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DIGEST

HAPUARATCHI AND ANOTHER

vs.

DHANAPALA AND ANOTHER

COURT OF APPEAL.
SOMAWANSA, J, (P/CA) AND
WIMALACHANDRA, J.
CALA 186/2004.
DC KANDY 32523/MR.
MARCH 30, 2005.

Civil Procedure Code, sections 17, 22, 36 and 37 - Misjoinder of parties and causes of action - Objection to be taken when?

The plaintiff-respondent instituted action seeking damages from the 1st and 2nd defendants-respondents.

The defendants-petitioners filed a motion and sought the dismissal of the plaint on the basis that the plaintiff-respondent has misjoined cause of action and defendants.

The trial judge after inquiry rejected the objections on the basis that the objections are premature and contrary to section 22.

HELD:

(1) The 1st and 2nd defendant-petitioners have taken up these objections of misjoinder of parties at the correct stage and certainly are not premature, "An objection to non-joinder of parties shall be taken at the earliest possible opportunity, otherwise such objections will be considered to have been waived"

Held further:

(2) The contesting defendants-petitioners have complied with the provisions in section 22. Rules of Procedure would allow them to reiterate this objection in their answer and thereafter raise issues based on those objections and seek dismissal of the action.

(3) There are no compelling reasons to grant leave to appeal against the impugned order, for there is no prejudice caused to the contesting defendant-petitioners in that they could re-agitate this matter as the trial judge has not rejected the objection.

APPLICATION for leave to appeal, from an order of the District Court of Kandy.

Cases referred to :-

1. *John Singho* vs. *Julius Appu* - 10 NLR 351
2. *London and Lancashire Fire Insurance Co.* vs. *P & O Company* - 18 NLR 15
3. *Dingiri Appuhamy* vs. *Talakotuwe Pangananda Thero* - 67 NLR 89
4. *Waharaka alias Moratota Sobita Thero* vs. *Amunugama Ratnapala Thero* 1981 1 NLR 201
5. *Kudhoos* vs. *Toonor* - 41 NLR 251
6. *Alden Fernando* vs. *Lionel Fernando* 1995 2 Sri LR 25
7. *Cologan and Another* vs. *Udeshi* 1996 2 Sri LR 220

L. P. A. Chitranganie with K. de Mel for defendant-petitioners.

A. A. de Silva, P. C. with Jayalath Hissella for plaintiff-respondent.

Cur.adv.vult.

July 22, 2005

ANDREW SOMAWANSA, J. (P/CA)

The plaintiff-respondent instituted action in the District Court of Kandy seeking as damages Rs. 3000,000/- Rs. 2000,000/- and Rs. 2000,000/- from the 1st and 2nd defendants-respondents respectively.

The plaintiff-respondent has taken up the position that the 1st and 2nd defendants-petitioners are running a business of conducting courses of counseling under the name of Institute of Psychological Studies and the 3rd defendant-respondent is a Lecturer in the said Institute, that the plaintiff-respondent joined the said course on 07.07.2002 which was due to end on 19.12.2002, that on the payment of fees by the plaintiff-respondent the 1st and 2nd defendants-petitioners entered into an agreement to enroll her

to the course, that the 1st defendant-petitioner having heard the tales carried by the 3rd defendant-respondent defamed the plaintiff-respondent on the 28th and 29th December, 2002 and on 5th January 2003. The 2nd defendant-petitioner having heard the tales carried by the 3rd defendant-respondent defamed the plaintiff-respondent over the telephone, that the 1st and 2nd defendants-petitioners did not allow the plaintiff-respondent to follow the said course and that the defendants do not have the proper knowledge and qualifications in counseling. In the premiss, the plaintiff-respondent claimed the aforesaid sums of money as damages from the three defendants.

The 1st and 2nd defendants-petitioners filed a motion dated 28.10.2003 and sought the dismissal of the plaint on the basis that the plaintiff-respondent has misjoined cause of action and defendants. This matter was inquired into and at the conclusion of the inquiry the learned District Judge by his order dated 14.05.2004 rejected the objections of the 1st and 2nd defendants-petitioners on the basis that the objections taken by the 1st and 2nd defendants-petitioners are premature and contrary to the provisions contained in section 22 of the Civil Procedure Code. The said section reads as follows:

> "All objections for want of parties, or for joinder of parties who have no interest in the action, or for misjoinder as co-plaintiffs or co-defendants, shall be taken at the earliest possible opportunity, and in all cases before the hearing. And any such objection not so taken shall be deemed to have been waived by the defendant."

It is to be seen that the 1st and 2nd defendants-petitioners have taken up these objections for misjoinder of parties at the correct stage and certainly not premature in terms of provisions contained in section 22 of the Civil Procedure Code. In the case of *John Sinno vs. Julis Appu*[1]. The head note reads as follows:

> "An objection to non-joinder of parties should be taken at the earliest possible opportunity, otherwise such objections will be considered to have been waived."

Also in the case of *London and Lancashire Fire Insurance Co. vs. P. & O. Company*[2] Pereira, J (obiter) :

"An objection to an action by a defendant on the ground of misjoinder or non-joinder of parties is not to be taken by way of answer. It should be taken by motion or application at the earliest opportunity."

