RANJITH PERERA AND ANOTHER
v
DHARMADASA AND OTHERS

COURT OF APPEAL
SALAM, J.
CA 1754/2004
DC HORANA 5387/P
JANUARY 8, 2008

Partition Law 21 of 1977 – Section 48 (4), Joint statement of claim – Trial date – Registered Attorney absent – One claimant taking part in the proceedings – Sections 24, 27(2) Civil Procedure Code – Applicability – Procedural Law – Its importance – Investigation of title? – Permission to conduct his own case – Not recorded? – Fatal?

The 3rd and 4th defendants-petitioners who had jointly nominated a registered Attorney-at-law and filed a joint statement of claim sought to revise the judgment and the interlocutory decree, on the basis that, they were unrepresented at the trial, and that the trial Judge should not have put the 4th defendant-petitioner into the witness box without legal assistance and permitted him to cross examine when he had a registered attorney on record. The petitioners also allege that, there was no investigation of title, and that, there was no settlement.

Held:

(1) As long as a party to a case has an Attorney-at-law on record, it is the Attorney-at-law on record alone, who must take steps and also whom the Court permits to take steps.

When the 4th defendant-petitioner attended Court without being represented by his Attorney-at-law or a Counsel (Section 27(3)) the trial Judge should have considered him as a party having failed to appear at the trial as the Court has chosen to do so in the case of the 3rd defendant-petitioner.

Further there is no indication pointing to the 4th defendant-petitioner having sought permission of Court to cross-examine the plaintiff or to present his case in person either.

Per Abdul Salam, J.

"As far as the 4th defendant-petitioner is concerned by improperly extending the right of audience to him at the trial. the trial Judge has proceeded on the

basis that the judgment and interlocutory *decree* were entered interpartes, this procedure wrongly adopted by Court has deprived the 4th defendant-petitioner of the right to invoke Section 48 (4)".

(2) The trial Judge had recorded at the commencement of the trial that the parties had resolved the disputes and the Court has proceeded to hear evidence without points of contest, before it was so recorded the trial Judge owed a duty to explain to the 4th defendant-petitioner the manner in which the disputes have been resolved and to make a contemporaneous reference to that fact in the proceedings.

If the 4th defendant-petitioner was a party to the compromise, need for cross examination of the plaintiff by the 4th defendant-petitioner would not have arisen – this clearly shows that the 4th defendant-petitioner was not a party to the compromise recorded at the commencement of the trial.

(3) Omission to give a party to a suit an opportunity of being heard is not merely an omission of procedure but is a far more fundamental matter in that it is contrary to the rule of natural justice embodied. There has been no investigation of title.

(4) The protective character of procedural law has the effect of safeguarding every person in his life, liberty, reputation, livelihood and property and ensuring that he does not suffer any deprivation except in accordance with the accepted rules of procedure – Dr. Amerasinghe in *Fernando* v *Fernando*.

APPLICATION in Revision from an order of the District Judge of Horana.

Cases referred to:

(1) *Seelawathie and Another* v *Jayasinghe* 1985 2 Sri LR 266.

(2) *Hameed* v *Deen and Others* 1988 2 Sri LR 1.

(3) *Fernando* v *Fernando* 1997 3 Sri LR 1.

(4) *Siriya* v *Amalee* 60 NLR 269.

(5) *Punchibanda* v *Punchibanda*

(6) *W.G. Rosaleen* v *H.B. Maryhamy* 1994 3 Sri LR 262.

Chandana Prematilaka for the 3rd and 4th defendant-petitioners.

Rohan Sahabandu with *Piyumi Gunatilaka* for the plaintiff-respondent.

Cur.adv.vult.

March 19, 2008

ABDUL SALAM, J.

The petitioners who were the 3rd and 4th defendants in the above partition action, have presently applied to revise the judgment dated 1 July 2004 and interlocutory *decree* entered thereon. They allege

that they were unrepresented at the trial and hence denied of a fair trial. Their position is that the learned trial judge erred when he proceeded to decide the action interpartes against the 4th defendant. It is averred in the petition that the learned trial judge should not have put the 4th defendant-petitioner into the witness box without legal assistance, when he had a registered attorney on record.

As a matter of law, the petitioners contend that the District Judge concluded the case on the same day it was taken up for hearing and thereby effectively shut out evidence of the 3rd and 4th defendants regarding their title and had compromised his sacred duty to investigate the title.

When unnecessary details are filtered out the factual background relevant to the revision application would appear to be uncomplicated. It involves a fundamental question of law and how pertinently it had been applied in the circumstances peculiar to the revision application.

The petitioners have jointly nominated a registered Attorney to be on record. They filed a joint statement of claim disputing the averments in the plaint. On the date the matter was set down for trial the registered Attorney of the petitioners was absent. Accordingly both petitioners were unrepresented. Yet, the 4th defendant-petitioner was present at the trial.

The learned District Judge in the course of the trial had allowed the 4th defendant to cross examine the plaintiff and also present his case in person. Thereafter he had delivered judgment to partition the land allotting certain undivided rights to the plaintiff and leaving the balance rights unallotted.

Thus, the learned District Judge had obtained the assistance of the 4th defendant to resolve the dispute by effectually making him to participate throughout the trial. The record does not indicate as to whether the 4th defendant-petitioner sought permission of Court to conduct his own case. There is no indication pointing to 4th defendant-petitioner having sought permission of Court to cross-examine the plaintiff or to present his case in person either. In the absence of any specific mention being made in proceedings to the contrary, I consider it as reasonable to assume that the learned District Judge on his own had involved the 4th defendant in the trial proceedings.

The main question that arises for determination in this matter is the applicability of section 27(2) of the Civil Procedure Code. In terms of Section 27(2) aforesaid when an appointment of a registered Attorney is made in terms of Section 27(1) of the Civil Procedure Code, such appointment shall be in force until revoked with the leave of Court and after notice to the registered Attorney by a writing signed by the client and filed in Court.

The effect of an appointment of a registered Attorney under Section 27(1) has been considered by this court on many an occasion. Suffice it would be to cite the judgment in *Seelawathie and Another* v *Jayasinghe*(1) and *Hameed* v *Deen and Others*(2) where in the former case it was authoritatively held that as long as a party to a case has an Attorney-at-law on record, it is the Attorney-at-law on record alone, who must take steps, and also whom the Court permits to take steps. It is a recognised principle in Court proceedings that when there is an Attorney-at-law appointed by a party, such party must take all steps in the case through such Attorney-at-law. Further, the established principle is that a party, who is represented by an Attorney-at-law, is not permitted to address Court in person. All the submissions on his behalf should be made through the Attorney-at-law who represents him.

The learned Counsel of the petitioners has also cited the judgment in the case of *Hameed* v *Deen (supra)* in which it was held that when there is an Attorney-at-law appointed by a party, every step in the case must be taken through such Attorney-at-law. The appointment of the Attorney-at-law under Section 25 of the Civil Procedure Code remains valid in terms of Section 27(2) until all proceedings in the action are ended or until the death or incapacity of the Attorney. The registered Attorney or Counsel instructed by him alone could act for such party except where the law expressly provides that any party in person should do any particular act.

The 4th defendant-petitioner has been suddenly called upon to cross examine the plaintiff and later to present his own case by the learned District Judge, immediately after the closure of the plaintiff's case, disregarding the fact that there was a registered Attorney on record. When the 4th defendant attended Court without being represented by his registered Attorney or a Counsel as contemplated under Section 27(3) of the Civil Procedure Code, the learned District

Judge should have considered him as a party having failed to appear at the trial, as the court had rightly chosen to do in the case of the 3rd defendant-petitioner.

It is quite significant to advert to the adverse consequences that flow from the learned judge's approach to identify the proceedings as interpartes. As far as the 4th defendant-petitioner is concerned, by improperly extending the right of audience to the 4th defendant-petitioner at the trial, the learned District Judge has proceeded on the basis that the judgment and interlocutory *decree* were entered interpartes. This procedure wrongly adopted by Court has deprived the 4th defendant petitioner of the right to invoke Section 48(4)(iv) of the Partition Act, No. 21 of 1977. Had the learned District Judge followed the provisions of the Civil Procedure Code and considered the 4th defendant-petitioner as a party who had failed to appear at the trial or as a party in default of appearance, the 4th defendant-petitioner could have legitimately exercised his rights under 48(4)(iv) of the Partition Act to obtain Special Leave of Court to invoke the jurisdiction of the original Court to amend or modify the interlocutory *decree* to such extent and in such manner as the Court could have accommodated the entitlement, if any, of the 4th defendant-petitioner.

On the contrary, the irregular procedure adopted by Court compelling the 4th defendant-petitioner to participate at the trial in person has ended up in a miscarriage of justice, in that the 4th defendant-petitioner had to forego the right conferred under 48(4)(iv) of the Partition Act.

