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October 12th 2011

DR. SHIRANI A. BANDARANAYAKE, CJ.

This is an appeal from the judgment of the Court of Appeal dated 13.07.2007. By that judgment the Court of Appeal had dismissed the appeal of the Accused-Appellant-Appellant (hereinafter referred to as the appellant) and affirmed the judgment of the High Court of Ampara dated 07.07.2004 by which the appellant was convicted of the charge of murder imposing the death sentence.

The appellant preferred an application before this Court for special leave to appeal on which such leave was granted. At the stage of hearing it was agreed that the consideration of the second question on which Special Leave to Appeal was granted, could conclude this appeal and accordingly both parties were so heard on the following question.

Did the Court of Appeal misdirect itself by failing to evaluate the possibility of a sudden fight that spontaneously occurred between the parties?

The facts of this appeal, as submitted by the appellant, *albeit* brief, are as follows:-

The appellant was charged with the murder of one Wilson Anasley Peters at Ampara on or about 25.09.1999 and causing hurt to one Bony Ignatius Peters in the course of that transaction. The indictment was originally preferred against the appellant and his brother, but was amended later consequent to the death of the appellant's brother. At the trial, the prosecution had led the evidence of 8 witnesses including the depositions of Bony Ignatius Peters. The appellant had given evidence on oath and had called 3

witnesses on his behalf. The High Court, whilst convicting him for the charge of murder, had acquitted him of the second count of causing hurt and the Death Sentence was imposed on him. The appellant had preferred an appeal to the Court of Appeal and by its judgment dated 13.07.2007, the Court of Appeal had affirmed the judgment of the High Court dismissing the appeal preferred by the appellant.

It is not disputed that the appellant was convicted on a count of murder before the High Court of Ampara. Section 294 of the Penal Code refers to the offence of murder and the definition of murder is given as follows:-

> 294."Except in the cases hereinafter excepted, culpable homicide is murder-
>
> ***Firstly*** – if the act by which the death is caused is done with the intention of causing death; or
>
> ***Secondly*** – if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or
>
> ***Thirdly*** – if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> ***Fourthly*** – if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

The said offence of murder in terms of Section 294 of the Penal Code is reduced to culpable homicide not amounting to murder under Section 293 of the Penal Code, if any of the five exceptions to Section 294 could be shown to apply. The exceptions are as follows:-

1. *grave and sudden provocation;*
2. *exceeding in good faith the right of private defence;*
3. *bona fide overstepping of the limits of his authority by a public servant;*
4. *the plea of sudden fight and*
5. *the case of a mother who caused the death of her child under the age of twelve months when the balance of her mind is disturbed by reason of her not having fully recovered from the effect of giving birth to a child or by reason of the effect of lactation consequent to the birth of the child.*

Learned Counsel for the appellant relied on the Exception 4 to Section 294 and submitted that the Court of Appeal had not evaluated the said possibility of a sudden fight. Learned Counsel submitted that the evidence before the High Court clearly established that the incident which resulted in the deceased being injured, fell into Exception 4 to Section 294 of the Penal Code and throughout the case that it was the position taken by the appellant.

The Exception 4 to Section 294 of the Penal Code reads as follows:-

"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion

upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

A careful consideration of the said exception indicates that the basis for the mitigation is purely depended on the fact that the murder had taken place in a sudden fight, which had occurred in the heat of passion upon a sudden quarrel. An important ingredient which is necessary in such instance would be that there was no malice or vindictiveness.

The necessary requisites that should be satisfied by a person who intends to come within the Exception 4 were clearly discussed with reference to several decided cases (*Surinder Kumar v Union Territory Chandigarh* [1], *Kikar Singh v State of Rajasthan* [2] by ***Ratanlal and Dhirajlal,*** (Law of Crimes, 24th Edition, 1998, page 1339) on the basis of Section 300 of the Indian Penal Code, which section and the Exceptions are identical to section 294 of our Penal Code. Accordingly in terms of the said section of the Indian Penal Code, the following requisites must be satisfied:

1. it was a sudden fight;
2. there was no premeditation;
3. the act was committed in a heat of passion; and
4. the assailant had not taken any undue advantage or acted in a cruel manner.

However as clearly held in *Bhagwan Munjaji Pawade vs State of Maharashtra*[3] and *State of Himachal Pradesh vs. Wazir Chend and Others*[4], all the above conditions must exist in order to invoke this exception.

In order to ascertain the possibility of a sudden fight, it would therefore be necessary to consider the events that had taken place on the day in question.

The prosecution in this regard had referred to three (3) incidents that had occurred between 10.30 pm and 11.45 pm on night in question.

The first incident had taken place at around 10.15 pm inside the deceased's house.

