

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

Don Gamini Nanayakkara,
No. 340, Gonawala,
Kelaniya.

Plaintiff

C.A. No. 965 / 2000 F

Vs.

D.C. Colombo No. 16458 / L

W. Irangani Fernando,
No. 77 B, High level Road,
Kirulapana,
Colombo 06.

Defendant

AND NOW BETWEEN

W. Irangani Fernando,
No. 77 B, High level Road,
Kirulapana,
Colombo 06.

Defendant Appellant

Vs

Don Gamini Nanayakkara,
No. 340, Gonawala,
Kelaniya.

Plaintiff Respondent

BEFORE : UPALY ABEYRATHNE, J.

COUNSELS : Ananda Kasturiarachchi with Janaka Ratnayake
for the Defendant Appellant
Manohara de Silva PC with Nimal Hippola for
the Plaintiff Respondent

WRITTEN SUBMISSIONS ON: 09.11.2011 and 16.01.2012

ARGUED ON : 13.03.2012

DECIDED ON : 24.05.2012

UPALY ABEYRATHNE, J.

The Plaintiff Respondent (hereinafter referred to as the Respondent) made an application to withdraw the action with liberty to file a fresh action. The Defendant Appellant (hereinafter referred to as the Appellant) objected to this application and requested court to allow the Respondent to withdraw the action without liberty to file a fresh action. The learned Additional District Judge after considering the submissions of both parties allowed the application for withdrawal of the action with liberty to file a fresh action subject to a prepayment of costs of Rs. 10,000/- before the institution of the fresh action. This appeal has been preferred against the said order dated 09.11.2000.

The Appellant contended that the Respondent had amended his plaint twice before the making of the application for withdrawal of the action and therefore he should not be given opportunity bring a fresh action.

It is apparent from the proceedings on 09.11.2000 that the said application for withdrawal of the action has been made due to a formal defect of the plaint. The learned trial judge also has satisfied about the formal defect of the plaint. The prepayment of costs before the institution of the fresh action also has been made with the consent of both parties. Hence at this stage it is pertinent to observe the relevant provisions of the Civil Procedure Code.

Subsections (1) and (2) of section 406 read thus -

406(1) If, at any time after the institution of the action, the court is satisfied on the application of the plaintiff -

(a) that the action must fail by reason of some formal defect, or

(b) that there are sufficient grounds for permitting him to withdraw from the action or to abandon part of his claim with liberty to bring a fresh action for the subject matter of the action, or in respect of the part so abandoned,

the court may grant such permission on such terms as to costs or otherwise as it thinks fit.

(2) 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.

Garvin J. in *Annamaly Chetty v. Thornhill* (1932) 34 N. L. R. 381 at 385 observed that "In section 406 there is an indication that it is the policy of the

Code that an action once instituted must be prosecuted until it is determined by a judgment upon the matter in dispute and that a plaintiff who withdraws from an action or abandons part of his claim will not be permitted to bring a fresh action for the same matter or in respect of the same part, unless he does so with the permission of the Court which may be granted, where it appears (a) that the action must fail by reason of some formal defect or (b) that there are sufficient grounds for permitting the plaintiff to withdraw from the action or to abandon part of his claim.”

In the said circumstances I see no reason to interfere with the said order of the learned Additional District Judge dated 09.11.2000. Therefore I dismiss the appeal of the Appellant with costs.

Appeal dismissed.

Judge of the Court of Appeal