

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

C.A. 898/98 F

D.C. Kurunegaia Case No. 3808/L

Rajapakshe Mudiyanseelage Somawathi,
Kajugalle, Bujjomuwa.

Plaintiff-Appellant -Petitioner

-Vs-

1. Batuwanayalage Ukkuwa,
 2. Wijesinghe Devage Maiya,
 3. Wijesinghe Devage Punchina,
 4. Ranamuna Devage Nimalsiri,
- All of Udakakulawala, Bujjomuwa.

Defendants-Respondents-Respondents

1. Batuwanayalage Magilin
 2. Batuwanayalage Saman Malini
 3. Batuwanayalage Rosaline
- 1st to 3rd Respondents all of Udakekulewala, Bujjomuwa.
4. Wijesinghe Devage Ranasinghe of Madurupitiya, Pirisyala.
 5. Wijesinghe Devage Gnanawathie of Meneripitiya,
Dummaladeniya, Warakapola
 6. Wijesinghe Devage Issebella Jayawathi
 7. Wijesinghe Devage Karunawathi
 8. Wijesinghe Devage Meraya Gunawathi

4th to 8th Respondents of Udakakulawala, Bujjomuwa.

C.A. Appeal No. 898/98(F) - D.C. Kurunegala No. 3808/L

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

Counsel : Athula Perera with Srihan Samaranayake for the
Plaintiff-Appellant

Defendant-Respondents are absent and
unrepresented.

Argued &

Decided on : 31.10.2013

K.T. Chitrasiri, J.

This matter was mentioned in this Court on 9th September 2013, in order to effect the substitution in place of the deceased 1st, 2nd and 3rd defendant-respondents. However, the said application for substitution was not allowed due to the deficiencies found therein. Accordingly, it is clear that the appellant has failed to take steps to substitute the heirs of the deceased 1st, 2nd and 3rd respondents though they alleged to have died on 24.01.2008, 29.03.2013 and 11.07.2003 respectively.

On that date namely 09.09.2013, this Court has also observed that this appeal had been filed to set aside the “order” dated 15th June 1998. It is evident by the paragraph (¶) in the prayer to the petition of appeal. By the

aforesaid order dated 15.06.1998, learned District Judge refused an application to vacate the judgment dated 15.06.1998 entered upon the terms of settlement arrived at by the parties to the action.

When an “order” is to be challenged, it is a requirement in terms of Section 754(2) of the Civil Procedure Code to have obtained leave of this Court before proceeding with an appeal filed against such an “order” of a court exercising original jurisdiction. The word “order” is defined in Section 754(5) of the Civil Procedure Code as a decision which is not a “judgment”. The word “judgment” is also defined in the same Sub Section. Said sub section (5) reads thus:

“754(5) “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 matter, which is not a judgment.”

On the face of it, the impugned decision does not contain the characteristics of a judgment as referred to in Section 754(5) of the Civil Procedure Code. It is a decision which does not have the effects of a final judgment. Indeed, it is not capable of deciding the rights of the parties finally. The law in this regard is now settled and it is clearly stated in the cases of **Siriwardane vs. Air Ceylon Ltd, [1984 (1) SLR at 286]** **Ranjith Vs Kusumawathie, [1998 (3) SLR 232]** **Rajendran Chettair vs. Narayanan**

**Chettiar, [S.C.H.C.C.A.L.A.174/2008 dated 10.06.2010] P.Malawiarachchi
Vs. D.A.Magret. [C.A. No. 708/98(F) C A Minutes dated 04.06.2013]**

The decision that is being challenged is a decision made pursuant to an application to set aside the judgment entered upon a settlement. Hence, it is clear that the judgment in that case has already been delivered before the impugned order was made.

Therefore, it is clear that the impugned decision dated 15.06.1998 does not amount to a "judgment". Hence, it becomes an "order". As referred to above, when an "order" is to be challenged, Section 754 (2) requires an appellant to have obtained leave of this Court first. Admittedly, such leave of this Court has not been obtained in this instant. Therefore it is clear that the appellant has not followed the procedure stipulated in the Civil Procedure Code when filing this appeal. As the procedural law also is important as substantive law, **[Fernando vs. Cybil Fernando 1997 (3) S L R page 01]** I wish to implement the law referred to in Section 754(2) read with sub section (5) in that section of the Civil Procedure Code in this instance.

Accordingly, it is clear that this appeal is misconceived and is not sustainable. For the aforesaid reasons this appeal is dismissed with costs.

Appeal dismissed

JUDGE OF THE COURT OF APPEAL

/mds