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

C.A. Case No. 576/1999 (F)

D.C. Gampola Case No. 2157/L

1. G. M. Deenawathi Menika Gajasinghe
2. S. M. Abeykoon

Both are in No.06, Ganhatha, Welamboda

PLAINTIFFS

-Vs-

E. M. Upali Ekanayake
No.03, Ganhatha, Welamboda.

DEFENDANT

AND

E. M. Upali Ekanayake
No.03, Ganhatha, Welamboda.

DEFENDANT-PETITIONER

-Vs-

1. G. M. Deenawathi Menika Gajasinghe
2. S. M. Abeykoon

Both are in No.06, Ganhatha, Welamboda

PLAINTIFF-RESPONDENTS

AND NOW BETWEEN

E. M. Upali Ekanayake
No.03, Ganhatha, Welamboda.
DEFENDANT-PETITIONER-APPELLANT

-Vs-

1. G. M. Deenawathi Menika Gajasinghe
2. S. M. Abeykoon
   Both are in No.06, Ganhatha,
   Welamboda.
   PLAINTIFF-RESPONDENT-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : D.M.G. Dissanayake for the Defendant-Appellant
Asthika Devendra for the Plaintiff-Respondent

Decided on : 10.05.2019

A.H.M.D. Nawaz, J.

The Plaintiff-Respondents (hereinafter sometimes referred to as "the Plaintiffs") filed this action in the District Court of *Gampola* seeking the relief of a declaration of title to the corpus more fully described in the schedule to the plaint. The averments in the plaint were to the effect that since the latter part of 1990, the Defendant-Appellant (hereinafter sometimes referred to as "the Defendant") had encroached upon the land of the Plaintiffs from the eastern boundary. The Plaintiffs further prayed that the Defendant

be evicted from the strip of land encroached upon and for damages in a sum of Rs.1,500/- and for continuing damages in a sum of Rs.200/- from the date of the plaint.

In his answer the Defendant traversed the cause of action of the Plaintiffs and further pleaded that the Plaintiffs had cut down several trees which were on his land along the western boundary causing damages in a sum of Rs.38,000/-.

When the trial was taken up on 08.12.1997, the Defendant was absent and unrepresented and the learned District Judge fixed the matter for an *ex parte* trial on 05.01. 1998. The *ex parte* trial concluded on 05.01.1998 and judgment was delivered in favour of the Plaintiffs. The *ex parte* judgment contains just two paragraphs devoid of any reasoning.

After the service of the *ex parte* decree, the Defendant sought to have the said *ex parte* judgment set aside an inquiry under Section 86 was fixed for 02.03.1999.

When the inquiry to purge default was taken up on 02.03.1999, an application was made by the Defendant to re-fix it, as his counsel was in a personal difficulty on that day.

The court did grant an adjournment re-fixing the inquiry for 14.06.1999 subject to the condition that a sum of Rs.5,000/- had to be paid to the Plaintiffs as a prepayment. The Court also made order that if the order of prepayment is not complied with before 14.06.1999, the application made by the Defendant would be dismissed.

On the adjourned date namely 14.06.1999, the Defendant notified to court that the prepayment ordered namely the sum of Rs.5,000/- had been deposited to the credit of the case and a receipt in proof thereof was produced.

The Counsel for the Plaintiffs objected to the course of action adopted by the Defendant and the gravamen of the complaint was that the Defendant had not sought leave of court to deposit the said sum of Rs.5,000/- to the credit of the case.

Accordingly an argument was advanced before the learned District Judge that the failure to make the prepayment in its proper way was in violation of the order made by Court on 2nd March 1999 and in the circumstances the Defendant's application must be dismissed and judgment entered in favour of the Plaintiffs. Upon a perusal of the record it is quite

clear that Journal Entry No.66 indicates that the Plaintiffs had moved Court to withdraw the said deposit of prepayment that had been made to the credit of the case by the Defendant.

Notwithstanding the aforesaid facts, the District Court proceeded to make the order on 27.07.1999 upholding the objections advanced by the Plaintiffs that the deposit of costs to the credit of the case had caused inconvenience to the Plaintiffs and that the Defendants act of making the payment to the credit of the case prevented the Plaintiff from receiving the costs on or before 14.06.1999.