It is of much importance to observe that the learned trial judge recorded at the commencement of the trial on 1 July 2004 that the parties have resolved the disputes and the Court proceeds to hear evidence without points of contest. Before it was so recorded the learned District Judge owed a duty to explain to the 4th defendant-petitioner the manner in which the disputes have been resolved and to make a contemporaneous reference to that fact in the proceedings. As there is no such reference found in the proceedings, I am not disposed to take it for granted that the learned District Judge has either consulted the 4th defendant-petitioner regarding the settlement or enlightened him as to its consequences. Had the learned District Judge taken the precaution to ensure that the 4th

defendant-petitioner also would be bound by such a settlement, he would have specifically referred to the 4th defendant as a party to the settlement.

On the other hand, if the 4th defendant-petitioner was a party to the compromise, the need for cross-examination of the plaintiff by the 4th defendant-petitioner would not have arisen. Above all, when the 4th defendant-petitioner had purportedly cross-examined the plaintiff posing only one question suggesting that Johanis was entitled to only 1/6th share and not 1/2 as claimed by the plaintiff, the learned trial judge ought to have realized that the 4th defendant-petitioner was trying to resile from the compromise. Without clarifying this from the 4th defendant-petitioner as to whether he was trying to pull himself out from the compromise the learned Trial Judge appears to have simply raised two points of contest and answered the same on the same day. This clearly shows that the 4th defendant-petitioner was not a party to the compromise reached at the commencement of the trial and the learned District Judge in fact should have raised points of contest at the commencement of the trial itself.

The learned District Judge does not appear to have taken into account the miserable plight of the 4th defendant-petitioner who should not have been held responsible for the dereliction of duty of the registered Attorney. The 4th defendant-petitioner was in his eightieth year when he was suddenly called upon to cross-examine a witness in a contested partition case and to present his case too. Even a lawyer with experience cannot be expected to discharge his functions satisfactorily if he is confronted with the difficulty which the 4th defendant-petitioner had to face.

The learned District Judge possibly in his enthusiasm to dispose of the case without delay has lost sight of the importance of the law of Civil Procedure. As has been stated by Dr. Amerasinghe, J. in *Fernando* v *Fernando*(3) "**civil procedural laws represent the orderly, regular and public functioning of the legal machinery and the operation of the due process of law. In this sense the protective character of procedural law has the effect of safeguarding every person in his life, liberty, reputation, livelihood and property and ensuring that he does not suffer any deprivation except in accordance with the accepted rules of procedure**".

Although recklessness on the part of the 4th defendant-petitioner and dereliction of duty by the registered Attorney cannot be denied, yet the irregular procedure adopted by the learned Judge is totally unwarranted and unjustifiable.

In *Siriya* v *Amalee et.al*[4] it was held that an omission to give a party to a suit an opportunity of being heard is not merely an omission of procedure but is a far more fundamental matter in that it is contrary to the rule of natural justice embodied in the *maxim audi alteram partem.*

In the result the manner in which title has been investigated by Court does not appear to be consistent with the law that is required to be followed in the investigation of such title.

In the circumstances it is my view the irregular procedure followed by the learned District Judge has ended up in a miscarriage of justice which transcends the bounds of procedural error.

It is appropriate to quote the relevant passage from the judgment of Soertsz, J. *Punchibanda* v *Punchibanda*[5] that has been cited with approval by his Lordship S.N. Silva, J. (as he then was) in *W.G. Rosalin* v *H.B. Maryhamy*[6] which reads as follows:

> "This Court has often pointed out that when settlements, adjustments, admissions, &c., are reached or made, their nature should be explained clearly to the parties, and their signatures or thumb impressions should be obtained. The consequence of this obvious precaution not being taken is that this Court has its work unduly increased by wasteful appeals and by applications being made for revision or *restitutio in integrum.* One almost receives the impression that once a settlement is adumbrated, those concerned, in their eagerness to accomplish it, refrain from probing the matter thoroughly lest the settlement fall through. This is a very unsatisfactory state of things and it is to be hoped that a greater degree of responsibility will be shown on these matters by both judges and lawyers".

For the foregoing reasons it is my view that the application of 4th defendant-petitioner should be allowed. The 3rd defendant-petitioner has no ground to challenge the propriety of the

impugned judgment by way of revision as he is entitled to invoke section 48(4)(iv) of the Partition Act. Hence the application of the 3rd defendant-petitioner is refused.

The judgment and interlocutory *decree* are accordingly set-aside and the learned District Judge is directed to investigate the title afresh, affording both the 3rd and 4th defendant petitioners an opportunity to participate at the trial.

I make no order as to costs.

Application allowed.

Judgment/interlocutory decree set aside.
Trial to proceed.