Also at 21 Pereira, J observed:

" Now, it seems to me that an objection on the ground of misjoinder or non-joinder of parties is not a defence to the plaintiffs' claim to be taken by way of answer. Section 22 of the Civil Procedure Code enacts that such an objection should be taken at the earliest possible opportunity, and if it were not so taken, it should be deemed to have been waived by the defendants."

In this respect the provisions contained in sections 36 and 37 of the Civil Procedure Code also become relevant and the said sections reads as follows:

"36. (1) Subject to the rules contained in the last section, the plaintiff may unite in the same action several causes of action against the same defendant or the same defendants jointly, and any plaintiffs having causes of action in which they are jointly interested against the same defendant or defendants may unite such causes of action in the same action.

But if it appears to the court that any such cause of action cannot be conveniently tried or disposed of together, the court may, at any time before the hearing, of its own motion or on the application of any defendant, in both cases either in the presence of, or upon notice to, the plaintiff, or at any subsequent stage of the action if the parties agree, order separate trial of any such causes of action to be had, or make such other order as may be necessary or expedient for the separate disposal thereof.

(2) When causes of action are united, the jurisdiction of the court as regards the action shall depend on the amount or value of the aggregate

subject-matters at the date of instituting the action, whether or not an order has been made under the second paragraph of subsection (1)".

37. "Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of in one action, may at any time before the hearing apply to the court for an order confining the action to such of the causes of action as may be conveniently disposed of in one action."

Order of Court thereon is contained in section 38 of the Civil Procedure Code which reads as follows:

"38. (1) If, on the hearing of such application, it appears to the court that the causes of action are such as cannot all be conveniently disposed of in one action, the court may order any of such causes of action to be excluded, and may direct the plaint to be amended accordingly, and may make such order as to costs as may be just"

In the order of the learned District Judge it is to be seen that she has made reference to section 17 of the Civil Procedure Code as well, which reads as follows :

> "No action shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

In the case of *Dingiri Appuhamy* vs. *Talakolawewe Pangananda Thera* [3]

Court observed:

> "There is no provision in the Civil Procedure Code or any other law requiring an action to be dismissed where there is a misjoinder of causes of action. It is therefore, improper for the court to dismiss an action on the ground of misjoinder of defendants and causes of action without giving an opportunity to the plaintiff to amend his plaint."

It was held in that case:

"That there was a misjoinder of defendants and causes of action. In as much as, under section 17 of the Civil Procedure Code, no action should be defeated by reason of misjoinder of parties, the plaintiffs should be given an opportunity to amend their plaint so that the action should proceed against the 1st defendant only."

In *Waharaka alias Moratota Sobitha Thera* vs. *Amunugama Ratnapala Thero* [4] section 17 of the Civil Procedure Code enjoins a Judge not to dismiss an action for misjoinder or non-joinder of parties.

Also in *Kudhoos* vs. *Joonoos* [5]:

A Court is not bound to dismiss an action on the ground of misjoinder of parties and causes of action. In such a case the Court may on application made in the exercise of its discretion strike out one or more plaintiffs and give an opportunity for amendment of the pleadings, so as to make the plaint conform to the requirements of section 17 of the Civil Procedure Code.

In *Aldin Fernando* vs. *Lionel Fernando* [6] it was held:

"(1) That provisions of the Civil Procedure Code relating to the joinder of causes of action and parties are rules of procedure and not substantive law. Courts should adopt a common sense approach in deciding questions of misjoinder or non-joinder."

(2) Section 18 permits Courts on or before the hearing upon application of either party to strike out the name of any party improperly joined. Section 36 provides that if any cause of action cannot be conveniently tried, for Court *ex mero motu* or on the application of the defendants with notice to the plaintiff at any time before the hearing or on agreement of the parties after the commencement of the hearing to order separate trials of any cause of action.

(3) It is not open to the defendant to await the framing of issues and then, without prior notice to the plaintiff frame issues on misjoinder of parties or causes of action."

In the case of *Colgan and Another* vs. *Udeshi* (J) G. P. S. de Silva, CJ stated :

> " It is well to remember that a Court should not be fettered by technical objections on matters of procedure."

On a consideration of the aforesaid authorities I would disagree with the finding of the learned District Judge that the objections raised by the 1st and 2nd defendants-petitioners on the basis of misjoinder of causes of action as well as parties are premature, My considered view is that the contesting defendants-petitioners have raised this objection at the correct time. Be that as it may, the learned District Judge has not in his order completely rejected the objection taken by the contesting defendants-petitioners but only says they are premature. In the circumstances the contesting defendants-petitioners have complied with the provisions contained in section 22 of the Civil Procedure Code. Rules of procedure would allow them to reiterate this objection in their answer and thereafter raise issues based on those objections and seek dismissal of the action. In the circumstances my considered view is that there is no compelling reason for this Court to grant leave to appeal against the impugned order of the learned District Judge, for there is no prejudice caused to the contesting defendants-petitioners, in that they could reagitate this matter. On the other hand, the plaintiff-respondent is aware of the objections taken to the plaint. It is up to him to decide whether to amend the plaint or not in view of the objection taken by the contesting defendants-petitioners to the plaint. Either way he will have to face the consequences.

For the above reasons, I do not intend to interfere with the order of the learned District Judge and accordingly the application for leave to appeal will stand dismissed. Parties will bear their own costs.

WIMALACHANDRA J. — *I agree.*

Application dismissed.

