

**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 260/2005

District Court of Gampaha No: 23663/P

W.L.P. H. Somasiri  
Wijesinghe

4<sup>th</sup> Defendant-Petitioner

Vs.

W.L.P. Victor Somasiri  
Wijesinghe

Substituted Plaintiff-  
Respondent & several other  
Defendant-Respondents

Before: **Eric Basnayake J**  
**K.T. Chitrasiri J**

Counsel: M.H.B. Morais for the 4<sup>th</sup> Defendant-Petitioner  
S.A.D.S. Suraweera for the Plaintiff-Respondent

Argued on: 15.1.2010

Written submissions tendered on: For the 4<sup>th</sup> defendant-petitioner-2.10.2007  
For the substituted plaintiff respondent-13.5.2008

Decided on: 25.8.2011

Eric Basnayake J

When this case was taken up for trial in the District Court of Gampaha on 18.2.2005, the 4<sup>th</sup> defendant-petitioner (4<sup>th</sup> defendant) raised an objection as to the maintainability of this action. The 4<sup>th</sup> defendant stated that this case was once dismissed and therefore cannot be restored back in to the trial roll. The learned Judge overruled this objection. The 4<sup>th</sup>

defendant filed this leave to appeal application to have the order dated 22.6.2005 of the learned Additional District Judge of Gampaha set aside. Leave was granted by this court on 16.6.2009.

This is a partition case. This case was originally fixed for trial for 22.6.1998. On this day the substituted-plaintiff-respondent (plaintiff) was absent and unrepresented. The court found that the plaintiff was not diligently prosecuting this action. None of the other parties present in court were inclined to prosecute the action. Hence the court dismissed the case with costs and ordered to cancel the *lis pendens*.

On 9.10.1998 the plaintiff filed papers to vacate the dismissal under section 87 (3) of the Civil Procedure Code. The 4<sup>th</sup> defendant filed objections. On 15.2.2001 a settlement was arrived at and the 4<sup>th</sup> defendant withdrew the objections. Thereafter the case was restored back into the trial roll. Again on 29.11.2002 the 4<sup>th</sup> defendant filed a petition and an affidavit (P7 & 8) and moved court to dismiss the action on the same ground. However the case was fixed for trial and this objection was taken at the commencement of the trial.

The learned Judge after inquiry by order dated 22.6.2005 rejected the objection for the reason that the court had already inquired in to this matter and made an order on 15.2.2001 allowing the case to be restored back into the trial roll. The learned Judge had observed that on 15.2.2001 the 4<sup>th</sup> defendant had withdrawn the identical objection. The learned Judge stated that the 4<sup>th</sup> defendant is bound by the order made on 15.2.2001 and is not entitled to re-agitate on the same matter. In his petition dated 29.11.2002 the 4<sup>th</sup> defendant does not disclose what happened in court on 15.2.2001. In the present application dated 8.7.2005 and the affidavit and in the written submissions tendered to the Court of Appeal the 4<sup>th</sup> defendant does not disclose the fact that this matter was once inquired into and a settlement was arrived at.

The learned counsel for the plaintiff submits that the dismissal was set aside on an application made by the plaintiff under section 87 (3) of the CPC. The learned counsel submits that the Partition Law provides for dismissal of the action for non-prosecution.

However it does not make provision similar to section 87 of the CPC where a dismissal is due to the absence of the plaintiff on a trial date due to a reasonable cause. The learned counsel submits that under those circumstances parties are permitted to resort to the CPC under section 79 of the Partition Law. Section 79 states as follows:-

79. In any matter or question of procedure not provided for in this law, the procedure laid down in the CPC in a like matter or question shall be followed by the court, if such procedure is not inconsistent with the provisions of this law.

Section 87 of the CPC makes provision for the court to restore the case back in to the roll if after dismissal the plaintiff proves to the satisfaction of court that his absence was due to a reasonable cause. Section 87 is as follows:-

- 87 (1): Where the plaintiff...make default in appearing on the day fixed for the trial, the court shall dismiss the plaintiff's action.
- (2) not reproduced.
- (3) The plaintiff may apply within a reasonable time from the date of dismissal, by way of petition supported by affidavit, to have the dismissal set aside, and if on the hearing of such application...the court is satisfied that there was reasonable grounds for the non-appearance of the plaintiff, the court shall make order setting aside the dismissal..

The learned counsel for the 4<sup>th</sup> defendant submits that once a partition case is dismissed it cannot be set aside. He mentioned the case of Paulusz vs. Perera (34 N.L.R.438) and Dingiri Amma vs. Appuhamy (72 N.L.R. 347) in support of his argument. In Paulusz vs Perera the learned District Judge dismissed an action as he found some documents marked not tendered. He sets aside his order of dismissal after realizing that the documents were in the record. In appeal De Silva A.J. held (at pg.440) that "the principle of law that a court may not set aside its own order is well established and rigorously enforced. It is a very important principle as on it depends the finality of judicial decisions. If a Judge can review his own decision, there is no limit to the number of times upon which he might do so or upon which he may be invited by the parties so to do. He may be asked to do so not only where there is obvious hardship but also wherever a point

that is arguable arises, because it is impossible to draw a clear line between the one case and the other”.

The setting aside of the dismissal in that case was not based on section 87 of the CPC. In Dingiri Amma’s case the question was whether an order of dismissal would operate as *res judicata* in a subsequent action brought by the plaintiff for partition of the same land. In these two cases the question was not with regard to section 87 of the CPC and is therefore not relevant. The present case is based on section 87 (3) of the CPC which make provision for restoration. The dismissal was set aside after the plaintiff showed a reasonable cause for his absence. Apart from that this matter was already adjudicated.

For the above reasons this appeal is without merit and is dismissed with costs.

Judge of the Court of Appeal

K.T. Chitrasiri J

I agree

Judge of the Court of appeal