That morning there had been an almsgiving at the residence of the deceased, in memory of his late father. The villagers who were unable to attend the said almsgiving during the day time had been invited for dinner that night. The appellant, commonly known as "Choota", had stated that the deceased himself had invited him to join with him for dinner. At that time one "Sudu" had been present at the deceased's home with whom the appellant had an issue and the appellant had tried to have an argument with the said Sudu. The sister of the deceased had referred to this incident in her evidence (page 43 of the brief).

"උ: පළමුවෙන්ම මල්ලියි සුගතුයි ආවා. ඒත් එක්කම ලියනගේ චුටා ආවා. ඒ ඇවිත් තමයි සුගත් එක්ක චුටා ෂිවා උඹත් එක්ක කථාවක් කථාකර ගන්න තියෙනවා කියා.

ප්‍ර: ඊට පසුව සුද්දා සහ චුටා රණ්ඩු වුනා?

උ: ඔව්.

ප්‍ර: ගහ ගත්තාද බැණ ගත්තාද?

උ: ගහගන්න ගියා. මල්ලි එයට ඉඩ දුන්නේ නෑ. චජෑටාව මගහැර යන්න ගියා."

The witnesses of the prosecution had referred to the said incident where the appellant had hit a glass on a teapoy which had resulted in that being broken injuring the appellant's hand.

At that time the deceased had gone inside the house to bring a piece of cloth to bandage the wound. Thereafter the appellant had poured blood in to the dishes where food was served on the table stating that he will not allow anyone to consume the food. Witness Fareeda had clearly stated this position in her evidence.

"ප්‍ර: ඊට පසුව චුටා මොකද ෂාග්?

උ: අපි ගේ ඇතුලට ගියා. එහි දානය උයා තිබුනා. චුටා ගොස් උඹලාට දානය කන්න ඉඩ තියන්නේ නැහැ කියලා එහි තිබුන ලේ වක්කලා දානයට."

උ: ඔව්.

ප්‍ර: ගහ ගත්තාද බැණ ගත්තාද?

උ: ගහගන්න ගියා. මල්ලි එයට ඉඩ දුන්නේ නෑ. චජෑටාව මගහැර යන්න ගියා."

The observations of Chief Inspector Wegapitiya, who had visited the house after the incident, clearly corroborates Fareeda's version.

"ප්‍ර: මරණකරුගේ නිවස නිරීක්ෂණයට ලක් කළාද?

උ: ඔව්.

ප්‍ර: ඒ නිරීක්ෂණ සටහන් වලදි දැනගන්නට ලැබුණාද විශේෂ දේවල්?

උ: මරණකරුගේ නිවසේ සාලේ ටීපෝවක් මත ලේ වැනි පැල්ලම් තිබුණා.

ප්‍ර ලේ පමණද තමා දැක්කේ ඒවා

උ: එපමණයි.

ප්‍ර: විශේෂ දෙයකට දැක්කේ ඒවා

උ: ඔව්.

ප්‍ර: ලේ වැනි පැල්ලම් එතෙන්ට ආවේ කොහොමද ෂියා පරීක්ෂණයේදී අනාවරණය කර ගත්තාද?

උ: එහෙමයි.

ප්‍ර: කොහොමද ඒ පැල්ලම් ආවේ ෂියා දැනගත්තාද?

උ: 24 වෙනි දින රාත්‍රී 10.30 ට පමණ 02 වෙනි සැකකරු නිශාන්ත බණ්ඩාර එම ස්ථානයට පැමිණ අරක්කු ඉල්ලා එය නොහන් නිසා වීදුරුවක් ටීපෝ එකේ ගහලා කැඩුන නිසා 02 විත්තිකරුගේ අත කැපුනා කියා තමයි දැනගන්න ලැබුණේ.

After the said incident the appellant had walked into the compound, had dashed the chair on the ground and had assaulted the said Sudu. At that moment, the deceased had hit on the back of the appellant, once. The appellant was then taken away by one Samantha, who is the brother of the appellant.

The second incident had occurred a few minutes thereafter. Champa Kumari and Bridget Florida, who were witness in this case, had seen a person squatting in the adjoining land. The deceased had spoken to that person and had identified him to be the appellant who had been armed with a club. When questioned by the deceased as to the reason for hiding holding a club, the appellant had said that he had just brought the club and had no quarrels with the family of the deceased. Thereafter the appellant had invited the deceased to visit his house.

The 3rd incident had taken place in front of the house of the appellant, According to the learned Senior State Counsel for the respondent, the deceased with some of his family members had walked upto the gate of the appellant's house and the elder brother of the appellant had shouted at them stating that they were ungrateful people. The appellant had

then dealt a blow on the head of the deceased with the club, which resulted in the death of the deceased.

