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

Liyanaarachchige Nandawathie,
Naramana,
Padeniya.
26th Defendant-Appellant

CASE NO: CA/369/1999/F
DC KURUNAGALA CASE NO: 2132/P

Vs.

Narasinghe Kesara Bandaralage
Pohodiralalegedera Anura
Bandara,
Naramana,
Padeniya.
Substituted Plaintiff-Respondent
and Several Other
Respondents

Before: A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Jacob Joseph for the 26th Defendant-Appellant.
P. Peramunugama for the Substituted Plaintiff-Respondent.
P. Suthanthriraraj for the other Defendant-Respondents.

Argued on: 18.09.2019

Decided on: 16.10.2019

Mahinda Samayawardhena, J.

This is a partition action. The 26th Defendant-Appellant filed a statement of claim. At the date of the trial, she was absent, and the registered Attorney informed the District Court that he had no instructions. The trial has proceeded, and the Judgment has been delivered on 17.09.1996, and the Interlocutory Decree has been entered. The Court Commissioner has prepared the final scheme of partition and has sent the proposed Final Plan and the Report to Court, and the Court has fixed a date for consideration of the proposed scheme of partition.

Thereafter the 26th Defendant by Petition dated 26.11.1997 has made an application under section 48(4)(a)(iv) of the Partition Law seeking to set aside the Judgment and the Interlocutory Decree on the basis that she was unable to come to Court on the trial date due to illness.

Having held an inquiry into this application, the learned District Judge has dismissed the application of the 26th Defendant by order dated 12.01.1999 on the premise that her evidence on inability to participate in the trial was unsatisfactory. Being aggrieved by that Order, the 26th Defendant has filed this appeal.

It is my considered view that, this appeal shall be dismissed on three distinct grounds.

(a) The application of the 26th Defendant under section 48(4)(a) of the Partition Law is misconceived in law.

(b) Even if the 26th Defendant could file the application under that section, the application to the District Court has been filed out of time.

(c) Even if the application has been filed under relevant section within time, no final appeal lies against that order.

Let me now consider them in sequence.

On the date of the trial, the 26th Defendant had been absent. But her registered Attorney with another Attorney-at-Law (probably, the counsel) having marked their appearance for the 26th Defendant, stated to Court that they have no instructions. ("26 වෙනි විත්තිකරු වෙනුවෙන් නීතීඥ දයා සමරකෝන් මහතා සමග නීතීඥ එස්. බී. විජේකෝන් මහතා පෙනී සිටින බව සඳහන් කරමින් වෙනත් උපදෙස් නොමැති බව සඳහන් කරයි."[1])

[1] Vide page 82 of the Brief.

The learned District Judge has not recorded that the trial would be taken up *ex parte* against the 26th Defendant, but has proceeded to trial and delivered the Judgment.

This is different from the registered Attorney being totally absent on the trial date or having been present in Court stating to the Judge that he does not appear for the Defendants, in which event, trial becomes *ex parte*. But in this instance, the registered Attorney has appeared for the 26th Defendant with a Counsel and stated that he has no instructions thereby the trial has become *inter partes*.

In the Supreme Court case of *Jinadasa v. Sam Silva*[2], Amarasinghe J. held:

> *When a registered attorney whose proxy is on record is present in court, but has no instructions, he nevertheless appears and there is no default in appearance. However there may be circumstances in which the presence of a registered attorney may not be an appearance.*

Full Bench of the Supreme Court in *Andiappa Chettiar v. Sanmugan Chettiar*[3] (comprising of Macdonell C.J., Garvin S.P.J., Lyall Grant J., Maartensz A.J.) held that:

> *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.*

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[2] [1994] 1 Sri LR 232
[3] (1932) 33 NLR 217

Stating "*no instructions*" is not sufficient. He must expressly state "*does not appear*." Whether the registered Attorney on record, until the proxy is revoked, can say he does not appear due to some reason (such as his professional fees for that day have not been paid) is another question.[4]

Garvin J. at page 222 stated:

> *If the proctor, though present, does not wish his presence to be construed as an appearance on behalf of his client, he must immediately inform the Court that he does not desire to and is not entering or making an appearance in the case. This must be done clearly and unambiguously. It is not sufficient, as in the case under consideration, to say that he has no instructions. A proctor who has no instructions may nevertheless do much for his client and in his interests. The Court, as I have said, is entitled to know at the outset whether the proctor is making an appearance for his client or not and unless he states that he is not making such an appearance, it is entitled to treat his presence as an appearance and to proceed as if the party had appeared.*

