IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

1. Rupasinghe Arachchilage Gunapala Perera, (deceased)
   No. 442, Colombo Road,
   Piliyandala
1A. Rupasinghe Arachchilage Ranjani Perera,
   No. 442, Colombo Road,
   Piliyandala
2. Rupasinghe Arachchilage Ranjani Perera,
   No. 442, Colombo Road,
   Piliyandala
   Defendant-Appellants

CA CASE NO: CA/476/2006/LA
DC PANADURA CASE NO: P/741

Vs.

1. Gallage Edmund Perera,
2. Hewabamuwitage Gimarahamy,
   Both of No. 443,
   Colombo Road,
   Piliyandala.
   Power of Attorney Holders of Gallage Mahinda Perera, presently living in United Arab Emirates.
   Plaintiff-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Anuruddha Dharmaratne for the 1A and the 2nd Defendants-Appellants.

Hemasiri Withanachchi with Shantha Karunadhara for the Plaintiffs-Respondents.

Argued on: 04.06.2018

Decided on: 19.06.2018

Samayawardhena, J.

This is a partition action. After the death of the 1st defendant the 2nd defendant was substituted in his place. Both the defendants filed statements of claim but failed to appear at the trial. After the Interlocutory Decree was entered, the defendant made an application under section 48(4)(a)(iv) of the Partition Law, No. 21 of 1997, as amended, for special leave to contest the case stating that she was mentally unsound at the time the trial took place. This application was resisted by the plaintiff, and the District Judge after holding an inquiry, rejected the application of the defendant by order dated 16.11.2006. It is against this order the defendant has filed this appeal with leave obtained.

The District Judge citing *Andiappa Chettier v. Sanmugam Chettier*[1] and *Malwatta v. Gunasekera*[2] rejected the defendant's application on the basis that when the Attorney-at-Law on record is not appearing for his client he shall inform it to Court in unambiguous terms and mere statement that he has "*no instructions*" is not sufficient, and in this case, the Attorney-at-Law on record has

[1] (1932) 33 NLR 217

[2] [1994] 3 Sri LR 168

merely stated that she has no instructions, and therefore the trial cannot be held to have been taken *ex parte* and hence the defendant is disentitled to invoke the provisions of section 48(4)(a)(iv) of the Partition Law.

There is no dispute over the principle of law enunciated in those two cases. However the District Judge in my view erred on facts to cite those two cases to reject the defendant's application.

In Andiappa Chettier's case (supra) the defendant's Attorney-at-Law stated that he had "*no instructions*" and "*no material on which to proceed with the case*" but did not state that he was not appearing for the defendant. The Judgment was entered for the plaintiff. Later an application was made to reopen the case, which was disallowed by Court stating that the Judgment was entered *inter partes* and not *ex parte*. The Full Bench of the Supreme Court affirmed that order and held: "*The presence in Court, when a case is called, of the proctor on the record constitutes an appearance for the party from whom the proctor holds the proxy, unless the proctor expressly informs the Court that he does not, on that occasion, appear for the party*."

This case was cited with approval in Malwatta's case (supra) where the application for a postponement of the trial by the Attorney-at-Law of the 4th defendant was refused and the Interlocutory Decree was entered. Thereafter the 4th defendant moved to reopen the trial under section 48(4)(a)(iv) of the Partition Law, and the District Judge rejected it on the basis that the trial was not *ex parte* but *inter partes* as there was an appearance for the defendant. This order was upheld by this Court.

However the facts of the instant case are totally different from those of the above two cases. Unlike in those two cases, in the instant case, as seen from the Journal Entry No. 66 dated 01.06.2004 and the proceedings relevant to that date, the defendant's registered Attorney on record has unambiguously stated to the District Judge that she does not appear for the defendant as she has no instructions. Counsel for the plaintiffs concedes that position.

Notwithstanding the District Judge has cited the law correctly, she has misapplied the law into the facts of this case. Therefore I take the view that the defendant is a defaulting party to whom section 48(4)(a)(iv) is applicable.

This is the only ground upon which the application of the defendant was dismissed after a full inquiry where a number of witnesses have given evidence and a number of documents have been marked. I must mention at this stage that, if the District Judge wanted to dispose of the matter on that ground, which is purely technical and needs no evidence to be led, it could have been tried as a preliminary question of law before embarking upon a lengthy inquiry.

Be that as it may, at the argument before this Court Counsel for the defendant candidly admitted that the defaulting party at such inquiry shall, in terms of section 48(c) of the Partition Law, satisfy the Court (a) that he failed to appear at the trial owing to accident, misfortune or other unavoidable cause, and (b) that he had a *prima facie* right, title or interest to or in the land, and (c) that such right, title or interest has been extinguished or he has been otherwise prejudicially affected by the Interlocutory Decree.

It was the submission of counsel for the defendant that the defendant at the inquiry satisfied all three requirements. I regret I am unable to agree.

In my view, the defendant has manifestly failed to satisfy the (b) above. What is her claim? Her claim is to exclude Lot 3B of the Preliminary Plan from the corpus as it is exclusively used by her as a roadway to have access to her house, which is situated outside the corpus. This strip of land is approximately 11 feet wide. On what ground does the defendant claim title to the said Lot? On two Deeds and on prescription. One is the Deed marked X5 whereby 8 foot wide and 90 foot long strip of land was purchased by her father and later gifted to her by Deed marked X6. The plaintiff does not dispute it and the District Judge both in the Judgment and the Interlocutory Decree has given that portion to the defendant.

The question is regarding the balance 3 foot wide portion of Lot 3B. It is the evidence of the defendant at the inquiry that the 8 foot wide road later widened up to 11 feet because the owner of the land to the south of the corpus, Sarath Abeywickrema, "*donated that part to the road.*" (Page 10 of the proceedings dated 25.04.2006)

The defendant also called Sarath Abeywickrema to give evidence on her behalf. His evidence was that he has been in occupation of his land since around 1993 and when he wanted to put up a boundary wall on the northern side of his land, the defendant requested to give a portion of his land to widen her roadway and he agreed to it and prepared the Sale Agreement marked X14 in 1998 but could not complete the sale as she was found missing. (pages 2-3 of the proceedings dated 15.06.2006) X14 was notarially executed after

the *lis pendens* in this case was registered and therefore void in terms of section 66 of the Partition Law.

Even if it was executed before filing the partition action, still, it was only an Agreement to Sell and no title passed to the defendant. In other words, the owner of the balance 3 foot wide portion of Lot 3B was, Sarath Abeywickrema and not the defendant. However, Sarath Abeywickrema never wanted to be a party to the partition action and he claims no right or interest from the corpus.

It is relevant to note that at the inquiry the defendant never spoke about prescription. Even if she did, according to her own evidence and that of Sarath Abeywickrema which I adverted to earlier, it is not possible at all for her to maintain a claim on prescription for the balance 3 foot wide portion of Lot 3B.

It is my considered view that no *prima facie* claim regarding the balance portion of Lot 3B has been made out by the defendant and therefore the defendant is not entitled to succeed on her application under section 48(4)(a)(iv) of the Partition Law.

Notwithstanding the finding of the District Judge is incorrect, her conclusion is correct.

Appeal is dismissed but without costs.

Judge of the Court of Appeal