

ABEYSINGHE
v
COMMERCIAL BANK OF CEYLON

COURT OF APPEAL
WIMALACHANDRA, J.
CALA 372/2003
DC COLOMBO 8273/M
DECEMBER 9, 2007

Civil Procedure Code Section 402 – Settlement – Consent judgment – Properties seized – Auction – Abatement order – When can a party seek an abatement order? – Failure to prosecute? – Execution proceedings – Ministerial acts? – Failure to reply to business letters – Presumption?

Consent judgment was entered and Court entered decree. As the defendant defaulted; steps were taken to seize the properties of the defendant and the properties were put up for auction.

The defendant sought an abatement order under Section 402 – which was refused by the District Judge.

On leave being sought,

Held:

- (1) An order of abatement of an action can be made under Section 402 only if the plaintiff fails to prosecute the action for twelve months after the last order. After the judgment is delivered the trial is brought to a close and there is nothing to prosecute. An order for abatement could be made only if the plaintiff failed to prosecute the action, the execution proceedings are ministerial acts.

In the instant case as the matter has been concluded and the judgment and decree had been entered there are no other requirements of law to prosecute the action.

All decrees passed by Court, subject to appeal are final between the parties and no plaintiff can thereafter be non-suited.

Held further

- (2) In business matters, in certain circumstances the failure to reply to the letter amounts to an admission of a claim made therein. The silence of the letter amounts to an admission of the truth of the allegations contained in that letter.

APPLICATION for leave to appeal from an order of the District Judge of Colombo.

Cases referred to-

1. *Saravanamuttu v De Mel* 49 NLR 529.
2. *Pathirana v Induruwage* 2002 2 Sri LR 63.
3. *Babun Appu v Gunawardane et.al* 10 NLR 167.

D.P. Mendis PC with *N. Gunawardane* for substituted defendant-petitioner
S.A. Parathalingam PC with *S. Cooray* and *Ms. S. Parathalingam* for plaintiff-respondent.

Cur.adv.vult

May 30, 2008

WIMALACHANDRA, J.

This is an application for leave to appeal filed by the substituted defendants-petitioner (substituted defendants) from the order of the learned Additional District Judge of Colombo dated 26.9.2003. By that order the learned Additional District Judge dismissed an application made by the substituted-defendants to make an order abating the plaintiff's action.

The plaintiff-respondent instituted this action against the deceased-defendant for the recovery of monies set out in the plaint. The deceased defendant filed answer and thereafter the case was fixed for trial. When the case was taken up for trial on 19.10.1990 the parties indicated to Court a possibility of settlement. The learned Judge made order to call the case on 8.7.1991 to record the terms of settlement. Thereafter this case was called again on 26.8.1991. On that day the parties submitted to Court a consent motion containing the terms of settlement. Thereafter, the consent judgment was recorded and the Court accordingly, entered the decree.

Nevertheless, the deceased defendant defaulted in making payments in terms of the settlement thereby infringing the terms of

the consent decree. The plaintiff took steps to execute the decree and obtained a writ of execution against the deceased defendant. The writ was subsequently executed and certain properties belonging to the deceased defendant was seized and the plaintiff in order to sell the properties seized, an auction was fixed for 9.12.1994. Thereafter the deceased filed a motion in order to suspend the auction. When the matter was taken up on 5.12.1994 in order to support the said application, the deceased defendant agreed to settle the decreed sum of money due to the plaintiff. The deceased defendant again defaulted the payments and the matter was again taken up for inquiry on 5.12.1994. At the conclusion of the inquiry the Court delivered the order in favour of the plaintiff. The deceased defendant preferred an appeal against this order to the Court of Appeal. The Court of Appeal rejected the said appeal on 27.6.1996. The Special Leave to Appeal to the Supreme Court against the said order of the Court of Appeal filed by the deceased defendant was also dismissed.

Thereafter, the plaintiff filed a motion together with the said order of the Supreme Court and supported for the re-issue of the writ against the deceased defendant. The Court allowed the application and the writ was accordingly issued. The fiscal seized certain properties belonging to the deceased defendant and the plaintiff obtained the permission of Court to auction the properties seized by the fiscal. In the meantime defendant died and the Court directed the plaintiff to take steps. Meanwhile, the wife of the deceased defendant had sent the letter dated 30.6.2000 to the plaintiff along with a cheque for Rs. 537,151.97 to the plaintiff. The plaintiff by letter dated 10.7.2000 acknowledged the receipt of the said sum of Rs. 537,151.97 and informed the wife of the deceased defendant, the present 1st substituted defendant to settle the outstanding dues in D.C. Colombo cases bearing Nos. 8272/M and 8273/M. The 1st substituted defendant, who is the wife of the deceased defendant did not make any further payments in settlement of the outstanding dues to the plaintiff-bank. Thereafter the present 1st substituted defendant, the wife of the deceased defendant filed a petition in Court on 26.10.2001(P9) to have her and the children of the deceased, substituted in place and room of the deceased defendant. Along with the aforesaid application for substitution, the substituted defendants also made an application by way of a motion for an order of

