

**WRITTEN SUBMISSIONS**  
**IN THE COURT OF THE DEMOCRATIC SOCIALIST**  
**REPUBLIC OF SRI LANKA**

Malimbada Liyanapathirana Mahindadasa  
Akkinawatte, Dikkumbura

**PLAINTIFF**

D.C. Galle No. P/7804

Vs.

1. Malimbada Liyanapathirana Leela Malanie  
and 7 others

**DEFENDANTS**

Court Appeal No: CA 668/95(F)

**AND BETWEEN**

3. Andrew de Silva Jayasinghe  
Malalgoda, Dikkumbura
4. Peththa Durage Harischandra

**3<sup>rd</sup> and 4<sup>th</sup> DEFENDANT**  
**APPELLANTS**

Vs.

1. Malimbada Liyanapathirana Mahindadasa  
Akkinawatte, Dikkumbura,  
Ahangama

**PLAINTIFF RESPONDENT**

1. Malimbada Liyanapathirana Leela Malanie
2. Malimbada Liyanapathirana Punyawathie  
both of Akkinawatte, Dikkumbura,  
Ahangama

**1<sup>st</sup> and 2<sup>nd</sup> DEFENDANT**  
**RESPONDENT**

5. Nihal Ranjith Hewawasam  
"Ramya" Dikkumbura, Ahangama
6. Dayawathie Ranaweera
7. Madurani Hewawasam
8. Mangalika Hewawasam  
all of "Ramya" Dikkumbura, Ahangama

**5<sup>TH</sup> - 8<sup>TH</sup> DEFENDANT**  
**RESPONDENTS**

**Counsel:** Ranjan Suwadaratne with Anil Rajakaruna for the  
Defendant/Appellant  
Ranjan Gunaratne for the Plaintiff/Respondents.

**Written Submissions:** 26-3-2010

**Before:** Rohini Marrasinghe J

**Order:** 24-5-2011

CA 668-95

The Plaintiff/ Respondent has raised a preliminary question of law that the impugned Order made on 23-5-1995 is not a final order. Consequently, he submits that the defendant/Appellant has no right of appeal against the said Order. The plaintiff submits that the appellant should first obtain leave of court in terms of section 754(2) of the Civil Procedure Code.

The facts of this are briefly as follows;

The plaintiff instituted a partition action to partition the land called "Uswatte alias Aladeniyehena" which was more fully described in paragraph 3 of the plaint. The appellants in this case were the 3<sup>rd</sup> and the 4<sup>th</sup> defendants in the said case. The said appellants had filed their statement of claim on 31-8-1982. By the said statement of claim they sought dismissal of the plaintiff's action.

The appellants averred that the corpus surveyed by the court commissioner was not a land belonging to the plaintiff. Their main contention was that the land surveyed was owned and possessed by the said appellants.

On the day the case was taken up for trial the appellants were absent. They made an application under section 48(4) of the Partition Law 21 of 1977. After inquiry the learned trial judge rejected their claim. The appellant have filed an appeal against that Order.

It is not disputed that the learned District made his order dated 23-5-1995 within the framework of section 48(4) (a) (iv) of the Partition Law. He had the jurisdiction do so under terms of section 48(5) of the Partition Law.

Section 754(1) of the CPC provides that any person “ who shall be dissatisfied with any judgment pronounced by any original court in any civil action, proceeding or matter to which he is a party may prefer an Appeal to the Court of Appeal against such Judgement for any error in fact or in law.

Section 754(2) provides that any person who shall be dissatisfied with any order made by any original court in the course of any civil action, proceeding or matter to which he is or seeks to be a party, may prefer an appeal to the Court of Appeal against such order for the correction of any error in fact or in law, with the leave of the court of appeal first had an obtained.

Submissions of the respondents were that the order made on 23-5-1995 was an interlocutory order and not a judgement entered in terms of section 184 of the CPC read with section 67 of the partition law. To the contrary the Appellants submit that the order of 23-5-1995 was an order having the effect of a final judgment contained in the final expression of its decision.

It was held in the case of **Siriwardena vs Air Ceylon Ltd 1984 1 SLR page 287** that the test to be applied to determine whether an order has the effect of a final judgment and so qualified as a judgment under section 754(5) of the CPC code are:-

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

Under the partition act if no complaint was alleged with regard to the judgment of 8-10-1991 and the judgment and the interlocutory decree and if no steps were taken under section 48 (4) (a) (iv) the special provisions relating to decrees in section 48(1) (2) (3) and section 67 of the partition law would come to operate.

I am of the view in this case that I should consider the rule formulated in the case of **Salaman v Warner 1891 1 QB 734-737**. In the said case Lord Esher MR stated that;

“The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of the parties. If their decision whichever way it is given, will if it stands finally disposed of the matter in dispute. I think for the purpose of the 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.”

In applying this test - if the order of the application of the appellants was in their favour, the result would have been to vary the judgment and the ID. Consequently, such order would have carried the same finality contained in section 48(1) (2) and (3). And section 67 of the Partition Law.

Therefore, I am of the view that the impugned order made on 23-5-1995 made by the learned District Judge disposed of their rights finally and determined their rights and liabilities under the Partition Act with finality. Therefore, I reject the objections raised by the Respondents and hold that the order made on 23-5-1995 was a final order. Consequently, the appellants have the right of appeal in terms of section 754(1) of the CPC.

The preliminary objections are over ruled.

The appeal is fixed for argument at a later date.

Rohini Marasinghe J

Judge of the Court of Appeal.