In the light of the aforementioned three incidents, it is necessary to examine as to whether there was a sudden fight as contended by the appellant. As stated earlier in terms of Exception 4 to Section 294 of the Penal Code, all the pre-requisites referred to in the said Exception have to satisfied in order to obtain the benefits of the said Exception.

Exception 4 to Section 300 of the Indian Penal Code, which deals with the offence of murder is identical to Exception 4 to Section 294 of our Penal Code. The said Exception 4 is as follows:

> *"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."*

The said Exception 4 to Section 300 of the Indian Penal Code was considered extensively by the Indian Supreme Court in *Bhagwan Munjaji Pawade v. State of Mahrashtra (supra)* where the learned counsel for the appellant had contended that a quarrel had erupted suddenly and that the injuries were inflicted by the appellant in the heat of passion without premeditation during a sudden fight and as such the appellant was entitled to the benefit of Exception 4 to Section 300 of the Indian Penal Code.

In that case accused 1, 2 and 5 were the sons of accused 4. Accused 3 was the wife of one Munjaji. The deceased Devidas had three (3) brothers and Baijabai was their mother.

All of them resided in the same village and lived quite close by to each other. According to the prosecution, there had been long-standing dispute between the accused on the one hand and Baijabai and her sons on the other hand, with regard to the open land in front of their houses.

On the day of the incident after Baijabai returned from the field, the 3rd accused had shouted and quarreled with her in which sharp words were exchanged between the two women. The 2nd accused had told Baijabai to hold her tongue. At that time the 2nd and 4th accused were carrying sticks, whilst the appellant was armed with an axe. The deceased had just returned home and he had questioned the 2nd accused as to why he was quarrelling with his mother. Suddenly the appellant had given three blows to the deceased; two with the blunt side and one with the sharp side of the weapon on the head. 2nd and 4th accused had used their sticks against the deceased.

Due to the blows dealt with by the appellant, Devidas (the deceased) had passed away on the spot.

Considering the circumstances of this case and the submissions made to come within Exception 4 to Section 300 of the Indian Penal Code, Sarkaria, J held that,

> "It is true that some of the conditions for the applicability of Exception 4 to Section 300 exist here, but not all. The quarrel had broken out suddenly, but there was no sudden fight between the deceased and the appellant. 'Fight' postulates a bilateral transaction in which blows are exchanged. The deceased was unarmed. He did not cause any injury to the appellant or his companions. Furthermore, no less than three fatal injuries were

inflicted by the appellant with an axe, which is a formidable weapon on the unarmed victim. Appellant is therefore, not entitled to the benefit of Exception 4 ...."

In *Pandurang Narayana Jawalekar v. State of Maharastra* [5] the appellant had given a blow on the head of the deceased old man who had been advising him not to fight. The injury that was caused to the brain from one end to the other, resulted in fracture. The evidence led, disclosed that the accused must have struck the blow on the head of the deceased with an iron bar with great force. The Indian Supreme Court had held that, although there was a sudden quarrel and that the fight was not premeditated to cause death, that Exception 4 to Section 300 of the Indian Penal Code would not apply.

It is therefore quite clear that Exception 4 does not apply simply because there had been a sudden quarrel. As Exception 4 to Section 294 of our Penal code clearly stipulates, the relevant incident should have been committed,

". . . . without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner."

Even if there had been a sudden quarrel, if the assailant had acted in a cruel or in an unusual manner, such an act would not come within Exception 4. In *Pandurang Narayan Jawalekar (Supra)*, the Supreme Court, whilst stating that there was a sudden quarrel and that the fight was not premeditated to cause death, it was held that it would be necessary to show that the injury caused is not a cruel one. Accordingly, in order to come within Exception 4 of Section

294 of our Penal Code, it is necessary to satisfy the specific requisites referred to in Section 294 of the Penal Code, viz;

1. it was a sudden fight;
2. there was no premeditation;
3. the act was committed in a heat of passion; and
4. the assailant had not taken any undue advantage or acted in a cruel manner.

As clearly stated in *Jumman and Others v State of Panjab*[6] and *Amrithalinga Nadar v State of Tamil Nadu* [7] the question of applicability of Exception 4 would be decided only after examining the facts of the case and thereafter if it is found that there has been a sudden fight.

In the present Appeal learned Counsel for the appellant strenuously contended that there had been a sudden fight in which the fatal blow was directed at the deceased. The three incidents explained at the outset clearly show that there had been a lapse of time between the first incident and the third. In the first incident the appellant had made several efforts to get the deceased to start up a fight. His actions were substantiated by direct and circumstantial evidence of Bonny Peters, Champa Kumari and Fareeda. Considering the said evidence, it is quite clear that at the time the appellant had started a fight with one 'Sudu' and later got himself injured by breaking a glass, the deceased had bandaged the injury of the accused. The third incident thereafter had occurred well after the first incident, at a time where the deceased was unarmed. In several Indian Cases (*Ahmad Sher and Others v Emperor* [8], *Gajanand and Others v State of Uttar Pradesh* [9], *Dharman v State of Punjab* [10], it had been clearly held that

when the accused was unarmed and did not cause any injury to the appellant, the appellant following a sudden quarrel had inflicted fatal blows to the deceased, that the Exception 4 to Section 300 of the Indian Penal Code would not apply.

