

MALWATTA
v.
GUNASEKERA AND OTHERS

COURT OF APPEAL.

PALAKIDNAR, J. (P/CA) &

A. DE Z. GUNAWARDENA, J.

C.A. NO. 1101/91

D.C. ANURADHAPURA NO. 149/P

JANUARY 21, 1993.

Partition Law, No 21 of 1977, section 48 - Statement of claim duly filed - Non-appearance of defendant on trial date - Interlocutory decree affirmed by the Court of Appeal - Application to original court thereafter under section 48 (4).

The 4th defendant who had filed a statement of claim was absent on 24.01.83, the trial date. His attorney-at-law moved for a postponement, and this application was refused. The Court after trial entered the interlocutory decree. On an appeal lodged, the Court of Appeal affirmed the judgment in 1989. An application was made in terms of Section 48 (4) to vacate the decree, which was refused.

Held:

1. Section 48 (4) does not help the 4th defendant petitioner as he had sent out his claim through a lawyer.
2. Default proceedings spelt out in the Civil Procedure Code do not apply to partition actions.
3. The trial on 24.01.83 has been held *inter-partes*.

Cases referred to:

1. *Syadu Varusai v. Weerasakera* 58 N.L.R 89.
2. *De Mel v. Gunasekera* 41 N.L.R. 33.
3. *Andlappa Chetty v. Sanmugam Chettyar* 33 NLR 217 (FB).
4. *Mohamad Baddurdeen v. Nizan Hadjler* C.A. Application 1725/79 D.C. Matara 3560/M. C.A. Minutes of 29.11.79.

APPEAL from order of the District Court of Anuradhapura.

A. K. Premadasa, P.C. with C. E. de Silva for petitioner.

G. L. Geethanda for the plaintiffs-respondents.

Cur adv vult.

January 21, 1993.

PALAKIDNAR, J. P/CA

Malwatta, the petitioner who was the fourth defendant in the partition case filed to divide the land in suit did not attend court on the date fixed for trial. The plaintiff states in his affidavit that he was seen in the court premises prior to the commencement of proceedings and later was not present in court. His lawyer informed court that he was not well and requested a postponement. The learned trial Judge disallowed the application for a postponement and proceeded to trial and entered Interlocutory decree.

The correctness of this order was reviewed by this Court in C.A. 76/83 in appeal and by order dated 24.10.89 the order of the learned trial Judge dated 24.1.83 was affirmed. This Court has further observed that the judgment of the learned trial Judge is supported by oral and documentary evidence. Shares have been allotted to 1st, 2nd and 3rd defendants. The petitioner did not get any shares.

From the facts disclosed in the petition and objection filed in this application the original owner of the land was Arthur Perera the father of the plaintiff-respondent Lily Gunasekera and the other defendants. The land was declared erroneously as land that could vest in the Land Reform Commission. By order dated 1.4.80 the vesting was cancelled by the Chairman of the Special Advisory Board (vide R1). It is to be noted that the petitioner was given a permit to cultivate the land by the Government Agent. He was therefore a licensee in occupation of this land. After the authority of the Government Agent was removed by the order of 1.4.80 the petitioner has sought to claim prescriptive rights to this land. This action was filed on 12.6.80. Therefore there was no basis at all for a prescriptive claim. It is also observed that he was prosecuted in M. C. Anuradhapura in 1980 (M.C. 93901) for cutting down valuable timber on the land which is now being used as a pilgrims rest.

In the background of these facts which show that the petitioner cannot be heard to say that a valid claim of his has been denied to him by the decree in the partition action, he has invoked Section 48 (4) of the Partition Law (Act 21 of 1977) which enables one to move

the trial Court to set aside the interlocutory decree and hear his claim.

The law in its wisdom having due regard to the finality of a decree entered under Section 48 (1) of the Partition Law has provided an opportunity to a party who has duly filed his statement of claim and registered his address but fails to appear at the trial to move court within 30 days of the entering of the decree for special leave to establish his right title or interest of such party to or in the said land notwithstanding the Interlocutory decree already entered. [Section 48 (4) (a) (iv)].

This right is given also to parties who have not been served with summons and heirs and persons of unsound mind not duly represented by guardian *ad litem* or when a party dies before judgment is entered and substitution has not been made to represent the estate of the deceased party [section 48 (4) (a) (ii) and (iii)].

In the instant case the petitioner does not fall into any eligible category set out in Section 48(4). He has in fact set out his claims through a lawyer and is therefore not a person who has registered his address without legal representation.

The only matter that was urged by counsel for petitioner was that the principles applicable to non-appearance as set out in the Civil Procedure Code do not apply to the non-appearance under the Partition Law and hence the ruling by the trial Judge should be reviewed under the Partition Law.

A party disclosed in a partition plaint is brought to Court by the issue of summons under section 13 of the Partition Law. Section 14 states that all provisions in the Civil Procedure Code relating to the service of summons shall apply under the Partition Law as well. Matters relating to default of appearance and the consequences thereof are not set out in the Partition Law. But a further provision under Section 20 of the Partition Law ensures that parties disclosed in a statement filed are also noticed. It is to be observed that before the Court proceeds to trial the attendance of all parties whose interests may be involved in the partition of the lands has been

ensured by notice on the land and registration of *lis pendens* in addition to notices tendered to Court by the plaintiff and parties disclosing any person with such interest.

If a person does not attend Court on receipt of summons or notice and commits a default of appearance then the provisions of the Civil Procedure Code would apply. Such applicability is expressly permitted by Section 79 of the Partition Law. Such a procedure is authorised within limits of inconsistency by this section which governs the situation of *casus ommissus*.

It was further urged that his default of appearance is explainable by the medical certificate filed in this Court. Once the correctness of the refusal to accept the petitioner's explanation to appear has been adjudicated upon by this Court it would be idle to seek to vacate that order again before this Court.

It has been consistently held that if a lawyer appears and applies for a postponement on behalf of a party the proceedings become *inter partes* because there is no such thing as limited appearance. His clear duty is to continue to appear for his client and to conduct the case which has been entrusted to him because the consequences to his client will be far-reaching. Vide *Syadu Varusai v. Weerasekera*⁽¹⁾ and *De Mel v. Gunasekera*⁽²⁾.

In the case of *Andiappa Chetty v. Sanmugan Chettier*⁽³⁾, Garvin, S.P.J. observed that if the proctor, does not wish his presence to be construed as an appearance he must clearly and unambiguously state so. It is not sufficient to say that he has no instructions. In *Mohamed Badurdeen v. Nizan Hadjier*⁽⁴⁾ Atukorale, J. considering these reasons held the view that the proceedings in a case similar to the one under review are *inter partes*. We respectfully agree with that view and hold that there is no merit in this application and dismiss it with costs.

DR. A. DE Z. GUNAWARDENA, J. – I agree.

Appeal dismissed.