

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

Seiyudeen Lebbe Mohomed
Husain,

330A, Bamunumulla,

Atulugama, Bandaragama.

6th Defendant-Appellant-Petitioner

Case No: 1012/98(F),1013/98(F) Vs.

Habeeb Mohamed Saharuwan
Beebi,

Mahawaththa, Atulugama,

Bandaragama.

**Substituted-Plaintiff-Respondent-
Respondent**

02. Sahabdeen Lebbe Ameena
Umma,

Mahawaththa, Atulugama,

Bandaragama.

1A. Abdul Sawadi Abdul Bari,

Mahawaththa,
Atulugama,

Bandaragama.

And 13 others

**Defendant-Respondent-
Respondent**

BEFORE : P.R. Walgama, J. &
L.T.B. Dehideniya, J.

COUNSEL : Sunil Wanigatunga for the 6th Defendant-Appellant-
Petitioner.

Asthika Devendra with Lilan Warusavithana for the
Substituted 1A Defendant-Respondent.

ARGUED ON: 03.06.2016

DECIDED ON: 15.09.2016

P.R. Walgama, J.

The instant order concerns an application made by 6th Defendant –Appellant seeking an order to re list this matter for hearing.

The facts as tersely stated by the 6th Defendant- Appellant are as follows;

The Petitioner was the 6th Defendant in case No. 1012/98/(f).

The said case was abated due to the fact that Appellant had failed to take necessary steps to substitute the 5th Defendant, deceased. It is stated by the 6th Defendant-Petitioner-Appellant that due to his old age and non corporation by Respondents that he could not obtain necessary documents on time.

But it is submitted by the 6th Defendant-Petitioner-Appellant that prior to the order of the abatement was made the Appellant has filed the death certificate of the substituted Plaintiff as 'W' and the her son's birth certificate as 'W1'.

In addition the Appellant has also filed relevant documents to substitute certain parties in place of the deceased.

Further it stated by the Appellant that as he could not produce certified copies of the some relevant documents court has dismissed the Appellant's application accordingly.

It is seen from the record that the Petitioner-Appellant has taken necessary steps and tender all the documents necessary for substitution.

Therefore in the above setting the 6th Defendant- Petitioner-Appellant urged this court to have this matter re listed.

The 6th Defendant Appellant Petitioner preferred an appeal to this court challenging the judgment in the case of DC. Horana 2276/P, on the basis that no share has been

allotted to by the said judgment. As it was a partition action the Appellant- Petitioner claims title by deeds and through prescription.

After the afore said judgment many parties have deceased and the Appellant was burdened with the task of substituting theirs heirs accordingly.

Further it is stated by the Appellant- Petitioner that the other respondents who were satisfied with the afore said judgment has not helped him to obtain the necessary documents to effect the substitution in respect of the parties deceased.

The primary bone of contention of the 1st Defendant- Respondent was that the Appellant -Petitioner has not acted with due diligence. But it is seen from the case record that the Appellant -Petitioner was encountered with the issue of substituting parties in place of the deceased and had caused tremendous hard-ship to him.

The Appellant- Petitioner has adverted court to the case of JUNADASA AND ANOTHER .VS. SAM SILVA AND OTHERS 1994 (1) SLR 232- has pronounced thus;

“since there is no legislation governing the matter under what authority could the Court have ordered the re-listing of the application? I think the Court had the Power the

restore the application to the list in the exercise of its inherent jurisdiction”

Further in the case of SHANMUGAM .VS. THAMBIRAJAH - Srikantha Law Reports digest Vol II page 163- has recognised the power of the Court of Appeal to reinstate on showing of sufficient cause.

Therefore it is the contention of the Appellant -Petitioner as there were number of deaths occurred during this period it was a difficult task to gather relevant information as to the heirs of the deceased parties.

The Respondent in this case had also referred to a case which has no nexus to the case in hand. In the case of JINADASA .VS. SAM SILVA 1994 1 SLR- 232

The above matter was mainly based on the absence of Petitioner, and has held that the court cannot order the reinstatement of an application and had dismissed, unless sufficient cause for absence is alleged and established. It cannot order reinstatement on compassionate grounds”

It is further alleged by the Respondent that the Appellant - Petitioner in his petition for relisting has not make an application to vacate the initial order dated 27.01.2014, which abated the appeal. In the said backdrop

it is contended by the Respondent that the application to relist the appeal should be dismissed.

But it is salient to note if this court decides to allow to relist the appeal then automatically the order of abetment will be vacated. Therefore this court should not be trammelled by technicalities, which will cause a miscarriage of justice to the Appellant -Petitioner.

In encapsulating the above factual and legal position this court is satisfied with the diligence shown in prosecuting the appeal.

Hence for the foregoing reason we allow the application for relisting.

Application is allowed.

JUDGE OF THE ~~COURT~~ OF APPEAL

L.T.B. Dehideniya, J.

I agree

JUDGE OF THE COURT OF APPEAL