A sudden fight cannot be premeditated as the word 'sudden' clearly means that there cannot be any such pre-arrangements. It should also be noted that the lapse of time between the initial argument and the final fight is material for an accused to come within Exception 4, since the lapse of time may grant the opportunity for an accused to premeditate and make arguments for a fight. Such a fight is not spontaneous and therefore cannot be regarded as one that could be described as sudden. If there is lapse of time between incidents prior to the final assault, it is quite clear that the heat of passion upon the quarrel would have subsided and the death on such an instance would be regarded as murder.

The Judicial Medical Officer, who performed the Post Mortem of the deceased had stated that the assault had been with a blunt weapon. The nature of the injury shows that extensive damage was caused to the brain which indicates that the appellant must have stuck the blow on the head of the deceased with the club with very great force. It was undisputed that the deceased was unarmed and had been at the place of the incident on the invitation of the appellant. This also indicates that the appellant had acted in a cruel manner.

Considering all the aforesaid it is quite clear that the appellant cannot come within Exception 4 to Section 294 of our Penal Code. Accordingly the question on which Special Leave to appeal was granted is answered as follows:

"The Court of Appeal has not misdirected itself in evaluating the possibility of a sudden fight that spontaneous occurred between the parties."

The judgment of the Court of Appeal dated 13.07.2007 is affirmed. This appeal is accordingly dismissed.

I make no order as to costs.

AMARATUNGA, J. - I agree.

IMAM, J. - I agree.

appeal dismissed.

S.R. CHETTIAR AND OTHERS V. S.N. CHETTIAR

SUPREME COURT,
J. A. N. DE SILVA , C.J.,
DR. SHIRANI A. BANDARANAYAKE J.,
AMARATUNGA , J.,
MARSOOF , J. AND
RATNAYAKE ,J.
S.C (APPEAL) NO. 101 A/2009
S.C.H.C.(C.A) LA NO. 174/2008
H.C. APPEAL I WP/HCCA/COL NO. 83/2008 (L.A.)
D.C. COLOMBO NO. 428/T
MARCH 3RD , 2010

Civil Procedure Code – Section754(1) – Mode of preferring an appeal – Section 754(5) – Interpretation of "judgment" and "order" for the purposes of the chapter LVIII, Section 5 of the Civil Procedure Code.

When shall an order have the effect of a judgment and decree within the meaning of Section 754(5) of the Civil Procedure Code.

This was an appeal from an order of the Provincial High Court of Civil Appeal of the Western Province. The High Court by its order, overruled the preliminary objection raised by the 2nd to 4th defendant s- respondents – appellants (appellants) on the basis that the plaintiff – petitioner – respondent's (plaintiff) leave to appeal application filed in the High Court is misconceived and that the respondent was only entitled to a final appeal.

The appellant preferred an application to the Supreme Court against the said order and the Supreme Court granted leave to appeal and it relates to the rejection of the said preliminary objection as to whether the order dated 14.5.2008 of the District Court of Colombo was a final order in terms of Section 754 of the Civil Procedure Code.

As the appeal related to a matter in respect of which there were two conflicting decisions of the Supreme Court given by numerically equal Benches of the Supreme Court. (Siriwardena V. Air Ceylon Ltd., (1984) 1 SLR 286, and Ranjith V. Kusumawathi (1998) 3 SLR 232, the matter was referred to a Bench of five Judges.)

Held :

(1) A final judgment or order should be interpreted for the purpose of Chapter LVIII of the Civil Procedure Code not according to the meaning given in Section 5 of the Civil Procedure Code, but that of the definition given in Section 754 (5) of the Civil Procedure Code.

(2) In terms of Section 754(5) of the Civil Procedure Code a judgment would mean any judgment of order having the effect of a final judgment made by any Civil Court and an order would mean the final expression of any decision in any Civil action, proceeding or matter which is not a judgment.

(3) The order made by the Additional District Judge was in terms of Section 46(2) of the Civil Procedure Code. The rights of the parties were not considered by the District Court. In such circumstances it would not be probable to state that the order made by the District Court had finally settled the litigation between the applicants and the plaintiff.