In *Malwatta v. Gunasekera*[5], Palakidnar J. referred to this Judgment to state 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.*"

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[4] Vide Daniel v. Chandradeva [1994] 2 Sri LR 1
[5] [1994] 3 Sri LR 168 at 171

The Supreme Court in *Cisilin Nona alias Pesonahamy v. Gunasena Jayawardena*[6] also referred to the Full Bench decision in *Andiappa Chettiar's* case and held that when the Attorney on record says no instructions, still the trial is conducted *inter partes* and not *ex parte*. Chitrasiri J. opined:

> *Having referred to the law applicable in this connection, I will now advert to the facts of this case in order to determine whether the trial in the original court was inter-partes or was it a trial ex-parte. Both in the journal entry and in the proceedings recorded on 27.05.1997 show that Mr. Junaideen Attorney-at-law, on that date, he being the proxy holder had marked his appearance on behalf of the respondent. Even the answer of the respondent had been filed under his name.*
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> *Having marked his appearance for the respondent, he has merely submitted that the respondent had not given him instructions to appear on that particular date. Authorities referred to above show that the trial judge, under those circumstances should have taken up the matter considering it as an inter-partes trial and allowed the counsel to cross examine the witness. Accordingly, it is clear that the Court of Appeal has correctly decided the issue in this case having adopted the law relevant thereto. In the circumstances, I am not inclined to interfere with the decision of the Court of Appeal.*

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[6] *SC Appeal No. 190/2012, SC SPL LA No.44/2012 decided on 02.02.2016.*

Ironically, the learned Counsel for the 26th Defendant cites the last mentioned Supreme Court Judgment to say that "*the case has been heard inter partes and not ex parte and the Appellant is entitled to make the application under section 48(4)(a)(iv) of the Partition Law.*" That argument is clearly misplaced in law. If the learned Counsel accepts that the trial has been conducted against the 26th Defendant *inter partes*, then the 26th Defendant has no right to make an application under section 48(4)(a)(iv) of the Partition Law.

This leads me to shift to the next point. That is, even if the trial has been conducted *ex parte* against the 26th defendant, and therefore the 26th Defendant could have made the application under section 48(4)(a)(iv), the application has not been filed within the stipulated time, and therefore, it ought to have been rejected by the learned District Judge *in limine*. In fact, the learned Counsel who appeared for the Plaintiff in the District Court has, in his objections[7] and the written submissions[8] has stated it, but the learned District Judge has just ignored it, which should not have been done.

Section 48(4)(a) reads as follows:

> *Whenever a party to a partition action-*
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> *(i) has not been served with summons or*
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> *(ii) being a minor or a person of unsound mind, has not been duly represented by a guardian ad litem, or*

[7] Vide pages 224-225 of the Brief.
[8] Vide pages 133-135 of the Brief.

(iv) being a party who has duly filed his statement of claim and registered his address, fails to appear at the trial,

and in consequence thereof the right, title or interest of such party to or in the land which forms the subject-matter of the interlocutory decree entered in such action has been extinguished or such party has been otherwise prejudiced by the interlocutory decree, such party or where such party is a minor or a person of unsound mind, a person appointed as guardian ad litem of such party may, on or before the date fixed for the consideration of the scheme of partition under section 35 or at any time not later than thirty days after the return of the person responsible for the sale under section 42 is received by court, apply to the court for special leave to establish the right, title or interest of such party to or in the said land notwithstanding the interlocutory decree already entered. [emphasis is added]

A party who can come under section 48(4)(a) to have the Judgment and the Interlocutory Decree set aside, cannot go before the District Judge at any time he feels free. According to that section, he can do so:

(a) on or before the date fixed for the consideration of the scheme of partition under section 35, or

(b) at any time not later than thirty days after the return of the person responsible for the sale under section 42 is received by court

In terms of section 26(2) of the Partition Law, the District Judge trying a partition case, can, in the Interlocutory Decree, make several orders, which include, an order for partition of the land and an order for a sale of the land. Section 35 relates to the former, and section 42 relates to the latter.

