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

The Colombo Municipal Council,
Town Hall,
Colombo 7.
Plaintiff-Appellant

CASE NO: CA/324/1998/F
DC COLOMBO CASE NO: 4906/SPL

Vs.

A.G.A.N. Dayananda,
No. 32,
Upper Floor,
Super Market,
Colombo 3.
Defendant-Respondent

Before: Mahinda Samayawardhena, J.

Counsel: Plaintiff-Appellant is absent and unrepresented.

T.K.D. de Silva for Defendant-Respondent.

Decided on: 07.02.2019

Samayawardhena, J.

The plaintiff-appellant filed this action against the defendant-respondent predominantly seeking a declaration that the latter cannot unilaterally increase the rental of the premises. Pending determination of the action, the plaintiff sought an interim injunction preventing the defendant from dispossessing him. The defendant filed objections and answer together, and the inquiry into the interim injunction was taken up before the trial. After that inquiry concluded by way of written submissions the learned District Judge by order dated 03.02.1998 dismissed the plaintiff's action upholding a preliminary legal objection taken up by the defendant on the basis that the plaintiff's alleged cause of action is prescribed. It is against this order the plaintiff has preferred this appeal.

The plaintiff-appellant has not participated at the argument before this Court. When this appeal came up before me for the first time, learned counsel for the defendant-respondent invited this Court to pronounce the Judgment on written submissions.

The learned counsel for the defendant-respondent takes up a preliminary objection to the maintainability of this appeal seeking dismissal of it *in limine* on the premise that the direct appeal filed against the impugned order under section 754(1) of the Civil Procedure Code is misconceived in law, and the proper remedy for the plaintiff was to come by way of leave to appeal under section 754(2) of the Civil Procedure Code.

The question whether an appeal or leave to appeal lies against an "order" of the District Court had been a subject of much controversy for a long period of time.

One school of thought represented by the leading local case of *Siriwardena v. Air Ceylon Ltd [1984] 1 Sri LR 286* Justice Sharvananda (later Chief Justice) opted to adopt "order approach" (suggested by Lord Alverstone C.J., in *Bozson v. Altrincham Urban District Council [1903] 1 KB 547*) to determine that question. The "order approach" contemplates only the nature of the order in isolation. When taken in isolation, if the order finally disposes of the matter in dispute without leaving the suit alive, the order is final, and a direct appeal is the proper remedy against such order.

The other school of thought represented by the leading local case of *Ranjit v. Kusumawathie [1998] 3 Sri LR 232* Justice Dheeraratne opted to adopt "application approach" (suggested by Lord Esher M.R., in *Standard Discount Co. v. La Grange (1877) 3 CPD 67 and Salaman v. Warner [1891] 1 QB 734*, and adopted by Lord Denning M.R., in *Salter Rex & Co. v. Ghosh [1971] 2 QB 597*) to determine that question. The "application approach" contemplates only the nature of the application made to Court in isolation, and not the order delivered *per se*. In accordance with this approach, if the order, given in one way, will finally dispose of the matter in dispute, but, if given in the other way, will allow the action to go on, the order is not final, but interlocutory, in which event, leave to appeal is the proper remedy.

The Full Bench of the Supreme Court in *Chettiar v. Chettiar [2011] 2 Sri LR 70* and *[2011] BLR 25* was called upon to decide on this vexed question, and the Full Bench of the Supreme Court (consisting of five Judges) having discussed both the approaches stemming from English decisions unanimously

decided that the application approach (and not the order approach) shall be the criterion in deciding the question whether appeal or leave to appeal is the proper remedy against an "order" of the District Court.

This Full Bench decision of the Supreme Court has consistently been followed in later Supreme Court cases.

In *Yogendra v. Tharmaratnam (SC Appeal No.87/09, SC (HCCA) LA No.84/09) decided on 06.07.2011*, Justice Marsoof with the concurrence of Justice Ratnayake and Justice Imam *inter alia* stated that: *"The decision of five judges of this Court in the Rajendran Chettiar case is not only binding on this Bench as it is presently constituted, but also reflects the practice of Court both in England as well as in Sri Lanka."*

In *Ranasinghe v. Madilin Nona [2012] BLR 109* Justice Ratnayake with Justice Suresh Chandra and Justice Dep (later Chief Justice) agreeing followed the said ruling of the Rajendran Chettiar case.

Justice Tilakawardane with the agreement of Justice Marsoof and Justice Imam in *Prof. I.K. Perera v. Prof. Dayananda Somasundara (SC Appeal No. 152/2010) decided on 17.03.2011* also had no hesitation to refer with approval the said Full Bench decision of the Supreme Court.

Notwithstanding this was a Full Bench decision of the Supreme Court, still, there were some lingering doubts regarding the correctness of this decision. Therefore, in *Senanayake v. Jayantha (SC Appeal No. 41/2015)* decided on 04.08.2017, a Fuller Bench of the Supreme Court (consisting of seven Judges) revisited the Chettiar's Judgment.

One of the main concerns for such a necessity, in my view, was the prejudice caused to some of the appellants whose lawyers filed final appeals against the orders of the District Court on the basis of the Judgment of Justice Sharvananda in *Siriwardena v. Air Ceylon Ltd (supra).* Therefore, there was a growing tendency to argue that the Chettiar's Judgment has no retrospective effect.

Although this matter (i.e. whether the Chettiar's Judgment has a retrospective effect), as seen from the Judgment, was in the forefront, the Fuller Bench of the Supreme Court in *Senanayake v. Jayantha (supra)* has not specifically addressed that issue. The Supreme Court has granted leave to appeal only on two questions of law, which does not include the above question.

The Fuller Bench of the Supreme Court (consisting of seven Judges) has decided that the Judgment of the Full Bench of the Supreme Court (consisting of five Judges) in Chettiar's case is correct, and the test which shall be applied to decide whether appeal or leave to appeal is the proper remedy against an order of the District Court is the application approach and not the order approach.

Chief Justice Dep (with the concurrence of the other six Judges of the Supreme Court) held that:

"*In order to decide whether an order is a final judgment or not, it is my considered view that the proper approach is the approach adopted by Lord Esher in Salamam v. Warner [*1891*]* 1 QB 734*, which was cited with approval by Lord Denning in Salter Rex & Co. v. Ghosh [1971] 2 QB 597. It stated: "If their decision, whichever way it is given, will, if it stands, finally dispose of the*

matter in dispute, I think that for that 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 other, will allow the action to go on, then I think it is not final, but interlocutory."

The Seven Judge Bench of the Supreme Court did not think it fit to consider whether the Five Judge Bench Judgment of the Supreme Court in Chettiar's case has retrospective effect or not, and instead dismissed the appeal on the basis that the plaintiff should have filed a leave to appeal application and not a final appeal against the dismissal of the plaintiff's action on a preliminary issue (even though that order of dismissal was made by the District Court prior to the Judgment in Chettier's case). That means, whether the order appealed from was given prior to the Judgment in Chettier's case or not, the correct test is the Application Test and not the Order Test. Accordingly, if the order, given in one way, will finally dispose of the matter in dispute, but, if given in the other way, will allow the action to go on, the order is not final, but interlocutory, in which event, leave to appeal is the proper remedy.

When I adopt that test to the present appeal, it is abundantly clear that, an appeal does not lie against the order of dismissal made by the District Judge. Notwithstanding the impugned order takes the shape of a final Judgment as it is, if the said preliminary objection was decided against the defendant, the case would not have ended there, but the trial would have proceeded with, and ultimately the case would have been decided on merits.

I uphold the preliminary objection and dismiss the appeal but without costs.

Judge of the Court of Appeal