

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

In the matter of an application for
Reinstatement / Relisting.

Wickrema Arachchilage Sumanawathie,

Kalugastenna,

Matale.

CA Case No. 699 / 1998 F

CA Matale Case No. 1920 / P

More correctly: Kalugastenna,

Maradurawala, Kaikawala,

Matale.

3rd Defendant - Appellant - Petitioner

-Vs-

Ranathun Arachchilage Gedara Ukku Menike

(Deceased) of Maradurawala, Kaikawala in the

District of Matale Middle Division.

Plaintiff - Respondent - Respondent

- 1. Ranathun Arachchilage Gedara Dingiri Banda**
of Palugastenna, Kaikawala in the District of
Matale.

2. Ranathun Arachchilage Gedara Gnanawathie
of Dikkumbura in the District of Matale.

**1st and 2nd Defendants - Respondents -
Respondents**

- 1. Diganawala Gedara Appuhamy,**
- 2. Diganawala Gedara Nandawathie,**
- 3. Diganawala Gedara Jayaratne,**
- 4. Diganawala Gedara Jayanthie Kumari,**
- 5. Diganawala Gedara Biso Menika**
All of Maradurawala, Kaikawala.

BEFORE : **A.H.M.D. Nawaz, J, and
H.C.J. Madawala J.**

COUNSEL : **Jagath Nanayakkara for the 3rd Defendant -
Appellant - Petitioner**
**Oliver Jayasuriya for the 1st to 5th Plaintiffs -
Respondents - Respondents**

Argued on : **03.12.2015**

Decided on : **16.12.2015**

A.H.M.D. NAWAZ, J,

By an initial petition dated 25th September 2013 the 3rd Defendant-Appellant-Petitioner (hereinafter referred to as “the Petitioner”) sought to relist his appeal which was dismissed by this court on 12th October 2011. Thereafter an amended petition dated 30th September 2013 has been filed and the pith and substance of the prayer are to the following effect;

- 1) Restatement of the appeal that was dismissed on 12.10.2011;
- 2) An order to have the brief prepared after the brief fees have been paid by the Petitioner;
- 3) An order calling for the record in DC 1920/P from the District Court of Matale with immediate effect and stay all proceedings in the District Court of Matale.

ORDER OF DISMISSAL ON 12.10.011

When the Court of Appeal proceeded to dismiss the appeal on 12th October 2011 the Petitioner had been absent and unrepresented, whilst the Plaintiff-Respondent-Respondent (hereinafter referred to as the “the Respondent”) was represented by counsel. When this Court peruses the journal entries of this case prior to 12th October 2011, the Court finds that on 5th October 2011 the registrar had issued notices to both parties including the Petitioner and her registered Attorney-at-Law.

In fact when the court made the order of dismissal of the appeal on the next date 12th October 2011, there was not a tittle of evidence before Court by way of a notation from the Registrar of the Court of Appeal that notices were not delivered to the Petitioner and her registered Attorney-at-Law. In other words there was nothing to indicate that the notices had returned undelivered. It was in those circumstances that the Court of Appeal proceeded to make its order dated 12th

October 2011 dismissing the appeal. The Court of Appeal stated that the 3rd Defendant-Appellant (the Petitioner) failed to exercise due diligence to prosecute the appeal. The Court of Appeal had come to this finding after having looked at the chronological narrative in the journal entries prior to 12th October 2011. What is borne out by the journal entries before 12th October 2011 could now be set down.

25.5.2011

Issued notices on the Appellant and her regd AAL

Filed this copy.

5.08.2011

Before Anil Gooneratne J

Appellant and the Respondent absent and unrepresented.

Notices have been dispatched only on 27th July 2011. Registrar is directed to re-issue notices on both parties and their Registered Attorneys-at-Law.

Mention on 12.10.2011.

5.10.2011

Dispatched notices to both parties and their regd Attorneys by regd post. Filed the copy.

