

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

In the matter of an application
for leave to appeal

Court of Appeal No: CALA 114/2005

District Court of Colombo No: 17021/L

R.L. Nilgiriya & another

Defendant-Respondent-
Petitioners

vs

Gamini De Soysa & two others

Petitioners Respondents

AND

B.R.J. De Soysa and Five others

Plaintiff-Respondents-
Respondents

Before: Eric Basnayake J

Counsel: Manohara De Silva P.C. with Bandara Thalagune for the Defendant –

Respondent-Petitioners

Harsha Soza P.C. with Anuruddha Darmaratne for the Plaintiffs-
Respondents.

Written submissions tendered: For the petitioners: 18.1.2011

For the Plaintiff-Respondents: 25.1.2006

Decided On: 9.9.2011

Eric Basnayake J

The defendant-respondent-petitioners (defendants) filed this leave to appeal application *inter alia* to have the order dated 11.3.2005 of the learned Additional District Judge of Colombo set aside.

This is a *rei vindicatio* action. The 1st to 6th plaintiffs filed this action in the District Court of Colombo *inter alia* to have the 1st plaintiff declared entitled to 1/7th share and the 2nd to 6th plaintiffs to another 1/7th share. After the filing of the answer the case was fixed for trial for 1.7.2002. On the trial date the court was informed of the death of the 1st plaintiff. Hence the case was fixed for 13.9.2002 for steps. On 13.9.2002 steps were not taken and the court made order to take steps and move.

On 21.1.2004 the 1st, 2nd and 3rd petitioners-respondents (petitioners) filed papers in court to have them substituted in place of the 1st plaintiff (P5a) and moved that the case be called on 6.2.2004. However the case was not called on 6.2.2004. On 10.2.2004 the court made order *ex mero motu* to abate the action. The reason for this order is the plaintiff's failure to take necessary steps for a period exceeding 12 months (namely, from 13.9.2002 to 21.1.2004).

On 23.2.2004 a motion was filed for the petitioners to have this action continued. The petitioners also filed a petition and an affidavit to have them substituted in place of the deceased 1st plaintiff. In the motion it is stated that the petitioners filed case No 36066/T and obtained probate. The defendants filed objections to this application. The learned Judge after inquiry made order vacating the order of abatement. The court also allowed the substitution. It is this order that the defendants are seeking to have set aside.

The learned Judge had observed in his order that probate had been granted in favour of the petitioners and was satisfied that the petitioners were prevented by sufficient cause from continuing with the action and for this reason the order of abatement was set aside.

The learned President's Counsel for the defendants submitted that the abatement was done under section 402 of the CPC and the plaintiffs failed to take steps to prosecute this action from 13.9.2002 till 8.1.2004.

Section 402 is as follows:-

402. If a period exceeding twelve months...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.

Learned Counsel submitted that the 2nd to 6th plaintiffs ought to have acted under section 393 of the CPC. He submitted that the purpose of this action is to evict the defendants from the premises on the basis that the defendants are trespassers and any co-owner can file action against a trespasser (Wimala Kanthi Ranasinghe vs. Amaradasa Weerasinghe and N. Angawatte CA No. 629/98 CA minutes of 27.7.2001 & The Mahakande Housing Co. Ltd. Vs. Duhilamol (1981) 2 Sri L.R. 232). Therefore even if the 1st plaintiff died the other plaintiffs had the opportunity of proceeding under section 393 of the CPC.

Section 393 is as follows:-

If there be more plaintiffs...than one and any of them dies, and if the right to sue on the cause of action survives to the surviving plaintiff or plaintiffs alone,...the court shall, on application in the way of summary procedure, make an order to the effect that the action do proceed at the instance of the surviving plaintiff or plaintiffs...

One of the reliefs sought in the present case is to have the 1st plaintiff declared entitled to 1/7th share of the subject matter. It is the 1st plaintiff who has to prove what he claims and if it is proved successfully, this share would be granted to the

1st plaintiff. In the event of his death it would devolve on the heirs and not on the surviving plaintiffs. Therefore it would be a necessary step in the prosecution of this action to have the heirs appointed. Section 394 makes provision for the petitioners as heirs to come to this case as a party. The section is as follows:-

394 (1): If there are more plaintiffs than one, and any of them dies, and if the right to sue does not survive to the surviving plaintiff or plaintiffs alone, but survives to him or them and the legal representative of the deceased plaintiff jointly, the court may cause the legal representative, if any, of the deceased plaintiff to be made a party and shall thereupon cause an entry to that effect to be made on the record and proceed with the action.

(2) Not reproduced.

Even if the cause of action survives to the remaining plaintiffs to proceed with the action, an order of abatement could be done only after notice to the parties. The consequences of an order that an action shall abate are so serious that the court should never exercise the power *ex mero motu*, but only on application by the defendant after due notice to the plaintiff (*Fernando vs. Peiris* 3 N.L.R. 77, *Cave & Co vs. Erskine* 6 N.L.R. 338, *Suppramaniam et al vs. Symons* 18 N.L.R. 229). When an action abates, no fresh action shall be brought on the same cause of action (Section 403 of the CPC, *Ponampalam vs. Canagasaby* 2 N.L.R. 23, *De Silva vs. Jawaz* 37 N.L.R. 165, *Kamala vs. Andiris* 41 N.L.R. 71). *Wijewardene J* held in *Sellamma Achie vs. Pelavasam* 41 N.L.R. 186 that a court has no power to enter an order of abatement under section 402 where the failure to prosecute the action for twelve months after the last order was due to the death of plaintiff within that period.

Section 403 of the CPC makes provision for the plaintiff or the person claiming to be the legal representative of the deceased to apply for an order to set aside the order of abatement. The section is as follows:-

403. When an action abates or is dismissed under this chapter, no fresh action shall be brought on the same cause of action.

But the plaintiff or the person claiming to be the legal representative of a deceased or insolvent party may, within such period of time as may seem to the court under the circumstances of the case to be reasonable, apply for an order to set aside the order of abatement or dismissal; and if it be proved that he was prevented by any sufficient cause from continuing the action the court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

After the death of the 1st plaintiff the petitioners had filed a testamentary case in the District Court to obtain probate to administer the estate of the deceased 1st plaintiff. Having obtained probate the petitioners moved court to have them substituted in place of the deceased plaintiff. By that time there was no application made by the defendants to abate the action. The court, without considering the motion filed for the petitioners, hurried to abate the action. Thus it is clear that at the time of abatement the petitioners had taken steps to prosecute the action. According to the judgments pronounced the court could not abate an action ex mero moto.

I am of the view that the learned Judge had correctly set aside the order of abatement. Therefore this application is without merit and leave is refused with costs.

Judge of the court of Appeal