1<sup>st</sup> defendant was dismissed.

According to Journal entry dated 21.06.2010 the Court fixed the case for ex-parte trial against the 2<sup>nd</sup> defendant and trial against the 5<sup>th</sup> defendant. The post script to the Journal entry of the date states 'plaintiff is not aware of the 3<sup>rd</sup> and 4<sup>th</sup> defendants. Take steps and move.' This is the pivotal journal entry which this Court has to examine.

By motion dated 22.02.2012, the 5<sup>th</sup> defendant moved Court to dismiss or lay-by the District Court case as the plaintiff has failed to take steps for a period exceeding 12 months. The District Court heard the plaintiff and the 5<sup>th</sup> defendant pertaining to the above application, called for written submissions and thereafter on 18.05.2012 rejected the motion and made order that action can proceed when the addresses of the 3<sup>rd</sup> and 4<sup>th</sup> defendants are known.

The Civil Appellate High Court affirmed the said Order on 14<sup>th</sup> February 2013 and stated that the plaintiff has taken steps to supply summons to be issued by Court and therefore being unaware of the defendants' whereabouts cannot be attributed as a fault of the plaintiff.

Being aggrieved by this order, the 5<sup>th</sup> Defendant-Petitioner-Appellant has come before this Court.

The application to lay by the District Court Case by the Appellant was made under Section 402 of the Civil Procedure Code. Section 402 of the Civil Procedure Code reads as follows,

**"If a period exceeding twelve months in the case of a District Court ....elapse subsequent 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 submission of the Appellant before this Court is, since no steps had been taken by the plaintiff for over 18 months subsequent to the last journal entry dated 21.06.2010, wherein it is minuted "take steps and move", District Court should have laid by the case.

The Substituted Plaintiff-Respondent-Respondent (hereafter referred to as the Respondent) takes up the position that there were no steps for the plaintiff to take as the plaintiff has tendered the necessary documents to serve summons on the 3<sup>rd</sup> defendant as far back as in January 2009 and with regard to the 4<sup>th</sup> defendant, plaintiff was not in a position to ascertain the correct address of the 4<sup>th</sup> defendant and therefore substituted service of summons on the 4<sup>th</sup> defendant was not possible and in the absence of a specific procedure laid down in the Civil Procedure Code as to what the plaintiff ought to do in such a situation, dismissing the action of the plaintiff without a trial is unreasonable and unfair.

Let me now advert to the position of the Respondent stated above.

It is undisputed that the plaintiff filed this action to obtain relief and the principal relief sought was against the 4<sup>th</sup> defendant. Thus, for the plaintiff to obtain relief prayed for plaintiff should bring the 4<sup>th</sup> defendant before Court. Failure of the plaintiff to do so would be to his own detriment. The first step to bring the 4<sup>th</sup> defendant before Court is to serve summons on him and if the plaintiff fails to do so, he should bear the consequences. In the instant case, the plaintiff has failed to give the address of the 4<sup>th</sup> defendant to Court for serving of summons. Thus from the institution of the action in 2006 until the motion was filed to lay by the case in February 2012, for a period of 5 ½ years, summons could not be served on the 4<sup>th</sup> defendant.

It is also significant that the plaintiff informed Court that action will not be pursued against the deceased 1<sup>st</sup> defendant (even the heirs were not substituted) to whom the land was originally transferred in 1995, 10 years prior to the institution of the action by the plaintiff as averred to in the plaint on a constructive trust. In 2006 when plaint was filed, plaintiff was aware (as averred to in the plaint) that the 4<sup>th</sup> defendant who refused to accede to the plaintiff's request to redeem the land was taking steps to alienate the land and that the 5<sup>th</sup> defendant moved Court to be added as a defendant on the basis that he purchased the land from the 4<sup>th</sup> defendant as a bona fide purchaser. Thereafter, in 2012 the 5<sup>th</sup> defendant moved court to lay-by the case for non-prosecution of the case by the plaintiff for a period exceeding 12 months.

In *Supramanium Vs Symons 18 NLR 229*, Wood Renton CJ held as follows:-

**"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."**

In the above referred Judgment, Wood Renton CJ has succinctly held that a party is bound to take steps and proceed with all possible and reasonable expedition to prosecute an action without allowing it to accumulate the case list. The words stated by the learned Chief Justice in the above Judgment one hundred years ago augur well for present day Courts as well. Cases should not be accumulated in Courts. Cases should be expeditiously concluded.

In the instant case, plaintiff has taken five and half years to serve summons and yet has not been able to ascertain the correct address. In such a situation, were the steps taken by the 5<sup>th</sup> defendant correct or in accordance with the law in moving Court to lay by the case and/or to dismiss the case for failure to prosecute the action by the plaintiff or should the case remain in the case list until the plaintiff obtain the addresses.

In the given circumstances of this case, I am inclined to agree with the steps taken by the Appellant to move Court to lay by the case.

