PATHIRANA
v.
INDURUWAGE

COURT OF APPEAL
JAYASINGHE, J.
JAYAWICKRAMA, J.
CALA NO. 215/98
DC COLOMBO NO. 623/L
NOVEMBER 05, 1999
DECEMBER 08, 1999
NOVEMBER 03, 2000

Civil Procedure Code s. 402 and 408 – Settlement – enlarging into a decree – Is the next step, the entering of the decree – Could an order of abatement be made under s. 402?

The plaintiff-petitioner instituted action for a declaration of title and for ejectment of the defendant-respondent. The defendant-respondent denied that a cause of action has accrued to the plaintiff. On 11. 10 1977 a settlement was recorded and in terms of that settlement, a Commission was issued to the Commissioner who made his return filing plan and report on 05. 08. 1979. On 17. 10. 1997 the defendant-respondent moved for abatement of the action in terms of s. 402 and the District Court made order abating the action.

On leave being sought –

Held:

(1) There is no step necessary on the part of the plaintiff to prosecute the action in terms of s. 402 and that after the settlement the trial is brought to a close and there is nothing to prosecute. In the case of a settlement there is no occasion for the trial Judge to deliver judgment, the settlement enlarges into a decree without the need for an intervening judgment.

(2) Order for abatement can be made under s. 402 only if the plaintiff has failed to take a step rendered necessary by some positive requirement of the law.

(3) Failure of the Court to do a ministerial act should not affect the parties.

APPLICATION for Leave to Appeal.

Cases referred to :

1. *Newton v. Sinnadurai* – 54 NLR 4.
2. *Samsudeen v. Eagle Insurance Co., Ltd.* – 64 NLR 372.
3. *Lorensu Appuhamy v. Parris* – 11 NLR 202.
4. *Perera v. Fernando* – 7 NLR 300.

N. R. M. Daluwatte, PC with Ms. *Y. Devasurendra* for plantiff-appellant-petitioner.

Nihal Jayamanne, PC with Ms. *Noorani Amerasinghe,* defendant-respondent-respondent.

Cur. adv. vult.

March 08, 2001

JAYASINGHE, J.

Plaintiff instituted action in the District Court of Colombo for a declaration of title to the land and premises described in the schedule to the plaint; for ejectment of the defendant therefrom and for damages.

The defendant filed answer denying the several averments contained in the plaint setting out his own title to the said land and premises and moved for dismissal of the plaintiff's action.

On 11. 10. 1977 the day fixed for the preliminary investigation (under the Administration of Justice Law) parties reached a settlement in that –

(*a*) the defendant agreed that if he has encroached on the land and premises of the plaintiff, that he shall vacate therefrom;

(*b*) that a commission be issued and the lands owned by the plaintiff and the defendant be surveyed according to plan No. 4927 made by M. B. de Silva, Licensed Surveyor, and plan No. 4984 made by H. M. Fernando, Licensed Surveyor

and if there is any encroachment by the defendant to be shown in his plan;

(c) and if there are any improvements on the encroachment to set forth its valuation.

A commission was accordingly issued to Anil Peiris, Licensed Surveyor who made his return filing plan and report on 05. 08. 1979.

The defendant thereafter sought to resile from the said settlement, but the learned District Judge by his order dated 15. 10. 1984 held that since settlement has been arrived at between the parties in terms of section 408 of the Civil Procedure Code, the Court has no jurisdiction to fix the case for trial as urged by the defendant. The defendant appealed against the said order and the Court of Appeal by order dated 08. 07. 1992 rejected the defendant's appeal. On 18. 11. 1992 the order of the Court of Appeal was conveyed to parties.

On 05. 02. 1997 the plaintiff made an *ex parte* application to issue a commission in terms of the settlement reached on 11. 10. 1977. The defendant on 17. 10. 1997 moved for abatement of the action in terms of section 402 and the Court after inquiry / written submissions made order abating the action on 04. 09. 1998.

Aggrieved by the order of the learned District Judge the plaintiff asked for leave to appeal. This Court on 06. 09. 1999 having heard Counsel granted leave.

