CHANDRASENA
v
NANDAWATHIE AND ANOTHER

COURT OF APPEAL
DISSANAYAKE, J.
SOMAWANSA, J.
CA 139/98 (F)
D.C. KALUTARA 4619/P
MARCH 8, 2002,
JULY 26, 2002 AND
SEPTEMBER 11, 2002

Civil Procedure Code – S. 189, S. 754 (1), Judgment – Notice of Appeal rejected – Schedule of Shares filed – Errors in the Judgment alleged – Dismissal – Order or Judgment – Partition Law 21 of 1977 – S.48 (4).

The Judgment dated 8.11 1996 was delivered on 20.12.96. Notice of Appeal was rejected as being out of time. Notwithstanding the rejection, a Petition of Appeal was filed on 19.2.97. Schedule of shares was tendered on 29.4.97 and interlocutory Decree signed. The defendant-appellant by his Petition of 7.8.97 sought to find errors in the Judgment and also averred that the schedule of shares is not in keeping with the judgment. The trial Judge after Inquiry by his order of 17.2.98 dismissed the petition. The 5th defendant-appellant preferred an appeal. The plaintiff-respondent contended that the said Order is not a final order, therefore appeal does not lie.

Held :

(i) The Judgment was delivered on 20.12.96 and Interlocutory Decree was signed on 29.4.97, thereby deciding the rights of parties.

(ii) Rights of parties had been disposed finally before the order on the defendant-appellants petition was made on 17.2.98, the suit was not kept alive to determine the rights of parties, but kept alive only for the purpose of partitioning the corpus.

(iii) The 5th defendant-appellant whose notice of appeal was rejected is trying to do the same thing indirectly by attempting to show that the trial Judge has made errors in his judgment and thereby was attempting to get his shares accepted. The Petition was not to bring the decree in conformity with the Judgment but to correct the alleged errors in the Judgment. The order dated 17.2.1998 is not a Judgment or an order having the effect of a Final Order.

APPEAL from the District Court of Kalutara.

Cases referred to:

1. *Siriwardena* v *Air Lanka Ltd.*, 1984 3 Sri LR 286
2. *Ranjit* v *Kusumawathie and Others* – 1998 3 Sri LR 232 at 238
3. *Wijesundera* v *Herath Appuhamy and Others* 67 CLW 63
4. *Charletuma* v *Batur* – SC 81/98 SCM 8.9.88

Vijith Singh for 5th defendant-appellant

N.R.M. Daluwatte P.C., with *Gamini Silva* for plaintiff-respondent and 3rd defendant-respondent.

Cur adv vult

February 25, 2002

SOMAWANSA, J.

When this appeal was taken up for hearing the learned President's Counsel who appeared for the plaintiff–respondent and the 3rd defendant-respondent raised a preliminary objection to the effect that a direct appeal under Section 754(1) of the Civil Proceudre Code is not the proper procedure in the circumstances of this case.

The relevant facts of this case are; after a inter parties trial, the judgment of the learned District Judge dated 8.11.1996 was delivered on 20.12.96 and a notice of appeal was rejected as being out of time by one day. Notwithstanding the rejection of the notice of

appeal a petition of appeal was filed on 19.02.1997. It appears the learned District Judge in delivering his judgment on 20.12.96 did not give the schedule of shares of the parties who were entitled to the corpus but stated that once the schedule of shares is filed and if it is in conformity with the judgment, it would be treated as part of the judgment and interlocutory decree should be entered. Thereafter according to journal entry 103, on 24.4.97 schedule of shares had been tendered and according to journal entry 104, on 29.04.97 interlocutory decree was signed. As per journal entry 105 on 25.08.97 three copies of the interlocutory decree were tendered for singature as the original was not clear due to certain corrections effected by pen. These copies were examined and found to be in order and were signed by the learned District Judge. In the same journal entry and on the same day there is also a minute to the effect that a petition being tendered by the 5th defendant-appellant together with an affidavit. This bears the date stamp 07.08.1997. By this petition the 5th defendant-appelant not only sought to find errors in the judgment delivered in the instant case but also averred that the schedule of shares as given by the plaintiff-respondent is not in keeping with the judgment and proceeded to give his own schedule of shares. The learned District Judge after inquiry by his order dated 17.02.98 dismissed the said petition of the 5th defendant-appellant. It is from the said order that the 5th defendant - appellant has preferred this appeal.