Per Dr. Shirani A. Bandaranayak, C.J., ---

> "the watershed in the long line of decisions which considered the test to determine a ' final judgment or order or an ' order' in my view was the decision of Lord Denning, MR., in Salter Rex and Co. V.Ghosh (1971 2 AER 865) . After considering the decision in Bozon, Hunt V. Allied Bakeries Ltd. (1956) 3 AER 513, and Salaman V. Warner, Lord Denning MR., had held that in determining whether an application is final or interlocutory, regard must be had to the nature of the application and not to the nature of the order which the court eventually makes and since an application for a new trial if granted would clearly be interlocutory and where it is refused it is still interlocutory. "

(4) In terms of Section 754(5) of the Civil Procedure Code, a decision of an Original Civil Court could only take the form of a judgment or an order having the effect of a final judgment or of the form of an interlocutory order.

(5) The order made by the District Judge on 14.5.2008 was in terms of Section 46(2) the Civil Procedure Code and by that order the Court had not considered the rights of the parties. In such circum-

stances, it could not be probable to state that the District Judge by that order had finally settled the litigation between the appellant and the plaintiff.

(6) The order dated 14.5.2008 is not a final order having the effect of a judgment within the meaning of sub-sections 754(1) and 754 (5) of the Civil Procedure Code. It is only an interlocutory order.

Cases referred to:

1. *Siriwardena v. Air Ceylon Ltd.* [(1984) 1 Sri L.R. 286]
2. *Ranjit v. Kusumawathi* [(1988) 3 Sri L.R. 2321]
3. *Viravan Chetti v. Ukku Banda* [(1924) 27 N.L.R. 65]
4. *Salamon v.Warner* [(1891) 1 Q.B. 734]
5. *Bozson v. Altrincham Urban District Council* [(1903) 1 K.B.547]
6. *Isaacs & Sons v. Salbetein* [(1916) 2 K.B.]
7. *Abdul Rahman and others v. Cassim & sons* (A.I.R. 1933 P.C. 58, 1933 P.C. 58)
8. *Settlement Officer v. Vander Poorten* [(1942) 43 N.L.R. 436]
9. *Fernando v. Chittambaran Chettiar* [(1949) 49 N.L.R. 217]
10. *Krishna Prashad Singh v. Moti Chand* [(1913) 40 Cal. 635]
11. *Usoof v. The National Bank of India Ltd.* [(1958) 60 N.L.R. 381]
12. *Subramaniam v. Soysa* [(1923) 25 N.L.R. 344]
13. *Onslow v. Commissioners of Inland Revenue* [(1890) 25 Q.B.D. 465]
14. *Exparte Moore* [(1885) 14 Q.B.D. 627]
15. *Palaniappa Chetty v. Mercantile Bank of India et.al.*[(1942) 43 N.L.R. 352]
16. *Fernando v. Chittambaram Chettiar* [(1948) 49 N.L.R. 217]
17. *Usoof v. Nadarajah Chettiar* [(1957) 58 N.L.R. 436]
18. *Arlis Appuhamy et.al. v. simon* [(1947) 48 N.L.R. 298]
19. *Marikar v. Dharmapala Unanse* [(1934) 36 N.L.R. 201]
20. *Rasheed Ali v. Mohamed Ali and others* [(1981) 1 Sri L.R.262]
21. *White v. Brunton* [(1984) 2 All E.R. 606]

22. *Shubroo v. Tufnell* [(1882) 9 Q.B.D. 621]
23. *Salter Rex and Co. v. Ghosh* [(1971) 2 All E.R. 865]
24. *Hunt v. Allied Bakeries Ltd.*[(1956) 3 All E.r. 513]
25. *Standard Discount co. v. La Grange* [(1877) 3 CPD 67]
26. *Anglo Auto Finance (Commercial) Ltd. v. Robert Dick (unreported)*
27. *Standerd Discount Co. La Grange* - 1877 3 CPD 67

APPEAL from the Provincial High Court of Civil Appeal of Western Province (Holden in Colombo)

R*omesh de Silva, PC,* with *Sevendran, Sugath Caldera, K.Pirabakaran* and *Eraj de Silva,* for 2nd, 3rd and 4th defendants – respondents – appellants in 101 A/2009.

P. Nagendran, PC, with *A.Muthukrishnan* and *Pathmanathan* for 1st defendant-respondent in 101 a/2009 and 1st defendant – respondent – appellant in 101 B/2009.

K. Kang – Iswaran, PC, with *Avindra Rodrigo, Lakshman Jayakumar* and *H. Jayamal* for plaintiff-petitioner-respondent.

Cur.adv.vult.

June 10th 2010

DR. SHIRANI A. BANDARANAYAKE, J.