Mr. Daluwatte, President's Counsel, submitted that the learned District Judge was in error when he stated that the plaintiff has not acted upon the plans presented to Court upon the commission being issued to the Surveyor. He submitted that since encroachments are shown in the said plans, the plaintiff has only to eject the defendant from the said encroachments. He submitted that when the appeal was rejected by the Court of Appeal by order dated 08. 07. 1992 the settlement entered on 11. 10. 1977 was final between parties.

Section 402 provides that : "if a period exceeding twelve months in the case of a District Court or six months in a Primary Court elapses subsequently to the date of the last entry of an order or proceeding in the record without the plaintiff taking any steps to prosecute the action where any step is necessary, the Court may pass an order that the action shall abate".

Looking at section 402 carefully it appears that a Court may pass an order that the action shall abate only if –

(1) 12 months have elapsed subsequent to the date of the last entry . . .

(2) without the plaintiff taking any steps to prosecute the action where any step is necessary.

Mr. Daluwatte, PC submitted that there was no step necessary on the part of the plaintiff to prosecute the action in terms of section 402 and that after the settlement the trial is brought to a close and that there is nothing to prosecute. Only the decree has to be entered by the trial Judge. This appears to be a well-merited argument. Therefore, in a case of a settlement there is no occasion for the trial Judge to deliver judgment; the settlement enlarges into a decree without the need for an intervening judgment. In *Newton v. Sinnadurai*[1] Gratiaen, J. stated that : "Indeed I venture to suggest that some responsibility attaches to trial Judge himself whose duty it is to enter decree in accordance with the terms of settlement". Entering of the decree is a ministerial act and it is the duty of the learned District Judge to enter decree.

Mr. Daluwatte, PC also submitted that the word "necessary" in section 402 should means the "satisfaction of a legal requirement" without which the action cannot proceed. In *Samsudeen v. Eagle Insurance Co., Ltd.*[2] it was held that : "an order for abatement can be made under section 402 only if the plaintiff has failed to take a step rendered necessary by some positive requirement of the law".

In *Lorensu Appuhamy v. Parris*[3] "the plaintiffs did not take any further steps for over one year after the defendant filed answer and the Court ordered that the action do abate. Four years later the plaintiffs moved that the order of abatement be vacated. Wood Renton, J. held that the duty of fixing the case for trial rests on the Court. The order of abatement was wrongfully made.

According to the terms of settlement the Court would make a final determination regarding any monies to be paid by the plaintiff to the defendant for improvements in the event of an encroachment by the defendant. However, neither the plaintiff nor the defendant sought to dispute the Commissioner's Report on payment of monies for the plantation or other improvements. If the plaintiff who was required to pay did not raise an objection or even a query, it is there -fore assumed that there was acquiscene and the learned District Judge was obliged to enter decree. If the defendant disputed the report then the Court was obliged to institute an inquiry and then make a determination. Neither situation arose and in view of the order of the Court of Appeal the matter was brought to a finality. The prevalent practice in the District Courts is that the registered Attorney tenders the decree and the learned District Judge merely places his signature. This practice is more for convenience and nothing else. However, in *Perera v. Fernando*[4] it was held that : "the failure of the Court to do a ministerial act . . .should not affect the parties".

Mr. Jayamanne, President's Counsel contended that after Anil Peiris executed the commission issued to him and submitted the Plan and Report on 15. 08. 1979, adjournments were taken for the consideration of Plan and Report. However, on 02. 07. 1980 the defendant moved to amend answer which was allowed and according to journal entry 38 of 08. 10. 1980 the case has been called to fix a date for trial. He argued that the terms of settlement entered on 11. 10. 1977 had failed and not pursued by the parties. He submitted that there was a total abandonment of the terms of settlement by

the parties. I am, however, unable to accept this submission of the learned President's Counsel. The learned District Judge made order on 15. 10. 1984 that since there is a settlement already entered, the Court had no jurisdiction to fix the case for trial and the defendant appealed against that order to the Court of Appeal without success.

It is my view that there is no step required to be taken by the plaintiff after the settlement was entered. The consequential step was entering decree was the responsibility of Court. It cannot be said that the plaintiff has been in default for section 402 to apply.

I, accordingly, set aside the order of the learned District Judge dated 04. 09. 1998. Appeal is allowed with costs fixed at Rs. 2,500.

JAYAWICKREMA, J. – I agree.

Application allowed.