

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

V.P. Susil Premaratne,
No. 03 Track 09, Rice Mill Complex,
Divulankadawala, Medirigiriya.

Plaintiff

M. Manel Dammika Cooray,
No. 102, Hapitigama,
Kal Eliya.

Power of Attorney Holder of
the Plaintiff

C.A. No. 1345 / 2000 F

Vs.

D.C. Polonnaruwa No. 6522/L

1. Hewawasampitabendi Badathurage
Kantha Pushpakumara,
Dharga Hotel, D.S.Senanayake Street,
Hingurakgoda.
2. Muthuthantrige Chandra Perera,
Kusumpokuna Junction,
Divulankadawala, Medirigiriya.
3. Vipula Gunarathne,
Kusumpokuna Junction,
Divulankadawala, Medirigiriya.

Defendants

AND NOW BETWEEN

V.P. Susil Premaratne,
No. 03 Track 09, Rice Mill Complex,
Divulankadawala, Medirigiriya.

Plaintiff Appellant

M. Manel Dammika Cooray,
No. 102, Hapitigama, Kal Eliya.

Power of Attorney Holder of
the Plaintiff Appellant

Vs

1. Hewawasampitabendi Badathurage
Kantha Pushpakumara,
Dharga Hotel, D.S.Senanayake Street,
Hingurakgoda.
2. Muthuthanthrige Chandra Perera,
Kusumpokuna Junction,
Divulankadawala, Medirigiriya.
3. Vipula Gunarathne,
Kusumpokuna Junction,
Divulankadawala, Medirigiriya.

Defendants Respondents

BEFORE : UPALY ABEYRATHNE J.

COUNSEL : Prashan Mendis for the Plaintiff Appellant.
Udhitha Egalahewa with Jagath Wickremanayake
for the Plaintiff Respondent-Respondent

ARGUED ON : 21.09.2011

DECIDED ON : ¹²~~07~~.10 2011 

UPALY ABEYRATHNE, J.

The Appellant instituted the said action against the Defendant Respondents (hereinafter referred to as the Respondents) in the District Court of Polonnaruwa seeking for a declaration and for a permanent injunction as prayed for in the plaint. The Respondents filed their answer praying for a dismissal of the Appellant's action and for a judgement as prayed for in the answer.

The trial commenced on 05.09.2000 and the parties have settled the issues of the case on the same date. After framing the issues the learned Counsel

for the Appellant has moved for a date to lead evidence. It appears from the proceedings of the said date that the learned Counsel has sought a final date for the trial on payment of costs since the Power of Attorney Holder of the Appellant who was present before court was not able to give evidence.

Thereafter the learned Additional District Judge instead of making order with regard to the said application for postponement, has proceeded to dismiss the Appellant's action on the ground that the Appellant had obtained dates over three years to get ready since the case first fixed for trial. The present appeal has been preferred by the Plaintiff Appellant (hereinafter referred to as the Appellant) from the said order of the learned Additional District Judge of Polonnaruwa dated 05.09.2000.

The learned trial judge was of the view that the application for the postponement was not a fair application. But he has failed to make an order with regard to the application for the postponement on payment of costs. Proceedings of the day in question does not reflect that the learned trial Judge, after dealing with the application for postponement, has proceeded to hear the case according to law. It is important to note that the Respondent too had set up a claim in reconvention in his answer.

With regard to the adjournments of the hearing of an action Section 143 of the Civil Procedure Code (CPC) stipulates as follows;

“143(1) The court may, if sufficient cause be shown, at any stage of the action grant time to the parties, or to any of them, and may from time to time adjourn the hearing of the action.

Provided however, that no adjournment in excess of six weeks may be granted except in exceptional circumstances, and for reasons to be recorded.

(2) In all such cases the court shall fix a day for the further hearing of the action, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment: Provided that, when the hearing of evidence has once begun, the hearing of the action shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the hearing to be necessary for reasons to be recorded and signed by the Judge.”

Section 145 of the Code stipulates that “If any party to an action, to whom time has been granted, fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the action, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the action forthwith.”

It seems from the said Section that if any party to an action fails to carry out purpose of adjournment, notwithstanding such default the court shall proceed to decide the action forthwith. It appears that Section 145 does not empower a trial court to dismiss an action forthwith.

In the case of Satuhamy Vs Jayasinghe (1920) 7 CWR 200 it was held that “the Judge had no power to dismiss the action for non-compliance with the order. That the dismissal of the action was unreasonable as the Plaintiff could not be held responsible for the surveyor’s delay in submitting the plan”.

In the case of Carolis Appuhamy Vs Peter Singho (1924) 26 NLR 376; 2 Times 240, it was stated that “Where a party to an action has been granted time to produce certain evidence and fails to do so at the hearing, the court has no power to dismiss the action. It must proceed to hear such evidence as may be tendered on behalf of the party in default and decide the action forthwith”.

The learned Counsel for the Respondent drew the attention of this court to the cases of Stephen Fernando Vs Jemes Fernando (1953) 55 NLR 119 and Syadu Varusai Vs Weerasekera (1956)58 NLR 89. In the case of Stephen Fernando the court did not dismiss the action after the refusing of the application for a postponement and the court has proceeded to hear the case. In Siyadu Varusai case also the court did not dismiss the action and has proceeded to deliver the judgement of the case. Hence the decisions of said two cases have no application to the present case.

When I consider the circumstances of the present case in the light of the said judicial pronouncement it seems to me that the learned trial judge has failed to adhere to the provisions contained in Section 145 of the CPC. The learned trial judge has dismissed the action forthwith instead of proceeding to decide the action forthwith. The said procedure adopted by the learned trial judge is in violation of Section 145 of the CPC. Therefore I set aside the order of the learned Additional District Judge of Polonnaruwa dated 05.09.2000 and allow the appeal of the Appellant without costs. The learned trial judge is directed to commence the proceedings of the case on the issues already raised by the parties and to hear and conclude the case according to law.

Appeal allowed.

Judge of the Court of Appeal