Regd. Post Nos.4415-4418

The subsequent date was **12th October 2011** when the appeal was dismissed. Thus I observe that whilst both the Petitioner and Respondent were absent and unrepresented on 5th August 2011, on the next date 12th October 2011 the Petitioner had absented from Court whilst the Respondent was represented before Court. It was because there was no intimation before Court about the return of

undelivered notices the Court of Appeal took the view on 12th October 2011 that the Petitioner was guilty of due diligence and dismissed this appeal. In this relisting application the Petitioner asserts that he never got these notices dispatched on 5th October 2011. That is why he was *non est* in Court on 12th October 2011.

The Petitioner asserts in paragraphs 7, 8 and 9 of his amended petition dated 30th September 2013 that even notices sent on 27th July 2011 were not delivered to him and his Attorney-at-Law and these notices were returned to the Court of Appeal and since the Petitioner managed to get certified copies of these undelivered notices from the Court of Appeal, they have been appended to this relisting application at X2.

The delay in making this relisting application to this Court two years after the order of dismissal is explained by the Petitioner in paragraph 11 of the amended petition. According to the Petitioner it was during August 2013 when the Petitioner got a Notice from the District Court of Matale requiring his presence on 1st November 2013 that he came to know that his appeal before this Court had been dismissed.

This Court has given its anxious consideration to ascertain the truth of the assertion regarding the undelivered notices in view of the averments in the petition that notices that were undelivered and returned to the Court of Appeal were not notified to Court when the Court made its order of dismissal on 12th October 2011. This court called for a report from the Registrar of this Court who has caused an inquiry and reported back by his minute dated 14th December 2015 and his information to this Court has been filed of record. According to the registrar of the Court of Appeal, the notice sent on 5th August 2011 had been returned on 10th August 2011 and the notice sent on 12th October 2011 had also returned on 19th October 2011. The

registrar reports to Court that inadvertently the fact of return of the notices had not been recorded on the docket.

Thus the conclusion is inescapable that the assertion of the Petitioner as regards the non delivery of the notices to him is true. When this Court made the order of dismissal of this appeal on 12th October 2011, the fact that the Appellant-Petitioner had not been served with notices of that date was not before Court and if Court had that requisite information it would not have visited the Appellant-Petitioner with the sanction of a dismissal as it had done on 12th October 2011.

This Court draws in aid the salutary principle pronounced by the Supreme Court in ***Sivapathalingam v Sivasubramaniam***¹ to remedy this situation. Justice S.B. Goonawardene stated in the case what has now come to be accepted as the golden mean whenever a Court finds that a particular suitor has suffered injustice on account of an inadvertent lapse or injury on the part of a Court-

“A Court whose act has caused injury to a suitor has an inherent power to make restitution. This power is exercisable by a Court of original jurisdiction as well as by a Superior Court.”

This curative power has been recognized and adopted in subsequent cases-vide ***Caroline Perera and another v Martin Perera and Another***² and ***Wimlawathie v Jayawardene***³.

I am of the view that the dismissal of the Petitioner’s appeal arising from a partition suit was caused entirely due to the requisite communication about the non delivery of notices on the Petitioner not being brought to the notice of this Court and this

¹ (1990) 1 Sri.LR 378

² (2002) 2 Sri.LR 1

³ (2004) 3 Sri.LR 110

Court is of the view that the explanation for the delay proffered by the petitioner in making a prompt application for relisting is plausible and acceptable.

In the circumstances I set aside order dated 12th October 2011 dismissing the appeal and make order restating the appeal for argument.

The Registrar is directed to communicate this order to the District Court, Matale forthwith and recall the record in D/C 1920/P from the District Court of Matale and upon receipt thereof in the Court of Appeal, the Registrar is directed to list this matter to be mentioned for the purpose of fixing this matter for argument.

The application for relisting the appeal is thus allowed.

JUDGE OF THE COURT OF APPEAL

H.C.J. Madawala, J.

I agree

JUDGE OF THE COURT OF APPEAL