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

C. A. Appeal No. 743/1996 (F)

D. C., Gampaha Case No. 16239/P

1A. Weerappuli Radage Magilin Jinadasa
2. Asarappulige Jinadasa
9. Weerappuli Radage Simon
32. Singapulige Cicilin
33. Magilin Jinadasa

All of Mudungoda

1A, 2, 9, 32 and 33
Defendant-Appellants

VS.

Weerappuli Radage Jemis of Mudungoda.

Original Plaintiff-Respondent

Weerappuli Radage Kamalasiri of Muidungoda.

And others.

Defendant-Respondents

Before : **M. M. A. GAFFOOR, J.**

Counsel : S. A. D. S. Suraweera for the Defendant-Appellants

M. Nizam Kariapper PC with M. I. M. Iynullah for the 1st Substituted Plaintiff-Respondent

Written Submission tendered on : 01.10.2018 (by the Defendant-Appellants)
02.11.2018 (by the Plaintiff-Respondents)

Decided on : **05.03.2019**

*****

M. M. Abdul Gaffoor, J.

The original Plaintiff had instituted this partition action against the Defendants above named seeking to partition the land called "Kongahawatte" *alias* "Millagahawatte" containing in extent of about 3 Acres.

The Defendants have filed their respective statements of claims before the Trial Court denying the identity of the corpus and the pedigree and they have also claimed that partition of a separate land too had been surveyed at the Preliminary Survey. Therefore, they have sought an exclusion of the said land from the corpus.

After the preliminary steps were concluded and the case was fixed for trial, the 1A, 2, 9, 32 and 33 Defendant-Appellants (hereinafter referred to as the Appellants) have failed to appear before the Trial Court on the date of the trial. Therefore, after hearing of the Plaintiff, on 24.11.1988 the learned Judge entered his judgment allowing the partition of the land as per the schedule of shares contained in the judgment (*vide Page 230-234 of the appeal brief*).

The interlocutory decree had been entered accordingly and thereafter a commission was issued for the purpose of preparing the final scheme of partition. After the said commission was returned to Court by the Court Commissioner, on or about 01.05.1990, the Appellants had preferred an application under the provisions of Section 48(4) of the Partition Law, Law No. 21 of 1977 as amended to vary the judgment by establishing their claims.

Having received the application of the Appellants, the learned District Judge fixed the case for inquiry and after the said inquiry, the learned Judge (on 14.10.1996) refused to grant relief under Section 48(4) of the Partition Law to the Appellants for the reasons stated therein in the said order (*vide pages 314-319 of the appeal brief*).

Therefore, in the instant appeal, the Appellants seeking to challenge the said order dated 14.10.1996 of the learned District Judge of Gampaha.

It is to be noted that, when the appeal was taken for argument (on 09.07.2012) Counsel for the Substituted *Plaintiff-Respondent had raised a preliminary objection as to the maintainability of the appeal without leave of this Court first had obtained*. At that time, both parties were agreed to tender their respective written submissions on that question and invite Court to rule on that matter first.

On the same day, both parties agreed to consider the propriety of the impugned order to the extent as to whether the learned District Judge is correct in his findings that *the Appellants have failed to adduce plausible explanation or excuse as to their absence*. They further

agreed that, in the event of the Appellants succeeding in the above two matters is to agree to argue the question as to whether the Appellants should have been accommodated under Section 48(4) of the Partition Law.

In case the Appellants are unsuccessful on the above two matters, this Court decided to place on record for future reference that this appeal would then come to an end. (*Vide proceeding dated 09.07.2012 of the Court of Appeal*).

Having observed the above matrix of the case, now I would like to deal with the fateful findings of the learned District Judge and the relevant legal issues therein.

Section 26 as well as Section 48 of the Partition Law confers finality to Interlocutory Decrees entered in a partition action. Accordingly, such a decree becomes good and sufficient evidence of the title of any person as to any right, share or interest awarded to him and it will be considered as final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, in the land to which such a Decree relates. However, such finality would operate subject to the matters referred to in Section 48 of the Partition Law particularly to the matters in Sub-Section 4 thereof. Therefore, it is clear that an Interlocutory Decree entered in a partition action binds the whole world subject to the matters referred to in Section 48 of the Partition Law.

The statutory provisions in question may be examined as follows:

Section 48(4)(c)

"If upon inquiry into such application, after prior notice to the parties to the action deriving any interest under the interlocutory decree, the Court is satisfied:

(i) *that the party affected had no notice whatsoever of the said partition action prior to the date of the interlocutory decree or having duly filed his statement of claim registered his address, failed to appear at the trial owing to accident, misfortune or other unavoidable cause, and*

(ii) *that such party had a prima facie right, title or interest to or in the said land, and*

(iii) *that right, title or interest has been extinguished or such party has been otherwise prejudicially affected by the said interlocutory decree,*

the Court shall upon such terms and conditions as the Court in its discretion may impose, which may include an order for payment of costs as well as an order for security for costs, grant special leave to the applicant."

