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

C. A. No. : C.A. 1067/99 (F)

D. C. Kegalle Case No. : 21867/P

1. Ranasinghe Mudiyanselage
   Tikiri Mahattaya ranasinghe,
   Undugoda,
   Rangalla.

2. Ranasinghe Mudiyanselage
   Mudiyasne,
   Undugoda
   Rangalla.

3. Ranasinghe Mudiyanselage
   Podimahattatya,
   Undugoda
   Rangalla

4. Ranasinghe Mudiyanselage
   Gunarathna,
   Undugoda
   Rangalla

Plaintiffs

Vs.

1. Ranasinghe Mudiyanselage
   Karunathilaka,
   Undugoda,
   Rangalla

2. Ranasinghe Mudiyanselage
   Wansathilaka,
   Undugoda.
   Rangalla.

3. Ranasinghe Mudiyanselage
   Chandrasoma Ranasinghe,
   Undugoda,
   Rangalla

4. Rotuwage Hearath Singho,
   Undugoda,
   Rangalla

5. Rotuwage Lokubanda,
   Undugoda,
   Rangalla

6. Mawathe Widanalage
   Charles Banda,
   Undugoda,
   Rangalla.

7. Rotuwage Hethuhany,
   Undugoda,
   Rangalla.

8. K.L. Ranmenikle,
   "Daisyeila"
   Wathura.

9. Arachige Don Gurusinghe,
   Undugoda
   Rangalla.

10. Arachige Don Ranasinghe
    Undugoda,
    Rangalla.

11. Ranasinghe Mudiyanselage
    Ranmenike,
    Undugoda,
    Rangalla.

AND NOW BETWEEN

Rotuwage Hereth Singho
(Deceased),
Undugoda,
Rangalla.

4th Defendant-Appellant

4 (a). Jayasinghe Arachige
Dingiri Mahattaya
(Deacesed)
Undugoda,
Rangalla

Substituted – 4(a) defendant-Appellant

4 (aa) Rotuwage Rathnawathei
4 (ab) Rottuwage Lokubanda
4 (ac) Rottueage Mahindapala
4 (ad) Rottuwagw Jayasinghe
All of
Undugoda, Rangalla.

Substituted 4 (aa), 4 (ab), 4 (ac),4 (ad) Defendant – Appellants

Vs.

1. Jayasinghe Arachige
Dingiri Mahattaya
(Deacesed)
Undugoda,Rangalla

01 (a). Senadhipathi
Mudiyansalage Jayantha
Nihal Ranasinghe,
Matikumbara

02. Ranasinghe
Mudiyanselage
Mudiyanse (Deceased)
Undugoda, Rangalla.

02(a). Ranasinghe
Mudiyaselege
Dayarathna,
Undugoda, Rangalla

03. Ranasinghe
Mudiyanselage
Podimahattaya,
Undugoda, Rangalla.

03(a). Ranasinghe
Mudiyanselege Vijani
Purnima Ranasinghe,
Warakapola.

04. Ranasinghe
Mudiyanselege
Gunarathna,
Undugoda, Rangalla.

Plaintiff – Respondents

AND

01. Ranasinghe
Mudiyanselege
Karunathilaka
(Deceased)
Undugoda, Rangalla

01 (a). Ranasighe
Mudiyansalage
Seveviratne,
Undugoda
Rangalla

03. Ranasinghe
Mudiyanselage
Chandrasoma
Ranasinghe
(Deceased),
Undugoda, Rangalla.

05. Rotuwage Likubanda,
Undugoda, Rangalla.

06. Mawathe Widanalage
Charles Banda,
Undugoda, Rangalla.

07. Rotuwage Hethuhamy,
Undugoda,
Rangalla

08. K.L. Ranmenike,
"Daisywila."
Wathura

09. Arachchige Don
Gurusinghe,
Ungugoda, Rangalla

10. Archchige Don
Ranasinghe,
Undugoda, Rangalla.

11. Ranasinghe
Mudiyanselage
Ranmenike,
Undugoda,
Rangalla.

Defendants-Respodents

BEFORE	:	**M.M.A GAFFOOR, J.**
COUNSEL	:	Pubudu De Silva with D.D.P. Dassanayake for the Substituted 4th Defendant-Appellant B.C. Balasuriya and Shantha Karunaratne for 1st to 4th Plaintiff-Respondents and 1st to 3rd Defendant-Respondents
WRITTEN SUBMISSIONS TENDERED ON	:	12.03.2018 (1st to 4th Plaintiff-Respondents and 1st to 3rd Defendant-Respondents) 23.04.2018 (Substituted 4th Defendant-Appellant)
DECIDED ON	:	**07.09.2018**

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M. M. A. GAFFOOR, J.