The Defendant preferred this appeal against this impugned order dated 27.07.1999 and when this appeal was taken up in this Court for argument, the Plaintiffs raised the preliminary objection that the Defendant does not enjoy a right of appeal under the provisions of Section 754(1) of the Civil Procedure Code (CPC) as the said order has no final effect and it does not fall within the definition of the judgment is provided for in Section 754(5) of the CPC.

The SC decision of ***Chettiar v. Chettiar*** (2011) 2 Sri L.R 70 was cited in order to drive home the argument that a final appeal does not lie in this case. According to the facts in that case, the action was dismissed under Section 46(2) of the CPC since the Plaintiff had not complied with a positive rule of law in the drafting of the plaint. The merits of the case had not been considered and the rights and liabilities of the parties had not been determined. The case was dismissed by the District Court on a procedural lapse. In terms of the English case of ***Salaman v. Warner***[1] the English Court of Appeal had held that if the decision is given in either way the case should be finally determined. But in this case the objections were upheld and the action was dismissed. On the other hand if the objections had been overruled, the case would have proceeded to trial. Shirani Bandaranayake, J. (as Her Ladyship then was) did not follow the order approach adopted in cases such as ***Shubruk v. Tufnel***[2] and ***Bozson v. Altrinchan Urban District Council.***[3]

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[1] (1891) 1 Q.B. 734
[2] (1889) QBD 621.
[3] (1903) 1 K.B. 547

Instead Shirani Bandaranayake, J. cited with approval the judgments of Lord Esher MR in ***Standard Discount Co v. La Grange***[4] and ***Salaman v. Warner*** *(supra)* which had adopted the application approach that was also subsequently followed by Lord Denning J. in ***Salter Rex and Co v. Rosh.***[5]

Therefore it was held in ***Chettiar v. Chettiar*** *(supra)* that the dismissal of the action was not a final order or a judgment. So ***Chettiar v. Chettiar*** adopted the application approach. Long prior to this in ***Ranjit v. Kusumawathie and Others***,[6] the application approach had been adopted. This was a case where the District Court rejected an application made by a defendant in terms of Section 48(4)(a)(iv) of the Partition Law No.21 of 1977. The appellant then preferred an appeal to the Court of Appeal in terms of Section 754(1) of the Civil Procedure Code on the basis that the 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 CPC, and that therefore an appeal could lie only with leave of the Court of Appeal first had and obtained. When an appeal was preferred therefrom to the Supreme Court, Dheeraratne, J. affirming the judgment of the Court of Appeal, held that:-

> *"The order of the District Court is not a "judgment" within the meaning of sections 754 (1) and 754 (2) of the Civil Procedure Code for the purpose of an appeal. It is an "order" within the meaning of section 754 (2) of the Code from which an appeal may be made with the leave of the Court of Appeal first had and obtained".*

As opposed to this was the test that was adopted by Sharvananda, J. (as His Lordship then was) in ***Siriwardene v. Air Ceylon Ltd.***[7] "Where the appellant had filed an application for leave to appeal from an Order of the District Judge made under section 189 of the Civil Procedure Code directing the amendment of a decree and the question was whether such an order is one having the effect of a final judgment of a civil court for

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[4] (1877) 3 CPD 67.
[5] (1971) 2 All E.R 865.
[6] 1998 (3) Sri L. R. 232
[7] 1984 (1) Sri L.R. 286

the purpose of determining whether the correct procedure should have been a direct appeal and not an application for leave to appeal.

It was held that, "To decide whether a party dissatisfied with the order of a civil court should lodge a direct appeal under section 754(1) of the Civil Procedure Code or appeal with the leave of Court first had and obtained under section 754(2) of the Civil Procedure Code, the definition of 'judgment' and 'order' in section 754(5) should be applied."

In view of the definition in Section 754(5) of the Civil Procedure Code, the procedure of direct appeal is available to a party dissatisfied not only with a judgment entered in terms of Section 184 of the Civil Procedure Code but also with an order having the effect of a final judgment, that is, a final order. Orders which are not judgments under Section 184 of the Civil Procedure Code or final orders are interlocutory orders from which a party dissatisfied can appeal but only with leave to appeal.