In the supra case it was also held that a Court has power under Section 402 of the Civil Procedure Code to make an order of abatement *ex mero motu*. Nevertheless, it is desirable that a Court, before making an order of abatement should notice the parties, as far as it conveniently can, to give them an opportunity of showing cause against the order. Wood Renton CJ further went on to say that if the plaintiff is injured by absence of notice he can proceed under Section 403.

In **Fernando Vs Peiris 3 NLR 77**, it was held that an abatement order under Section 402 can be entered by Court *ex mero motu*, however since the consequences are serious it should be made on application by the defendant with due notice to the plaintiff.

In the instant case, upon the Court being moved by the 5<sup>th</sup> defendant, the Court heard the parties and refused the application of the 5<sup>th</sup> defendant to lay-by the action on the basis that case can proceed when the addresses of the 3<sup>rd</sup> and 4<sup>th</sup> defendants are tendered to Court.

The learned Judges of the Civil Appellate High Court affirmed the order of the District Court on the premise that the rejection of the motion to lay-by was proper.

In the instance case, as stated earlier, the addresses of the 3<sup>rd</sup> and 4<sup>th</sup> defendants should have been tendered by the plaintiff. The Court has no duty to obtain addresses. It is the plaintiff's action and there is a duty cast upon the plaintiff to take steps as directed by Court to tender addresses. If the plaintiff fails to fulfill same and does not take steps to prosecute or continue with the action *ex mero motu* or the Court on its own could have made order to abate the action after hearing the parties.

Before this Court, Respondent relied heavily on **Cave & Co. Vs. Erskine 6 NLR 338** wherein it was held that where the Fiscal has failed to serve summons, no blame is allocated to the plaintiff and it is not open to Court to abate the suit.

The instant case can be distinguished from the above case, as in the instant case for the Fiscal to serve summons the present addresses of the 3<sup>rd</sup> and 4<sup>th</sup> defendants should be tendered to court and the only person who could tender the addresses is the plaintiff who is seeking relief from the said defendants albeit the 4<sup>th</sup> defendant from whom order is sought to transfer the land back to the plaintiff and also damages. I also observe that the plaintiff has failed to tender the correct address

from the date of institution of action to 21.06.2010 the material date on which the Court made order “to take steps and move” and also thereafter until the motion to lay by was filed on 12.02.2012. If the plaintiff fails to tender the addresses, my considered opinion is that the plaintiff has failed to prosecute the case and undoubtedly the blame will fall on the plaintiff and the Court could abate the suit in such a situation.

Even in an instance in which the plaintiff could not obtain the addresses of the 3<sup>rd</sup> and 4<sup>th</sup> defendants, there were steps for the plaintiff to take. The plaintiff could have made an application to serve Summons by way of substituted service on the last known addresses of the 3<sup>rd</sup> and 4<sup>th</sup> defendants or move for an appropriate order from Court not to proceed against the 3<sup>rd</sup> and 4<sup>th</sup> defendants but to proceed against the 2<sup>nd</sup> defendant against whom ex parte trial had been fixed and against the 5<sup>th</sup> defendant against whom trial had been fixed. But for a period of 18 months after Court made order on 21.06.2010 to take steps and move, the plaintiff has not taken any meaningful steps and has failed to prosecute the case. On the other hand 5<sup>th</sup> defendant, the bona fide purchaser of the land who got himself added as a defendant to the case is waiting with the Sword of Damocles hanging over his head.

However, since the 5<sup>th</sup> defendant has also included a cross claim against the plaintiff praying for a declaration of title and damages against the plaintiff, the 5<sup>th</sup> defendant could have moved Court to proceed with the trial and I observe that the 5<sup>th</sup> defendant too has failed in his duty towards Court.

On the other hand this Court in **Fernando Vs Curera 2 NLR 29** and **Lorensu Appuhamy Vs Paaris 11 NLR 202** held that fixing a date of hearing is a matter for Court.

In the instant case on the relevant date, namely 21.06.2010, the Court fixed the case for ex-parte trial against the 2<sup>nd</sup> defendant and trial against the 5<sup>th</sup> defendant but has not fixed a ‘date’ for the ex parte trial and trial respectively.

The failure of the District Court to fix a date for ex-parte trial against the 2<sup>nd</sup> defendant and trial against the 5<sup>th</sup> defendant has caused immense prejudice to the parties and has led to the delay in prosecuting and concluding the case expeditiously. This I observe is an instance as aptly quoted by Wood Renton CJ in **Supramaniam Vs Symons 18 NLR 229** (referred to above), wherein he stated that no Judge is obliged or entitled to allow the accumulation upon is cause list of a mass of inanimate or semi animate actions.

In the above circumstances, I answer the questions of law raised in this appeal in favour of the 5<sup>th</sup> Defendant- Petitioner- Appellant. The appeal is allowed. The Judgment of the Civil Appellate High Court of Gampaha dated 14.02.2013 and the Order of the District Court of Gampaha dated 18.05.2012 are set aside.

In the circumstances of this case, parties will bear their own costs.

**Judge of the Supreme Court**

**S. Eva Wanasundera PC. J**

I agree

**Judge of the Supreme Court**

**Vijith. K. Malalgoda PC. J.**

I agree

**Judge of the Supreme Court**