JAYAWARDENE
VS
PUTTALAM CEMENT COMPANY LIMITED

COURT OF APPEAL
SOMAWANSA J. (P/CA) AND
WIMALACHANDRA, J.
CA (PHC) APN 265/2004
REV. H. C. CHILAW HCA 22/2.
LABOUR TRIBUNAL COLOMBO 21/1251/94.
MARCH 19, 2005.

Constitution, Article 138-Article 154 P, Article 154 P(3)(b)-13th Amendment - Order made by Provincial High Court in an industrial dispute - Does revision lie to the Court of Appeal? - High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, section 9 (a). -- Specific remedy provided to canvass the grievance before the Supreme Court - Industrial Disputes Act - Section 531DD(1)-Canvass.

HELD:

(1) The Law provides for a specific remedy for any party who is aggrieved by an order of the Provincial High Court. The appellant - petitioner should have appealed with the leave of the High Court or the Supreme Court first had and obtained, to the Supreme Court.

Per Somawansa, J. (P/CA) :

"One cannot come to this court for redress when the relief lies elsewhere and this court cannot by implication, surmise or conjecture assert itself with jurisdiction that has not been granted in law".

APPLICATION in revision from an order from the High Court of Chilaw.

Chintaka Siriwansa for appellant - respondent - petitioner.
Nayana Abeysinghe for respondent - appellant - respondent.

Cur. adv. vult.

August 05, 2005.

ANDREW SOMAWANSA, J. (P/CA)

At the hearing of this application counsel for the respondent-appellant - respondent took up a preliminary objection that this Court lacks jurisdiction to entertain the instant application as the right of appeal from an order made by a Provincial High Court lies only to the Supreme Court as stipulated by the Constitution. On this preliminary issue of law both parties agreed to tender written submissions and both parties have tendered their written submissions.

It is contended by counsel for the applicant - respondent - petitioner that a medical certificate has been tendered to this Court to establish the fact that the applicant respondent - petitioner had met with an accident and was bed ridden for a long period of time and that when a situation of such a nature arises, the Constitution is silent as to the recourse available to an injured party who was prevented from adverting to the remedies provided to him by law, that in such a situation of the said nature this Court could exercise its extraordinary revisionary jurisdiction to grant redress to an aggrieved party. He further submits that the jurisdiction vested in this Court under Article 138 of the Constitution has not placed any restrictions whatsoever in such circumstances. The 13th Amendment which brought in the Provincial High Courts have granted the Supreme Court the final appellate power against the order made in the Provincial High Courts in an industrial dispute matter but has not taken away the revisionary jurisdiction specifically. Thus he submits that in the absence of any specific provisions taking away the revisionary jurisdiction of the Appeal Court this Court is vested with the jurisdiction to hear, determine and grant redress to an aggrieved party like in the instant case. I am not at all in agreement with the aforesaid submission for the simple reason that the 13th Amendment to the Constitution which grants appellate powers against an order made in a High Court in an industrial dispute make no provisions for granting appellate jurisdiction either by away of appeal or revision to this Court. I would say the preliminary objection raised by the respondent - applicant - respondent is sustainable and far reaching for one cannot come to this Court for redress when the relief lies elsewhere

and this Court cannot by implication, surmise or by conjecture assert itself with jurisdiction that has not been granted in law. Accordingly I would reject the proposition of counsel for the applicant-respondent - petitioner.

At this point, it would be useful to consider some of the provisions of Act, No. 32 of 1990 and Section 9(a) of Act, No. 19 of 1990 having a direct bearing on the issue at hand.

Section 31 DD(1) of the Industrial Disputes (Amendment) Act, No. 32 of 1990 reads as follows:

"(1) Any workman, trade union, or employer who is aggrieved by any final order of a High Court established under Article 145P of the Constitution, in the exercise of the appellate jurisdiction vested in it by law or in the exercise of its revisionary jurisdiction vested in it by law, in relation to an order of a labour tribunal, may appeal therefrom to the Supreme Court with the leave of the High Court or the Supreme Court first had and obtained."

Section 9(1) of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 reads as follows :

9(a) "a final order, judgment, decree or sentence of a High Court established by Article 154P of the Constitution in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154 P of the Constitution or section 3 of this Act or any other law, in any matter or proceeding whether civil or criminal which involves a substantial question of law, may appeal therefrom to the Supreme Court if the High Court grants leave to appeal to the Supreme Court *ex mero motu* or at the instance of any aggrieved party to such matter or proceedings;

Provided that the Supreme Court may, in its discretion grant special leave to appeal to the Supreme Court, from any final or interlocutory order, judgment, decree or sentence made by such High Court, in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P of the Constitution or section 3 of this Act, or any law where such High Court has refused to grant leave to appeal to the Supreme Court, or where

in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court;

Provided further that the Supreme Court shall grant leave to appeal in every matter or proceeding in which it is satisfied that the question to be decided is of public or general importance."

Thus it is to be noted that law provides for a specific remedy for any party who is aggrieved by an order of the Provincial High Court and the applicant - respondent petitioner could have appealed against the order of the Provincial High Court with the leave of the High Court or the Supreme Court first had and obtained. It is to be seen that the applicant - respondent -petitioner did exercise an option available to him by law and sought leave to appeal from the Provincial High Court which was refused. When leave to appeal is refused by the Provincial High Court there is a specific course of action stipulated in law to such a person in terms of Section 9 (a) of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 as stated above by way of seeking special leave to appeal to the Supreme Court.

Thus it could be seen that there was a specific remedy provided by law for the applicant - respondent - petitioner to canvass his grievance before the Supreme Court. This was the correct and proper legal remedy. However instead of resorting to the legal remedy that was available to him the applicant - respondent - petitioner has filed a revision application in this Court.

The right of revision is a discretionary remedy which is allowed by Court only in exceptional circumstances and the right of revision is not available specially when there is an alternative remedy available in law which remedy the applicant-respondent-petitioner failed to have recourse to.

It is also well settled law that the discretionary remedies such as writs and revision are not available when there is an undue delay in invoking the jurisdiction of Court. In the instant application the delay is as much as 10 months. Furthermore, the reasons adduced for the inordinate delay in

invoking the revisionary jurisdiction is ill health of the applicant–respondent-petitioner. However the medical certificate submitted by him dated 15. 06.2004 marked P5 reveals that it was issued on 15. 06. 2004 and the ayurvedic physician has recommended leave for two months from 03. 05. 2004. The learned High Court Judge had delivered his order on 30. 10. 2003 and thereafter the leave to appeal application to the High Court had been refused on 29. 04. 2004. The instant revision application was tendered on 13. 09. 2004.

In paragraph 8 of the petition the applicant - respondent petitioner states that there is a delay in filing this application since he met with an accident and was bedridden for several months and due to the ill health he was unable to instruct an Attorney - at - Law to proceed with the revision application immediately, in proof of which the applicant respondent-petitioner has annexed the medical certificate marked P5. As per the medical certificate dated 15. 06. 2004 leave has been recommended for 2 months from 03.05. 2004. The learned High Court judge's order is dated 30. 10. 2003. The medical certificate does not indicate that there was anything to prevent the applicant respondent-petitioner from seeking leave to appeal to the Supreme Court. No explanation was given as to why he did not seek leave to appeal to the Supreme Court in terms of section 9 (a) of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990. In any event, no exceptional circumstances have been pleaded or shown for this Court to invoke its revisionary jurisdiction. Be that as it may my considered view is that the remedy lies elsewhere and if we were to allow this application we would be opening the flood gates for parties to come to this Court circumventing the remedies stipulated by law.

For the above reasons, I have no hesitation in dismissing this application with costs fixed at Rs. 20,000/-.

WIMALACHANDRA, J. – *I agree.*

Application dismissed.

MANGALIKA
vs.
SUGANDI FERNANDO AND OTHERS

COURT OF APPEAL.
WIJAYARATNE, J AND
SRISKANDARAJA, J.
CALA 446/2003.
DC MARAWILA 219/P.
FEBRUARY 10, 2005.

Civil Procedure Code, sections 524, 534, 534(2) and 754(2) - Testamentary proceedings - Intervenient petitioner producing last will - Application dismissed - Last will a forgery - Letters granted - Order or judgment?

On a preliminary objection taken whether the order is an interlocutory order or a judgment,

HELD:

(1) The application of the intervenient petitioner is one under section 524 and Court made order dismissing the application in terms of section 534.

(2) The order has the effect of a final judgment in as much as it deals with the question of proof of last will and the entitlement of the intervenient petitioner to have the probate granted.

(3) The order finally disposed the matter of last will and the application of the intervenient petitioner for probate thereof. It is a judgment. Appeal lies.

APPLICATION for leave to appeal from judgment of the District Court of Marawila.

Mahinda Ralapanawa for intervenient-petitioner.

S. F. A. Cooray for petitioner-respondent.

Cur.adv.vult.

August 01, 2005.
WIJAYARATNE, J.

The petitioner-respondent instituted testamentary proceedings to administer the intestate estate of deceased Warnakulasooriya George Henry Moraes Fernando in the District Court of Marawila. The intervenient-petitioner intervened in those proceedings producing Last Will purported to have been left by the deceased and claiming probate to himself on the said Last Will which is marked P1 or X. The learned District Judge after inquiry into such application and the objections shown, dismissed the claim of the intervenient-petitioner holding that the purported Last Will submitted was a forgery. Aggrieved by such order the Intervenient-petitioner made this application for leave to appeal. The petitioner-respondent objected to leave being granted on the ground that the intervenient-petitioner has no right to make a leave to appeal application in terms of section 754(2) of the Civil Procedure Code because the order appealed from rejecting to admit the purported Last Will is a final judgment having the effect of a final judgment made by the Court.

The application of the intervenient-petitioner is one made in terms of section 524 of the Civil Procedure Code and Court made order dismissing the application in terms of section 534 and granted letters of administration to the petitioner-respondent. This order has the effect of a final judgment in as much as it deals with the question of proof of Last Will and the entitlement of the intervenient-petitioner to have the probate granted. In terms of section 534(2) of the Civil Procedure Code, since the letters of administration has been granted to the petitioner-respondent, the intervenient-petitioner is not entitled to renew his application. Accordingly this order finally disposed of the matter of Last will and the application of the intervenient-petitioner for probate thereof as between the parties. Therefore the proper procedure would be to prefer an appeal and not make an application for leave to appeal.

I uphold the preliminary objection raised on behalf of the petitioner-respondent and dismiss the application of the intervenient-petitioner for leave to appeal with costs fixed at Rs. 5,000/-

SRISKANDARAJAH, J. — *I agree.*

Preliminary objection upheld.
Application dismissed.

