

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

In the matter of Appeal under Section  
754(1) of the Civil procedure code.

Rannulu Upali Ranjith De Soysa of  
Akurala Kahawa

2<sup>nd</sup> Defendant/Appellant

**C.A. Appeal No. 362/2000 (F)**

V.

**D.C. Balapitiya No. 1920/P**

Dewa Binet Chandra Pathmini De Zoysa of  
Akurala Kahawa

Substituted 1<sup>st</sup> Plaintiff/Respondent  
and the 1<sup>st</sup> Defendant/Respondent

**BEFORE**

:

**JANAK DE SILVA, J**

**K.PRIYANTHA FERNANDO, J**

**COUNSEL**

:

Nagitha Wijesekara with Ayesha Ginige for  
the 2<sup>nd</sup> Defendant/Appellant

Bimal Rajapakshe with Amrit Rajapakshe  
and Nimesha Rodrigo for the 1<sup>st</sup> Plaintiff/  
Respondent

**ARGUED ON**

:

19.03.2019

## **WRITTEN SUBMISSIONS**

**FILED ON** : 03.08.2017 and 16.06.2014- by the 2<sup>nd</sup>  
Defendant/Appellant  
07.03.2014- by the 1<sup>st</sup> Plaintiff/ Respondent

**JUDGMENT ON** : 20.06.2019

## **K. PRIYANTHA FERNANDO, J.**

01. Plaintiff Respondent (Plaintiff) instituted this action in the District Court of Balapitiya to partition the land called 'Rambodawatte', described in paragraph 02 of the plaint. The 2<sup>nd</sup> Defendant Appellant (2<sup>nd</sup> Defendant) has intervened and later filed his statement of claim.
02. However, the 2<sup>nd</sup> Defendant was absent for the trial. On two occasions when the case was fixed for trial, the 2<sup>nd</sup> Defendant was absent and medical certificates were filed on behalf of him. Finally, when the case was re fixed for trial on 16.12.1999, counsel for the 2<sup>nd</sup> Defendant informed the Court that he had no instructions from the 2<sup>nd</sup> Defendant, and the Court proceeded to trial.
03. The learned District Judge on 25.01.2000 delivered the judgment on the evidence adduced before him. Being aggrieved by the said judgment, the 2<sup>nd</sup> Defendant appealed against the same on the following grounds;
  1. The said judgment of the learned District Judge is contrary to law.

2. The said judgment is against the weight of the evidence led in the case.
  3. The learned District Judge has erred in law by not considering the interests of the absent parties.
  4. The learned District Judge has erred in law by proceeding with the trial without the disclosed parties are being served with notices, and in their absence.
04. We carefully considered the plaint, statement of claim filed by the 2<sup>nd</sup> Defendant, procedure followed in the District Court, the evidence including the documents submitted at the trial, written submissions filed by counsel and the submissions made by counsel on behalf of the parties at the argument of the appeal.
05. Grounds of appeal No. 01 to 04 will be considered together.  
Counsel for the Appellant submitted that although nine persons intervened and claimed before the surveyor, notices were not served on 2<sup>nd</sup>, 6<sup>th</sup> and 8<sup>th</sup> claimants.
06. First and foremost, it is to be noted that the said claimants on whom the notices were not served have not made any request to court. It is the 2<sup>nd</sup> Defendant/Appellant who is making this submission through his counsel. Section 48(1) of the Partition Act provides for finality of the interlocutory and the final decree in a partition action. Section 48(1) clearly provides that any omission or failure to serve summons on any party, any omission or defect of any procedure will not affect the finality of the interlocutory and final decree of a partition action. Intention of the Legislature is very clear that there should be a finality of an interlocutory or final decree and should be free from any encumbrances.

07. Remedy for a party who has not been served with summons and in consequence thereof that party is prejudiced by the interlocutory decree, is provided in section 48(4) a (1) of the Partition Act. Such party can apply for special leave to establish the right, title or interest of such party, notwithstanding the interlocutory decree already entered within the prescribed period. Further, in terms of section 49 of the Act, any person not being a party to a partition action, whose rights have been extinguished, may by a separate action recover damages from any party to the action by whose act or omission such damage may have accrued. Therefore, the so-called persons whom the Appellant says are interested and not served with summons are not without a remedy.
08. On perusing the court record of the District Court, it is observed that out of those persons named as claimants before the surveyor from the same address as of the Appellant, 4<sup>th</sup>, 5<sup>th</sup> and 9<sup>th</sup> parties who were served with summons also have not appeared in court. It is also to be noted that once a notice is sent by registered post it is presumed that it is served. (*B.W.Podisingho and P.A.W.Perera 75 N.L.R. 33*).
09. Counsel for the Appellant submitted that the learned District Judge has failed to consider the deed marked 'P9' from which the Appellant derived title. As submitted by the counsel for the Respondent, the deed No. 2084 marked as 'P9' was attested after the registration of the *lispendens* in this case. Therefore, in terms of section 66 of the Partition Act, the said deed shall be void. Therefore, learned District Judge was right when he did not take the deed 'P9' into consideration.

10. As submitted by the counsel for the Appellant, and as mentioned in paragraph 02 of this judgment, on the 3<sup>rd</sup> day that this case was fixed for trial in the District Court, the Appellant was absent. Counsel had informed court that he had no instructions, and Court proceeded with the trial. Counsel for the Appellant contended that when the counsel informed that he had no instructions, it amounts to non-appearance and that case proceeded *ex parte*.
11. In case of *Malwatte V. Gunasekera and Others [1994] 3 Sri L.R. 168*, a similar situation was discussed. In that case, after the Defendant filed his statement of claim, the Defendant was absent and the counsel moved for a postponement. Application was refused and Court proceeded to trial. On an appeal, Court of Appeal affirmed the judgment. An application was made in terms of section 48(4) to vacate the decree and it was refused. Court of Appeal held, that section 48(4) does not help the Defendant petitioner as he had sent out his claim through a lawyer. Court of Appeal also held that the trial had been held not *ex parte* but *inter partes*. Court of Appeal observed;

*“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...”*

Court further 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, Athukorale J. considering these reasons held the view that the proceedings in a case similar to one under review are inter partes. ...”*

12. The learned Trial Judge has taken all the evidence including the documents placed before him and decided rightly on the rights of the parties. We find that all grounds of appeal above are without merit and should necessarily fail.

Appeal is dismissed with costs.

**JUDGE OF THE COURT OF APPEAL**

**JANAK DE SILVA, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**