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 515/2005

District Court of Colombo No: 17652/L

W.G. Alwis

Defendant-Petitioner

Vs.

Shabir Omar

Substituted Plaintiff-Respondent-Respondent

Before: **Eric Basnayake J**

Counsel: Gamini Marapone P.C. with Navin Marapone for the Defendant-Petitioner
N.K. Parathalingam for the Substituted Plaintiff-Respondent-Respondent

Argued On: 10.3.2011

Written Submissions Tendered On: 14.6.2010

Decided On: 9.6.2011

Eric Basnayake J

The defendant-Petitioner (defendant) filed this leave to appeal application *inter alia* to have the order dated 14.12.2005 (X8) of the learned Additional District of Colombo set aside. Leave was granted by this court on 9.3.2010.

In this case an *ex-parte* decree was entered against the defendant on 28.6.2002 and the substituted plaintiff respondent-respondent (plaintiff) moved for execution of the writ. Finding that the decree was not served on the defendant the court made an order for the plaintiff to apply for writ after serving the decree on the defendant. This order was made on 3.9.2003. On 3.11.2004 the defendant moved court *inter alia* for an order of abatement of the plaintiff's action under section 402 of the Civil Procedure Code. The court after an inquiry, by order dated 14.12.2005 refused to abate the plaintiff's case with costs. It is this order the defendant is seeking to have set aside.

The learned President's Counsel for the defendant submitted that the moment the *ex-parte* trial was concluded a duty was cast on the plaintiff under section 85 (4) of the CPC to have the decree served on the defendant. Sub section (4) is as follows:-

> 85 (4): The court shall cause a copy of the decree entered under this section to be served on the defendant in the manner prescribed for the service of summons...

The learned counsel submitted that serving the decree is mandatory. The court does the serving. However it has to be at the instance of the plaintiff. The learned counsel submitted that the phrase "the court shall cause a copy to be served" means that it has to be at the instance of the plaintiff and where the court is obliged to take a step and does not take it and the plaintiff also does not move on the matter for a period of one year the plaintiff is bound to suffer. The learned counsel relied on the judgment in Samsudeen vs Eagle Insurance Co. Ltd., (64 N.L.R. 372) where Tambiah J held that an order of abatement could be made under section 402 of the CPC "only if the plaintiff has failed to take a step rendered necessary by the law"

In this case Tambiah J considered a long line of cases. The first case to be considered was Fernando vs. Curera (1 N.L.R. 29) where Bonser CJ held that it was the duty of the court to fix a day for hearing. In Lorensu Apuhamy vs. Paaris (11 N.L.R. 202) Wood Renton J (With whom Hutchinson C.J. agreed) held that the duty affixing the day of trial is vested on the court. The judgment of Wood Renton J was followed by Lascelles C.J. in Kuda

Banda vs. Hendirick ((1911) 6 Weerakoon Reports 42) where Lascelles CJ held that the duty of fixing the case for retrial vested on the courts. Having cited also Seyado Ibrahim vs. Naina Marikkar (1912) 6 S.C.C. 79, Suhuda vs. Sovena (1913) 1 Bal Notes 87., Setua vs. Cassim Lebbe (1919) 7 C.W.R. 28, Associated Newspapers Ltd vs. Kadirgarmar (1934) 36 N.L.R. 108, Tilekeratne vs. Keerthiratne (1935) 14 C.L.R. 412, Sellaman Achie vs. Palavasam (1939) 41 N.L.R. 186, Chittambaram Chettiar vs Fernando (1947) 49 N.L.R. 49 Tambiah J held "that both on principle and on authority it seems to us that **unless the plaintiff has failed to take a step rendered necessary by the law to prosecute his action an order of abatement should not be made under section 402 of the CPC**"(emphasis added).

Tambiah J also considered the judgment in Suppramaniam vs. Symons (supra) and preferred to follow the ruling in Lorensu Appuhamy vs. Paaris (supra) for the reason that "it has been consistently followed in a number of weighty decisions". Subramaniam's decision was followed in Bank of Ceylon vs. Liverpool Marine and General Insurance Co. Ltd (66 N.L.R. 472).

The learned President's Counsel submitted that the plaintiff failed to take a step rendered necessary by law by not moving court to serve the decree on the defendant, and has to thus suffer the consequences.

Section 402 of the CPC is as follows:-

> If a period exceeding twelve months elapses subsequently to the last entry of the order or proceeding in the record **without the plaintiff taking any steps to prosecute the action where such a step is necessary** the court may pass an order that the action shall abate (emphasis added)

The learned counsel for the plaintiff submitted that the defendant should first purge the default under section 86 (2) of the CPC to come back to the case. He submitted that by the application made on 3.11.2004 the defendant appeares to have taken notice of the

case. Once he had taken notice and gets the default purged the defendant gets *locus standi*. Without *locus standi* the defendant is not entitled to seek refuge under the provisions of the CPC. The learned counsel further submitted that once *ex-parte* decree is entered the action is over and there is no other step rendered necessary by law to prosecute the action. The plaintiff may not be able to recover the property until the decree is served on the defendant. However this is not a step in the prosecution of the action.

In Subramanium vs. Eagle Insurance Co. Ltd., (supra) Tambiah J (with T.S. Fernando J agreeing) held that there is no duty cast on the plaintiff to restore the case to the trial roll. In the present case I see no step the plaintiff is required to take to prosecute the action as the action is over with the entering of the decree (Pathirana vs. Induruwge (2002) 2 Sri L.R. 63). I also agree with the submission of the learned counsel for the plaintiff that the defendant has no locus standi in the case until he purges the default. Therefore I am of the view that the learned Judge had correctly refused the application of the defendant and thus this case is without merit and is dismissed with costs.

Judge of the court of Appeal