It was contended by the counsel for the plaintiff-respondent and the 3rd defendant-respondent that the said order of the learned District Judge dated 17.02.98 does not have the effect of a final judgment and therefore direct appeal under section 754(1) of the Civil Procedure Code does not lie and the proper procedure would be to file an application for leave to appeal. The relevant section which deals with this question is section 754 (1) (2) and (5).

> 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.
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> (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.

(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."

The provisions contained in the said Sections were considered in the case of *Siriwardena* v *Air Lanka Ltd*.(1)

Where the appellant had filed an application for leave to appeal from an Order of the District Judge made under section 189 of the Civil Procedure Code directing the amendment of a decree and the question was whether such an order is one having the effect of a final judgment of a civil court for the purpose of determinig whether the correct procedure should have been a direct appeal and not an application for leave to appeal.

It was held, 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 on a final judgment, that is, a final order. Orders which are not judg-

ments 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 a live for the purpose of determining the rights and liabilities of the parties in the ordinary way.

(3) The finality of the order must be determined in relation to the suit.

(4) The mere fact that a cardinal point in the suit has been decided or even a vital and important issue determined in the case, is not enough to make an order a final one.

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

It could be seen that in the instant case where the 5th defendant-appellant tendered his petition and affidavit which bears the date stamp 07.08.97, Interlocutory decree had been signed by the learned District Judge and the rights of the parties decided and the action was not a live suit in respect of the shares of the co-owners. The judgment in the instant case was delivered on 20.12.1996 and the interlocutory decree was signed on 29.04.97 thereby deciding the rights of parties to the land sought to be partitioned and also fulfiling the requirements of the tests initiated in *Siriwadena* v *Air Lanka Ltd.* (*supra*). In that the rights of parties had been disposed finally before the order on the 5th defendant-appellant's petition was made on 17.02.98. and the suit was not kept alive to determine the rights of parties but kept a live only for the purpose of partitioning the *corpus*.

It would also be pertinent at this stage to examine the petition filed by the 5th defendant-appellant and the relief he is seeking. Paragraphs 7,8,9,10,12 and 13 deals with the judgment and in paragraph 10 he avers that the learned District Judge's judgment has the effect of misleading all the parties. In paragraph 14 he avers that as issue No. 5 raised by him has been answered in the affirmative, the schedule of shares tendered by the plaintiff-respondent is not in keeping with the judgment and should be rejected and accept the schedule of shares prepared according to devolution given by him in his statement of claim and to enter decree accordingly. In the circumstances he prays that his petition and affidavit be accepted that having examined the said petition and affidavit the schedule of shares tendered by him be accepted and the corpus partitioned according to the said schedule of shares tendered by the 5th defendant-appellant.

On an examination of this petition I am inclined to agree with the learned District Judge when he observed in his order that "the 5th defendant whose notice of appeal was rejected is trying to do the same thing indirectly by the petition namely attempting to show that the learned trial Judge had made errors in his judgment and thereby was attempting to get his claims to shares accepted" that this was not a petition under section 48(4) of the Partition Law, No. 21 of 1977 for the 5th defendant-appellant was present in Court and was represented by Attorney-at-Law and participated at the trial. It was also not a petition under section 189 of the Civil Procedure Code to bring the decree in conformity with the judgment by the correction of any arithmetical or clerical errors or any accidental slip or omission, for the petition expressly states that there is lacuna or errors in the judgment.

The petition appears to be an application to correct the alleged errors in the judgment mentioned by the 5th defendant-appellant.

At this stage it would be relevant to consider the observation of Dheeraratne, J. in *Ranjit* v *Kusumawathie and others* (2).

> "The order appealed from is an order made against the appellant at the first hurdle. Can one say that the order made on the application of the 4th defendant is one such that whichever way the order was given, it would have

finally determined the litigation? Far from that, even if the order was given in favour of the appellant, he has to face the second hurdle, namely the trial to vindicate his claim. In the words of Lord Esher in Salaman's case (*supra*) at 735:"

"The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given. will if it stands, finally dispose of the matter in dispute, I think for the purposes of these rules it is final. On the other hand, if their 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."