LEELAWATHIE
VS.
EKANAYAKE

COURT OF APPEAL.
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J,
CALA 374/2004.
DC COLOMBO 15179/L.
SEPTEMBER 21, 2005.

Civil Procedure Code, sections 82(2), 88(1), 88(2), 752, 754(2), and 754 (5) - Vacating previous order of dismissal of plaintiff's action for non appearance - Restoring the case back to the trial roll - Right to a direct appeal or leave to appeal? - What is a judgment?-What is an Order?.

Held :

(1) Section 88(1) lays down that no appeal shall lie against any judgment entered upon default, and order setting aside or refusing to set aside the judgment entered upon default shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made.

(2) The statute states that the order shall be accompanied by a judgment adjudicating on the facts; it is a judgment as defined in section 754(5) and a direct appeal lies from the said final order.

APPLICATION for leave to appeal from an order of the District Court of Colombo.

Cases referred to :

1. *Siriwardane vs. Air Lanka Ltd* (1984) SLR 286
2. *Salaman* vs. *Warner* (1891) QB 734

3. *Bonzon vs. Altrichan Urban Development Council (1903) KB 547 at 549*
4. *A. S. Sangarapillai and Brothers* vs. *Kathiravelu - 2 Sri Kantha Law Reports - 99*
5. *Wijenayake Vs. Wijesinghe - Sri Kantha* Law Reports 28

D. Alwis for respondent - petitioner,

S. A. D. S. Suraweera for plaintiff-respondent.

Cur. adv.vult.

December 09, 2005

Andrew Somawansa, J. (P/CA)

This is an application for leave to appeal from the order of the learned District Judge of Colombo dated 10. 09. 2004 vacating the previous order of dismissal of the plaintiff - petitioner - respondent's action for non appearance and restoring the case back to the trial roll and if leave is granted to quash and set aside the aforesaid order dated 10.09.2004 and dismiss the plaint of the plaintiff-petitioner-respondent.

When this application was taken up for hearing counsel for the plaintiff petitioner-respondent (hereinafter called the respondent) took up a preliminary objection to the maintainability of this application for the reason that the impugned order gives the right to a direct appeal and not an application for leave to appeal.

Both counsel agreed to tender written submissions on the aforesaid preliminary objection taken by Counsel for the respondent and accordingly both parties have tendered their written submissions.

Counsel for the defendant - respondent - petitioner (hereinafter called the petitioner) submits that section 82(2) of the Civil Procedure Code states that an order in terms of the said section shall be liable to an appeal to the Court of Appeal. However the said section does not specify whether leave of the Court of Appeal should be first had and obtained with regard to such an appeal. He submits that when one examines the provisions of sections 754 (1) and 754(2) of the Civil Procedure Code, it is clear that a leave to appeal application is instituted against an order made in the course of any civil action as opposed to a final appeal which as the

word "final" itself indicates is instituted against a judgment finally adjudicating the rights of parties. Thus as in the instant action when an order made under section 82(2) sets aside the judgment made in default and refixes the case for trial the said order quite obviously does not finally adjudicate the rights of parties but leaves the rights of parties to be decided by way of further trial. For this proposition of law he cites several authorities both local as well as foreign decisions.

The local case cited was the Supreme Court decision in *Siriwardena vs. Air Lanka*[1].

> "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 definitions 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.

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 alive for the purpose of determining the rights and labilities 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."

Counsel for the petitioner also has cited Privy Council decision in the case of *Salaman* vs *Warner*[2].

"I think that a judgment or order will be final within the meaning of the rule when whichever way it went it would finally determine the rights of the parties. On the other hand if the 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".

A similar view been expressed by Lord Alverstone, CJ in the case *Bonzon* vs. *Altricham Urban District Council* at 549.

However I am not impressed with the aforesaid submission for the reason that provisions contained in section 88(2) clearly indicates that what is contemplated therein is not a interlocutory order but a judgment adjudicated upon the facts and specifying the ground upon which it is made. It is from this judgment that an appeal lies to the Court of Appeal.

Section 88(1) and (2) of the Civil Procedure Code reads as follows:

"88(1) No appeal shall lie against any judgment entered upon default".

(2) The order setting aside or refusing to set aside the judgment entered upon default shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made, and shall be liable to an appeal to the Court of Appeal".

At this point it would be pertinent to consider section 754(a) (2) and (5) of the Civil Procedure Code which reads as follows:

" 754(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 in 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.

(5) Notwithstanding anything to the contrary in this Ordinance, for the purpose of this Chapter -

"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".

The aforesaid sections were considered in the case of *A. S. Sangarapillai* and Bros. Vs. *Kathiravelu*[4] wherein the judgment were as follows:

(i) Ex-parte decree entered for default–defendant ejected - application in court that no summons served and to have the proceedings vacated - Court set aside all proceedings - Civil Procedure Code Sections 84, 88, 753 and 754.

(ii) Meaning of "Judgment" and "Order" -Revisionary powers of court- when revision lies.

HELD:

(a) "Order made under section 88(2) of the Civil Procedure Code gives rise to a direct appeal and not leave to appeal.

(b) The onus is on the defendant to prove that summons were not served on him."