This is an appeal against the judgment of the Learned District Judge of Kegalle in respect of a Partition action No. 21876/P. The original Plaintiffs instituted this action seeking to partition the land called "Hitinawatta" morefully described in the Schedule to the Plaint in an extent of 15 Laha. (Plan No. 06 made by P. B. Wijesundera Licensed Surveyor marked as "X" and produced and filed of record).

According to the plaint, shares should be devolved on the 1st to 4th Plaintiffs and 1st – 3rd Defendants; shares have not been allocated to the 4th and 5th Defendants. But the 4th and 5th Defendants were made as a party because they have entered in to the corpus and they have made Wattle house before one month prior to the filing of this action (vide page 81 of the brief).

The 4th Defendant-Appellant filed his statement of claims with the 5th, 6th and 7th Defendants jointly.

The District Court trial was taken up on 27th September 1988 and only the 2nd Plaintiff and the 2nd Defendant were present. Thereafter, the judgment dated 15th January 1990 was delivered in favour of the 2nd Plaintiff and the order was made to enter Interlocutory Decree as prayed by the Plaintiffs; shares have not been allotted to the 4th and 5th Defendants.

Being aggrieved by the said judgment, the 4th Defendant - Appellant filed a notice of Appeal on 24.01.1990, under Section 48(4) of the Partition Law to set aside the Interlocutory Decree. However, the Petition of Appeal has not been filed on the same day.

The inquiry was held and evidence was led on behalf of the 4th Defendant-Appellant. He stated that due to terrorist activities operated in the area prevented his coming to the Courts on that particular day. However, at the end of the inquiry the Learned District Judge by her order dated 6th December 1999 dismissed the aforementioned application, therefore, the request to vacate the interlocutory decree not allowed.

Being dissatisfied with the said order dated 06.12.1999, this appeal was filed by the 4th Defendant-Appellant (hereinafter referred to as the 'Appellant') praying to set aside the judgment of the Learned District Judge dated 15th January 1990.

The Appellant's position is that ongoing appeal is a final appeal with regard to a dismissal of his purge default application filed under section 48 (4) (a) (iv); Whilst, in their written submissions that the Plaintiff-Respondents took up a Preliminary objection stating that the order dated 06.12.1999 is not a judgment and it is an order within the meaning of section 754(2) of the Civil

Procedure Code which an appeal may be preferred with the leave of the Court of Appeal.

Learned Counsel for the Appellant further submitted that as the Learned District Judge by the said order, has finally disposed of the rights of the appellant, the order was a final order.

Therefore, this Court has to decide whether the questioned order dated 06.12.1999 is a final judgment or an order which comes under section 754(2) of the Civil Procedure Code. In order to decide this question, I would like to consider certain judicial decisions.

In ***Shubrook vs. Tufnell*** *(1882) 9 QBD 621*, where Jessel, MR and Lindley, LJ held that, an order is final if it finally determines the matter in litigation. Thus the issue of final and interlocutory depended on the nature and the effect of the order made.

In ***Ranjith vs. Kusumawathie*** *(1998) 3 SLR 232* that Supreme Court has held that the interlocutory decree is not final and the order of the District Court is not a judgment within the meaning of section 754(1) and 754(5) of Civil Procedure Code for purpose of an appeal.