In the instant situation too there are two hurdles for the 5th defendant-appellant to clear. First to succeed in persuading the learned District Judge to examine his schedule of shares belatedly tendered. Secondly to justify that his schedule of shares are in accordance with the evidence led in the instant case as opposed to the schedule of shares filed by the plaintiff-respondent for which a further inquiry has to be held and the 5th defendant-appellant has failed at the first hurdle.

Counsel for the 5th defendant-appellant also cited the case of *Wijesundera* v *Herath Appuhamy and others*[3] in which the appeal raised the question of correctness of an order made by the learned District Judge refusing an application to amend in terms of Section 189 of the Civil Procedure Code the interlocutory decree entered in the partition action. The application was made on the ground that the decree was not in conformity with the judgment and that it has been entered by an error arising from an accidental slip or omission on the part of the learned District Judge who heard the trial. However as stated the petition of the 5th defendant-appellant was not to bring the decree in conformity with the judgment but to correct the alleged errors in the judgment.

It is also contended by the counsel for the 5th defendant-appellant that the preliminary objection taken on the question of right of direct appeal was raised by the counsel for the plaintiff-

respondent on an earlier occasion and this Court, after a hearing rejected the said objection and has directed the Registrar to prepare the briefs and fix the matter for hearing. Therefore the plaintiff-respondent is estopped from raising the same preliminary objection afresh. In support of this contention the 5th defendant-appellant has tendered with his written submissions a photo copy of an application to this Court to support an application in terms of section 755 (5) of the Civil Procedure Code. However I am unable to trace such an application in the docket and the minutes in the docket do not indicate that such an application was considered or any objection raised by the plaintiff-respondent challenging the right of appeal or any order made on such objection. However by minute dated 02.02.1999 this appeal has been accelarated and the learned District Judge has been directed to stay proceedings. On an examination of the docket and the minutes therein, I am unable to accept the position that the same preliminary objection was taken by the plaintiff-respondent in an earlier occasion.

It is also contended by the counsel for the 5th defendant-appellant that the learned District Judge in his judgment dated 8.11.1996 did not come to a conclusion in relation to the schedule of shares but stated that if the schedule of shares forwarded by the plaintiff-respondent was in conformity with the judgment it would be treated as part and parcel of the judgment thereafter. It is contended that final appeal lies against this part of the judgment which had been postponed to 17.02.1998 on which date the petition of the 5th defendant-appellant was refused. I am unable to agree with this line of argument for the reason presenting no difficulty or complication, that the order pronounced on 17.02.1998 was incidental to the judgment pronounced on 20.12.1996 and the rights of the parties to the action was finally and decisively disposed of by the judgment dated 20.12.1996 and the schedule of shares was accepted and even the interlocutory decree was signed on 29.04.97 and in any event the petition of the 5th defendant-appellant was tendered only on 07.08.97 more than 3 months after the interlocutory decree was signed.

In the circumstances I have no hesitation in holding with the plaintiff-respondent that the order dated 17.02.1998 is not a judgment or an order having the effect of a final order deciding the rights of the parties.

It was also contended by the counsel for the 5th defendant-appellant that notwithstanding the rejection of the notice of appeal a petition of appeal has been filed on 19.02.1997. Further it is contended that the rejection of the appeal is erroneous in view of the decision in *Charletuma* v *Batun*[4] and also having cited SC Appeal 71/99 it was averred that this Court has inherent power to correct any order made per incuriam by the original Court. However I do not think that I could consider at this juncture to correct any order made per incuriam without the 5th defendant-appellant taking proper steps to have the said order vacated. In the circumstances it appears to me that the 5th defendant-appellant has waived any rights if any to have the said order vacated.

It is also contended by the 5th defendant-appellant that since issue no. 05 raised by him has been answered in the affirmative the schedule of shares given according to devolution shown by him in his statement of claim should have been accepted by the learned District Judge in preference to the schedule of shares given by the plaintiff-respondent. However it should be noted here that issues 04 and 06 raised by the 5th defendant-appellant has been answered in the negative. Hence it is apparent that the pedigree as shown in the statement of claim of the 5th defendant-appellant has not been accepted by the learned District Judge in his judgment. For the above reason I hold with the plaintiff-respondent and reject the appeal of the 5th defendant-appellant with costs.

DISSANAYAKE, J. - I agree

Appeal rejected.