At page 103 Siva Selliah, J. made the following observations:

"The facts material for the determination of these applications are as follows: The plaintiff filed action in D. C. Chavakachcheri No. 5933 on 7.8.80 praying for ejectment of the defendant from certain shop premises. Summons was served on the defendant returnable on 12. 11. 81 on which date the defendant did not appear and the case was thereafter fixed for ex-parte trial on 04.12.80 and judgment and decree were entered in favour of the plaintiff. The decree was served on the defendant on. 01. 01. 81 and on 23.01. 81 plaintiff moved for issue of writ which was allowed and the writ was executed on 27,. 01. 81. On 9. 02. 81 the defendant filed application to set aside the ex- parte judgment against him for default on the ground that summons had not been served on him. This was set down for inquiry and order delivered on 1. 9. 83 setting aside the judgment entered against him for default of appearance and allowing the defendant to file answer and also ordering restoration of possession of the premises to the defendant. Against this order the plaintiff-appellant has filed these present applications for leave to appeal and revision. Certain preliminary objections were taken to these applications: (a) that leave to appeal is not available as the order complained of is an appealable order and therefore notice of appeal should have been filed".

"In the instant case I am of the view that the determination of the District Judge made on 1.9.83 setting aside judgment entered against the defendant for default of appearance due to non service of summons and allowing him to file answer is an 'order' made under section 88(2) of the Civil Procedure Code and that due to the special provision contained therein and the in built safeguard provided thereby and considering the tenor of the judgments of Vaitilingam, J. and Abdul Cader, J. and O. S. M. Senevirate, J. quoted above, I hold that a direct appeal is provided for in the circumstances and that an application by way of leave to appeal does not lie".

Also in the case of *Wijenayake* vs. *Wijenayake* [5] the aforesaid section *viz*: Section 88 (1) and (2) and also section 754 of the Civil Procedure Code were considered. The facts as narrated by Palakidnar, J. are as follows:

The defendant petitioner Gamini Wijenayake is seeking the leave of this Court to appeal from a judgment of the District Judge of Mount Lavinia dated 18.08.1986 entered ex-parte in favour of the plaintiff-respondent Sunil Wijenayake in a rent and ejectment matter (No. 2534/Re–D. C. Mount Lavinia).

On 02.09.1986 the defendant made an application to set aside this order on the grounds that summons was not served on him. On 12.05.1987 the learned District Judge made order refusing to set aside the ex-parte judgment and decree. An earlier application for revision of this judgment 536/87 to this court was withdrawn.

A preliminary objection was taken to this application by counsel for the respondent that this remedy sought by the defendant in this manner is misconceived in law. It was the learned counsel's contention that a direct appeal lies from this order and there was no provision in law for leave to appeal as prayed for by the defendant. This although it has been averred that there are other serious factual irregularities which made the defendant-petitioner's position untenable before this Court.

This section 88(2) sets out clearly and unambiguously the right of appeal given to a party in either event, the order though so described is accompanied by judgment adjudicated upon the facts. Thus any misconception with regard to the appealability of the order under section 88(2) is clearly removed. It is a final order accompanied by a judgment deciding the rights of the parties in a conclusive way within the contemplation of the term judgment

set out in section 754(1) of the Civil Procedure Code. An order as interpreted in section 754(5) is a final expression of any decision in any civil action proceeding or matter which is not a judgment. In the instant case statute requires that the order has to be accompanied by a judgment adjudicating on the facts. Thus it is clearly a judgment as defined in section 754(5).

The right of appeal is given by the words "shall be liable to appeal'> Thus one cannot conceive it to be an order to appeal from which leave from the Supreme Court should be first had and obtained as set out in section 754, subsection (2). The remedy sought is therefore misconceived.

It was contended by learned counsel for the respondent that section 752(2) repeals section 88(2), in that it confers a right to appeal from any order for the correction of any error of fact or law with the leave of the Supreme Court first had and obtained. If section 88 (2) did not contain the requirement that the order shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds on which it is made, one may deem it to be an order contemplated in section 752(2), and that the instant application was correctly made. But section 88(2) makes it very plain that the order shall be accompanied by a judgment and is an appealable order as distinct from an order for which leave has to be had and obtained from the Supreme Court. On the mere reading of the two sections 754(2) and section 88(2) one has to reject without hesitation the argument that the former repeals the latter, . Therefore this application for leave to appeal has to be rejected as a relief misconceived in the circumstances and the application is dismissed with costs fixed at Rs. 205.

I have no hesitation in agreeing with the reasoning of Palakidnar, J. I might also add that there is no ambiguity in the words used in section 88(2) of the Civil Procedure Code which provides a specific statutory right of a final appeal. This is clearly spelt out when it is stated very clearly in the section that the order setting aside or refusing to set aside the judgment entered upon default shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made and shall be liable to an appeal to the Court of Appeal'.

For the foregoing reasons, I would hold that the petitioner has failed to resort to the statutory remedy provided by law in not lodging a direct appeal to this Court and the instant application for leave to appeal is

misconceived in law and hence the petitioner cannot have and maintain this action. In the circumstances the preliminary objection raised with regard to the maintainability of this application is well taken. Accordingly the application for leave to appeal will stand rejected with costs fixed at Rs. 10,000/-

WIMALACHANDRA, J - *I agree.*

Appeal dismissed.

