

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

CA/1392/99 (F)

D. C. Galle, Case No. 6210/P

Ekanayaka Aranasal,
Kahaduwa,
Waduwelivitiya North.

PLAINTIFF

VS

1. Neelanduwage Amarawathie
2. Neelanduwage Robert
both of No. 105, Sapumal
Pedesa, Rajagiriya.
3. Neelanduwage Agnes of No.
31/54, Nedimala, Pepiliyana.
4. Neelanduwage Rupawathie
of No. 105, Sapumal Pedesa,
Rajagiriya
5. Neelanduwage Rathnawathie
of Kossinne, Ganemulla.
6. Neelanduwage Siriyawathie
of 105, Sapaumal Pedesa,
Rajagiriya.
7. Neelanduwage Amarasena
of Sapumal Pedesa,
Rajagiriya.
8. Neelanduwage Charlott
9. Neelanduwage Hamina
both of 15, Iscapedia
Avenue, Thimbirigasyaya,
Colombo 05

10. Korottagoda Gamage
Marshall
11. Korottagoda Gamage
Esandahamy
both of Gonapinuwala.
12. Korottagoda Gamage
Eddie
13. Kankanthiri Wijesiri of
Gonapinuwala
14. Neelanduwage Gunadasa of
Waduveliwitiya North,
Kahaduwa.
15. Neelanduwage Sirisena of
Waduveliwitiya North,
Kahaduwa.
16. Neelanduwage Jayasena of
No. 301, Gemunu Mawatha,
Kiribathgoda, Kelaniya
17. Neelanduwage
Karunawathie of
Rekadahena, Kahaduwa.
18. Neelanduwage Dona Eulyn
Amarawathie
Wijesiriwardena of No. 49/2,
Templers Road, Mount
Lavinia
19. Kariyawasam Weerasinghe
Arachchi Samel of
Waduveliwitiya North,
Kahaduwa.

20. Kariyawasam Weersinghe
Arachchi Pemasiri of
Waduveliwitiya North,
Kahaduwa.

1A. Tudor Wijesiriwardena

7A. Neelanduwage Siriyawathie

8A. Neelanduwage Rathnawathie

12A. Korottagoda Gamage
Badrawathie

14A. Neelanduwage Sugathadasa

15A. Ekanayake Meraya

17A. Korottagoda Gamage
Badrawathie

DEFENDANTS

AND NOW BETWEEN

Ekanayaka Aranasal,
Kahaduwa,
Waduvelivitiya North. (*Deceased*)

PLAINTIFF-APPELLANT

Damayanthi Ekanayaka,
Waduveliwitiya North,
Kahaduwa.

Substituted Plaintiff-Appellant

VS

1. Neelanduwage Amarawathie,
No. 105, Sapumal Pedesa,
Rajagiriya

1A. Tudor Wijesiriwardena
No. 105, Sapumal Pedesa,
Rajagiriya.

