

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

C.A.No.1035/98 (F)

D.C.Kurunegala Case No.6935/T

N.P. Jayakodi
Wewaliyadda Watta.

1st Respondent-Appellant

And others

Vs.

P. Fernando

And others

Respondents

BEFORE : **K.T.CHITRASIRI, J**
P.R.WALGAMA, J

COUNSEL : Appellant is absent and unrepresented
P.M.Thilakarathne for the 1st & 2nd
Respondents

ARGUED AND
DECIDED ON : 09.02.2015

K.T.CHITRASIRI, J

Appellant is absent and unrepresented. When this matter was mentioned on the last date namely on 14.11.2014 too, the appellant was absent and unrepresented. Accordingly, the Registrar had been directed to issue notices on the appellant and to his registered Attorney informing them that this matter is to be taken up for argument today. A motion also had been filed by the Counsel for the 1st Respondent-Appellant namely J.Jayasooriya stating that he is not appearing for the appellant. He has informed his decision to the appellant and to her registered Attorney as well. Copies of those two letters are filed into the docket with the said motion dated 25.11.2014. Therefore, this matter is taken up for argument in the absence of the appellant. Court also notes that a number of notices had been sent previously to the appellant by this Court on several occasions.

Learned Counsel for the respondents submit that the appellant should have filed a leave to appeal application rather than a final appeal in view of Section 754(2) of the Civil Procedure Code since the order that is being challenged is only an interlocutory order and not a final judgment. Accordingly, he moves that this appeal be dismissed for the procedural irregularities.

Having perused the order dated 26.10.1998, it is observed that it is an order made in respect of an application to have two items included into the inventory in the testamentary proceedings. Hence, it is clear that the impugned decision is not a judgment but it is an order referred to in Section 754(5) of the Civil Procedure Code. In such a situation the appellant should have filed a leave to appeal application in terms of Section 754(2) of the Civil Procedure Code. Therefore, this Court is inclined to accept the argument of the learned Counsel for the respondents. For the aforesaid reasons Court decides that the failure to follow the procedure referred to in the Civil Procedure Code when filing this appeal is a fatal irregularity.

For the aforesaid reasons this appeal is dismissed without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

P.R.WALGAMA,J.

I agree

JUDGE OF THE COURT OF APPEAL