THE

Sri Lanka Law Reports

**Containing cases and other matters decided by the**

**Supreme Court and the Court of Appeal of the**

**Democratic Socialist Republic of Sri Lanka**

**[2011] 2 SRI L.R. - PART 3**

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294 – exception 4 – plea of sudden fight

 **Bandara vs. Hon. Attorney General**

*Bandara vs. Hon. Attorney General*

SC *(Dr. Shirani A. Bandaranayake, CJ.)* 57

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

affrmed 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 fght that spontane-*

*ously 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

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witnesses on his behalf. The High Court, whilst convict-

ing 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 affrmed 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

defnition 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

inficted is suffcient 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 prob-

ability 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.”

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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

fve 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 fde overstepping of the limits of his authority by*

*a public servant;*

*4. the plea of sudden fght 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 conse-*

*quent to the birth of the child.*

Learned Counsel for the appellant relied on the Ex-

ception 4 to Section 294 and submitted that the Court of

Appeal had not evaluated the said possibility of a sudden

fght. 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 with-*

*out premeditation in a sudden fght in the heat of passion*

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*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 fght, 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 satisfed 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 Excep-

tions are identical to section 294 of our Penal Code. Accord-

ingly in terms of the said section of the Indian Penal Code, the

following requisites must be satisfed:

1. it was a sudden fght;

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 ex-

ist in order to invoke this exception.

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In order to ascertain the possibility of a sudden fght, 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 frst 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).

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.shd'˜

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.

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At that time the deceased had gone inside the house to bring

a piece of cloth to bandage the wound. Thereafter the appel-

lant 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.

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The observations of Chief Inspector Wegapitiya, who

had visited the house after the incident, clearly corroborates

Fareeda’s version.

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m%( f,a jeks me,a,ï tf;kag wdfõ fldfyduo Ishd mÍlaIKfha§

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W( tfyuhs'

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W( 24 fjks Èk rd;S% 10'30 g muK 02 fjks iellre ksYdka;

nKavdr tu ia:dkhg meñK wrlal+ b,a,d th fkdyka ksid

ùÿrejla àfmda tfla .y,d levqk ksid 02 ú;a;slref.a w;

lemqkd lshd ;uhs oek.kak ,enqfKa'

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 identifed 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

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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 fght

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 satisfed

in order to obtain the benefts of the said Exception.

Exception 4 to Section 300 of the Indian Penal Code,

which deals with the offence of murder is identical to Excep-

tion 4 to Section 294 of our Penal Code. The said Exception

4 is as follows:

 *“Culpable homicide is not murder if it is committed with-*

*out premeditation in a sudden fght 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 inficted by the appellant in the heat of passion

without premeditation during a sudden fght and as such the

appellant was entitled to the beneft 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.

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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 feld, 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 applicabil-

ity of Exception 4 to Section 300 exist here, but not all.

The quarrel had broken out suddenly, but there was no

sudden fght 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

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inficted by the appellant with an axe, which is a formi-

dable weapon on the unarmed victim. Appellant is there-

fore, not entitled to the beneft 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 fght. The injury

that was caused to the brain from one end to the other, re-

sulted in fracture. The evidence led, disclosed that the ac-

cused 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 fght 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 Excep-

tion 4 to Section 294 of our Penal code clearly stipulates, the

relevant incident should have been committed,

 “. . . . without premeditation in a sudden fght 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 fght 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

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294 of our Penal Code, it is necessary to satisfy the specifc

requisites referred to in Section 294 of the Penal Code, viz;

1. it was a sudden fght;

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 ex-

amining the facts of the case and thereafter if it is found that

there has been a sudden fght.

In the present Appeal learned Counsel for the appellant

strenuously contended that there had been a sudden fght 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 frst incident and the third.

In the frst incident the appellant had made several efforts to

get the deceased to start up a fght. His actions were substan-

tiated 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

fght with one ‘Sudu’ and later got himself injured by break-

ing a glass, the deceased had bandaged the injury of the

accused. The third incident thereafter had occurred well

after the frst 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

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when the accused was unarmed and did not cause any injury

to the appellant, the appellant following a sudden quarrel had

inficted fatal blows to the deceased, that the Exception 4 to

Section 300 of the Indian Penal Code would not apply.

A sudden fght 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 fnal fght 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 fght. Such a fght is not sponta-

neous and therefore cannot be regarded as one that could be

described as sudden. If there is lapse of time between inci-

dents prior to the fnal 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 Offcer, 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:

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 “The Court of Appeal has not misdirected itself in evalu-

ating the possibility of a sudden fght that spontaneous

occurred between the parties.”

The judgment of the Court of Appeal dated 13.07.2007 is

affrmed. This appeal is accordingly dismissed.

