

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

Pallege Arachchillage Gunaratne,
Epitawala, Kiriella.

C. A. 1130/99 (F)

D. C. Ratnapura No. 10468/P

PLAINTIFF

VS

1. Pallege Arachchillage
Sumanasekera, Epitawala, Kiriella.
2. Imiyahamillage Jinadasa,
Epitawala, Kiriella.
- 2A. Nimalawathie Jinadasa,
Epitawala, Kiriella.
3. Rupasinghe Arachchillage
Darmasiri Rupasinghe,
Mdawala, Ellagawa.
4. Dassanayaka Lekamalage
Sumanawathie Gunaratne Menike,
Epitawaala, Kiriella.
5. Dassanayake Lekamalage
Chandrasiri,
Epitawala, Kiriella.
6. Pallege Arachchilage Janenona,
Epitiwala, Kiriella.
- 6A. Amis Wettasinghe
Epitawala, Kiriella
7. Dassanayake Lekamalage Kulasiri,
Epitawala, Kiriella.
8. Barallage Amis Singho,
Epitawala, Kiriella.
9. Kurugala Arachchillage Sarlis
Singho,
Epitiwala, Kiriella.

DEFENDANTS

AND

Pallege Arachchillage Gunaratne,
Epitawala, Kiriella. (*Deceased*)

PLAINTIFF-APPELLANT

1A. Pallage Arachchillage Yathindra
Gunaratne,
Epitawala, Kiriella.

1B. Pallege Arachchillage Chandima
Gunaratne,
No. 173/10, 3rd Lane, Elsmoruwatta,
Ingiriya.

1C. Pallege Arachchillage Chintha
Nandani Gunaratne,
No. 156, 4th Lane, Elsmoruwatta,
Ingiriya

**SUBSTITUTED-PLAINTIFF-
APPELLANTS**

VS

1. Pallege Arachchillage
Sumanasekera, Epitawala,
Kiriella.

2. Imiyahamillage Jinadasa,
Epitawala, Kiriella.

2A. Nimalawathie Jinadasa,
Epitawala, Kiriella.

2AA. Imiya Hamillage Athula
Ravindra
Epitawala, Kiriella.

3. Rupasinghe Arachchillage
Darmasiri Rupasinghe,
Mdawala, Ellagawa.

4. Dassanayaka Lekamalage
Sumanawathie Gunaratne
Menike, (*Deceased*)

4A. Dissanayake Mudiyanalage
Ranjith Dissanayake,

4B. Dissanayake Mudiyanalage
Nihal Dissanayake,

4C. Dissanayake Mudiyanalage
Nimal Dissanayake,

4D. Dissanayake Mudiyanalage
Sarath Dissanayake,

4E. Dissanayake Mudiyanalage
Chandrakumara Dissanayake

4F. Dissanayake Mudiyanalage
Neel Dissanayake,

All of Epitawala, Kiriella

5. Dasanayake Lekamalage
Chandrasiri,
Epitawala, Kiriella

6. Pallege Archchillage Janenona,
Epitawala, Kiriella.

6A. Amis Wettasinghe
Epitwala, Kiriella

7. Dassanayake Lekamalge Kulasiri,
Epitawala, Kiriella.

8. Barallage Amis Singho
(Deceased)
Epitawala, Kireilla.

8A. Baralage Kirimenike
(Deceased)
Epitawala, Kireilla.

8AA. Dissanayake Mudiyanalage
Sarath Dissanayake

9. Kurugala Arachchillage Saralis
Singho,
Epitiwala, Kiriella.

DEFENDANT-RESPONDENTS

BEFORE : **M. M. A. Gaffoor, J.**

COUNSEL : Indika Jayaweera & Anuruddha Dharmaratne for the 1A, 1B and 1C Substituted Plaintiff-Appellant

R. M. D. Bandara with Sanjeewa Kaluarachchi for the 2A, 3A, 5th, 6th and 7th Defendant-Respondents

WRITTEN SUBMISSIONS TENDERED ON : 27.08.2018 - by the 1A, 1B and 1C Substituted Plaintiff-Appellant

: 29.10.2018 – by the 2A, 3A, 5th, 6th and 7th Defendant-Respondents

DECIDED ON : **10.01.2019**

M. M. A. Gaffoor, J.

The Plaintiff –Appellant (hereinafter referred to as the Appellant) had filed a Partition Action bearing Case No. 10468/P in the District Court of Ratnapura for the land called ‘Bandara Kumbura’ *alias* ‘Thittawelpitiya Kumbura’ situated at Epitawela. The Preliminary Plan No. 227 dated 20.05.1994 was made by J. Somasiri, Licensed Surveyor and the report tendered to the District Court on 31.05.1994.

The Appellant admitted that in 1973 he was forcibly evicted by the Defendant-Respondents and there was a dispute in respect of his corpus from the respective land. He was given advice by the Mediation Board to file an action in the District Court but he filed Partition Action in 1993 after 18 years.