abatement under Section 402 of the Civil Procedure Code. The Court fixed the matter for inquiry and the parties agreed to dispose of the inquiry by way of written submissions. The written submissions were accordingly tendered by the parties. Thereafter the learned Judge delivered the order on 26.9.2000, dismissing the application of the substituted defendants. It is against this order the substituted defendants have filed this application for leave to appeal. This Court (Court of Appeal) granted leave on 22.2.2007.

It is not in dispute that the wife of the deceased defendant who is presently the 1st substituted defendant had paid a sum of Rs. 537,151.97 to the plaintiff-bank. The plaintiff-bank by its letter dated 10.7.2000 sent under registered post, accepting the aforesaid sum of Rs. 537,151.97 had requested the 1st substituted defendant to make arrangements to settle the balance amount due to the bank. However, there is no material placed before Court to indicate that the 1st substituted defendant had replied to the said letter sent by the plaintiff-bank. In business matters, in certain circumstances, the failure to reply to a letter amounts to an admission of a claim made therein. In *Saravanamuttu v D MeA*⁽¹⁾ Dias, J. held that in business matters, if a person states in a letter to another that a certain state of facts exists, the person to whom the letter is written must reply if he does not agree with or means to dispute assertions. Otherwise the silence of the letter amounts to an admission of the truth of the allegations contained in that letter.

Section 402 of the Civil Procedure Code provides when Court may order an action to abate.

Section 402 states as follows:

"If a period exceeding twelve months in the case of a District Court or Family 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 such step is necessary, the court may pass an order that the action shall abate."

It will be seen that an order of abatement of an action can be made under Section 402 of the Civil Procedure Code only if the plaintiff fails to prosecute the action for twelve months after the last order. That is unless the plaintiff had failed to take a step rendered

necessary by the law to prosecute his action an order of abatement cannot be entered. In the instant case judgment and the *decree* had been entered. Accordingly, the plaintiff's task of prosecuting the action is over and only the execution proceedings remains.

After the judgment is delivered the trial is brought to a close and there is nothing more to prosecute. An order for abatement can be made under Section 402 only if the plaintiff has failed to prosecute the action. The execution proceedings are ministerial acts. In the case of *Pathirana v Induruwage*⁽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 law to prosecute the plaintiff's action.

In the instant case as the case has been concluded and the judgment and *decree* had been entered there are no other requirement of law to prosecute the action.

It is to be noted that all decrees passed by the Court, subject to appeal are final between the parties and no plaintiff can thereafter be non-suited. It was held in *Baban Appu v Gunawardene et.al.*,⁽³⁾ that a judgment is conclusive, not only as to matters actually pleaded, put in issue and tried and decided, but also as to matters which might and ought to have been pleaded, tried and decided.

In any event, it appears that as the wife of the deceased, the 1st substituted defendant had paid a sum of Rs. 537,151.97 to the plaintiff-bank as part payment due from the deceased defendant to the plaintiff. By letter dated 10.7.2000 the plaintiff-bank has informed the wife of the deceased-defendant to make early arrangements to settle the balance amount due to the bank in terms of the *decree* entered in the D.C. Colombo cases Nos. 8272/M and 8273/M. It seems to me that the plaintiff-bank had not taken steps to substitute the heirs of the deceased defendant to recover the outstanding amounts due to the bank as the bank was expecting the wife of the deceased-defendant to settle the outstanding amounts. In the meantime on 26.10.2001 the heirs of the deceased filed an application seeking to have them substituted in place and room of the deceased defendant and also filed an application to have the action abated.

The whole exercise of the substituted defendants, as it appears to me, is to deprive the plaintiff from recovering the aforesaid sums of

monies due to the plaintiff in terms of the *decree* entered in the above mentioned District Court cases.

On a consideration of the totality of the circumstances in this appeal and for the aforementioned reasons, I uphold the order of the learned Additional District Judge of Colombo. Accordingly, I dismiss the appeal with costs.

The judgment in this case will apply to CALA No. 371/2003.

Application dismissed.