In ***Salter Rex and Co. vs. Gosh*** *(1972) 2 All ER 865* Lord Denning, M. R. stated:

> *"If their decision whichever way it is given, will if it stands finally dispose of matter in dispute, I think that for the purpose of these Rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the order, will allow the action to go on, then I think it is not final, but interlocutory."*

In ***Siriwardene Vs Air Ceylon Ltd*** *(1984) 1 SLR page 286* Sharwannada J (as he then was) held thus: "The tests to be applied to determine whether the order has the effect of a final judgment and so qualifies as a judgment under section 754(5) of the Civil Procedure Code are:

a) It must be an order finally disposing the rights of the parties.
b) The order cannot be treated as a final order, if the suit or the action is still left alive suit or action for the purpose of determining rights and liabilities of the parties in the ordinary way.
c) The finality of the order must be determined in relation to the suit.
d) The mere fact that a cardinal point in the suit has been decided or even a vital and important issue determined in the case, is not enough to make an order a final one.

It's important to have an attention to the facts in this matter for consider the issue that whether the Appellant's rights were affected in a final and conclusive manner.

When the inquiry was held, the 4th Defendant-Appellant and 3 other persons gave evidence. In his evidence the 4th Defendant testified that due to unrest of the country in 1988 transportation system was not properly activated and there were no buses available in Maharangalle to Kegalle.

Therefore, he was unable to present in Court on that particular day 27.09.1988. But regarding the 2nd Plaintiff-Respondent he had own vehicle in the said period of time.

The 4th Defendant-Appellant further added that,

"කලබල තිබුනේ නැහැ ගමේ, ත්‍රස්තවාදී කලබල නිසා බස් ඒක තිබුනේ නැහැ. ඒ කාලයේ කවුරුවත් පාරට බහින්න බයයි" (page at 130)

In the page 133 of the brief Appellant state as follow:

Q: මහ රංගල්ල බස් ඒක නැති නිසා තමා තන්ති මලේට එන්න උත්සහ කලාද?

A: ඔව්. මම තන්තිමලේට ආවා. තන්ති මලේට ඇවිත් බස් එකක් එනකල් බලා සිටියා මගීන් ප්‍රවාහන බස් එකක් වත් ආන්ඩුවේ බස් එකක්වත් තිබුනේ නැහැ.

In the evidence of G. V. Podi Ralahamy, former Grama Niladhari of Uduwa testified as a witness, (at page 135 and 136)

Q: 88 September වෙන කොට පොදු ප්‍රවාහන සේවාවන් ගමේ පැවතුන ද?

A: නැහැ

Q: පොදු ප්‍රවාහන සේවාවන් නොපැවතුනේ ඇයි?

A: රටේ ත්‍රස්තවාදී කලබල ඇති වුනා. එම නිසා රජයේ ගමනාගමන බස් යෙදවුයේ නැහැ.

Q: පුද්ගලික බස් ධාවනය වුනාද ඒ කාලයේ ?

A: තන්ති මලේ රංගල්ල පාරේ බස් ධාවනය කලේ නැහැ. ප්‍රධාන පාරවල් වල පමණයි බස් ධාවනය කලේ.

Q: 88 September මාසය වෙනකොට පොදු ප්‍රවාහන සේවාවන් මහ රංගල්ල ගමේ පැවතුනා ද??

A: පැවතුනේ නැහැ.

In the evidence of Piyadasa Athugala - Assistant Manager of Kegalle Ceylon Transport Board stated as witness, page at 142,

Q: කොයි කාලයේ ඩ පටන් ගත්තේ ත්‍රස්තවාදි කලබල?

A: 88 අගෝස්තු වගේ. වෙඩි වශයෙන් ත්‍රස්තවාදි කලබල තිබුනේ සැප්තැම්බර් මාසය වෙනකල්

Q: පොදු ප්‍රවාහන සේවාවන්ට යම් බැටක ඇති වුනා ද?

A: බස් ප්‍රවාහන සේවාවන්ට ත්‍රස්තවාදී බලපෑම් නිසා තර්ජන නිසා ධාවනය ඉටීමට නොහැකි වුනා.

At page 144 witnesses further stated that buses did not work in a schedule in the questioned time period.

Even though The Learned District Judge did not satisfy with the evidence adduced at the inquiry and refused the 4th Defendant-Appellants Application. The learned judge was reasoning that the Appellant was not taking any careful steps to appear by his personal capacity or by the way of an attorney.