I make no order as to costs.

**amaratunga, J. -** I agree.

**imam, J.** - I agree.

*appeal dismissed.*

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**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- respon-

dents – appellants (appellants) on the basis that the plaintiff – petitioner

– respondent’s (plaintiff) leave to appeal application fled in the High

Court is misconceived and that the respondent was only entitled to a

fnal 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 fnal

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

conficting 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 fve Judges.)

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**held :**

(1) A fnal 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 defnition 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 fnal

judgment made by any Civil Court and an order would mean the

fnal 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 Dis-

trict Court had fnally 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 ‘ fnal 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 fnal 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 fnal 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-

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stances, it could not be probable to state that the District Judge by

that order had fnally settled the litigation between the appellant

and the plaintiff.

(6) The order dated 14.5.2008 is not a fnal 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 Offcer 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]

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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 – appel-

lants 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 fled in the High Court was miscon-

ceived and that the respondent was only entitled to fle a fnal

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appeal and fxed 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 fnal 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 confict between the aforesaid two judgments, that

this appeal be referred to a Bench of fve (5) Judges. That

Bench had also considered that this appeal to be a ft 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

fve Judges to hear this matter and the appeal was thereafter

fxed for hearing.

The 1st defendant-respondent-appellant (hereinafter

referred to as the 1st respondent) had also fled 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

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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. 101B/2009.

The facts of Appeal No. 101A/2009, as submitted by the

appellants, albeit brief, are as follows:

The plaintiff, by Plaint dated 11.12.2007, fled 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’, fled a leave to appeal application in terms of

section 757 of the Civil Procedure Code. On 30.05.2008, the

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plaintiff had also fled 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 fle 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. Accord-

ingly the application was fxed 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;

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 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 fnal 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 fnal

appeal and not a leave to appeal application. In support of this

contention it was submitted that there can only be one judg-

ment 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

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‘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 fnal appeal is only possible against a

judgment (decree) entered in terms of section 184 read

with section 217 of the Civil Procedure Code and fnal or-

ders 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 defnition 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 dissatisfed 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 dissatisfed with any*

*order made by any original court in the course of*

*any civil action, proceeding or matter to which he*

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*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 frst 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 hav-*

*ing the effect of a fnal judgment made by any civil*

*court; and*

 *“order” means the fnal 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

defnes the effect of a judgment and an order pronounced by

any original Court. Whilst section 754(1) refers to any person,

who is dissatisfed with any judgment pronounced by any

original Court, section 754(2) refers to a situation, where a

person is dissatisfed with an order made by such an original

Court. In the frst 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 frst 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.

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In terms of section 754(5) of the Civil Procedure Code

a judgment would mean any judgment or order having the

effect of a ‘fnal judgment’ made by any Civil Court and order

would mean the fnal 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 defnition of the term ‘fnal

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 fnal 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 fled 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 Shar-

vananda, 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 Offcer 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).

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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 fnal judgment and to qualify to be a

‘judgment’ under section 754(5) of the Civil Procedure Code,

“1. It must be an order fnally disposing of the rights of

the parties;

2. the order cannot be treated to be a fnal 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 fnality 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 fnal one.”

The meaning of “Judgment” for the purpose of appeal

was also examined by Dheeraratne, J., in *Ranjit v Kusuma-*

*wathi and others (supra)*.

In that decision attention was paid to examine the test to

determine a ‘fnal 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 Offcers v Vander Poorten (supra)*, *Fernando v*

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*Chittambaram Chettiar*(16), *Usoof v Nadarajah Chettiar*(17),

*Usoof v The National Bank of India Ltd. (supra)*, *Arlis Appu-*

*hamy 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 fnal 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 judg-

ment or an order had not only been diffcult, 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 fnal 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 fnal

order.

Considering the test that should be adopted to decide

a ‘fnal 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*

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*Urban District Council (supra),* the Court had considered the

question as to whether an order made in an action was fnal

or interlocutory and reverted to the order approach. In decid-

ing 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, fnally dispose of the rights of the parties? If it

does, then I think it ought to be treated as a fnal order:

but if it does not, it is then, in my opinion, an interlocu-

tory order.”

The watershed in the long line of decisions, which con-

sidered the test to determine a ‘fnal 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 fnal 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 diffculties 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 fnal and what is interlocutory. In *Standard*

*Discount Co. v La Grange* and *Salaman v Warner*(25), Lord

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Esher MR said that the test was the nature of the appli-

cation 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,

fnally dispose of the rights of the parties?’ Lord Alver-

stone 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 judg-

ment 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 ‘fnal’ or ‘interlocutory’ is so uncer-**

**tain, 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).