

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA AMENDED CAPTION**

Welathantrige William Botheju,
No. 122, Kahantora Road,
Malabe.

PLAINTIFF

VS.

**Court of Appeal No. CA 334/1998(F)
D.C. Homagama Case No. 142/P**

- (Deceased) 1. Welathantrige Pedrik Botheju,
No. 470, Galawila Road,
Homagama.
- (Deceased) 2. Welathantrige Adilin Botheju,
No.122, Kahantota Road,
Malabe.
- (Deceased) 3. G. Marthina Perera,
Of No. 121, Kahantota Road,
Malabe.
- (Deceased) 4. Welathantrige Wilson
Botheju,
No. 121, Kahantota Road,
Malabe.
5. Welathantrige Albert Botheju,
No. 121, Kahantota Road,
Malabe.
6. Welathantrige Victor Botheju,
No. 121, Kahantota Road,
Malabe.

7. Welathanthrige Ebert Botheju,
No.121, Kahantota Road,
Malabe.
8. Welathanthrige Shelton
Botheju,
No. 121, Kahantota Road,
Malabe.
9. Josage Nimalawathie Perera
10. Josage Shayama Kumudini
Perera
11. Josage Daniel Perera
All of No.99, Kahantota Road,
Malabe.

DEFENDANTS

AND BETWEEN

Welathanthrige William
Botheju,
No. 122, Kahantota Road,
Malabe.

PLAINTIFF-APPELLANT

VS.

- (Deceased) 1. Wilathanthrige Pedrik Botheju,
No. 470, Galawila Road,
Homagama.
- 1a Weligepolage Sumanadasa
Perera,
No. 63C, Rukmale,
Pannipitiya.

- 1b Weligepolage Nimalasena
Perera,
No. 63 C, Rukmale,
Pannipitiya.
- 1c Weligepolage Namasena
Perera,
No.474, Galawila Road,
Homagama.
- (Deceased) 2. Welathanthrige Adilin Botheju,
No. 122, Kahantota Road,
Malabe.
- 2a. Kahathuduwage Premawathie
Perera,
No. 231/101, C.G.R. Land,
Meethotomulla,
Mulleriyawa.
- (Deceased) 3. G. Marthina Perera,
Of No. 121, Kahantota Road,
Malabe.
- (Deceased) 4. Welathanthrige Wilson
Botheju,
No. 121, Kahantota Road,
Malabe.
- 4a. Welathanthrige Nimal Ranjith
Botheju,
- 4b. Welathanthrige Bandula
Shrinatha Botheju,
- 4c Welathanthrige Kumari
Malkanathi Botheju,
All of No. 121, Kahantota
Road, Malabe.

5. Welathanthrige Albert Botheju,
No. 121, Kahantota Road,
Malabe.
6. Welathanthrige Victor Botheju
No. 121, Kahantota Road,
Malabe.
7. Welathanthrige Ebert Botheju,
No. 121, Kahantota Road,
Malabe.
8. Welathanthrige Shelton
Botheju,
No. 121, Kahantota Road,
Malabe.
9. Josage Nimalawathie Perera,
10. Josage Shayama Kumudini
Perera,
11. Josage Daniel Perera,
All of No. 99, Kahantota Road,
Malabe.

DEFENDANT-RESPONDENTS

**BEFORE: W.M.M. Malinie Gunaratne, J. and
P.R. Walgama, J.**

COUNSEL: Ranjan Suwandaratne.
for the Plaintiff-Appellant

Nihal Jayamanne, P.C. with Noorani Amarasinghe
for the 5th Defendant- Respondent.

Argued on : 25.09.2015

Written submissions filed on : 30.11.2015

Decided on : 09.02.2016

Malinie Gunaratne, J.

The Plaintiff – Appellant (hereinafter referred to as the Appellant) filed the above-mentioned partition action to partition the land described in the schedule to the Plaint. The 5th Defendant – Respondent who was the only contesting Defendant filed statement of claim and sought for dismissal of the action. After the trial, the learned District Judge dismissed the Plaintiff's case.

Aggrieved by the said Judgment, the Appellant preferred this Appeal to this Court seeking to set aside the Judgment of the learned District Court Judge made on 05.03.1988.

When this case was taken up for argument on 11.01.2012 the Appellant informed Court that the 1st, 2nd, 3rd, 4th, 9th and 11th Defendants – Respondents have expired and that substitution should be effected. Accordingly, the Appellant was given time to file substitution papers.

The Plaintiff substituted in place of the deceased 1st, 2nd, 4th and 11th Defendant -Respondents but did not take steps on behalf of the 3rd Defendant – Respondent. As the Appellant had failed to take the necessary steps to effect the substitution of the 3rd Defendant – Respondent, the Court made an order on 25.03.2014 abating the Appeal. The Order of the Court of Appeal was pronounced in the District Court of Homagama on 11.11.2014

and thereafter the Appellant has made the present application on 19.12.2014 to this Court to have the Order for abatement set aside.

The 5th Defendant-Respondent objected to the application and the matter was fixed for inquiry. When the matter was taken up for Inquiry on 29.05.2015, learned Counsel for the parties made submissions and subsequently tendered written submissions.

It is the contention of the learned President's Counsel for the 5th Defendant-Respondent, (hereinafter referred to as the Respondent) that when an order has been made for abatement by the Court of Appeal under the Supreme Court Rules, the Court of Appeal itself cannot and has no jurisdiction to set aside its own order. The learned President's Counsel further contended that the Appellant should have appealed against the abatement order to the Supreme Court.

However, it is the stance of the learned Counsel for the Appellant, that in view of Section 403 of the Civil Procedure Code the same Court can set aside an order for abatement. The learned President's Counsel for the Respondent argued, that Section 403 must be read in the context in which it is incorporated to the Civil Procedure Code. He further argued that the Section 403 comes under Part III of the Civil Procedure Code under the heading INCIDENTAL PROCEEDINGS (Chapter XXV) and therefore Section 403 applies to incidental proceedings taken under the Civil Procedure Code and it is a clear reference to orders of abatement entered by the District Court, and the District Court alone. However, the stance of the learned President's Counsel is, that it does not apply to orders of abatement made by the Court of Appeal.

Accordingly, the first question that arises for consideration in this application is whether when an order has been made for abatement by the Court of Appeal, the Appellant should appeal to the Supreme Court against that order or whether the Court of Appeal itself has jurisdiction to set aside its own order. In the case at hand, firstly, it is relevant to note, that the order of the Court of Appeal was not a judgment pronounced at the termination of the hearing of an Appeal, but rather **an order on an incidental question, viz., an application for re-listing**. It was held in *Jinadasa and Another vs. Sam Silva and Others* (1994) 1 SLR 232 since, there is no legislation governing the matter, the Court has the power to restore the application to the list in the exercise of its inherent jurisdiction. (*Issarsing vs. Udhavdas and Others* AIR 1921 Sind 55, 57).

Accordingly, I find myself unable to agree with the submissions made by the learned President's Counsel for the Respondent. As such I am of the view that this Court has the power to restore the application to the list in the exercise of its inherent jurisdiction.

The next question that arises for decision is, if this Court has the power to order re-listing, under what circumstances should the matter be reinstated. If sufficient cause for reinstatement has been established, the Court may have to reinstate the matter.

It is important to note, that the burden of alleging and proving the existence of facts, rests on the party who seeks reinstatement. It was held in *Jayasooriya vs. Kothalawela* (1922) 23 N.L.R. 511, the Court cannot order the reinstatement of an application it had abated, unless sufficient cause is

established. It cannot hold that, there is sufficient cause to reinstate the matter unless the grounds for coming to that conclusion were reasonable.

It is relevant to note, when this case was mentioned on 11.01.2012 to fix for argument, Counsel for the Appellant informed Court that the 1st, 2nd, 3rd, 4th, 9th and 11th Defendant- Respondents have expired and that substitution should be effected. Even though the Appellant substituted in place of the deceased 1st, 2nd, 4th and 11th Respondents after two years, he did not take steps on behalf of the deceased 3rd Defendant-Respondent.

On 08.03.2013 the Court directed the Plaintiff to take steps before 30.05.2013 and if not, that the appeal will be abated. When the case was mentioned on 30.05.2013, as the Plaintiff had not taken steps to substitute persons in place of the deceased 3rd Defendant-Respondent, again the Court granted time to take steps until 15.07.2013. On that day also Counsel for the Appellant moved for further time to file substitution papers and another date (17.09.2013) was granted for the Appellant to take steps. When the case was mentioned on 17.09.2013 without mentioning that he has not taken steps to substitute a person in place of deceased 3rd Defendant – Respondent, the Counsel for the Appellant stated to Court that the matter can be now fixed for argument and accordingly the Court fixed the matter for argument on 25.10.2013 for the second time.

On the argument date the Counsel for the Appellant moved to support a Petition and Affidavit filed on 09.07.2013, which was an application to substitute in place of the 3rd Defendant-Respondent. It is to be noted, that application had been filed before the matter was fixed for argument for the second time. This application was dismissed as the papers were not in order.

The Court granted further time finally warning the Appellant to file the papers before 17.03.2014 and if he does not act with due diligence that the Appeal will be abated. On 21.03.2014, the learned Judge was absent and the case was re-fixed to be mentioned on 25.03.2014. On that date, as the papers were not in order, the application was rejected and the Court made an order abating the Appeal. It is relevant to note that the Court has been generous and considerate in allowing so much time to file the necessary papers for substitution.

Abating the Appeal, this Court has observed that the 3rd Defendant – Respondent had died in the year 1985, while this case was pending in the District Court, and the Appellant being the Plaintiff to this action should have taken steps to substitute the heirs of the 3rd Defendant-Respondent at that point of time. Further Court has observed, for nearly 30 years the Appellant has failed to perform his duty.

Now, I will turn to the contents of the Petition and Affidavit filed by the Appellant seeking to set aside the order of abatement made by this Court on 25.03.2014. Paragraph 8 of the Petition states, “after the case record was sent to the District Court of Homagama, the Appellant found that when the case record was reconstructed after the destruction of the Homagama District Court on 7th April 1988, a motion dated 9th April 1986, the Petition and Affidavit also bearing the same date was submitted to Court and sought to substitute the 1st Respondent of the said Application, the said Vincent Boteju to be substituted in place of the deceased 3rd Defendant-Respondent”. It is relevant to note these facts were not mentioned at all before making the order of abatement. It was held in *Jinadasa and Another vs. Sam Silva and Others* (1994) 1 S L R 232, “Belated reflection on irrelevant side issues and

matters which are not of decisive importance should be discouraged in the interests of the expeditious disposal of the work of the Appellate Courts”.

Although the Petitioner has stated that he annexes certified copies of the said Motion, Petition and Affidavit they are only true copies signed by the Petitioner's Registered Attorney. Be that as it may, on perusal of document marked X2 (the Petition) it is relevant to note, that the date of the death of the 3rd Defendant – Respondent is not mentioned. Also, a copy of the death certificate has not been filed along with the Petition. However, it is important to note, that the Appellant has not annexed an Order with effect to the substitution in place of the deceased 3rd Defendant-Respondent made in the District Court. As such, the Petitioner cannot say that the substitution on behalf of the deceased 3rd Defendant - Respondent was made in the original Court.

It is relevant to note, documents marked X1, X2 and X3 are photo copies of pages 83 – 86 of the appeal brief which were available to the Plaintiff at the time he made the application for substitution in place of the 3rd Defendant - Respondent and at the time the order for abatement was made. The Appellant has admitted that he perused, and examined the brief / original case record after the abatement order was made. Had he perused the brief before making the order for abatement, he would have found those documents filed along with the Petition. However, by those documents it has not been proved that the deceased 3rd Defendant-Respondent has been substituted.

The Appellant was under a heavy obligation to prosecute his application with due diligence. However it is important to mention the

following observations of Amarasinghe J. in the case of Jinadasa and Another vs. Sam Silva and Another.

“The Petitioners were under no legal obligation to be heard through lawyers. Yet no doubt after due consideration and deliberation as a matter of conscious willing and resolution, they decided to place the matter in the hands of lawyers. The success might have come from their lawyer’s endeavours would have been enjoyed by them. They must, now, with evenness of mind, take the consequences of the defaults and failure of their lawyers”.

It is important to note, the Counsel would gain full control of the case, if he retained and instructed. In the case at hand, the discovery of documents marked X1, X2 and X3 after the abatement order, is nobody’s fault but the Counsel’s. Had he perused the brief before the abatement order was made, he would have found those documents filed along with the Petition. Admittedly, it is the party who suffers when the Counsel do not discharge their duty properly.

However, reinstatement will not be granted because of the culpable failure of the Counsel.

The journal entries of this case show, that the Appeal of this case has been preferred on 19.03.1988 and was not heard till 25.03.2014 and during that time the case has been postponed on seventeen (17) occasions. Three (3) of which were to suit the convenience of Court, and all other occasions for the convenience of the Appellant. This shows that the Appellant has not shown due diligence to prosecute his Appeal.

Provision 34 of the Supreme Court Rules – Part II – General Provisions, reads as follows:

“Where an appellant or a petitioner who has obtained leave to appeal fails to show due diligence in taking all necessary steps for the purpose of prosecuting the appeal or application, the Court may on an application in that behalf by a respondent, or of its own motion, on such notice to the parties as it shall think reasonable in the circumstances, declare the appeal or application to stand dismissed for non-prosecution, and the cost of the Appeal or application and any security entered into by the appellant shall be dealt with in such manner as the Court may think fit”.

I am of the view, this Court taking the requirements of the due administration of justice into account, was justified in ordering to abate the Appeal on 25.03.2014.

Having taken the above facts and circumstances into consideration this Court is of the view that the Order made on 25.03.2014, should not be set aside, and accordingly, the application of re-listing is dismissed with costs of Rs.50,000/-.

JUDGE OF THE COURT OF APPEAL

P.R.Walgama, J.

I agree

JUDGE OF THE COURT OF APPEAL

Appeal is dismissed