2. Neelanduwage Robert both of
No. 105, Sapumal Pedesa,
Rajagiriya.

3. Neelanduwage Agnes of No.
31/54, Nedimala, Pepiliyana.

4. Neelanduwage Rupawathie of
No. 105, Sapumal Pedesa,
Rajagiriya

5. Neelanduwage Rathnawathie
of Kossinne, Ganemulla.

6. Neelanduwage Siriyawathie of
105, Sapaumal Pedesa,
Rajagiriya.

7. Neelanduwage Amarasena of
Sapumal Pedesa, Rajagiriya.

7A. Neelanduwage Siriyawathie

8. Neelanduwage Charlott

8A. Neelanduwage Rathnawathie

9. Neelanduwage Hamina both of
15, Iscapedia Avenue,
Thimbirigasyaya, Colombo 05.

10. Korottagoda Gamage Marshall

11. Korottagoda Gamage
Esandahamy both
Gonapinuwala.

12. Korottagoda Gamage Eddie
of Rekadahena, Kahaduwa

**12A. Korottagoda Gamage
Badrawathe**

13. Kankanthiri Wijesiri of
Gonapinuwala

14. Neelanduwage Gunadasa of
Waduveliwitiya North,
Kahaduwa.

**14A. Neelanduwage
Sugathadasa**

15. Neelanduwage Sirisena of
Waduveliwitiya North,
Kahaduwa.

15A. Ekanayake Meraya

16. Neelanduwage Jayasena of
No. 301, Gemunu Mawatha,
Kiribathgoda, Kelaniya

17. Neelanduwage Karunawathie
of Rekadahena, Kahaduwa.

**17A. Korottagoda Gamage
Badrawathie of Rekadahena,
Kahaduwa**

18. Neelanduwage Dona Eulyn
Amarawathie
Wijesiriwardena of No. 49/2,
Templers Road, Mount
Lavinia

19. Kariyawasam Weerasinghe
Arachchi Samel of
Waduveliwitiya North,
Kahaduwa.

19A.Kariyawasam

Weerasinghe Arachchi
Pemasiri of Waduveliwitiya
North, Kahaduwa

20. Kariyawasam Weersinghe
Arachchi Pemasiri of
Waduveliwitiya North,
Kahaduwa.

DEFENDANT-RESPONDENTS

BEFORE : **M. M. A. GAFFOOR, J.**

COUNSEL : Sandun Naghawatta for the Substituted
Plaintiff-Appellant

Sanjeewa Ranaweera & Chandana
Amarasinghe for the 19th (a) and 20th
Defendant-Respondents

WRITTEN SUBMISSION

FILED ON : 12.07.2018 (by the Plaintiff-Appellant)
28.06.2018 (by the Defendant-Respondents)

DECIDED ON : **21.11.2018**

M. M. A. GAFFOOR, J.

The deceased Plaintiff-Appellant (hereinafter referred to as the "Appellant") instituted this action in the District Court of Galle against 20 Defendants seeking *inter alia*, a decree of partition of the land called Madakadahenathuduwe Deniya more fully described in paragraph 2 of the plaint dated 11th December 1973.

However, it is seen from the journal entries that after 08.03.1974 there were no entries/records whatsoever taken by the Appellant to proceed this case until 17.09.1990 (*vide page 20 & 21 of the appeal brief*).

On 17.09.1990, the Appellant made an application for an interim injunction and an enjoining order preventing the 19th and 20th Defendant-Respondents (hereinafter referred to as the "Respondents") build up any buildings on the land sought to be partitioned, and the Court was granted those interim reliefs in the first instance on or around 19.06.1991 (*vide page 23 of the brief*).

Subsequently, on 21.01.1992 the interim injunction sought by the Appellant was also granted (*page 157, 158 of the brief*). However, the Respondents (on 14.05.1997) made an application under Section 666 of the Civil Procedure Code to set aside the interim injunction and an inquiry was held in that regard, but later, parties agreed to dispose of the inquiry by written submissions (*vide page 159-183 of the brief*).

It is also to be noted that on 03.06.1998 the learned Additional District Judge of Galle, delivering the order, set aside the interim injunction and fixed the case for 14.08.1998 finally, directing the Appellant to take all necessary steps to prosecute the action (*page 184-186 of the brief*). Since the Appellant failed

to comply with the aforesaid direction, on 14.08.1998, the Appellant's action was dismissed for non-prosecution (page 57 Of the brief). However, this dismissal of action was later set aside consequent to an application made by the Appellant (*vide page 58 of the brief*).

Thereafter, on 21.05.1999, when the case was called in open Court, the Appellant was absent and unrepresented and the Respondents made an application to dismiss the action. Accordingly, the Appellant's action was dismissed (*vide page 59 of the brief*).

The Appellant had subsequently filed papers including an affidavit dated 02.06.1999 to set aside the order dated 21.05.1999. In the affidavit dated 02.06.1999, the Appellant had stated that this case was to be called on 21.05.1999 in the District Court of Galle Court No. 01 before the District Court Judge and that the Appellant and his instructing Attorney had been waiting in the same Court room for their case to be called (*vide page 124-128 of the brief*). At this inquiry, the application was strongly opposed by the Respondents; and the Respondents initially moved to file objections on 16.08.1999, but their objection was articulated in open Court. Consequently, the District Court rejected the Appellant's application to set aside the dismissal of the action on the ground that it had no jurisdiction or authority to make an order in that regard (*vide journal entry No. 74; page 60-61 of the brief*).

Being aggrieved with the said order dated 16.08.1990 the Appellant filed this appeal seeking for an order to set aside the order of dismissal and be restored to the calling cases roll. The Appellant seeks this court's intervention on the following grounds:

1. The said order dated 16.08.1999, is contrary to law;
2. The learned Additional District Judge has not held an inquiry to ascertain the facts stated by the Appellant in his petition and affidavit dated 02.06.1999 and has thereby erred in law in dismissing this application of the Appellant to purge default; and
3. The learned Additional District Judge has failed to consider that when case was dismissed on 21.05.1999, the step was summons returnable on the 8A Defendant, and according to the prevailing law at that time no steps were needed to be taken against deceased defendant, and the learned Additional District Judge has erred in law in dismissing the Appellant's case on 21.05.1999 (*as per Petition of Appeal dated 14.10.1999*).

In this appeal, the Appellant's submission was that due to the said District Court-order dated 16.08.1999 to dismiss the Partition Case, which had been going on for 26 years up to that time, where the Appellant had taken all necessary steps to serve summons on all the parties, and where the case could have been fixed for trial without any further delay, was unduly dismissed. Accordingly, the Appellant further submitted that all of the efforts of the Appellant in bringing this case to the stage of trial was abruptly halted due to the said order of dismissal of the learned District Court Judge.

In this case, the Appellant moved in to action by filing an application with an affidavit to purge his default. In the inquiry the Appellant stated that, when the case had been called in the District Court room No. 02, whereas in fact the case should have been called in District Court room No. 01, where the Appellant and his Attorney-at-Law were waiting. He further stated that the said fateful day namely 21.05.1999 is a calling date; and there is no provision

in the Partition Act to dismiss a case on a calling date. Accordingly, the Appellant argued that when the Partition Act is silent on a matter of Law, the provisions of the Civil Procedure Code shall be adopted, as per Section 79 of the Partition Act (*the Appellant's Counsel in his written submission mistakenly has mentioned as Section 99*). Therefore, Counsel for the Appellant argued that the instant case will be treated under Section 87 of the Civil Procedure Code, regarding the non-Appearance of Plaintiff (Appellant in this case).

It is surprisingly to note that, in this appeal the Appellant was not go in to deep for establishing his version of evidence that which was led in the District Court regarding his default. Rather he hasten to draw some arguments to show the dismissal was unreasonable, therefore, the Appellant was constantly made his submissions on Section 87(1) and 87(3) of the Civil Procedure Code.

In contrast, Counsel for the Respondents contended that the Appellant's action was dismissed on 21.05.1999, not purely for his non-appearance, but for his failure to prosecute the action with reasonable diligence, which was manifest in his non-appearance, therefore, he argue that the Appellant's action was dismissed under Section 70(1) of the Partition Law (as amended) for non-prosecution and not under Section 87(1) of the Civil Procedure for mere non-appearance (*vide page 3 of the written submission on behalf the Respondent*). Accordingly, Counsel for the Respondents bring this Court's attention that the order dated 03.06.1998 delivered by the learned District Judge also demonstrate the failure on the part of the Appellant to prosecute the action with reasonable diligence. Therefore, the following observations of the District Court are noteworthy:

“මෙම නඩුවේ පැමිණිල්ල, පැමිණිලිකරු විසින් ඉදිරිපත් කර ඇත්තේ 1973 වසරේදී ය. 1974 සිට 1990 දක්වා කිසිදු පියවරක් ගෙන

නොමැතිව සිටි මෙම පැමිණිලිකරු 1990 වසරේදී 19 සහ 20 වෙනි විත්තිකරුවන්ට විරුද්ධව අතුරු තහනම් නියෝගයක් ලබා ගැනීම සඳහා මේ නඩුව නැවත කැඳවීම රෝලට ගෙන, එසේ අතුරු තහනම් නියෝගයක් ලබා ගෙන ඇත.”

