

**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 106/2006
District Court of Colombo No: 16381/MB

N. Wimalasena and another

Defendant-Respondents-
Appellants

Vs.

P.E.A. Jayawickrama and
another (Liquidators)

Petitioner-Respondents

Union Trust and Investments

Limited

Plaintiff-Respondent

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

Counsel: Kumaran Aziz for the Defendant-Respondent-Appellants
Rajindra Jayasinghe with Deepika Ratnayake for the Petitioner-Respondents

Argued On: 1.4.2009

Written submissions tendered on: 21.6.2007

Decided on: 23.3.2011

Eric Basnayake J

The defendant-respondent-appellants (defendants) filed this leave to appeal application to have the order dated 24.2.2006 of the learned Additional District Judge of Colombo set aside. By this order the learned Judge had allowed the application of the petitioner-respondents (petitioners) to be substituted in place of the plaintiff-respondent company.

The plaintiff filed this action in the District Court of Colombo on 13.2.1992 to determine the mortgage deed no. 142 of 11.9.1984 and *inter alia* to claim a sum of Rs.2,544,000/-. The defendants filed answer on 4.1.1996 and moved for a dismissal of the plaintiff's action. The trial commenced on 25.7.1996. It proceeded until the management of the plaintiff's company was taken over by the Central Bank. The Central Bank has ordered the plaintiff company to wind up. Hence winding up proceedings commenced and the petitioners were appointed as liquidators.

On 18.10.2000 prior to the appointment of the petitioners as liquidators the case was taken off the trial roll. It appears from the record that this was done on application made by the defendants. By this time the defendants had suggested a settlement which was not acceptable to the Central Bank. Hence the defendants intended on making a proposal to the liquidators, they were once appointed. The case was taken off the trial roll for that purpose. When this case was mentioned on 16.3.2001, the appointment of the liquidators was not made. Therefore at the instance of both parties the court made order to lay by the case.

The liquidators (petitioners) were appointed on 22.10.2003. On 9.9.2005 the petitioners filed petition and affidavit and moved court to substitute them in place of the plaintiff to prosecute the action. The defendants objected to this application under section 402 of the CPC. The defendants moved to abate the plaintiff's action on the ground that the plaintiff had failed to take steps to prosecute the action for nearly 4 ½ years. The court after inquiry allowed the petitioner's application to be substituted in place of the plaintiff

company and dismissed the objections of the defendants with costs. The learned Judge followed the decision in Samsudeen vs. Eagle Insurance Co Ltd., (64 N.L.R.372). It is in this order the defendants are seeking to be set aside. With consent leave to appeal was granted by this court on 1.6.2006.

Submission of the learned Counsel for the defendants

The learned counsel submitted that a period of 12 months have lapsed subsequent to the last order without the plaintiff taking any steps to prosecute the action and the same should be treated as being abated at the expiration of the 1st year. This case was laid by for almost 4 ½ years and the case should be treated as having been automatically abated. The learned counsel heavily relied on the judgment of Wood Renton CJ in Subramaniam vs. Symons (18 N.L.R. 229). Subramaniam's is an action instituted in 1889 on a mortgage bond for the recovery of a sum of Rs.51000. On 14.8.1893 with the consent of parties the case was struck off the roll with a view for settlement. In 1896 the Judge had abated the case under section 402 of the CPC on the ground that a period of 12 months had elapsed without the plaintiff having taken necessary steps for its prosecution. On 13.3.1911 (after 18 years of the abatement) an application was made to set aside the abatement. This application was refused by the District Judge and Wood Renton CJ upheld this decision.

The learned counsel submitted that it is the duty of the plaintiff to get the case back in to the roll. The learned counsel also submitted that the case of Samsudeen vs. Eagle Star Insurance Company Ltd. (supra) was wrongly decided.

Submission of the learned counsel for the respondents

The learned counsel for the respondents submitted that this case was taken off the roll on 18.10.2000 at the instance of the defendants and thereafter laid by on 16.3.2003 with the consent of both parties. The liquidators were appointed on 22.10.2003. The learned counsel submitted that an order for abatement can be made only where the plaintiff has failed to take a step rendered necessary by some positive requirement of the law. The

duty of fixing the case for retrial which is laid by is vested on the court (Samsudeen vs. Eagle Insurance Co. Ltd (supra), Appuhamy vs. Paaris (11 N.L.R. 202). Once a case is laid by with a view to a settlement there is no requirement on the plaintiff under the law to take any step to prosecute the action (Bank of Ceylon vs. Liverpool Marine and General Insurance Co Ltd. (66 N.L.R. 472). The learned counsel submitted that this case was originally taken off the trial roll to enable the defendant to submit proposals for settlement. This was never done.

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)

Samsudeen vs. Eagle Insurance Co. Ltd

This case was fixed for trial for 25.9.1956. On this date the court laid by the case at the instance of the plaintiff as the plaintiff was unable to contact some material witnesses. On 29.11.1957 the plaintiff filed a motion to have the case laid by for another six months period. This was allowed. On 15.12.1958 the defendant moved under section 402 of the CPC for an order of abatement. The court after inquiry made order to abate the action. In appeal the court considered whether when a case was laid by, a duty is cast on the plaintiff to restore the case to the trial roll. Tambiah J (with T.S. Fernando J agreeing) having considered a long line of authorities held that there is no duty cast on the plaintiff to restore the case to the trial roll.

The first case to consider was Fernando vs. Curera (2 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 Kuda Banda vs. Hendrick ((1911) 6 Weerakoon Reports 42) where Lascelles CJ held that the duty of fixing the case for retrial vested on the courts. Having also cited the cases of Seyado Ibrahim vs. Naina Marikar (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 of Ceylon Ltd vs. Kadirgamer (1934) 36 N.L.R. 108, Tilekeratne vs. Keerthiratne (1935) 14 C.L.R. 412, Selamma Achie vs. Palavasam (1939) 41 N.L.R. 186 and Chittambaram Chettiar vs Fernando (1947) 49 N.L.R. 49 Tambiah J held that the long line of case decisions reviewed above favour the view 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"

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". 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". Subramaniam's decision was followed in Bank of Ceylon vs. Liverpool Marine and General Insurance Co. Ltd (supra).

In the present case what was the step the plaintiff was required by law to take to prosecute his action? Has the plaintiff taken all the necessary steps? The plaintiff filed this action against the defendants. He placed evidence before court. Whilst the case was in progress the plaintiff company could not proceed any further. A liquidator had to be appointed to take the case forward. The defendant wanted the case taken off the trial roll to submit proposals of settlement. This has to be submitted to the liquidator. On 16.3.2001 the case was laid by as the liquidator had not been appointed. By this time proceedings were instituted in court and the liquidators (petitioners) were appointed on 16.10.2003. The next step is to have the case back in the roll. According to the long line of authorities it is the duty of court to bring back an action to the roll. It is not the duty of the plaintiff to bring the case to the roll. Therefore there was no step rendered necessary by the law for the plaintiff to prosecute the action.

I am of the view that the learned Judge had correctly followed the long line of authorities and dismissed the defendants' objections. Therefore I am of the view that this appeal is without merit and the same is dismissed with costs.

Judge of the court of Appeal

K.T. Chitrasiri J

I agree

Judge of the court of Appeal