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

Godigamuwa Acharige Sriyalatha
No.27/35, Manthrimulla Road,
Attidiya, Dehiwela.

Plaintiff-Appellant

Vs.

C.A.NO.1274/98 (F)
D.C.MORATUWA CASE NO.105/L

1. R.B.Podi Nona
2. M. A.Jagath
3. M.A.Sirisena

All of No.110, 13th Lane,
Daham Mawatha, Kaldmulla,
Moratuwa.

Defendant-Respondents

BEFORE : **K.T.CHITRASIRI, J.**

COUNSEL : Chandrasri Wanigapura with Henendra Banagala Attorneys-at-Law for the Plaintiff-Appellant

Rohan Sahabandu PC with Hasitha Amarasinghe Attorney-at-Law for the 2nd Defendant - Respondent

ARGUED ON : 11TH MARCH 2013

DECIDED ON : 04TH APRIL 2013

CHITRASIRI, J.

This is an appeal seeking to set aside the judgment dated 02.12.1998 of the learned District Judge of Moratuwa. By that judgment learned District Judge dismissed the plaint filed by the plaintiff.

When this appeal was taken up for hearing on the last date namely on11.03.2013, learned President's Counsel for the 2nd defendant-respondent (hereinafter referred to as the respondent) raising a preliminary issue submitted that the impugned decision, not being a decision that falls within the category of a "judgment" as defined in Section 754(5) of the Civil Procedure Code, the plaintiff-appellant (hereinafter referred to as the appellant) should first have had obtained leave of this Court in terms of Section 754 (2) of the said Code. Accordingly, he further submitted that the failure to do so should result in dismissing this appeal since it amounts to a fatal irregularity.

In support of his argument, learned President's Counsel cited the case of **Rajendran Chettiar and two others v. Narayanan Chettiar.[S.C.Appeal No.101A/1009(2011 Bar Association Law Reports at page 25)]** His contention is that the impugned decision does not fall within the category of a "judgment" since it was delivered on the basis of the answers given to the 3 issues framed on mis-joinder of parties and of causes of action, without looking at the other issues pertaining to the main dispute.

In reply, learned Counsel for the appellant submitted that the final decision dated 02.12.1998 of the learned District Judge was made only after going through a full scale trial having framed issues suggested by both parties and thereafter having recorded the evidence presented by them and also upon considering the submissions that they have filed. He accordingly contended that the decision that is being canvassed should be interpreted as a "judgment" for the purpose of Section 754 of the Civil Procedure Code and therefore it is correct to file this appeal in terms of Section 754(1) of the Code.

The procedure in filing appeals referred to in Section 754 of the Civil Procedure Code does not create a doubt. However, the issue is to determine whether the decision that is being challenged is a "Judgment" or an "Order". When a decision is defined as a judgment, a party aggrieved by such a decision is entitled to file directly a final appeal whereas if it does not fall within the category of a "judgment" then the party who is aggrieved by such a decision should first obtain leave of the Court of Appeal, in order to proceed with that appeal.

Definition to the words "judgment" and "order" is found in Section 754(5) of the Civil Procedure Code. It reads thus:

> *"754(5).Notwithstanding anything to the contrary in this Ordinance, for the purposes of this Chapter –*
>
> *"Judgment" means any judgment or order having the effect of a final judgment made by any civil court; and*
>
> *"Order" means the final expression of any decision in any civil action proceeding or or matter, which is not a judgment."*

Courts have devolved different criteria in determining whether a particular decision is a "judgment" or an "order" referred to in the said Section 754(5) of the Civil Procedure Code. The difference between a "judgment" and an "order" had been discussed in length in the case of Rajendran Chettiar v. Narayanan Chettiar (supra) by a Five Judge Bench. In that case, Dr.Shirani Bandaranayake, J (as she then was) had referred to many authorities

both in Sri Lanka and outside, including that of **Siriwardena v. Air Ceylon Ltd (1984) 1 SLR at 286** and **Ranjit v. Kusumawathie and others(1998) 3 SLR at 232** where two approaches namely "order approach" and "application approach" were devolved by Sharvananda, J. (as he then was) and Dheeraratne, J respectively. Shirani Bandaranayake J in Chettiar V Chettiar has preferred to adopt the "application approach". I have referred to all those authorities in length in one of my earlier decisions of this Court as well. [Court of Appeal minutes dated 18.12.2012 in CA 889/98 (F)]

Upon a careful consideration of all these decisions, it is clear that the Courts have formulated different approaches or different criteria or guide lines in determining whether a particular decision falls within the meaning of a "judgment" or an 'order". It must be noted that those pronouncements would be of immense assistance in deciding the issue. I do not intend repeating those approaches or guide lines in this judgment as it could easily be found in those judgments. It is my view that none of those judgments overrule the other though some seem to think so.

Whilst appreciating the approaches or the guide lines adopted in the decisions referred to above, it must be noted that the circumstances of each case and the end result of those also should carefully be considered when the Court is required to determine whether a particular decision falls within the category of a "judgment" or an "order". Otherwise, it may lead to miscarriage of justice being caused to a person aggrieved by a decision of an original court judge as no other option is available for him to present even a **blatant wrong committed by a judge.** Therefore, it must be noted that in the event the contention

advanced by the learned President's Counsel in this instance is acceded to, it would lead to grave miscarriage of justice being caused to the plaintiff due to a **fault on the part of the trial judge** because no other forum is available in this instance for the appellant to show the ignorance of the law referred to in Section 17 of the Civil Procedure Code of the trial judge.

In this instance, the learned District Judge commenced the trial having recorded 16 issues at the beginning. Thereafter 3 other issues also were raised at a later stage. The 3 issues raised subsequently are on the basis of mis-joinder of parties and of causes of action. Aforesaid Section 17 of the Civil Procedure Code clearly stipulates that no action shall be defeated by reason of mis-joinder. Learned District Judge had clearly disregarded this provision in Law when he decided to dispose the action finally, depending on his answers to those 3 issues raised on mis-joinder.

At this stage, it must be noted that the final decision of the case had been arrived at after recording the evidence of the plaintiff and the 3rd defendant and of several other witnesses. Those witnesses were subjected to cross-examination as well. After the closure of the case for the defendants, submissions also had been filed by both the parties. Accordingly, application to court then was to have the final judgment of the case. Therefore, even if the application approach that was recognized in Ranjith V Kusumawathie which was adopted by the Five Judge Bench in Chettiar v Chettiar is made use of, the impugned decision should be considered as a "judgment". On the other hand, impugned decision could also be interpreted as a judgment as described in Siriwardena V Air Ceylon (supra) since it disposes the rights of the parties finally and no further step is to

be taken by them. Therefore, it is my considered view that this is a decision which has the effect of a final judgment as envisaged by Section 754(5) of the Civil Procedure Code.

For the aforesaid reasons, it is my considered view that the impugned decision of the learned District Judge falls within the category of a "judgment" as referred to in Section 754(5) of the Civil procedure Code and therefore, it is correct to file an appeal in terms of Section 754(1) without leave of Court being obtained. Accordingly, I decide that the preliminary objection raised by the learned President's Counsel for the 2nd defendant has no merit and it is therefore overruled. The matter is fixed for further hearing.

JUDGE OF THE COURT OF APPEAL