I am in a view that, the facts of the case and averments of the Appellants cannot be sustained. Its trite law through few land mark precedents, as held in ***Wickremarathne vs. Samarawickrama*** *(1995) 2 SLR 212*, who did not appear at the trial and whose rights in the corpus have been extinguished by the interlocutory decree may apply for special leave to establish his rights.

Now I again recall the decision of ***Ranjit vs. Kusumawathie and others.*** In this case the original 4th Defendant having filed his statement of claim failed to appear at the trial and the evidence was led for the Plaintiff, other parties been absent, the judgment and the interlocutory decree were entered accordingly. The original 4th Defendant applied to the trial Court, in terms of sub section 48 (4)(a)(iv) of the Partition Law, for special leave which permits a defaulting party to make an application to enter the case. The application for special leave was rejected by the District Court. The appellant then preferred an appeal to the Court of Appeal against the order, in terms of subsection 754(1) of the Civil Procedure Code as if that order made by the District Court was a "judgment". The Court of Appeal rejected the appeal on the basis that what was appealed from was an "order" within the meaning of subsection 754(2) of

the Civil Procedure Code and that therefore an appeal could lie only with leave of the Court of Appeal first had and obtained. This appeal relates to that rejection.

In this case, the main issue was whether the refusal of the Application made under section 48(4)(a)(iv) is a judgment contemplated under section 754 (1) or an order under 754 (2) of the Civil Procedure Code.

Dheerarathne, J. in his judgment (at page 238) stated that:

> *"A party to a partition action making an application in terms of subsection 48(4)(a)(iv) in order to establish his right, title or interest, has two hurdles to surmount. First he has to satisfy court, in terms of subsection (c) that (i) having filed his statement of claim and registered his address, he failed to appear at the trial owing to accident, misfortune or other unavoidable cause, and (ii) that he had a prima facie right, title or interest in the corpus, and (iii) that such right , title or interest has been extinguished or such party has been otherwise prejudicially affected by the interlocutory decree. Then only the court will grant special leave. After granting special leave, in terms of subsection (d), the court will settle in the form of issues the questions of fact and law arising from the pleadings relevant to the claim and then appoint a day for trial and determination of the issues. The second hurdle the party has to surmount is the determination of those issues by court after trial, in terms of subsection (e).*
>
> *The order appealed from is an order made against the appellant at the first hurdle. Can one say that the order made on the application of the 4th defendant is one such that whichever way the order was given, it would have finally determined the litigation? Far from that, even if the order was*

given in favour of the appellant, he has to face he second hurdle, namely the trial to vindicate his claim"

Dheerarathne, J. followed the judgments of Lord Esher in ***Salaman vs. Warner*** *(1891) 1 QB 734*, and Lord Denning's judgment in ***Salter Rex vs. Gosh*** (supra) which adopted the application approach and held that the order appealed from is not a "judgment" within the meaning of subsections 754(1) and 754(5) of the Civil Procedure Code.

In my opinion, the above quoted observation of Dheerarathne, J is pertinent to the decision of this case.

Further, I think it's important to have a note on the decision of ***Abeygunasekara vs. Wijesekara and Others*** *(2002) 2 SLR 269*, in this case, the defendant appealed against the order made under section 48(4) of the Partition Law. The Plaintiff raised a preliminary objection by way of a motion that no appeal lies against an order made under section 48(4). But the defendant argued that 'with the inherent revisionary jurisdiction of the Court of Appeal, the matter can be entertained under section 48(4) of the Partition Law'. But Somawansa, J. held that: *the defendant has* ***no right to direct appeal*** *against the impugned order, therefore, it will not cause any prejudice to him.*

And Somawansa, J. further held that:

"I am inclined to take the view that the inherent power of the Court could be invoked only where provisions have not been made, but where provision has been made and are provided in section 752(2) of the Civil Procedure Code inherent power of this court cannot be invoked; inherent powers cannot be invoked to disregard express statutory provisions"

Therefore, I hold that order given by the Learned District Judge is not a final order and the Appellant should have filed a leave to Appeal Application under section 754(2) instead of filling an appeal under section 754(1) of the Civil Procedure Code.

For the forgoing reasons, I see no reason to interfere with the judgment of the Learned District Judge; therefore, the appeal is dismissed without costs.

JUDGE OF THE COURT OF APPEAL