PAULIS
VS
JOSEPH AND OTHERS

COURT OF APPEAL.
IMAM, J. AND
SRISKANDARAJAH, J.
CA 478/2003.
DC MT. LAVINIA 160/931/D.
OCTOBER 28, 2004.
SEPTEMBER 30, 2004.
JULY 19, 2005.

Divorce obtained ex-parte - Complaint that divorce was obtained by abuse and misuse of legal process and by fraud - Restitution in intergrum - Court of Appeal (Appellate Procedure Rules) 1990, and Rule 3(5)-No affidavit accompanying objections - Exceptional circumstances - Right to pension - Constitution, Article 138(1).

The petitioner sought to revise and sought *restitutio - in intergrum* and to set aside the judgment, decree nisi, and decree absolute entered dissolving the marriage of the petitioner to one P, and a declaration that she is the lawful wife of the said P. She further sought a declaration that, she is entitled to the pension.

It was contended that the petitioner not being a party in the District Court case cannot seek restitution - in - intergrum and as the objections are not accompanied by an affidavit the objections should not be accepted.

HELD:

(1) Where one of the parties to the divorce action was dead, and if it is shown by the surviving spouse that divorce was obtained fraudulently without service of summons and by abuse and misuse of legal process the Court of Appeal has the power to grant restitutio - in- intergrum as well as act in revision and set aside the divorce.

(2) The Colombo fiscal's reports seem to have been produced by a misuse of the legal process.

Held further:

(3) Even though there is no affidavit accompanying the objections, the petitioner has pointed out exceptional circumstances to revise the order.

(4) The petitioner is the lawful wife of deceased P and is entitled to the pension, being the lawful wife of P.

APPLICATION for revision and restitutio - in intergrum from an order of the District Court of Mt. Lavinia

Cases referred to :

1. *Kusumawathie* vs *Wijesinghe* 2001 Sri LR 238

2. *Sirinivasa Thero* vs. *Sudassi Thero* - 63 NLR 31

S. Mithrakrishan R. Mithrakrishanan for petitioner.

A. Muthukrishan with *K. Sabaratnam* for respondent.

Cur. adv. vult.

September 7, 2005.

IMAM, J.

This is an application by the Petitioner for a revision and or Restitutio in Intergrum to set aside the Judgment, Decree Nisi, Decree Absolute entered in DC. Mount Lavinia in Case No. 160/93 Divorce dissolving the marriage of the petitioner to Anthonipillai Paulis null and void, for a declaration that the petitioner is the lawful wife of the said Anthonipillai Paulis who died on 16. 12. 2002, for a declaration that the petitioner is entitled to obtain the widow's pension of her deceased husband Anthonipillai Paulis, and for an order on the 2nd and 3rd Respondents to pay the pension of Anthonipillai Paulis who died on 16. 12. 2002 to the Petitioner, *inter alia* other reliefs sought for in the Petition.

On 12. 07. 2004 Counsel for the petitioner brought to the notice of Court that the statement of objections of the 1st Respondent were not accompanied by an affidavit as stipulated by the Court of Appeal (Appellate Procedure) Rules, which resulted in Counsel for the 1st Respondent seeking permission from Court to file an affidavit, which application was refused by this Court.

The facts of this case as set out in the Petition are briefly as follows : The Petitioner is the widow of Anthonipillai Paulis who died on 16. 12. 2002 while serving as Assistant Director of Education (English) at Thunukkai in the Mullaitivu District (X7a). The Petitioner married the aforesaid Anthonipillai Paulis on 20. 02. 84 (X2a), with the Birth Certificate of the petitioner being marked as (X1). After marriage, the Petitioner was living with her husband at her ancestral and dowry house at No. 131C,

Beach Road Jaffna. At the time of their marriage, the Petitioner's husband was employed as a Teacher at Pundulu Oya, and he was subsequently transferred to other schools. On or about 1990 the Petitioner having discovered that her husband had started an illicit affair with the 1st Respondent, resulted in-constant misunderstanding between the Petitioner and her husband. Nevertheless the Petitioner continued to live with her husband, and the couple did not produce any children. About October 1995 due to the problems in Jaffna the Petitioner and her husband were displaced from their house at 131C Beach Road, Jaffna with a fax copy of a letter given by the Grama Sevaka corroborating this situation (X3), and a English translation being marked as (X3a). The Petitioner went to live with her mother at Nelliyaddy, although her husband never joined her as promised. The Petitioner after about eight months came to Colombo on or about 23. 06. 1996 and was residing at SSK Lodge at 42 A/1, Sagara Lane, Bambalapitiya for about two years with a true copy of the declaration made to the police being marked as X4. From about 24. 06. 1998 the Petitioner was living at 12, Fernando Road, Colombo 06 until February 2000, a true copy of the Declaration made to the Police dated 24. 06. 1998 being marked as X5. Since then the Petitioner is living at No. 10/1, Fernando Road, Colombo 06 as set out in (X6).