Section 48(4)(d)

"Where the Court grants special leave as herein-before provided the Court shall forthwith settle in the form of issues the questions of tact and law arising from the pleadings and any further pleadings which are relevant to the claim set up in the petition only, the Court shall

appoint a date for trial and determination of the issues. The applicant, unless the Court otherwise orders, shall cause notice of such date to be given to all parties whose rights under the interlocutory decree are likely to be affected or to their registered attorney in such manner as the Court shall specify. The Court shall thereafter proceed to hear and determine the matters in issue in accordance with the procedure applicable to the trial of a partition action."

In the light of the above mandatory requirements of the law, I now proceed to examine the Appellants averment.

When the Appellants pleading on their absence before the District Court to vary the order, they submitted that the alleged incident had taken place in the year 1988 and the 32nd Defendant-Appellant had suffered the ill effects of the said snake bite for a long period of time. It is an important fact that the Medical Certificate tendered on behalf of the said 32nd Defendant-Appellant had been issued in the year 1990 a date about two years after the date of the incident. It is also revealed from the said evidence of the 32nd Defendant that the Medical Practitioner had commenced treatments only in the year 1990 as the 32nd Defendant was presented to him to treat the ill effects of the snake bite which had taken place some time back.

The reason for the absence of the 9th Defendant-Appellant at the trial was attributed to the fact that his wife the 32nd Defendant-Appellant was ill within the said period and he had to tend the needs of his wife.

He further stated that he had forgotten the dates of the trial under the circumstances.

Further, the other Defendant who had not participated at the trial stage is the 2nd Defendant-Appellant who claimed that he was suffering from the ill effects of a blow to his head which had taken place a *considerable period prior to the date of the trial*.

The learned District Judge in his order dated 14.10.1996 had stated reasons for rejecting the excuses given by the defaulting Appellants for not appearing before the Courts on the trial dates. He stated as follows:

> "මෙහි මෙම සාක්ෂිවලින් සමස්ථයක් හැටියට ගත් විට පෙනීයන්නේ මෙම නඩු විභාග දිනයේ මෙම තුන්දෙනාම අධිකරණයට අවිත්නැත. එයට ඔවුන් සාධාරණ හේතු පවා පෙන්වානැත.
>
> මෙහි විත්තිය වෙනුවෙන් සාක්ෂි කැඳවානැත. ඉන්අනතුරුව දෙපාර්ශවය ලිඛිත දේශණයද ඉදිරිපත් කොට ඇත. විත්තිකාර පෙත්සම්කරුවන් මෙම නඩු විභාග දිනයේදී අධිකරණයට පෙනී, *අධිකරණයේ පෙනී නොසිටීම හෝ නීතිඥයෙකු මාර්ගයෙන් නියෝජනයක් පවා නොකිරීමෙන් පෙනී යන්නේ ඔවුන් මේ සම්බන්ධව කිසිම උනන්දුවක් නොතිබූ බවයි.* ඉහත සඳහන් සාක්ෂි ලේඛණද, 32වෙනි විත්තිකාරිය සර්පයෙකු දෂ්ඨ කිරීමෙ ප්‍රතිඵලයක් වශයෙන් අධිකරණයට නොපැමිණි බව ප්‍රකාශ කර සිටියද, ප්‍රතිකාර ලබා ගැනීම සඳහා *රෝගියා සර්පයෙකු දෂ්ඨ කිරීමෙන් අවුරුදු 02 කට පමන ලයට පසුව තමාගේ රෝගයට*

ප්‍රතිකාර කල වෛද්‍යවරයෙකුගෙන් 01.05.90 දිනැති වෛද්‍ය සහතිකය ඉතිරිපත් කර එම වෛද්‍ය සහතිකයේ 23.03.88 දින සර්පයෙකු දෂ්ඨ කලබව ප්‍රකාශ කොට ඇත."

(Page 318 of the appeal brief)

Therefore, it is crystal clear from the fateful judgment that the learned District Judge did not satisfy with the evidence adduced at the inquiry and refused the Appellants' Application. Further, the learned Judge was reasoning that the 32nd Defendant-Appellant was not taking any vigilant steps to appear by his personal capacity or by way of his attorney.

I am of the view that the 32nd Defendant-Appellant has not acted with the utmost promptitude when he decided to purge the alleged order in the District Court. As held by several cases in our Courts, in the absence of a satisfactory explanation as to why the alleged party could not come before a Court of law in a reasonable period of time is considered as an irreparable delay [vide: *Babu Appu vs. Simon Appu* (1907) 11 NLR 44]. Thus, I fully subscribed with the learned District Judge on the absence of plausible explanation or excuse as to their absence.