This is an appeal from the order of the Provincial High Court of Civil Appeal of the Western Province (Holden in Colombo) (hereinafter referred to as the High Court) dated 21.11.2008. By that order learned Judges of the High Court overruled the preliminary objection raised by the 2nd to 4th defendents-respondents-appellants (hereinafter referred to as the appellants) on the basis that the plaintiff-petitioner-respondent's (hereinafter referred to as the plaintiff) leave to appeal application filed in the High Court was misconceived and that the respondent was only entitled to file a final

appeal and fixed the case for support on the question of whether leave should be granted. The appellants preferred an application before this Court for which leave to appeal was granted and this appeal relates to the rejection of the aforesaid preliminary objection as to whether the order dated 14.05.2008 of the District Court of Colombo was a final order in terms of section 754 of the Civil Procedure Code.

At the time leave to appeal was granted, this Court had noted that the appeal relates to a matter in respect of which there are two decisions of this Court given by numerically equal Benches of this Court, viz., *Siriwardena v Air Ceylon Ltd.* [1] and *Ranjit v Kusumawathi* [2].

Accordingly at that stage both learned President's Counsel had invited this Court that in order to resolve the apparent conflict between the aforesaid two judgments, that this appeal be referred to a Bench of five (5) Judges. That Bench had also considered that this appeal to be a fit matter to be heard by a Bench numerically superior to the Benches, which had pronounced two lines of authority referred to in the aforementioned decisions. The Registrar was accordingly directed to submit the said decisions to His Lordship the Chief Justice for an appropriate order.

His Lordship the Chief Justice had nominated a Bench of five Judges to hear this matter and the appeal was thereafter fixed for hearing.

The 1st defendant-respondent-appellant (hereinafter referred to as the 1st respondent) had also filed a leave to appeal application under Number S.C. H.C. (C.A.) L.A. 175/2008 against the order of the learned High Court Judge

dated 21.11.2008, for which leave to appeal was granted by this Court along with the application under Number S.C. H.C. (C.A.) L.A. 174/2008, which is the present appeal.

At the time S.C. (Appeal) No. 101A/2009 was taken for hearing it was agreed that the decision in this appeal would be binding on S.C. (Appeal) No. 101^{B}/2009.

The facts of Appeal No. 101^{A}/2009, as submitted by the appellants, albeit brief, are as follows:

The plaintiff, by Plaint dated 11.12.2007, filed District Court case No. 428/T in the District Court of Colombo having prayed for the reliefs against the Trustees of the Hindu Temple known "Sri Kathirvelayuthan Swami Kovil" in terms of section 101 of the Trusts Ordinance.

On 07.02.2008, the 2nd and 3rd appellants, by way of a motion, brought to the attention of Court that the plaintiff's action is barred by positive rule of law and that the Plaint ought to be rejected and the plaintiff's action be dismissed *in limine*, in view of section 46(2) of the Civil Procedure Code. By motion dated 11.02.2008 the 1st respondent also brought to the notice of Court that plaintiff's action is barred by positive rule of law and the 4th appellant also associated himself with the said objections.

By his order dated 14.05.2008, learned Additional District Judge upheld the preliminary objection and dismissed the action of the plaintiff.

On 02.06.2008 the plaintiff having titled 'Petition of Appeal', filed a leave to appeal application in terms of section 757 of the Civil Procedure Code. On 30.05.2008, the

plaintiff had also filed Notice of Appeal in the Provincial High Court (A).

On 19.09.2008, when that matter was taken up for support, learned Counsel for the plaintiff admitted that the said plaintiff had taken steps to file the Final Appeal against the order dated 14.05.2008. At the same time both learned Counsel for the appellants raised a preliminary objection that the plaintiff is not entitled to maintain the leave to appeal application, as the order dated 14.05.2008 is an order having the effect of a Judgment and that the application of the plaintiff seeking leave to appeal in terms of section 757 of the Civil Procedure Code is misconceived in law.

Thereafter having heard the submissions of learned Counsel for the parties, on the question as to whether the order dated 14.05.2008 is a Final order or an Interlocutory Order, the Provincial High Court had delivered its order dated 21.11.2008 holding that the order dated 14.05.2008 was an interlocutory order and that in view of the test laid down by Sharvananda, J., (as he then was) in S*iriwardena v Air Ceylon Ltd. (supra)*, the order of the learned Additional District Judge was not an order having the effect of a Final order. Accordingly the application was fixed for support for 24.03.2009(Z).

The Provincial High Court of Civil Appeal, on its order dated 24.03.2009 had held that,

1. the impugned order in the present case is not in a special proceedings;
2. it is an order made in terms of section 46 of the Civil Procedure Code;

3. the rights of the parties have not yet been considered and therefore the rights of the parties have not yet been determined;

4. learned Additional District Judge had rejected the Plaint under section 46(2) of the Civil Procedure Code;

5. under section 46(2) of the Civil Procedure Code, the plaintiff is not precluded from presenting a fresh Plaint in respect of the same cause of action; and

6. in view of the test laid down by Sharvananda, J., (as he then was) in *Siriwardena v Air Ceylon Ltd. (supra)* the order of the learned Additional District Judge is not an order having the effect of a final order.

Being aggrieved by the said order 21.11.2008 of the Provincial High Court, the appellants sought leave to appeal from the Supreme Court.

The main contention of the learned President's Counsel for the appellants was that the order of the learned Additional District Judge dated 14.05.2008 is an order having the effect of a Final Judgment in terms of sections 754(1) and 754(5) of the Civil Procedure Code and therefore since the plaintiff's action has been dismissed, he could only make a final appeal and not a leave to appeal application. In support of this contention it was submitted that there can only be one judgment in a case and the other orders made would therefore be incidental orders. It was also submitted that the phraseology used in section754(5) of the Civil Procedure Code stating that 'order having the effect of a Final Judgment' is only applicable in cases, where no judgments are given and that those are cases, which have been instituted under summary procedure. Accordingly the contention was that the term

'judgment' would mean judgments and decrees entered in terms of section 217 of the Civil Procedure Code and orders having the effect of a Final judgment in terms of sections 387 and 388 of the Civil Procedure Code. Accordingly it was contended that a final appeal is only possible against a judgment (decree) entered in terms of section 184 read with section 217 of the Civil Procedure Code and final orders in terms of sections 387 and 388 of the Civil Procedure Code. The contention put forward therefore by the learned President's Counsel for the appellants was that as there could only be one judgment in a case, the definition of the decision of the Judge could be based on the procedure of an action. Accordingly it was contended that if the procedure is regular, then the decision given could be a judgment and when the procedure followed is summary, such a decision should be regarded as an order of Court.

Chapter LVIII of the Civil Procedure Code deals with Appeals and Revisions and section 753 to section 760 are contained in this Chapter. Section 754 refers to the modes of preferring appeals and the relevant sub-sections of section 754 are 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 by 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.

(3) ....

(4) ....

(5) Notwithstanding anything to the contrary in this Ordinance, for the purposes 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."

Sections 754(1) and 754(2) of the Civil Procedure Code defines the effect of a judgment and an order pronounced by any original Court. Whilst section 754(1) refers to any person, who is dissatisfied with any judgment pronounced by any original Court, section 754(2) refers to a situation, where a person is dissatisfied with an order made by such an original Court. In the first instance such a person could prefer an appeal to the Court of Appeal against such a judgment, where if it is against an order, he could prefer an appeal to the Court of Appeal with the leave of the Court of Appeal first had and obtained. The difference enumerated in section 754 of the Civil Procedure Code thus is between a judgment and an order by the original Court.

In terms of section 754(5) of the Civil Procedure Code a judgment would mean any judgment or order having the effect of a 'final judgment' made by any Civil Court and order would mean the final expression of any decision in any civil action, proceeding or matter, which is not a judgment.

Although section 754(5) of the Civil Procedure Code had laid down the meaning of the judgment and order, it had not been easy to give a comprehensive definition of the term 'final judgment' (*Viravan Chetty v Ukka Banda* [3].

The question of the test that should be applied to decide as to whether an order has the effect of a final judgment was considered by the Supreme Court in *Siriwardena v Air Ceylon Ltd. (supra)* and *Ranjit v Kusumawathi and another (supra).*

In *Siriwardena v Air Ceylon Ltd. (supra)*, 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 decision and the question was whether the order of the District Judge dated 10.05.1982 amending the judgment and the decision dated 13.03.1980, is a 'judgment' within the meaning of sections 754(1) and 754(5) of the Civil Procedure Code or an 'order' within the meaning of section 754(2) and section 754(5) of the Civil Procedure Code. In his judgment Sharvananda, J. (as he then was) had referred to the decision in *Salaman v Warner*[4], *Bozson v Altrincham Urban District Council*[5], *Isaacs & Sons v Salbstein*[6], *Abdul Rahman and others v Cassim & Sons*[7], *Settlement Officer v Vander Poorten*[8], *Fernando v Chittambaram Chettiar*[9], *Krishna Prashad Singh v Moti Chand*[10], *Usoof v The National Bank of India Ltd.*[11], *Subramaniam v Soysa*[12], *Onslow v Commissioners of Inland Revenue*[13] and *Exparte Moore*[14].

After an examination of the aforementioned decisions, Sharvananda, J., (as he then was) had held that for an 'order' to have the effect of a final judgment and to qualify to be a 'judgment' under section 754(5) of the Civil Procedure Code,

"1. It must be an order finally disposing of the rights of the parties;

2. the order cannot be treated to be a final order if the suit or 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."

The meaning of "Judgment" for the purpose of appeal was also examined by Dheeraratne, J., in *Ranjit v Kusumawathi and others (supra).*

In that decision attention was paid to examine the test to determine a 'final judgment or order' or an 'order' within the meaning of section 754(5) of the Civil Procedure Code.

Justice Dheeraratne in *Ranjit v Kusumawathi (supra)* had examined several cases including those which were referred to by Sharvananda, J., (as he then was) in *Siriwardena v Air Ceylon Ltd. (supra)*, (*Subramanium Chetty v Soysa (supra)*, *Palaniappa Chetty v Mercantile Bank of India et.al*[15], *Settlement Officers v Vander Poorten (supra)*, *Fernando v*

Chittambaram Chettiar[16], *Usoof v Nadarajah Chettiar*[17], *Usoof v The National Bank of India Ltd. (supra)*, *Arlis Appuhamy et. al v Simon*[18], *Marikar v Dharmapala Unanse*[19], *Rasheed Ali v Mohamed Ali and others*[20] and *Siriwardena v Air Ceylon Ltd. (supra)*, and hadcome to the conclusion that the determination whether an order in a civil proceeding is a judgment or an order having the effect of a final judgment has not been an easy task for Courts.

An analysis of the English cases, further strengthens the point that the question of determining the status of a judgment or an order had not only been difficult, but many judges in different jurisdiction for centuries had been saddled with the complexity of the problem in differentiating a judgment from an order having the effect of a final judgment and an interlocutory order. For instance in *Salaman v Warner (supra)* the question before Court was to decide as to whether an order dismissing an action made upon the hearing of a point of law raised by the pleadings before the trial, is a final order.

Considering the test that should be adopted to decide a 'final judgment or order' or an 'order' in terms of section 754(5) of the Civil Procedure Code, Justice Dheeraratne in *Ranjit v Kusumawathi and others (supra)* had referred to the two tests, which was referred to as the 'Order approach' and the 'application approach' by Sir John Donaldson MR., in *White v Brunton* [21].

The order approach had been adopted in *Shubrook v Tufnell* [22] whereas the application approach was adopted in *Salaman v Warner (supra)*. Later in *Bozson v Altrincham*

Urban District Council (supra), the Court had considered the question as to whether an order made in an action was final or interlocutory and reverted to the order approach. In deciding so, Lord Alverstone, C.J., stated thus:

> "It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order: but if it does not, it is then, in my opinion, an interlocutory order."

The watershed in the long line of decisions, which considered the test to determine a 'final judgment or order' or an 'order', in my view, was the decision of Lord Denning, MR., in *Salter Rex and Co. v Ghosh* [23]. After considering the decisions in *Bozson (supra)*, *Hunt v Allied Bakeries Ltd.*[24] and *Salaman v Warner (supra)*, Lord Denning, MR., had held that in determining whether an application is final or interlocutory, regard must be had to the nature of the application and not to the nature of the order, which the Court eventually makes and since an application for a new trial if granted would clearly be interlocutory and where it is refused it is still interlocutory. Examining the question at issue, Lord Denning, MR, not only described the difficulties faced, but also pointed out the test to determine such issues. According to Lord Denning Mr.,

> "There is a note in the Supreme Court Practice 1970 under RSC Ord. 59, r 4, from which it appears that different tests have been stated from time to time as to what is final and what is interlocutory. In *Standard Discount Co. v La Grange* and *Salaman v Warner*[25], Lord

Esher MR said that the test was the nature of the application to the Court and the nature of the order which the Court eventually made. But in *Bozson v Altrincham Urban District Council* [26], the Court said that the test was the nature of the order as made. Lord Alvenstone C.J. said that the test is: 'Does the judgment or order, as made, finally dispose of the rights of the parties?' Lord Alverstone C.J. was right in logic but Lord Esher MR was right in experience. Lord Esher MR's test has always been applied in practice. For instance, an appeal from a judgment under RSC Ord. 14 (even apart from the new rule) has always been regarded as interlocutory and notice of appeal had to be lodged within 14 days. An appeal from an order striking out an action as being frivolous or vexatious, or as disclosing no reasonable cause of action, or dismissing it for want of prosecution – every such order is regarded as interlocutory: See *Hunt v Allied Bakeries Ltd*[24]*.,* so I would apply Lord Esher MR's test to an order refusing a new trial. **I look to the application for a new trial and not to the order made. If the application for a new trial were granted, it would clearly be interlocutory. So equally when it is refused, it is interlocutory.** It was so held in an unreported case, *Anglo-Auto Finance (Commercial) Ltd. v Robert Dick*[26], and we should follow it today.

This question of 'final' or 'interlocutory' is so uncertain, that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way" (emphasis added).