“1990 සිට නැවතත් වසර 08 ක පමණ කාලයක් ගත වුවර මෙම නඩුව විභාගයට නියම කර බෙදුම් නඩු නීතිය යටතේ බෙදා වෙන් කර ගැනීම සඳහා මෙම පැමිණිලිකරු උනන්දු වී ඇති බවක් නොපෙනේ...” (page 184 of the brief).

“...මෙම නඩුවේ උද්ගතවී ඇති ඉහත සඳහන් කරුණු අනුව පැමිණිලිකරු මෙම නඩුව ඉදිරියට ගෙන යෑමට අවශ්‍ය සියලු පියවර ගෙන නඩුව විභාගයට තබා ගැනීම සඳහා අවසාන දිනයක් මම ලබා තෙමි.”

“ඒ අනුව, මෙම නඩුවේ පැමිණිලිකරු විසින් ගතයුතු සියළු පියවර ගැනීම අවසාන වශයෙන් කැඳවන්න.”

1998 අගෝස්තු 14.

එදින අවශ්‍ය පියවර පැමිණිලිකරු විසින් නොගතහොත් පැමිණිලිකරුගේ පැමිණිල්ල නිශ්චයා කළයුතු මවට ද වැඩිදුරටත් නියම කරමි (page 186 of the brief).

Therefore, in the above context the Respondents argue that the learned Additional District Judge made the necessary directions requiring the Appellant to take all the necessary steps to prosecute the action, finally, on

14.08.1998 in order to compel the parties to bring the action to a termination as the Appellant was not prosecuting the action with reasonable diligence (*paras 2 (d) & (e) of the Respondents' written submission*).

At this stage I wish to point out some law-elements on non-prosecution of a (partition) action. Section 70(1) of the Partition Law No. 21 of 1977 (as amended) which provides as follows:

"No partition action shall abate by reason of the non-prosecution thereof, but, if a partition action is not prosecuted with reasonable diligence after the court has endeavoured to compel the parties to bring the action to a termination, the court may dismiss the action;

Provided, however, that in a case where a plaintiff fails or neglects to prosecute a partition action, the court may, by order, permit any defendant to prosecute that action and may substitute him as a plaintiff for the purpose and may make such order as to costs as the court may deem fit."

It is to be observed that Section 70 quoted above, states on an empathetic note, that no partition action shall abate by reason of non-prosecution of the same and it imposes a duty on the Court to "compel the parties" to bring the action to an end (vide, *Peiris and Others vs Chandrasena and Others* (1999) 3 SLR 153, *Amarasinghe vs Podimenike and Others* 1997 1 SLR 349).

In ***Peiris and Others vs Chandrasena and others***, this Court was held that,

“Section 70 (of the Partition Law) states that no partition action shall abate by reason of non-prosecution, and it imposes a duty on the Court to ‘compel the parties’ to bring the action to an end - which duty the Court in this case has failed to fulfil. Where a delay in an action is the act or omission of the Court, no party shall suffer for it.”

Also this court has endeavoured to set out some legal principles on the word of “compel the parties” in the said Section.

In ***K. S. Victor vs. W. I. Tissera (CA 374/2000)***-(Court of Appeal minutes dated 12.10.2015), A. H. M. D Nawaz, J has observed as follows:

“The pith and substance of promoting the spirit behind the Partition Law lie in the District Judge's role in his/her endeavor to bring the parties to trial and terminate proceedings as the final decree is dispositive of parties' right against the whole world. Towards the end the grant of a date even subject to costs is a course of action that cannot be characterized as an erroneous exercise of discretion and one is reminded of that perennial dictum-cost is a panacea for all ills...” (page at 14).

