

GAMINI
Vs
CHANDRA AND OTHERS

COURT OF APPEAL
AMARATUNGA J.
CALA APP. 35/02,
D. C. MT. LAVANIA 12/92 (SUMMARY)
SEPTEMBER 02, 2003,
NOVEMBER 28, 2003.

Civil Procedure Code - Section 88 (2) - Cap. 53. Summary Procedure on Liquid Claims - Sections 703, 704 & 707 - Decree Nisi - made absolute - Is it a final order ? Order refusing to set aside Decree Absolute - Is it a final order ?

The Defendant failed to appear in Court to obtain leave to appear and defend. Decree Absolute was entered under Section 704 (1). The Defendant made an application to set aside the said Order which was dismissed. The Defendant sought leave to appeal from the said order.

HELD -

- (i) Once the decree is entered in an action brought under summary procedure on liquid claims, the action is finally disposed of. As far as the trial court is concerned, the action is at an end.
- (ii) Order refusing to set aside the decree is akin to an order under Section 88 (2).
Petitioner cannot come by way of Leave to Appeal. It is a final order.

APPLICATION for Leave to Appeal from an Order of the District Court of Mt. Lavana.

Cases referred to :

1. *Ranjith vs Kusumawathie* - 1998, 3 Sri LR 233
 2. *Air Lanka vs Siriwardena* - 1984, 1 Sri LR 286
- M. R. de Silva* for the Petitioner.

Rohan Sahabandu for the Respondent.

September 29, 2003

GAMINI AMARATUNGA, J

This is an application for leave to appeal. The respondent has raised a preliminary objection that this leave to appeal application is misconceived in law and that the order complained of was a final order against which the proper remedy is a final appeal.

The plaintiffs-respondents instituted action against the defendant under Chapter 53 of the Civil Procedure Code which sets out summary procedure on liquid claims, to recover a sum of Rs. 258,500 due to them on five cheques. After fiscal reported that summons have been served on the defendant, the latter failed to appear in Court to obtain leave to appear and defend. Accordingly, in terms of section 704(1) of Code, the Court entered decree in favour of the plaintiffs.

Once such a decree is entered it is final subject to the power the Court has, under section 707 of the Code, in special circumstances to set aside the decree and to grant leave to appear and defend. The defendant petitioner made an application to court to set aside the decree and after inquiry the learned Judge dismissed the application. The petitioner having filed a notice of appeal against that order has also filed this leave to appeal application.

The respondent's contention is that the said order was a final order against which a final appeal is the remedy and that the petitioner cannot come by way of leave to appeal.

Once the decree is entered in an action brought under summary procedure on liquid claims, the action is finally disposed of. As far as the trial Court is concerned, the action is at an end. The learned counsel for the petitioner in his written submissions has contended that if the defendants application under section 707 of the Code to set aside the decree was allowed, the action would have proceeded and accordingly, the order complained of, i. e. the order refusing to set aside the decree was an interlocutory decree. He has relied on the case of *Ranjith vs. Kusumawathie* ¹.

Sometimes, it is difficult to identify with certainty, whether an order is a final order or an interlocutory order. In such situations, the Courts have

adopted two approaches to decide whether a particular order is a final order or an interlocutory order. One test is the order approach - that is to see whether the order made by Court finally determines the matter in litigation. If it does, it is a final order and not an interlocutory order. This approach was adopted in *Air Lanka vs Siriwardana*⁽²⁾

The other approach is the application test - that is to consider the nature of the application. If the order made on such application (for whichever side) finally determines the matter such order is final. But if the order, given in one way, will finally dispose of the matter, but if given in the other way will allow the proceedings to continue, such order is not final but interlocutory. This approach was adopted in *Ranjith vs Kusumawathie*. (*Supra*). The learned Counsel for the petitioner has based his submissions on the application approach, favoured in *Ranjith vs Kusumawathie*. (*Supra*)

However, in this instance, it is clear that the decree entered by Court is the final step in the application made by way of summary procedure. The fact that the Court has the power to set it aside, and that the defendant-petitioner has made an unsuccessful application under section 707 to invoke the power of Court under that section cannot change the final nature of the decree and its confirmation by the Court's refusal to set it aside. The order complained of, i. e. the order refusing to set aside the decree is akin to an order contemplated under section 88 (2) of the Civil Procedure Code. Accordingly, I hold that the order complained of was a final order against which the remedy is a final appeal. The petitioner cannot come by way of leave to appeal. The preliminary objection is upheld and the application is dismissed with costs in a sum of Rs. 5,000.

Application dismissed Preliminary objection upheld.