As I mentioned earlier, Counsel for the Respondents took up a Preliminary objection stating that the said order dated 14.10.1996 is not a judgment and it is an order within the meaning of Section 754(2) of the Civil Procedure Code, No. 2 of 1889, as subsequently amended, which an appeal may be preferred with the leave of this Court.

Thus, this Court has to decide whether the questioned order dated 14.10.1996 is a final judgment or an order which comes under Section 754(2) of the Civil Procedure Code. In order to decide this question, I would like to consider certain judicial decisions.

In ***Shubrook vs. Tufnell*** [(1882) 9 QBD 621], where Jessel, MR and Lindley, LJ held that, an order is final if it finally determines the matter in litigation. Thus the issue of final and interlocutory depended on the nature and the effect of the order made.

In ***Ranjith vs. Kusumawathie*** [(1998) 3 SLR 232], the Supreme Court has held that the interlocutory decree is not final and the order of the District Court is not a judgment within the meaning of Section 754(1) and 754(5) of Civil Procedure Code for purpose of an appeal.

In ***Salter Rex and Co. vs. Gosh*** [(1972) 2 All ER 865] Lord Denning, M. R. stated that:

> *"If their decision whichever way it is given, will if it stands finally dispose of matter in dispute, I think that for the purpose of these Rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the order, will allow the action to go on, then I think it is not final, but interlocutory."*

As held in ***Wickremarathne vs. Samarawickrama*** [(1995) 2 SLR 212], who did not appear at the trial and whose rights in the corpus have

been extinguished by the interlocutory decree may apply for special leave to establish his rights.

Now, I again recall the decision of ***Ranjit vs. Kusumawathie and others*** (*supra*). In this case the original 4th Defendant having filed his statement of claim failed to appear at the trial and the evidence was led for the Plaintiff, other parties been absent, the judgment and the interlocutory decree were entered accordingly. The original 4th Defendant applied to the Trial Court, in terms of Sub-Section 48 (4)(a)(iv) of the Partition Law, for special leave which permits a defaulting party to make an application to enter the case. The application for special leave was rejected by the District Court. The appellant then preferred an appeal to the Court of Appeal against the order, in terms of Section 754(1) of the Civil Procedure Code as if that order made by the District Court was a "judgment". The Court of Appeal rejected the appeal on the basis that what was appealed from was an "order" within the meaning of Section 754(2) of the Civil Procedure Code from which an appeal that therefore an appeal could lie only with leave of the Court of Appeal first had and obtained.

In *Ranjit* case, the main issue was whether the refusal of the Application made under Section 48(4)(a)(iv) is a judgment contemplated under Section 754(1) or an order under 754(2) of the Civil Procedure Code.

Dheerarathne, J. in his judgment (at page 238) stated that:

> *"A party to a partition action making an application in terms of subsection 48(4)(a)(iv) in order to establish his*

right, title or interest, has two hurdles to surmount. First he has to satisfy court, in terms of subsection (c) that (i) having filed his statement of claim and registered his address, he failed to appear at the trial owing to accident, misfortune or other unavoidable cause, and (ii) that he had a prima facie right, title or interest in the corpus, and (iii) that such right , title or interest has been extinguished or such party has been otherwise prejudicially affected by the interlocutory decree. Then only the court will grant special leave. After granting special leave, in terms of subsection (d), the court will settle in the form of issues the questions of fact and law arising from the pleadings relevant to the claim and then appoint a day for trial and determination of the issues. The second hurdle the party has to surmount is the determination of those issues by court after trial, in terms of sub-section (e).

The order appealed from is an order made against the appellant at the first hurdle. Can one say that the order made on the application of the 4th defendant is one such that whichever way the order was given, it would have finally determined the litigation? Far from that, even if the order was given in favour of the appellant, he has to face he second hurdle, namely the trial to vindicate his claim"

In the above mentioned case, Dheerarathne, J. followed the judgments of Lord Esher in ***Salaman vs. Warner*** [(1891) 1 QB 734],

and Lord Denning's judgment in ***Salter Rex vs. Gosh*** (*supra*) which adopted the application approach and held that the order appealed from is not a "judgment" within the meaning of Sections 754(1) and 754(5) of the Civil Procedure Code.

In the circumstances, I hold that the order (dated 14.10.1996) given by the learned District Judge of Gampaha is not a final order and the Appellant should have filed a leave to Appeal Application under Section 754(2) instead of filling an appeal under Section 754(1) of the Civil Procedure Code.

For the forgoing reasons, I see no reason to interfere with the judgment of the learned District Judge. Therefore, the appeal is dismissed.

I make no order as to costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL