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

In the matter of an application for substitution under Section 337 of the Civil Procedure Code.

C.A. Case No. 599/1983 (F)

D.C. Jaffna Case No. 5455/L

1. **Selvanantham**, son of Jaganathan
2. **Sivanantham,** son of Jeganathan, presently in Dubai
3. **Sakunthaladevi,** daughter of Jaganathan
   (after marriage Mrs. Sakunthaladevi Tharumakulasingam)
4. **Tharumakulasingam** all of Neervely North, Neervely.

SUBSTITUTED DEFENDANT-PETITIONERS

(in place of the 2nd Deceased Defendant)

-Vs-

1. **Sinnathamby Kasinathan**
2. and wife, **Nagammah**

Both of Neervely North, Neervely.

PLAINTIFF-RESPONDENTS

1. **Baladevi,** widow of Rathasegaram,
2. **Nalayaini,** daughter of Rathasegaram,
   (after marriage, Mrs. Nalayaini Vimalarajah)
3. **Vimalarajah** all of Neervely North, Neervely.

SUBSTITUTED DEFENDANT-RESPONDENTS

(in place of the 1st Deceased Defendant)

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	C.V. Vivekananthan with P.N. Joseph for the Substituted Defendant-Petitioners. Dr. Sunil Coorey for the Plaintiff-Respondent
Written Submissions on:		18.06.2014; 16.07.2015 (For Substituted Defendant-Petitioners)
Decided on	:	30.03.2016

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

This case juxtaposes the inordinate delay and inertia displayed by the Substituted Defendant-Petitioners (sometimes hereinafter referred to as "the Petitioners") in this case in prosecuting this appeal to vindicate the rights of the original Defendants vis-a-vis the rights of the Plaintiff-Respondents (sometimes hereinafter referred to as "the Respondents"). In fact the judgment in the case was pronounced in favor of the Plaintiff-Respondents as far back as 1983. In a nutshell the concatenation of events in the case goes as follows. As far back as 02.12.1983 the District Court of Jaffna delivered its judgment in favour of the Plaintiff-Respondents who had come to court to vindicate their pre-emption rights under the Thesawalamai. The original 1st and 2nd Defendants preferred an appeal to the Court of Appeal in 1983. An order of abatement of the appeal was made by this court on 02.01.1997 because the original Defendant-Appellants, in terms of the proceedings dated 02.01.1997, had not complied with Rule 4 of the Supreme Court Rules. The substituted Defendant-Petitioners representing the 2nd Deceased Defendant made an application to this Court to re-list this appeal canvassing the order of abatement in 2008-almost 13 years after the order of abatement was made in 1997. The inquiry into the application for re-listing was not taken up on a number of occasions for one reason or the other and when it ultimately came up for inquiry on 30.03.2011,

neither the parties nor their representatives were present in court and in the attendant circumstances this Court made the following order

"Parties absent and unrepresented. No order."

Barely four years had lapsed since the making of this order when the Plaintiff-Respondents filed a motion in this Court praying *inter alia* that the application for re-listing of the appeal and vacation of the order of abatement must be dismissed. It is this motion that has seemingly activated the substituted Defendants-Petitioners to file objections to the motion and what has come up for inquiry before this Court is the inquiry into this motion to have the application for re-listing dismissed.

The gravamen of argument of Dr. Sunil Coorey who appeared for the Plaintiff-Respondents was that since this Court made the order on 30.03.2011 on which date the court found none of the parties present in Court and until the Plaintiff-Respondents filed their motion in 2014, the substituted Defendant-Petitioners lay dormant doing nothing about their re-listing application and therefore a judgment in favor of the Plaintiff-Respondents that was rendered by the District Court of Jaffna in 1983 has remained elusive and beyond the reach of the Plaintiff-Respondents for well-nigh 33 years and this displays a crass lack of due diligence on the part of the substituted Defendant-Petitioners.

On the contrary Mr. C.V. Vivekananthan for the substituted Defendant-Petitioners launched his attack on the order of abatement itself made in 1997 and contended that since that order was flawed for want of due process, all other steps taken since then have become null and void.

I must straightaway make clear that the issue before this Court is whether the application for re-listing the appeal should be disallowed for its non-prosecution and not whether the order of abatement made in 1997 is a nullity.

If an order of abatement is a nullity, no doubt that order would be of no use or avail and the appeal would in effect be pending. But the order of abatement must be shown to be a nullity by the Petitioners. In order to argue the question of nullity, the Petitioners

must initially get over the threshold issue before Court-namely whether this re-listing application can be taken up at all in the first place. The question of nullity of the order of abatement, I must hold, could be argued only if this Court proceeds to hear the re-listing application and in the course of an argument to restate the appeal, definitely the question of nullity of abatement could be taken up. As I have said before, nullity is not the issue before me. What is in issue before me now is whether the application for re-listing could be taken up at all. Dr. Coorey for the Plaintiff-Respondents contends that the application for re-listing must be dismissed for non prosecution thereof. The question of investigation of the nullity alleged against the order of abatement would arise only when the re-listing application is fully gone into. The argument of Dr. Coorey was that this re-listing application itself should be dismissed because for 4 years till 2014 the substituted Defendant-Petitioners did nothing about their application for re-listing having let it lie in abeyance and they took no steps whatsoever to revive the re-listing application since it was filed.