In the instant case, the applicable section is section 35 as the learned District Judge after the trial ordered to partition the land.

Section 35 of the Partition Law reads as follows:

> *After the surveyor makes a return to the commission, the court shall call the case in open court and shall fix a date for the consideration of the scheme of partition proposed by the surveyor. The date so fixed shall be a date not earlier than thirty days after the receipt of such return by the court.*

In the instant case, the surveyor, having executed the commission for Final Partition Plan, returned same to Court on 20.10.1997[9]. Thereafter, the Court called the case on 22.10.1997[10], and fixed the date for consideration of the proposed scheme of partition on 25.11.1997, which is not earlier than thirty days after the receipt of the proposed Final Plan by Court in terms of section 35 of the Partition Law.

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[9] Vide Court Date Stamp (20.10.1997) on the Plan at page 147 of the Brief.
[10] Vide JE No.47. As per JE No.45 dated 03.09.1997, 22.10.1997 was the next calling date.

However, the 26th Defendant made the application under section 48(4)(a)(iv), on 26.11.1997[11], which is, after the date fixed for the consideration of the scheme of partition under section 35. This time limit in a partition case is mandatory. Hence the District Judge ought to have dismissed the application of the 26th Defendant *in limine* without wasting time in recording evidence to refuse that application.

Although it did not arise in this case, for completeness, I must state that, to make the application under section 48(4), a party need not wait until the return of the commission by the surveyor, whether under section 35 or 42. The application can be made at any time, subject however to the qualification that, if the order is to partition the land, before the date fixed for the consideration of the scheme of partition, and if the order is to sell the land, not later than thirty days after the return of the commission for sale.

In view of the Judgment of G.P.S. de Silva C.J. in *Podinona v. Premadasa*[12], there is a misconception that, the application shall be made within thirty days of the return of the commission for proposed Final Partition Plan. That is not correct. At the time of the said Judgment was delivered, although the application could have been made "*at any time, not later than thirty days after the date on which the return of the surveyor under section 32 or the return of the person responsible for the sale under section 42, as the case may be, is received by the court*", the Law was changed by Partition (Amendment) Act No.17

[11] Vide pages 186-191 of the Brief.
[12] [1996] 2 Sri LR 191

of 1997 whereby a distinction was made between the return of two commissions (partition and sale) under section 32 and 42, and made it imperative to make the application "*on or before the date fixed for the consideration of the scheme of partition under section 35 or at any time not later than thirty days after the return of the person responsible for the sale under section 42 is received by court*".

I will now deal with the last point, which is, the final appeal filed against the impugned order is misconceived in law, and therefore this appeal shall be rejected.

The learned counsel for the 26th Defendant states that this appeal was filed under section 67 of the Partition Law, which allows, subject to section 36A and 45A, a party dissatisfied with any Judgment, Decree or Order made or entered by the District Court in a partition action to come before this Court by way of final appeal. Conversely, the learned Counsel for the Plaintiff-Respondent submits that the 26th Defendant should have come by way of leave to appeal under section 754(2) of the Civil Procedure Code and not by way of final appeal under section 754(1) of the Civil Procedure Code.

Section 67(1) of the Partition Law reads as follows:

> *Subject to the provisions of sections 36A and 45A, an appeal shall lie to the Court of Appeal against any judgment, decree or order made or entered by any court in any partition action; and all the provisions of the Civil Procedure Code shall, subject to the succeeding provisions of this section, apply accordingly to any such appeal as*

> *though a judgment, decree or order made or entered in a partition action were a judgment, decree or order made or entered in any action as defined for the purposes of that Code.*

By reading this section, it is clear that, the law relating to appeals against Judgments and Orders made by the District Court in a partition action is governed by the Civil Procedure Code subject to the provisions of the Partition Law, in particular, sections 36A and 45A thereof.

The question whether an appeal or leave to appeal lies against an "order" of the District Court had been a subject of much controversy for a long period of time.

One school of thought represented by the leading local case of *Siriwardena v. Air Ceylon Ltd*[13] Justice Sharvananda (later Chief Justice) opted to adopt "order approach" (suggested by Lord Alverstone C.J., in *Bozson v. Altrincham Urban District Council*[14]) to determine that question. The "order approach" contemplates only the nature of the order in isolation. When taken in isolation, if the order finally disposes of the matter in dispute without leaving the suit alive, the order is final, and a direct appeal is the proper remedy against such order.

In *De Costa v. De Costa*[15], this Court, following the Judgment of Sharvananda J. in *Siriwardene v. Air Ceylon* (supra) took the view that, a party aggrieved by an order made upon an

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[13] [1984] 1 Sri LR 286
[14] [1903] 1 KB 547
[15] [1998] 1 Sri LR 107

application filed under section 48(4)(a)(iv) of the Partition Law can come by way of final appeal.

The other school of thought represented by the leading local case of *Ranjit v. Kusumawathie*[16], Justice Dheeraratne opted to adopt "application approach" (suggested by Lord Esher M.R., in *Standard Discount Co. v. La Grange*[17] and *Salaman v. Warner*[18], and adopted by Lord Denning M.R., in *Salter Rex & Co. v. Ghosh*[19]) to determine that question. The "application approach" contemplates only the nature of the application made to Court in isolation, and not the order delivered *per se*. In accordance with this approach, if the order, given in one way, will finally dispose of the matter in dispute, but, if given in the other way, will allow the action to go on, the order is not final, but interlocutory, in which event, leave to appeal is the proper remedy.

In fact, in *Ranjit v. Kusumawathie* (supra) the issue was identical to the one in the instant case where the appellant came before the Court of Appeal by way of final appeal against an order made on an application filed under section 48(4)(a)(iv) of the Partition Law. The Supreme Court affirmed the Judgment of the Court of Appeal that the proper remedy was to come by way of leave to appeal and not final appeal.

The Full Bench of the Supreme Court in *Chettiar v. Chettiar*[20] was called upon to decide on this vexed question, and the Full Bench of the Supreme Court (consisting of five Justices) having

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[16] [1998] 3 Sri LR 232
[17] (1877) 3 CPD 67
[18] [1891] 1 QB 734
[19] [1971] 2 QB 597
[20] [2011] 2 Sri LR 70 and [2011] BLR 25

discussed both the approaches stemming from English decisions unanimously decided that the application approach (and not the order approach) shall be the criterion in deciding the question whether appeal or leave to appeal is the proper remedy against an "order" of the District Court.

This Full Bench decision of the Supreme Court has consistently been followed in later Supreme Court cases.[21]

Notwithstanding this was a Full Bench decision of the Supreme Court, still, there were some lingering doubts regarding the correctness of this decision. Therefore, in *Senanayake v. Jayantha*[22], a Fuller Bench of the Supreme Court (consisting of seven Justices) revisited the *Chettiar*'s Judgment.

Having so revisited, the Fuller Bench of the Supreme Court (consisting of seven Justices) has decided that the Judgment of the Full Bench of the Supreme Court (consisting of five Justices) in *Chettiar*'s case is correct, and the test which shall be applied in deciding whether appeal or leave to appeal is the proper remedy against an order of the District Court is the application approach and not the order approach.

Chief Justice Dep (with the concurrence of the other six Justices of the Supreme Court) held that:

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[21] Eg. Yogendra v. Tharmaratnam (SC Appeal No.87/09, SC (HCCA) LA No.84/09) decided on 06.07.2011, Ranasinghe v. Madilin Nona (SC Appeal No.03/09, SC (HC) LA No.147/08) decided on 16.03.2012, Prof. I.K. Perera v. Prof. Dayananda Somasundara (SC Appeal No. 152/2010) decided on 17.03.2011.

[22] (SC Appeal No. 41/2015) decided on 04.08.2017

> *In order to decide whether an order is a final judgment or not, it is my considered view that the proper approach is the approach adopted by Lord Esher in Salamam v. Warner [*1891*]* 1 QB 734*, which was cited with approval by Lord Denning in Salter Rex & Co. v. Ghosh [1971] 2 QB 597. It stated: "If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for that 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 other, will allow the action to go on, then I think it is not final, but interlocutory*.

When I adopt the Application Test to the present appeal, it is abundantly clear that, an appeal does not lie against the order of dismissal made by the District Judge. Notwithstanding the impugned order takes the shape of a final Judgment as it is, if the application of the 26th Defendant were to be decided in favour of her, the case would not have ended there, but the trial would have proceeded with, and a fresh Judgment would have been delivered.

For the aforesaid reasons, I dismiss the appeal of the 26th Defendant but without costs.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Court of Appeal