FRANCIS WANIGASEKERA AND ANOTHER
v.
PATHIRANA

COURT OF APPEAL.
WEERASEKERA, J.,
WIGNESWARAN, J.
C.A. 673/87 (F).
D.C. MATARA 8109/P.
JUNE 4, 1997.

Partition Action – Application for Postponement – Prepayment order regarding costs not carried out – Case heard – What is required to signify consent – Civil Procedure Code – Sections 82, 142 and 91A – Partition Act 21 of 1977 – Section 25 – Investigation of Title.

Held:

***Per* Weerasekera, J.**

"The 2nd defendant-appellant was present and represented by an Attorney-at-Law when the order for prepayment was made. The proceedings have a statement that the defendant-appellant agreed to the prepayment order. What more than this is necessary to indicate the consent to prepay cost. The defendant had not signed the record, if that is what is sought to be argued as being what is required to signify consent, I cannot subscribe to this view where the party agreeing to the prepayment is present and is represented by an Attorney-at-Law and signified in the proceedings as having agreed to comply with the prepayment order – this would satisfy the provisions of sections 82, 142, 91A Civil Procedure Code."

***Per* Weerasekera, J.**

"There has been a very pernicious practice among litigants to resile from Agreements merely because they have not subscribed their signature to the record. This pernicious practice in my view must be condemned and refuted with all the contempt it deserves."

***Per* Weerasekera, J.**

"As I have stated our system of Civil Law is one of confrontation. Abstruse interpretation of section 25 is a dangerous exercise which could lead to dangerous and unreasonable situations from which it is best to desist from, but to follow the time tested pattern, procedure and methodology of the general Civil Law and in particular the generally applied procedure under the Partition Act is in my view most prudent and reasonable."

The partition act provides for a defaulting defendant to explain his default law fully.

APPEAL from the Judgment of the District Court of Matara.

Cases referred to:

1. *Callistus Perera v. Nawange* – 1994 3 SLR 305.
2. *Sirimalie v. Punchi Ukku* – 72 NLR 347.

D. R. P. Gunatillake with S. Suraweera for defendant-appellants.

Plaintiff-respondent absent and unrepresented.

Cur. adv. vult.

July 8, 1997.

L. H. G. WEERASEKERA, J.

The plaintiff-respondent instituted this action for the partition of the land called lot 1 of "Ullagodawatta" and morefully described in the schedule to the plaint. The plaintiff by his pedigree claimed a 1/4 share and conceded a 1/2 share to the 1st defendant-appellant and a 1/4 share to the 2nd defendant-appellant.

The 1st and 2nd appellants filed their statement of claim denying the plaintiff-respondent's pedigree and that the plaintiff-respondent was not entitled to any share whatsoever. They prayed for a dismissal of the plaintiff-appellant's action to partition the land.

At the trial on 23.04.84 the 1st and 2nd defendant-appellants were present and represented by Mr. Kretser Attorney-at-Law who raised points of contest No. 3 and 4 on their behalf.

The trial was thereafter postponed for 04.07.86, 10.09.86 and 16.01.87. On 16.01.87 when the case was taken for hearing the 2nd defendant-appellant was present and represented by Mr. Kretser Attorney-at-Law who moved for a postponement of the hearing. The application for a postponement of the hearing on the application of Mr. Kretser on behalf of the 2nd appellant was granted on the 2nd defendant agreeing to prepay the plaintiff-respondent costs of Rs. 350/- before 9.30 a.m. on the next date of trial, namely, 30.03.87. The 1st defendant-appellant was absent on the trial date on 30.03.87 though represented by his Attorney-at-Law on record.

On 30.03.87 by 9.30 a.m. when the case was taken for hearing as the prepayment order had not been complied with, the learned District Judge proceeded to hear the case and delivered judgment on 27.07.87.

This appeal is from that judgment by the 1st and 2nd defendant-appellants.

It was urged on behalf of the 1st defendant that he appeared on 01.07.87 and on his informing Court that he was not ready his application for a postponement was unjustly refused.

I have given my best consideration to this submission. I have examined the record and I find that this submission cannot be sustained for the following reasons:–

By Journal Entry 94 of 28.10.81 the original proxy of the 1st and 2nd defendants was cancelled and a new proxy was filed. That proxy was the proxy of Mr. Kretser, Attorney-at-Law. The 1st defendant was therefore represented by Mr. Kretser until the third new proxy was filed by Mr. Liyaudeen on 11.05.87 Vide Journal Entry 126. In the absence of any statement by the Attorney-at-Law of record of the 1st defendant-appellant during this entire period from 28.10.81 to 11.05.87 that he had no instructions from the 1st defendant-appellant and was not appearing for him, the only inference I could come to is that the 1st defendant was legally represented at the trial on 30.03.87.

On 11.05.87 the 1st defendant-appellant through his new Attorney-at-Law filed papers to explain his absence on 30.03.87 but on the date of inquiry his Attorney of record Mr. Liyaudeen has informed Court that he had no instructions and was not appearing for him. The 1st defendant-appellant was present and not ready for inquiry.

In those circumstances the only appropriate order that the learned District Judge could have made was to dismiss the application of the 1st defendant-appellant even if it could be said that this procedure to explain the absence of the defendant's appearance was legally available under the provisions of the Partition Act. In my view the Partition Act provides for a defaulting defendant to explain his default lawfully.

I am therefore of the view that the order dismissing the 1st defendant's application apparently to explain his absence on 30.03.87 is the correct order.

Learned Counsel for the 2nd defendant-appellant urged that the order made on 30.03.87 for non-compliance of the prepayment order was not legally justifiable.

Learned Counsel for the 2nd defendant-appellant submitted that the Supreme Court in the case of *Calistus Perera v. Nawange*[1].

Held: "That the trial Judge had no jurisdiction to give judgment for the plaintiff merely because the defendant failed to pre-pay costs order without the defendant's consent."

I fully agree with this opinion expressed in that case but to that extent only.

Even so in the present case the 2nd defendant-appellant was present in Court when the order for prepayment was made. He was represented by his Attorney-at-Law Mr. Kretser. The proceedings bore a statement that the defendant-appellant agreed to the pre-payment order. What more then is necessary to indicate the consent of the defendant to the prepayment order of 16.01.87? The defendant has not signed the record on the 16th of January, 1987 if that is what is sought to be argued as being what is required to signify consent. I cannot subscribe to this view where the party agreeing to the pre-payment is present and is represented by an Attorney-at-Law and signified in the proceeding as having agreed to comply with the pre-payment order. There has been a very pernicious practice among litigants to resile from agreements merely because they have not subscribed their signature to the record. This pernicious practice in my view must be condemned and refuted with all the contempt it deserves. In my view when the 2nd defendant-appellant was present and when he was represented by his Attorney-at-Law and the consent of the defendant was signified by the proceedings of the day that would completely satisfy the provisions of sections 82, 142 and 91A of the Civil Procedure Code to confer the power to give judgment and adjudication in the event of non compliance. It is nothing but reasonable and particularly so in the confrontational system of justice of the Civil Law that prevails in this country. Moreover if such a power was not conferred on the Court to give judgment the entire procedure and working of our Civil Law would come to a grinding halt and to say that it does not grant the power of adjudication in the event of non compliance is to say the least an indication of a purile mind with no experience of the working of the original Civil Courts of this country.

Learned Counsel also urged that the learned District Judge failed to act in terms of section 25 of the Partition Act which requires Court

to examine and hear and receive evidence of the title of each party as decided in the case of *Sirimalie v. Punchi Ukku*[2].

I do agree that section 25 of the Partition Act requires the Court to examine and hear and receive evidence of the title and interest of each party. But it must be remembered that the literal application of the provisions of this section would lead to the most disturbing, hilarious and absurd result and no partition case could ever be finally concluded. The most practical via media would have to be adopted in my view. As I have stated earlier our system of Civil Law is one of confrontation. After due notice to parties and the filing of statements of claim where parties are represented the trial commences with the points of contests being raised if any, the adjudication of which the Court proceeds to do. If no disputes are raised or those raised are abandoned and there is no contest the Court proceeds to examine the title presented by the plaintiff to determine ownership by a judgment contained in interlocutory decree. This in my view is briefly what happens in the practical application of the Partition Act. Abstruse interpretation of Section 25 is a dangerous exercise which could lead to dangerous and unreasonable situations from which it is best to desist from, but to follow the time tested pattern, procedure and methodology of the general Civil Law and in particular the generally applied procedure under the Partition Act is in my view most prudent and reasonable.

In this case both the 1st and 2nd defendant-appellants were represented by Counsel up to 01.07.87. They had filed statements of claim. At some point of time points of contest had been raised on their behalf. The learned District Judge was hearing a civil action in particular a partition action. The learned District Judge was not trying the 1st and 2nd defendant-appellants as accused in a criminal trial. When the prepayment order made against the defendant had not been complied with and where on the date of inquiry of a purported application of the 1st defendant to explain his absence on the date of trial he is absent what more can a District Judge do than to proceed to determine the action on the basis of the material available and that to hear, receive and examine the title and interest of each party on the basis of the plaintiff-respondent's evidence. I am of the view that in the circumstances of this case the learned District Judge has complied with the provisions of section 25 of the Partition Act.

The plaintiff-respondent was noticed of the date of argument on the direction of Court on 18.06.96, 13.03.97 and 06.05.97. He was absent and unrepresented.

I do not propose to interfere with judgment of the learned Additional District Judge dated 27.07.87.

The appeal is dismissed. The judgment dated 27.07.87 is affirmed.

I make no order as to costs as the plaintiff-respondent has been absent from the hearing despite notice.

WIGNESWARAN, J. – I agree.

Appeal dismissed.