

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

B.A. Piyasena of Mawalagama, Waga.

DEFENDANT- APPELLANT

01. Rupasinghe Arachchige Don Ananda Kumara

Rupasinghe of Mawalagama, Waga. (Deceased)

Court of Appeal Case No: 831/99F

01 A. Welikala Lalitha,

01 B. Roshan Chinthaka Rupasinghe,

01 C. Roshana Lakmal Rupasinghe

02. Rupasinghe Arachchige Don Sarath Kumara

Rupasinghe of Mawalagama, Waga.

D.C. Avissawella Case No: 16127/P

03. Rupasinghe Arachchige Don Esonsighe of

Kudagama, Avissawella.

03 A. Rupasinghe Arachchige Don Robert

Rupasinghe.

PLAINTIFF- RESPONDENTS

AND

01. Rupasinghe Arachchige Don Jayewardene
Rupasinghe.

02. Rupasinghe Arachchige Don Albertsinghe of
MAwalagama, Waga.

03. Rupasinghe Arachchige Don Violet.

04. Hewawasam Puwakpitiyage Don Karunaratne..

05. Rupasinghe Arachchige Don Leelaratne

And Others.

DEFENDANT- RESPONDANTS

BEFORE

: VIJITH K. Malalgoda. PC, J (P/CA),

: A.H.M.D. Nawaz, J.

COUNSEL

: D.Karunaratne for the Defendant – Appellant,

B.O.P. Jayewardene for the Substituted Plaintiff – Respondent,

C. Ranawaka for Substituted 6th Defendant- Respondent.**Supported Re- Listing Application On: 10 .10 .2014****Oder On**

: 20. 10. 2014

Vijith K. Malalgoda. PC, J (P/CA).

On 26/04/2012 when this matter came up for Argument, it was brought to the Notice of court that the 6th Defendant –Respondent was dead. Since then this case has gone down nine days for substitution. In all nine days when this matter came up counsel for Appellant had moved further time for substitution. On 09/12/2013 when this matter came up for substitution for the 09th occasion , it was recorded that “Counsel moves for further date to support this application with certified copies” and the matter has been postponed for 13/12/2013 for support.

When the matter came up for support 13/12/2013 Defendant Appellant was absent and unrepresented and therefore the court abetted the Appeal.

On 18/12/2013 counsel for the appellant had filed a motion along with a petition from a different counsel and paragraph 01 of the petition read as follow.

“On the very next date 10/12/2013 a certified copy obtained from the Registra General Was filed in the court by way of a motion and this was minuted in the record. On 13/12/2013 the court had inadvertently decided to abate the appeal on the ground that the Appellant has failed to take step with regard to substitution, when all the necessary documents have been field and when the Appellant was in the court and without even calling his name. His counsel was indisposed that day, but another counsel was arranged. Unfortunately by the time he rushed to the court the case was abetted”.

Paragraph 09 of the said petition read as follow.

“Therefore this order to abate the Appeal on 13/12/2013 is clearly *PER INCURIUM* as it will cause immense hardship and irreparable loss to the Appellant for no fault of him. A *PER INCURIUM* Order can be vacates by the same court and seek permission to support with authorities on this aspect and on the issue of certified copies”.

As pointed out about the journal entry dated 13/12/2013 is very clear, that when the case was called the Appellant was absent and unrepresented. The order made by court to abet the case cannot be PER INCURIAM order. It was correct and lawful decision by court

However the counsel who filed the petition had submitted that when the case was called, the Appellant was present in court and the counsel for the Appellant not available due to sickness. The counsel arranged to appear was late. There was no affidavit in support of the above position at least from the Appellant.

This motion was supported before us on 10/10/2014 but even on this day there is nothing before us to support the above version. When a counsel submits a very serious allegation on the conducted of this court, this court taken very serious view on the allegation and therefore it is duty of the counsel to support his version by supporting documents.

In absence of any such document, I see no reason doubt the order made by this court on 13/12/2013. This case has gone down for nine occasions for substitution of the 06th Defendant-Respondents and therefore it is correct for this court to abet the case when Appellant is absent and unrepresented I see no reason to interfere with the decision of this court on 13/12/2013.

Application for relisting is dismissed.

Appeal stand abetted. No cost is order.

President court of Appeal

A.H.M.D. Nawaz. J.

I agree,

Judge of the court of Appeal