

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

Appeal No: CA 521/98(F)

D.C. Nuwara-eliya Case No.MS/1232

N. A. Amarapala
"Nelum Sevana":
No. 1/4, Hawa Eliya,
Nuwara-eliya.

Defendant -Appellant

- Vs-

P. A. Leslie Kumara Perera,

E. B. R. Swarna Edirisinghe,

Both of
"Supreme Marketing Company",
No. 204,
Galle Road,
Ratmalana

Presently of 38,
Hill Street,
Dehiwela.

(Carrying on a business under the name and
style of "Supreme Marketing Company")

Plaintiffs-Respondents

C.A. Appeal No.521/98(F)

D.C.Nuwara Eliya No.1232/MS

Before : **K.T.Chitrasiri, J**

Counsel : Defendant-Appellant is absent and unrepresented.

Upali de Almeida with R.J.V.Almeida for the Plaintiff-Respondent

Argued &

Decided on : 28.08.2013

K.T.Chitrasiri,J.

Registrar of this Court has sent notices to the Defendant-Appellant on several occasions informing him of listing of this appeal in this Court. Accordingly, when this matter was taken up for argument on the last occasion namely 01.08.2013, Miss Kaushalya Wijesinghe Attorney-at-Law had appeared for the appellant and then she had moved for a date on the ground of ill health of her senior Counsel Sulari Gamage. However, neither the appellant nor his Attorney-at-Law is present in Court today to prosecute this appeal. Therefore argument in this appeal is now taken up in the absence of the appellant.

This is an appeal seeking to set aside the order dated 23.07.1998. By that order, learned District Judge of Nuwara Eliya directed the Defendant-Appellant to deposit Rs.300,000/- and granted leave for him to appear and to defend the action in terms of Section 706 of the Civil Procedure Code. In the circumstances, it is clear that the order that is being challenged is not a decision which has the characteristics of a judgment as defined in Section 754(5) of the Civil Procedure Code.

Section 754(5) of the Code, defines a “judgment” and an “order”. In that Section, judgment means any judgment or order having the effect of a final judgment made by any Civil Court whilst the order means a final expression of any decision in any civil action, proceeding or matter which is not a judgment. Different procedure shall be adopted when filing appeals against a “judgment” and a totally separate procedure is to be followed when it comes to canvass an “order”. Referring to those two different procedures, learned Counsel for the respondent submits that this appeal should be dismissed as the appellant has chosen a wrong procedure in this instance by filing a final appeal instead of filing a leave to appeal application.

As mentioned hereinbefore, the decision that is being challenged is an order to deposit Rs.300,000/-, in order to appear and to defend the action. Therefore, it is abundantly clear that such a decision would not amount to a judgment as defined in Section 754(5) of the Civil Procedure Code. It is not a decision having the effect of a final judgment. The trial has not even begun in this case. The procedure that should be adopted when canvassing an order, as in this instance, is referred to in Section 754(2) of the Civil Procedure Code. In such a situation a party seeking to prefer an appeal shall first had and obtained leave of the Court of Appeal. In this instance no such leave had been obtained. The appellant has opted to file a final appeal without leave being obtained. Therefore, it is clear that the appellant has chosen wrong procedure when coming to this Court. Accordingly, it is clear that this appeal is misconceived. For the aforesaid reasons this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

KLP/-