

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

CA 1074/96  
DC Homagama 1716/L

Madapatha      Kankanamge      Don  
Jayaratna,  
No 665, Galawila Road,  
Homagama

**PLAINTIFF-APPELLANT**

-Vs-

D H Weerasiri,  
High Level Road,  
(Adjoining Wasantha Hotel)  
Homagama

**DEFENDANT-REPOUDENT**

Before :    A.W.A. SALAM, J.

Counsel :

R Chula Bandara for the plaintiff-appellant and Harsha  
Soza PC with Srihan Samaranayaka for the defendant-  
respondent.

Argued on:      18.10. 2010.

Written Submissions tendered on: 8 & 11 October 2010.

Decided on: 28.04.2011

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A W A Salam,J

The question that arises for determination at this stage of this appeal is whether the plaintiff has the right to invoke the appellate jurisdiction by exercising the right of appeal, as he has purportedly done. The Learned President's Counsel has raised a preliminary objection in that he submits that the impugned decision is an interlocutory order in nature and it's legality can be challenged only after the leave of this court is first had and obtained in terms of section 754 (2) of the Civil Procedure Code. It is common ground that the impugned decision dated 6 December 1995 relates to issue No 19. For purpose of ready reference issue No 19 is reproduced below...

19. In any event does proceedings No 2521/Land operates as Res Judicata against the plaintiff who has purchased rights from Somawathie?

The issue arising from No 19 is numbered as 20 and reads as to whether the plaintiff can maintain the action if the issue relating to *res judicata* is answered in the affirmative. The trial judge having considered the impact of the previous action No 2521/L on this case, came to the conclusion that it operates against the plaintiff as *res judicata* and therefore the plaintiff's action against the defendant is not maintainable in law.

The learned President's counsel submits that if, issue No 19 was answered in the negative the trial would have proceeded to the very end and the impugned decision in the result would be an interlocutory order and not a final order.

The vital question that arises here is whether the impugned decision would have finally determined the litigation either way? If the order was given in favour of the appellant, he would never have filed this appeal because the action had to be continued in the district court.

Having considered the recent judgment of the Supreme Court in the case of S Rajendran Chettiar and others Vs S Narayanan Chettiar, I am of the view that the preliminary objection raised by the learned President's Counsel should be upheld. In the result, I hold that the impugned decision in this matter is appealable only by way of an interlocutory appeal after the leave of this court is first had and obtained. Hence, the appeal of the plaintiff-appellant is dismissed.

There shall be no costs.

Judge of the Court of Appeal

NT/-