Once again the chronology of events is quite pertinent in this matter. The District Court of Jaffna delivered its judgment in 1983. An appeal was preferred to this Court in the same year. This Court made the order of abatement of appeal in 1997. The record of the case was sent back to the District Court of Jaffna. Only when the District Court of Jaffna made its order to execute the decree on 23.05.2008, the application for re-listing the abated appeal was made to this court on 26.05.2008.

Long delay to make an application to re-list

The substituted Defendant-Petitioners took 11 years from the order of abatement to make an application to re-list the appeal. Even after it was filed, it is a salient feature in this protracted litigation that the application for re-listing was not pursued with due diligence. The application for re-listing was taken up for argument on several dates but it has so happened that the inquiry had gone down on these dates for one reason or the other-please *see* the journal entries dated 4/3/2009, 9/12/2009, 15/2/2010, 11/06/2010, 10/9/2010 and 30/03/2011.

No order on the date of the inquiry into the application for re-listing

So when the inquiry into the application for re-listing came up again on 30.03.011, *no order* was made as both parties had been absent and unrepresented.

Three years later, on the 13.02.2014, the Plaintiff-Respondents filed a motion praying for a dismissal of the case as no appropriate steps had been taken by the substituted Defendant-Petitioners even to prosecute the application for re-listing. The substituted Defendant-Petitioners filed their objections to this motion and it is the inquiry into this motion that was argued before this Court. As the above concatenation of events shows, there has been inertia and lethargy in prosecuting this appeal and more particularly the application for re-listing. If a Petitioner seeks a re-listing of an abated appeal, it is the bounden duty to show utmost diligence and promptitude in prosecuting the re-listing application. The mere filing of a re-listing application would not suffice for this purpose. Constant vigilance has to be shown as to the seriousness of restoring the appeal. The Petitioners by a long lapse of time in prosecuting the re-listing application cannot render a judgment secured in the original court elusive and beyond the reach of successful litigants such as the Plaintiff-Respondents in this case.

If a Petitioner for a re-listing application absents himself from the inquiry for reasons beyond his control, a reasonable cause for absence must be brought home to Court. Merely because the Respondent to the re-listing application is also absent that is no ground for absolution for the Petitioner. Because it is the petitioner's application for re-listing that is before Court, it is incumbent upon him to move Court to expeditiously have the appeal restored. But the substituted Defendant-Petitioners in this case have not displayed any of the aspects of due diligence as is required of them. When no order was made by this Court on 30.03.2011 on which day the application for re-listing came up for inquiry, the Petitioners should have moved with speed and dispatch to explain the delay by way of a motion and taken steps to restore the inquiry. For three years running the substituted Defendant-Petitioners stood as mute bystanders. It is quite natural in the circumstances for the Respondents (the Plaintiff-Respondents who had succeeded in the original court) to file a motion to move for a dismissal of the

application for re-listing. It was in these circumstances that the motion dated 13.02.2014 filed by the Plaintiff-Respondents has to be understood. There must be a *finis* to litigation and that has remained the age-old and well-established policy of law-*Ut sit finis litium.*

It is the motion of the Plaintiff-Respondents that seems to have awoken the Petitioners for re-listing. In their objections to the motion filed by the Petitioners, I find no explanation as to why the Petitioners did not revive their application for re-listing so soon after no order was made. Such conduct of want of due diligence is so glaring that one wonders whether the Petitioners would deserve any kind of relief in these circumstances. On the facts and circumstances of this case, the decision of the Supreme Court in ***Jabir v. Karunawathie*** (2005) 3 Sri.LR 412 becomes quite pertinent. In that case the Defendant-Appellant had died on 30.01.2000 pending his appeal. As no application for substitution was made for two years by any interested party in order to proceed with the appeal, the Court of Appeal issued notice on the registered attorney-at-law of the deceased Defendant-Appellant. On being satisfied that the notice had been served, and as no application for substitution was made even thereafter, the Court of Appeal made the order of abatement. Accordingly the Court of Appeal sent back the record to the District Court. An application made thereafter by the spouse of the deceased Defendant-Appellant to get the order of abatement set aside and to have herself substituted in the room of the deceased Defendant-Appellant was allowed by the Court of Appeal. The Plaintiff-Respondent appeal against the order of the Court of Appeal to the Supreme Court. In appeal the Supreme Court set aside the said order and dismissed the application of the spouse to set aside the order of abatement and for substitution.

In the instant case before me, the order of abatement was made a decade ago. The demerits of the application to set aside this order by way of the instant re-listing application far outweigh the merits and the want of due diligence tainting the non prosecution of the application to re-list is inexcusable given that there has been no explanation for the long inertia displayed by the Petitioners. The Plaintiff-Respondents

can no longer be kept away from a judgment rendered in their favor 19 years ago by a stratagem adopted by the Petitioners to first file a belated re-listing application and not prosecute it later.

In the circumstances I proceed to dismiss the application of the substituted Defendant-Petitioners with costs.

JUDGE OF THE COURT OF APPEAL