

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

Von. Dombawela Dhammikka  
Thero,  
The Trustee and the  
Viharadhipathi of Kolawenigama  
Rajamaha Viharaya,  
Kolawenigama

**17<sup>th</sup> Defendant-Appellant**

**CA. Appeal/1422/1999 (F)**

**VS.**

DC, Matara Case No. 13787/P

Menikpurage Somadasa  
Bogahawatte, Mahauldeniya,  
Kolawenigama

**Plaintiff-Respondent**

1B. Menigpurage Pemedasa,  
Mahauldeniya, Kolawenigama

And 16 others

All of Mahauldeniya,  
Kolawenigama

**Defendant-Respondents**

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

**COUNSEL** : Shantha Karunadara for the 17<sup>th</sup> Defendant-Appellant

Jayantha Siriwardena for the Plaintiff-Respondent

**WRITTEN SUBMISSION**

**FILED ON** : 02.02.2018 (by the 17<sup>th</sup> Defendant-Appellant)  
: 09.10.2018 (by the Plaintiff-Respondent)

**DECIDED ON** : 27.03.2019

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**M. M. A. GAFFOOR, J.**

This is an appeal filed by the 17<sup>th</sup> Defendant-Appellant (Appellant) against the decision dated 23.04.1997 delivered by the District Judge of Matara.

When this matter taken up for hearing, Counsel for the Plaintiff-Respondent (Respondent) had raised a preliminary objection and stated that the fateful decision of the learned District Judge of Matara is an interlocutory decree fell under Section 48(4) of the Partition Law, No. 21 of 1979 as amended subsequently, which is required a leave of this Court. Therefore, Counsel for the Plaintiff-Respondent was in a position that the decision dated 23.04.1997, is an order under Section 754(5) of the Civil Procedure Code, thus the correct procedure would be to obtain leave to appeal from this Court.

However, the Appellant stated that the said decision dated 23.04.1997 of the District Judge is an order having the effect of a final judgment made by the District Court.

The Appellant submitted that, when the Respondent instituted this partition action, had not made the Appellant as a party to this action at the time filing of this action and the Appellant, intervened in the said action and was added as the 17<sup>th</sup> Defendant. He further submitted that on 19.04.1994 the said case was laid by the Court as the Respondent had failed to take steps to proceed the case and on 09.05.1994 the Court issued notices to the Respondent directing him to take proper steps. Accordingly, when the case called on 14.10.1996 the District Court fixed the case for trial finally.

The Appellant further submitted that the facts such as above, he was not given notice of the said application of the Respondent to have the case entered in to the trial roll and to participate at the trial and claim the land sought to be portioned. It's further revealed that the Appellant made an application and took up a position that the application of the Respondent to have the case entered into the roll without notice to the Appellant was travesty of justice.

However, a careful perusal of the case record suggested that the Appellant had participated in the case and when the commission partitioning was held in the District Court, the Appellant had failed to file a statement of claim made an application under Section 48(4) of the Partition Law. This application was dismissed by the learned District Judge.

Therefore, the above circumstances suggest that, the Appellant had made an application before the Learned District Judge under Section 48(4) of the Partition Law.

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.

Therefore, my views are fortified as I gather more supports from 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.*

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 allow the preliminary objection of the Respondent and dismissed the appeal without cost.

*Preliminary objection allowed;  
Appeal dismissed.*

**JUDGE OF THE COURT OF APPEAL**