

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

*In the matter of an application
under Section 760 A of the Civil
Procedure Code.*

Wickramasinghe
Mudiyanselage Sirisena
Kithulampitiya, Uluwitike.
Plaintiff

Case No. CA 354/96 (F)
DC Galle Case No: 9570/P

Vs.

1. Weligama Palliya Guruge
Nandawathie,
Navinna Road, Kithulampitiya,
Uluwitike..
2. Weligama Palliya Guruge
Piyadasa,
Uluwitike
And 7 others
Defendants

AND NOW

Weligama Palliya Guruge
Nandawathie,
Navinna Road,
Kithulampitiya,
Uluwitike.
1st Defendant-Appellant

Deceased

Weligama Palliya Guruge
Piyadasa, Uluwitike.
3rd Defendant Appellant

September 9, 2011 CA 354/96F DC Galle 9570 P



Weligama Palliya Guruge
Palitha
***Substituted 3rd Defendant-
Appellant***

Vs.

Wickramasinghe
Mudiyanselage Sirisena
Kithulampitiya, Uluwitike.
Plaintiff-Respondent

Weligama Palliya Guruge
Dharmadasa,
Navinna Road,
Kithulampitiya, Uluwitike.

And 6 others
Defendant-Respondents

Before : **A.W.A. Salam, J.**

Counsel : Kapila Sooriyarachchi for the 1st and 3A
Defendant-Appellants and
N.R.M. Daluwatte P.C. with M/S Mala
Maitipe for 4, 5A and 6th Defendant-
Respondents.

Argued on : 16.12.2010

Written submissions tendered on : 11.07.2011

Decided on : 09.09.2011



A.W.A.Salam, J.

This is an appeal filed under section 754(1) of the Civil Procedure Code against the order of the learned Addl. District Judge refusing an application made under section 48(4) of the Partition Act. The impugned order has been made consequent upon the application of defendant-appellants whose names appear in the caption in the original record as 1st and 3^A defendants.

The facts relevant to the appeal briefly are that the partition action in which the appellants and others are involved had been fixed for trial on 28.8.1993. The 1st defendant was absent and unrepresented and the 3rd defendant although presented himself at the trial was not represented on that day. As there was no contest among the parties the matter was taken up for trial without any points of contest being raised and decided on 16.9.1993. By the said decision the learned district judge allotted shares in the following manner.

Plaintiff - $\frac{1}{2}$
4,5,6 defendants - $\frac{1}{4}$
Unallotted - $\frac{1}{4}$

The 1st defendant in his written statement has claimed an undivided ten perches from the corpus and the 3rd defendant has claimed the rights shown to the 2nd defendant in the plaint as he has purportedly purchased the same, presumably on a pending partition deed. By the interlocutory decree entered by the additional district judge apparently no rights have been declared entitled to the 1st 2nd and 3rd defendants but an undivided $\frac{1}{4}$ th share has been left unallotted.

Be that as it may, the question that arises at this stage of the appeal is whether the appellants are entitled in law to file an appeal by way of statutory right under 754(1) of the CPC. This question has been considered in detail in a



well considered judgment had been pronounced in Ranjith vs Kusumawathie reported in 1998 3 SLR 232.

It is well known that generally two alternate tests have been adopted by judges, to find a proper solution to problems relating to whether an appeal or an interlocutory appeal that should be presented in a given situation. These tests are commonly known as the order approach and the application approach.

In **Ranjith vs Kusumawathi 1998 3 S.L.R. 232** the Respondent contended that the appeal should be dismissed as there was no right of direct appeal against an order made under section 48(4) of the Partition Act,

Section 48 (4) of the Partition Act No.17 of 1997 (filtering out inapplicable details) reads thus,

Whenever a party to a partition action--

(1)...has not been served with summons...

(2).....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 partymay at any time not later than 30 days after the date on which the return of the surveyor under section 32.....apply to court for special leave to establish the right, title or interest of such party to or in the land notwithstanding the interlocutory decree already entered”.

It was held in Ranjith Vs Kusumawathie (supra) that the order of the District Court is not a proper “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."

Dealing with the question relating to the availability of an unconditional appeal Deeraratne, J. Observed as follows

"The order appealed from, is an order made against the appellant at the first hurdle. Can one say that the order made on the application of the 4th defendant is one such that whichever way the order was given, it would have finally determined the litigation? Far from that, even if the order was given in favour of the appellant, he has to face the second hurdle, namely the trial to vindicate his claim...."

In the above mentioned case which is exactly in point to the facts and circumstances of this case, Deeraratne, J. preferred the application approach.

In view of the dictum in the aforesaid case and for reasons of my own I regret my inability to agree or follow the dictum of L.Weerasekara , J. in **De Costa and Others Vs De Costa and Others reported in (1998) 1 SLR at page 107**, cited by the counsel for the appellant.

The finality must be determined in relation to the suit and not merely to the application. In the case before Court the refusal to grant special leave under section 48(4) of the Partition Act, would have at the most finally disposed of the rights and liabilities of the appellant and cannot be regarded as a final order in relation to the suit.

The question as to the availability of a statutory appeal and interlocutory appeal with the leave of court first had and obtained was also the subject of detail study in a painstaking judgment delivered by Her Ladyship Dr.Shirani Bandaranayake J. (as she was then) as a



member of a divisional bench of five judges of the Supreme Court in S.C.Appeal No.101(a) & 101(b) of 2009. In that judgment too the approach adopted by Dheeraratne J. in Ranjith Vs Kusumawathie (Supra) received due recognition and approval.

In the circumstances, having considered the impugned order as one, the legality of which should have been challenged in terms of 754 (2) of the CPC I uphold the preliminary objection and consequently dismiss this appeal.

There shall be no costs.

Judge of the Court of Appeal.

NT/-