The Petitioner's position is that although she made several attempts to live with her husband who was employed in the Education Department at Thunukkai, he evaded living with her. The Petitioner states that her husband died while he was functioning as Assistant Director of Education (X7a) and his funeral took place in Jaffna which she could not attend. The Petitioner avers that after the death of her husband when she went to the Zonal Department of Education Thunukkai on or about 27. 12. 2002, and made an application to get her Widow's Pension, the Petitioner to her utter dismay was informed by the Officers there, that in her husband's file there is a marriage certificate stating that her husband was married to the 1st Respondent. In mid January 2003 the Petitioner was informed by the aforesaid officers that the 1st Respondent had claimed the Widow's pension which was due to the petitioner and that the 1st Respondent had

produced the Decree of Divorce of the petitioner's marriage to her husband issued by the District Court of Mount Lavinia. The Petitioner states that she obtained certified copies of all the relevant papers in DC Mount Lavinia Case No. 160/93, including the Judgment, Decree nisi and Decree Absolute marked as X8a, X8b, and X8C respectively.

The Petitioner contends that in the aforesaid Divorce case against her filed by her plaintiff husband, her address has been cited as "134 Eli House Road, Colombo 15," although she never resided at this address, and further does not know these premises. She avers that although the Colombo Fiscal reported to Court that summons was served on the Petitioner on 08. 11. 1993 that summons was never served on her. She further contends that after Ex-parte Trial was held on 10. 10. 94, although the Colombo fiscal reported that Decree Nisi was served on her on 23. 12. 94, it was never served on her. The Decree Nisi was made absolute on 07. 06. 95. The Petitioner contends that the particulars of the registered Voters lists in the years 1993 to 2001 of the addresses mentioned in the Pleadings as mentioned in the Documents marked X10a (1) to X10a (9) do not refer to the name of her husband the Plaintiff in the Divorce Case, and the voters list marked X11a(1) to X11a(9) do not contain her name, and thus the addresses of both the plaintiff (her husband) and herself are false. The Petitioner submits that her husband had sought to obtain the divorce by abuse and misuse of legal process and or by fraud and or by producing false evidence. She further states that grave injustice has been caused to her, and she has been deprived of her widow's pension. She contends that the final decree entered in the Divorce Case be declared null and void.

As the objections of the 1st respondent are not accompanied by an affidavit, and no subsequent affidavit was filed, Rule 3 (5) of the Court of Appeal (Appellate Procedure Rules) 1990 has been contravened, and thus the objection cannot be accepted, as the aforesaid rule is mandatory. Nevertheless the position of the 1st respondent is that the remedy of restitutio in integrum is an extra ordinary remedy and should only be

granted in exceptional circumstances and that the District Court having original jurisdiction the parties must go before the District Court. The position of the 1st respondent is that only a party to a contract or to legal proceedings can seek this relief. The view of the 1st Respondent is that the issue of summons is a matter between Court and the officer concerned, and when an alternative remedy is provided in law, the remedy has to be exhausted before resorting to Restitutio in integrum. The contention of the 1st Respondent is that she got married to Anthonipillai Paulis on 04. 07. 1998, and is thus the lawful wife.

As the 1st Respondent did not file any affidavit with the objections as mentioned earlier the Petitioner's averments stand uncontradicted. Counsel for the 1st Respondent accepted this in his oral submissions; however he wished to make written submissions on a point of law. Although the position of the 1st Respondent is that the Petitioner should have gone to the District Court as it has original jurisdiction and where a due inquiry would be held. However there is no merit in this submission, as the Plaintiff (Petitioner's husband) is now dead and she obviously cannot go to the District Court. The facts of this case are almost identical to *Kusumawathie vs Wijesinghe*[1] . That case too dealt with the right to pension. In that case the wife filed papers in the District Court to set aside the ex-parte Judgment and Decree after the death of the plaintiff when she became aware that the Decree for Divorce was obtained fraudulently. The District Court held that it has no jurisdiction as the plaintiff was dead. The Court of Appeal held that in a situation where one of the parties to the divorce action was dead, and if it is shown by the surviving spouse that divorce was obtained fraudulently without service of summons and by abuse and misuse of legal process the Court of Appeal has the power to grant Restitutio in integrum as well as act in revision and set aside the Divorce.

In this case although the Colombo Fiscal reported that summons had been served on the petitioner, on examination of documents marked X10a(1) to X10a(9) and X11a(1) to X 11a(9), it is proved beyond doubt that the addresses of the Plaintiff (husband) and Defendants (Petitioner) are not those contained in the caption of the plaint nor in the Decree

Nisi. Hence the Colombo Fiscal could not have served summons nor a copy of the Decree Nisi on the Petitioner. Thus the Colombo Fiscal's reports seem to have been produced by a misuse of the legal process.

In *Sirinivasa Thero vs Sudessi Thero* [2] at 31 it was held that Article 138(1) of the Constitution has vested in the Court of Appeal sole and exclusive jurisdiction to grant relief by way of Restitutio in integrum. The Petitioner has also pointed out exceptional circumstances to revise the order of the learned District Judge of Mount Lavinia entered in District Court Mount Lavinia Case No. 160/93 Divorce dissolving the marriage of the Petitioner to Anthonipillai Paulis which order this Court declared null and void. The Petitioner has thus proved that she is the lawful wife of the aforesaid Anthonipillai who died on 16. 12. 2002.

For the aforesaid reasons we grant relief to the petitioner as prayed for in the prayer to the petition, and this Court directs the 2nd and 3rd Respondents to pay the widow's pension to the Petitioner being the lawful wife of Anthonipillai Paulis who died on 16. 12. 2002. We further order the 1st Respondent to pay the Petitioner Rs. 5000/- costs.

SRISKANDARAJAH, J. - I agree.

Application Allowed.