Also, I observe that the proviso to Section 70 of the Partition Law states that in a case where a Plaintiff fails or neglects to prosecute a partition action, the court may, by its order, permit any Defendant to prosecute that action and may substitute him as a Plaintiff for the purpose and may make such order as to costs as the court may deem fit. It is clear that the expression, “any defendant” in the above Section 70(1) means, any defendant irrespective of

whether he has soil rights or not can prosecute the action thereunder; and that Section 70 permits each single defendant, without distinction, to step in to the shoes of the plaintiff, in case the plaintiff omits to do in the action that which he ought to do or fails to prosecute the same with diligence. However, a defendant's act (right) to step in to the shoes of the plaintiff is a voluntary one. In the instant case, on the fateful day - when Appellant was absent and unrepresented, any defendants (including Respondents) were not willing to seek a permission to proceed the case; the Respondents eventually made an application to dismiss the action - accordingly, the Appellant's action was dismissed. Therefore, it is my view that in most of the case, the sanction of the dismissal of action could be directly impact on plaintiff who failed to (diligently) prosecute his/her case – same was happened in this case.

In the appeal, the Respondents' strong argument was that the learned Additional District Judge by his order dated 03.06.1998 had directed the Appellant to take all necessary steps to prosecute the action. Since the Appellant failed to do so, therefore, on 14.08.1998 the Appellant's action was dismissed for non-prosecution; however this (first time) dismissal of action was later set aside consequent to an application made by the Appellant. Later, on 21.05.1999 when the case was called in open Court, the Appellant was absent and unrepresented, thus the learned Additional District Judge (second time) dismissed the Appellant's action and entered a decree on 14.08.1998. At this juncture, I wish to recall the dictum of A. H. M. D Nawaz, J - he observed that,

"...Towards the end the grant of a date even subject to costs is a course of action that cannot be characterized as an erroneous exercise of discretion and one is reminded of that perennial dictum-cost is a panacea for all ills..." (Emphasized added).

In the instant case, it is important to note that the learned Judge had granted reasonable (period) dates to prosecute the case, even the Appellant failed to do so.

Also, the Respondents submitted that, the Appellant's action was dismissed on 21.05.1999, not purely for the Appellant's non-appearance, but for his failure to prosecute the action with reasonable diligence therefore, they are in position that the Appellant's action was dismissed on 21.05.1999 under section 70(1) of the Partition Law and not under Section 87(1) of the Civil Procedure Code for mere non-appearance (*para 2 (j) of the written submission*). This court inclines to agree with these submissions.

The Appellant in his submission stated that the said fateful day namely 21.05.1999 is a calling date; and there is no provision in the Partition Act to dismiss a case on a calling date. Accordingly, the Appellant submitted that when the Partition Act is silent on a matter of Law, the provisions of the Civil Procedure Code shall be adopted, as per Section 79 of the Partition Act. Therefore, Counsel for the Appellant argued that the instant case will be treated under Section 87 of the Civil Procedure Code, regarding the non-Appearance of Plaintiff (Appellant in this case).

Section 79 of the Partition Law, 21 of 1977 (as amended) sets out the following:

"In any matter or question of procedure not provided for in this Law, the procedure laid down in the Civil Procedure Code in a like matter or question shall be followed by the court, if such procedure is not inconsistent with the provisions of this Law."

Now it is settled law that this *casus omissus* provision is has the effect regard to the facts and circumstances of the case. The Section was introduced for filling the lacunas in Partition Law.

Even, it is my view that the forgoing issue should be settled under Section 70(1) of the Partition Law; not under Section 87 of the Civil Procedure Code. After careful perusal of the judgment of the learned Additional District Judge, it is crystal clear that he dismissed the action not purely for the Appellant's non-appearance, but for his failure to prosecute the action with due diligent. The learned Additional District Judge reasonably compelled the Appellant (Plaintiff) to prosecute the case which was filed around 1973; and he had been enough lenient on the Appellant to before dismissing the action.

In the circumstances, I proceed to affirm the order of the learned Additional District Judge and dismiss this appeal with Costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL