PUNCHIHEWA
v.
ABEYWARDENA

SUPREME COURT
AMERASINGHE, J.,
DHEERARATNE, J. AND
WADUGODAPITIYA, J.
S.C. APPEAL NO. 152/97
C.A. NO. 216/87 (F)
D.C. COLOMBO NO. 14126/L
JUNE 12, 1998
JULY 13, 1998

Vindicatory suit – Abatement of previous action on the same cause without notice to plaintiff – Plea of res judicata – Sustainability of the plea.

The original plaintiff filed an action in 1980 against the original defendant seeking a declaration of title to the land in dispute, for ejectment and damages. The defendant pleaded that the plaintiff could not have maintained the action in as much as the order of abatement dated 9. 1. 76 entered in case No. 296 ED in the Magistrate's Court of Colombo instituted under the Administration of Justice Law between the same parties and on the same cause of action operated as *res judicata*.

Held:

The purported order of abatement entered in case No. 296 ED had been made by Court *ex more motu* without any notice to the plaintiff or his registered Attorney on record. As such that order is a nullity and the plea of *res judicata* fails.

Cases referred to:

1. *Fernando v. Peiris* (1897) 3 NLR 77.
2. *Cave & Co. v. Erskine* (1902) 6 NLR 338.
3. *Allahakoon v. Wickramasinghe* (1908) Appeal Court Reports 8.
4. *Lorensu Appuhamy v. Paaris* (1908) 11 NLR 202.
5. *Suppramaniam v. Symons* (1915) 18 NLR 229.
6. *Muttucumarasmy v. Sathasivam* (1951) 53 NLR 97.
7. *Bank of Ceylon v. Liverpool Marine & General Insurance Co., Ltd.* (1962) 66 NLR 472.
8. *Nagappan v. Lankabarana Estate Ltd.* (1971) 75 NLR 488.

APPEAL from the judgment of the Court of Appeal.

Faiz Musthapha PC for appellant.

Bimal Rajapakse with *Ms. Damayanthi de Silva* for respondent.

Cur. adv. vult.

July 30, 1998.

DHEERARATNE, J.

The original plaintiff filed this action on 22nd January, 1980, against the original defendant, seeking a declaration of title for the land called lot CG in Plan No. 4082 made by H. W. Fernando, Licensed Surveyor, bearing assessment No. 4/40, Polhengoda Road, Colombo, in extent 10.02 perches and for damages. If I may give some more particulars of the plaint at this stage, no value of the land was mentioned although a declaration of title was asked for; the quantum of damages mentioned was Rs. 38,000; and the action was valued at Rs. 38,000. The original defendant, resisted the action *inter alia* on the basis that the original plaintiff could not have had and maintained the action, inasmuch as the order of abatement entered in case No. 296 ED in the Magistrate's Court of Colombo, between the same parties, and on the same cause of action, operated as *res judicata*.

The learned District Judge held against the defendant on the plea of *res judicata* on the basis that the action filed in the Magistrate's Court was a nullity, as the Magistrate's Court had no jurisdiction to hear that case and that "that Court had jurisdiction only if the value of the land was below Rs. 1,500". The Court of Appeal affirmed that judgment for a different reason; it held that in the earlier action "presumably" no relief had been sought for declaration of title and ejectment, but only for damages in a sum of Rs. 300 and therefore the plea failed. The only matter for determination before us in this appeal is whether the plea of *res judicata* should have been upheld.

I shall now turn to the previous case No. 296 ED. The plaint in that case dated 28. 2. 75, was filed in the Magistrate's Court of

Colombo on 5th March 1975. At that time the Administration of Justice Law (AJL) No. 44 of 1973 was fully in operation, section 52 of that law having come into operation on 15. 11. 73 by virtue of the order published in the *Gazette* No. 85/7 of 16. 11. 73, and other sections of the law having come into operation on 1. 1. 74 by virtue of the order published in the *Gazette* No. 94/11 of 28. 12. 73. By section 30 of that law, the Magistrate's court was granted exclusive original jurisdiction to hear and determine all actions, proceedings or matters in which the debt, damage, demand or claim, or the value of the movable or immovable property or the particular share, right or interest in dispute or the land to be partitioned or sold does not exceed one thousand five hundred rupees. No new civil procedure was introduced by that law. Therefore when the plaint was filed in the case No. 296 ED in the Magistrate's court, it had to conform to requisites specified in the Civil Procedure Code.

It was in those circumstances that a plaint in the nature of a regular action (as opposed to summary) was filed. Para 2 of that plaint averred how the plaintiff became the owner of the property. The schedule to the plaint described the land in the identical manner in which it was described in the present action. No value of the land was mentioned like in the present action too. The prayer to the plaint in para (*a*) specifically asked for that the plaintiff be declared owner of the land; para (*b*) for the ejectment of the defendant, his servants and those holding under her; and para (*c*) for damages at the rate of Rs. 100 from 5. 12. 74 until the defendant was ejected. Thus it is quite manifest that the cause of action impleaded in each case is identical.

According to the Journal Entry of that case dated 21. 11. 75, summons had been served on the defendant; her attorney filed a proxy on her behalf and the court fixed 9. 1. 76 as the date to file her answer. Meanwhlile, the AJL (Amendment) Law No. 25 of 1975 was passed, the date of operation of which by *Gazette* No. 129/5 dated 29. 12. 75 was fixed as 1. 1. 76. By this law the Civil Procedure Code was repealed and in terms of section 363 (2) of that law "every action instituted in the Magistrate's court shall commence and proceed by way of summary procedure".

The Journal Entry of 9. 1. 76 reads that: "The plaintiff's attorney-at-law was informed that he should take necessary steps in terms of sections 673 and 564 of the AJL 25/74". Section 673 is a reference to the necessity for the pending cases to conform to the new procedure laid down in the AJL; and section 564 is a reference to summary procedure. The next Journal Entry in case No. 296 ED is undated according to the certified copy of that filed of record and that states: "Although six months have elapsed after the last order was made, the plaintiff has failed to take necessary steps; therefore I quash the case".

In Sinhala, the last part of that entry reads "naduwa ahosi karami". The appropriate Sinhala terminology should have been "nadu kruthiya nathara karami". Whatever the Sinhala words used in that connection were, I shall proceed to determine this case, on the basis that the order made by the Learned Magistrate in that case, purported to be one of "abatement" and that order was referable ot sections 575 and 576 (1) of the AJL (Amendment) Law No. 25 of 1975.

Those sections read as follows :

575 – If a period exceeding six months elapses after the date of the last entry of an order or proceeding in the record without the plaintiff taking any step to prosecute the action where any such step is necessary, the court may pass an order that the action shall abate.

576 (1) – Where an action abates or is dismissed no fresh action shall be brought on the same cause of action.

Sections 575 and 576 (1) of the AJL correspond to sections 402 and 403 of the CPC respectively. Thus the consequences of entering orders of abatement are so serious that courts should make such orders with extreme circumspection. There is no doubt that Judges owe a duty to expeditiously dispose of matters pending before them, but, equally they owe a duty not to lightly deprive parties of their right to have access to courts without first giving them adequate prior notice of such prospective deprivation. In the instant case the order of abatement appears to have been made by court *ex mero motu* without any notice to the plaintiff or his registered attorney on record.

If I may now turn to some of the reported decisions of the Supreme Court, it was thought at one time, that the consequences of an order of abatement are so serious, a court should never excercise the power to make an order of abatement *ex mero motu,* but only upon an application made by the defendant with due notice to the plaintiff. See *Fernando v. Peiris*[1]; *Cave & Co. v. Erskine*[2] and *Allahakoon v. Wickramasinghe*[3]. The correctness of that proposition was however doubted later (*obiter*) in *Lorensu Appuhamy v. Paaris*[4]. The reason for such doubt was the absence of any language in section 402 of the CPC itself, expressly or impliedly, imposing any such fetter on the court. In *Suppramaniam v. Symons*[5] it was held that although the court had the power to made an order of abatement *ex mero motu* it was desirable that a court, before making such order, should notice the parties, as far as it conveniently can, to give them an opportunity of showing cause against the order. This last decision was cited with approval in the two majority judgments (Jayatileke, CJ. and Pulle, J.) in *Muttucumarasamy v. Sathasivam*[6] in the case of *Bank of Ceylon v. Liverpool Marine & General Insurance Co., Ltd.*[7] and in the case of *Nagappan v. Lankabarana Estates Ltd.*[8]

For the above reasons I hold that the purported order of abatement entered in case No. 296 ED, without notice to the plaintiff, is a nullity and the plea of *res judicata* fails. In view of the conclusion I have reached that the purported order of abatement is a nullity, I need not consider the further question whether the original plaintiff or the substituted plaintiff should have, in terms of either section 576 (2) of the AJL or section 403 of the CPC, moved the Magistrate's court within reasonable time to get the purported order vacated. The Appeal is dismissed with costs of this court fixed at Rs. 5,000. In view of the long time taken to conclude these proceedings, I make order that writ of ejectment shall not be issued against the substituted defendant till 31. 10. 98 and the plaintiff will be entitled to take out writ thereafter without notice.

AMERASINGHE, J. – I agree.

WADUGODAPITIYA, J. – agree.

Appeal dismissed.