It is clear according to the Appellant’s witness that he had not possessed the corpus for 18 years from 1973 to 1991.

All the parties of the Partition case admitted the corpus and the trial commenced on 31st March 1997 and the land called 'Bandara Kumbura' *alias* 'Thittawelpitiya Kumbura' as per the Preliminary Survey Plan is in extent of 2 Acres 3 Roods and 38.7 Perches.

The Appellant had set out the devolution of title prayed to declare that he is entitled to 69/144th share of the land.

1st to 9th Defendants did not admit the Appellant as a co-owner and pleaded that he was not entitled to any shares in the above said land.

Having admitted by the corpus of the said land by all parties, the case was taken up for the trial on 31.03.1997 based on 18 issues.

The issue No. 18 was asked to the Appellant – *“on his own admissions, whether he had been chased away in 1973 by all the Defendants from the land and as such he has had no possession since 1973 to date and in the result, have the Defendants prescribed to the land?”*

The learned Judge in his Order dated 25.11.1999 saying affirmative to the issue No-18 and stated the reasons that, the Appellant admitted that the Defendant-Respondents are encroached the corpus and he had lost his possession since 1973, after 18 years of dispossessing, he cannot maintain an action before the District Court and without answering 1-17 issues, therefore, the Court had dismissed the action.

The Appellant had appealed against the order of the learned Judge of the District Court of Ratnapura under Section 754(1) of the Civil Procedure Code.

The preliminary objection raised by the Defendant-Respondents was can the Appellant maintain the instant appeal which is misconceived in law and has been filed without seeking leave to appeal from this Court in terms of Section 754(2) of the Civil Procedure Code as much as the order of the learned Judge of the District

Court made on 25.11.1999 was not a final judgment in terms of Section 754(1) read with Section 754(5) of the Civil Procedure Code. Therefore, they argued that the order was an interlocutory order only.

Another preliminary objection raised by the Defendant-Respondents was that the Appeal is not pleaded in the caption under the provision of law that the Plaintiff has appealed against the order of the learned Judge of the District court.

The Appellant in his submission quoted the findings of Supreme Court Appeal Cases Nos. **41/2015** and **S C/CHC Appeal 37/2008** which were decided on 2017 and pleaded that as at the year 2000, there was no such trite Law and some judges have held that the Order Approach should apply and for some it was the Application Approach. And further pleaded that one cannot argue that the approach to taken by the Appellant to institute this action by year 2000 as a Final Appeal, is against the contemporary law prevailed. Thus, each case was distinctly attended by the judges and the decision of whether the case is subject to a final appeal or Leave to Appeal was decided as per the facts of each case.

The fact that germane to the issue is the applicability of Section 754 of the Civil Procedure Code which states about the types of appeal and the procedure to be followed in the course of the appeal.

Section 67 of the Partition Law, No. 21 of 1977 as amended states that the procedure to be followed when appealing against any judgment decree or order is the procedure prescribed in the Civil Procedure Code.

Section 754(1) of the Civil Procedure Code states that, any person who dissatisfied with any judgment pronounced by any original court in any civil action proceedings or matter to which a party may prefer an appeal to the Court of Appeal against such judgment for any error in fact or law.

Section 754(2) of the Civil Procedure Code provides that a person aggrieved by the order of the District Court in the course of any civil action, proceeding or

matter to which he is, or seeks to be a party may prefer an appeal to the court of appeal against such order for the correction of any error in fact or in law, with the leave of the Court of Appeal.

Section 754 reads as follows,

(1) Any person who shall be dissatisfied with any judgment pronounced, by any original court in any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any error in fact or in law.

(2) Any person who shall be dissatisfied with any order made by any original court in the course of any civil action, proceeding, or matter to which he is or seeks to be a party, may prefer an appeal to the Court of Appeal against such order for the correction of any error in fact or in law, with the leave of the Court of Appeal first had and obtained.

Section 754(5) of the Civil Procedure Code provides that notwithstanding anything to the contrary in the Civil Procedure Code, for the purpose of Chapter 105,

“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.

It is to be noted that the question arises whether the Interlocutory Order of the learned Judge of the District Court of Ratnapura falls under Section 754(1) or 754(2) of the Civil Procedure Code.

It is observed that an Interlocutory Order or decree of a Partition Act always have a nature of the Order not the Judgment.

I am of the view that the nature of the order made by the learned Judge of the District Court was clearly itself shows that is an order with have a final expression of the decision made by the judge. Therefore, Section 754 of the Civil Procedure Code upon Appeal of whether Order or Judgment is very clear and without any absurdity deeply explained the nature and the procedure should be followed hereof, and in order to appeal the Interlocutory Order made by the learned Judge, the aggrieved party has to file an application for leave to appeal.

In this instance, the primary step of the Appellant would be that he has to file an application for leave to appeal.

The appeal made by the Appellant cannot be considered as an instant appeal and he should comply with the provisions of law when constituting an appeal and should take steps to insert captions, names, addresses in accordance with the law.

For the foregoing reasons, I dismiss the appeal without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL