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

C.A. No. 708/98(F)
D.C. Balangoda Case No. 346/L

P. Malam Arachchi
Main Road,
Rakwana.

Appellant

Vs.

D.A. Marbram
R.M. Somasiri
No: 78,
Deniyaya Road,
Rakwana.

Respondent

C.A. No. 708/98(F) **D.C. Balangoda Case No. 346/L**

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

COUNSEL : E. Ariyarathne with Indika Kuruppuarachchi for the Respondent-Appellant.

Vidura Gunerathne for the Plaintiff-Respondent.

ARGUED & DECIDED ON : 04.06.2013.

K. T. CHITRASIRI, J.

Heard both Counsel in support of their respective cases.

This is an appeal seeking to set aside the two orders dated 23.4.1998 and 13.08.1998 of the learned District Judge of Balangoda. The aforesaid two orders are found in the journal entries made by the learned Judge on those respective dates. The order made on the 23.04.1998 is to refix the trial consequent upon an application made by the Defendant subject to a payment of Rs.2000/= being made to the plaintiff as the costs of that date. The said payment of costs is to be made on or before the next date namely 13.08.1998. When it was taken up for trial on 13.08.1998, it was brought to the notice of Court that the Defendant had not paid the costs as ordered on the previous day and accordingly an order had been made deciding the case in favour of the plaintiff.

At the commencement of the argument today, learned Counsel for the Plaintiff-Respondent raising a preliminary objection submitted that the Appellant cannot have and maintain this appeal as he has chosen to file a final appeal instead of making an application to obtain leave from this Court, in terms of Section 754(2) of the Civil Procedure Code since the impugned decisions do not fall into the category of a "judgment". Therefore the issue now before this Court is to determine whether the two orders dated 23.4.1998 and 13.08.1998 amount to a "judgment" or an "order".

Learned Counsel for the Appellant submitted that the learned District Judge after taking up the case for trial on 13.08.1998, had stated thus:

"පැමිණිල්ලේ වාසියට නඩුව තීන්දු කරමි".

On the basis of the manner in which the said sentence is worded he contended that the said decision of the Trial Judge amounts it to be a "judgment", as far as the appellant is concerned. Accordingly, learned Counsel for the appellant submitted that the impugned decision should be interpreted as a "judgment". He further submitted that the decision in **Rajendran Chettair vs. Narayanan Chettiar** [S.C.H.C.C.A.L.A.174/2008 dated 10.06.2010] is not applicable in this instance as the appeal has been filed on the basis of the manner in which the learned District Judge has made his order on 13.08.1998. Several judicial pronouncements also had been referred to in the written submissions filed on behalf of the appellant in support of his contention. However, the learned Counsel, now unable to point out any decision where this particular issue had been discussed from amongst those decisions referred to in the written submissions.

The relief prayed for in the petition of appeal is to set aside two orders made on the 23.04.1998 and 13.08.1998. Therefore on the face of the petition of appeal these two decisions have been considered and accepted as "orders" by the appellant himself. Moreover, upon a careful perusal of the journal entry made on 13.08.1998, I am unable to find the word "තීන්දුව" in that entry though the learned Counsel for the appellant is of the view that it as a "judgment". (තීන්දුව) Therefore, the learned Counsel for the Appellant seems to have come to an erroneous conclusion as to the decision of the learned District Judge.

Be that as it may, section 754(5) of the Civil Procedure Code defines the word "judgment" and it reads thus.:

> *"Judgment means any judgment or order having the effect of a final judgment made by any civil court".*

This section has been interpreted in numerous occasions. In the case of **Siriwardane Vs. Air Ceylon Ltd [1984 (1) SLR at 286],** Sharvananda J (as he then was) introduced the "order approach" in interpreting the word "judgment". In the case of **Ranjith Vs Kusumawathie, [1998 (3) SLR 232]** Deerarathne, J introduced the application approach. In the case of **Rajendran Chettair vs. Narayanan Chettiar** (supra) these two approaches have been discussed in length and in that decision the Supreme Court preferred to adopt the application approach. Whatever the approach is being applied in this instance, the particular decision that is been challenged does not fall into the category of a "judgment" Accordingly, agreeing with the contention of the learned Counsel for the respondent, I

decide that the two impugned decisions of the learned District Judge do not fall into the category of a "judgment".

In the circumstances, it is my considered view that the two orders that are being impugned do not fall within the category of a judgment. Accordingly, the party who is aggrieved with such an order should have first obtained leave of the Court of Appeal in terms of Section 754(2) of the Civil Procedure adopting the procedure mentioned in Section 757 found therein. Therefore. it is clear that the appellant has failed to follow the procedure stipulated in the Civil Procedure Code when he filed this appeal. In the case of **Fernando vs. Sybil Fernando [1997 (3) SLR 1],** it is stated that the procedural law is also as important as the substantive law. Hence, adoption of incorrect procedure in this instance should result in dismissal of the appeal.

For the aforesaid reasons the appeal is dismissed with costs fixed at Rs. 50,000/=. Appeal dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

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