As held by Sharvananda, J. (Colin Thome and Ranasinghe JJ. agreeing) in the case of ***Siriwardene v. Air Ceylon Ltd.*** (*supra*), the tests to be applied to determine whether an order has the effect of a final judgment and so qualifies as a judgment under Section 754(5) of the Civil Procedure Code are:-

1) "It must be an order finally disposing of the rights of the parties.
2) The order cannot be treated as a final order, if the suit or the action is still left a live suit or action for the purpose of determining the rights and liabilities of the parties in the ordinary way.
3) The finality of the order must be determined in relation to the suit.
4) 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."

By these tests, an order amending a decree made under Section 189 of the Civil Procedure Code is a final order. Hence, the appellant's application for leave to appeal was misconceived and could not be entertained".

Both these tests came up before a seven bench decision of the Supreme Court in ***Mohamed Woleed Mohamed Zawahir v. Amana Takaful Company Ltd*** SC CHC Appeal No.37/2008 (SC minutes of 04.08.2017) wherein in an exhaustive judgment, His Lordship the Chief Justice Priyasath Dep, P.C laid down that appeals could be filed in respect of judgments or orders which are final judgments. In respect of other orders which are not final and considered as interlocutory orders leave to appeal applications have to be filed.

His Lordship the Chief Justice further held that judgments fall into two categories and similarly orders too would fall into two categories.

a) Judgments which are final judgments.
b) Judgments which are not final.
c) Orders which are final judgments.
d) Orders which are interlocutory orders.

The Divisional Bench held that appeals could be filed in respect of judgments or orders that are final. In respect of other orders leave it has to be first obtained. Therefore, His Lordship the Chief Justice held that it is not the name given as a judgment or order that matters but it is the finality of the judgment or order that matters.

Adopting this rationale, could the order made in this case on the 27th July 1999 be described as having the effect of a final judgment? The learned District Judge titles his decision as an order. But this appellation does not matter. What matters is the finality of the order. If the order made on 27th July 1999 entails the consequences of a final judgment, then an appeal would definitely lie against that order.

The order dated 27th July 1999 quite categorically shuts out the defendant from participating at an *inter partes* trial. The order does not give him an opportunity to participate at the trial even though he had made the prepayment but in a way not prescribed in the order. Money payable lies in Court and there is no impediment to secure this money. In fact the Plaintiffs had made the application to the money. If the Defendant had made the payment, he should be allowed to participate at the trial. It can

be easily verified whether money had been paid to Court and that nobody disputes the payment on the part of the Defendant.

In my view thus came to an end any prospect of an *inter partes* trial proceeding to a conclusion. If one interprets the order made by the learned District Judge of *Gampola*, it would appear that the door to justice is all but shut to the defendant. A final judgment must decide the rights and liabilities of parties. In this case the learned District Judge has decided not to proceed further with the purge default inquiry and thus there is no alternative for the defendant but to prefer this appeal. It would appear that the impugned order dated 27.07.1999 has finally settled the litigation between the Plaintiffs and the Defendant.

In the circumstances I take the view that the order made by the learned District Judge on 27th July 1999 refusing participation at the purge default inquiry because the manner or mode of payment was wrong case the form of a final order which is appealable.

So I would overrule the preliminary objection as to the maintainability of this appeal and proceed to set aside the order of the learned District Judge dated 27.07.1999.

As regards the propriety of the mode of payment of the cost was never argued before me and therefore the argument on the propriety or otherwise of the mode of payment must be taken to have been waived. If the payment had been made to the credit of the case, it is open to the Plaintiffs to withdraw the money from Courts. In such a situation the application made by the Defendant to participate at the purge-default inquiry must be allowed and direct the learned District Judge to conduct a purge-default inquiry to satisfy himself whether the Defendant shows reasonable grounds for default. Relying on the outcome of the purge default inquiry, the learned District Judge of *Gampola* is directed to take steps according to law.

In the circumstances I allow the appeal of the Defendant-Appellant.

JUDGE OF THE COURT OF APPEAL