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

Pathma Abeysekara

1st Respondent-Respondent-Appellant

Vs

CA (PHC) 67/2000
HC Galle 51/99

1. H.L Jeewani
2. Nihal Nagahawatthe
3. W. Nandasiri
4. M.W Dharmawathi

1st to 4th Respondent-Petitioner-Respondents

Before : Sisira de Abrew J &
K.T Chitrasiri J

Counsel : Varuna Senadheera for the Appellant.

Sanjeewa Ranaweera for the Respondents

Argued on : 23.07.2012 and 24.07.2012
Decided on : 27.09.2012

Sisira de Abrew J.

This is an appeal to set aside the order of the learned High Court Judge dated 6.4.2000. The learned Magistrate in an application under section 66 of the Primary Court Procedure Act No 44 of 1979 made an order in favour of the appellant. Being dissatisfied with the said order, the respondents filed a revision application in the High Court seeking to set aside it. The appellant could not file her objection although notice was sent by the High Court directing her to file objection. The learned High Court Judge thereafter decided to deliver his order without the objection of the

appellant. The appellant however sought permission of the High Court to file her objection. The learned High Court Judge, by his order dated 6.4.2000, (delivered on 7.4.2000) rejected the said application and decided to deliver his order on the revision application filed in the High Court. This order was fixed for 31.5.2000. But before 31.5.2000, the appellant, on 3.5.2000, filed an appeal against the order of the learned High Court Judge dated 6.4.2000. The learned high Court Judge forwarded the case record to this court.

Learned counsel for the respondents submitted that the order of the learned dated 6.4.2000 was not a final order and that therefore this appeal should be rejected. Learned counsel for the appellant submitted that as the learned High Court Judge, by the said order, has finally disposed of the rights of the appellant, the order was a final order. I must therefore examine whether the said order of the learned High Court Judge is a final order or not. In order to decide this question I would like to consider certain judicial decisions.

In Siriwardene Vs Air Ceylon Ltd [1984] 1 SLR page 286 Sharwannada J (as he then was) held thus: "The tests to be applied to determine whether the an order has the effect of a final judgment and so qualifies as a judgment under section 754(5) of the Civil Procedure Code are

1. It must be an order finally disposing the rights of the parties.
2. The order cannot be treated as a final order, if the suit or the action is still left a live suit or action for the purpose of determining rights and liabilities of the parties in the ordinary way.
3. The finality of the order must be determined in relation to the suit.

4. The mere fact that a cardinal point in the suit has been decided or even a vital and important issue determined in the case, is not enough to make an order a final one.

By these tests an order amending a decree made under section 189 of the Civil Procedure Code is a final order. Hence the appellant's application for leave to appeal was misconceived and could not be entertained."

In Ranjith Vs Kusumawathi [1998] 3 SLR 232 the case filed in the District Court was a partition action. In the said case the 4th defendant filed his statement of claim. On the day of the trial all parties except the plaintiff were absent. Evidence of the plaintiff was led and the judgment and the interlocutory decree were entered. Later the 4th defendant applied to the trial court in terms of section 48(4)(a)(1V) of the Partition Law, for special leave to establish his right, interest and title to the corpus, seeking to explain his failure to appear at the trial. The application for leave to appeal was rejected by the District Court. The appellant then preferred an appeal to the Court of Appeal against the order of the Court of Appeal in terms of section 754(1) of the Civil Procedure Code. 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 and that therefore an appeal could lie only with the leave of the Court of Appeal first had and obtained. The Supreme Court affirming the judgment of the Court of Appeal held thus: "the order of the District Court is not a judgment within the meaning of section 754 (1) and 754(5) of the civil Procedure Code for the purpose of an appeal. It is an order within the meaning of section 754(2) of the Code from which an appeal may be made with the leave of the Court of Appeal first had and obtained."

Justice Dheerarathne in Ranjith Vs Kusumawathi (supra) at page 236 observed thus: "There have been two virtually alternating tests adopted by different judges from time to time in UK to determine what the final orders and interlocutory orders were. In White Vs Brunton [1984] 2 All ER 606 Sir John Donaldson MR labeled the two tests as the order approach and the application approach. The order approach was adopted in Shubrook Vs Tufnell [1882] 9 QBD 621 Jessel MR and Lindely 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 of the order made. The application approach was adopted in Salaman Vs Warner & others [1891] 1QB 734 in which Court of Appeal consisting of Lord Esher MR, Fry and Lopes LJJ held that the final order is one made on such application or proceeding that, for whichever side the order was given, it will, if it stands, finally determine the matter in litigation. Thus the issue of final or interlocutory depended on the nature of the application or proceedings giving rise to the order and not the order itself."

In Bozson Vs Altrincham Urban District Council [1903] 1KB 547 at 548 Lord AlverstoneCJ dealing with a question whether an order was a final order or interlocutory order laid down the following test: "It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order, but if it does not, it is then, in my opinion an interlocutory order". Swinfen Eady L.J (with whom Pickford and Bankes LJJ agreed) in Isaac & Sons v. Salbstein (1916) 2KB 139 at 147 approved the test of finality stated by Lord Alverstone C J.

In Chettiar Vs Chettiar [2011] Bar Association Law Reports page25 Plaintiff filed action in the District Court of Colombo praying for relief against the trustees of a Hindu Temple in terms of section 101of the Trust Ordinance. The defendants by way of a motion brought to the notice of court that the plaintiff's action is barred by a positive rule of law and moved to dismiss the plaint in limine in view of section 46(2) of the Civil Procedure Code. The learned District Judge, by his order dated 14.5.2008, upheld the objection and dismissed the plaint. The matter for determination was whether the order of the District Judge was a final order. The Supreme Court (a bench of five judges) after considering several judicial decisions including Siriwardene vs Air Ceylon (supra) and Ranjith vs Kusumawathi (supra) held thus; "Considering the decision given by Dheerarathne J in Ranjith Vs Kusumawathi (supra) it is abundantly clear that the order dated 14.5.2008 is not a final order having the effect of a judgment within the meaning of sub section 754(1) and 754(5) of the Civil Procedure Code, but is only an interlocutory order."

Coming back to the facts of this case, I ask the question: even according to the dictum of Alverstone CJ is the order of the learned High Court Judge dated 6.4.2000 a final order. Has the said order finally disposed of the rights of the parties? The learned High court Judge, by the said order, has not decided the revision application. He was going to deliver his order on 31.5.2000. Therefore the learned High Court Judge, by his order dated 6.4.2000, has not finally disposed of the rights of the parties. Thus even according to the dictum of Lord Alverstone CJ, the order of the learned High Court Judge dated 6.4.2000 is not a final order.

Even according to the principles laid down in the Shubrook Vs Tufnell (supra) and Salaman Vs Warner and Others (supra) is the order of the learned High Court Judge dated 6.4.2000 a final order? Has the said order finally determined the matter in litigation? The answer is clearly 'no'. The learned High Court Judge was going to deliver his order on the revision application on 31.5.2000. Before the said date the appellant filed this appeal.

For the above reasons, I hold that the order of the learned High Court Judge dated 6.4.2000 is not a final order and that therefore no appeal lies against the said order. I therefore dismiss the appeal with costs.

The learned High Court Judge is directed to deliver the order on the material already submitted to the High Court in connection with the Revision application.

Appeal dismissed.

Judge of the Court of Appeal.

KT Chitrasiri J

I agree.

Judge of the Court of Appeal.