

**SOMATILAKA BANDARA
VS
PEOPLES BANK**

COURT OF APPEAL
AMARATUNGA, J.,
WIMALACHANDRA, J.,
CALA 8/2004
D.C. MAHO 5700/M
AUGUST 25, 2004 AND
OCTOBER 7, 2004

Civil Procedure Code - Sections 754, 754(1), 754(5) 757 - Debt Recovery Act, No. 2 of 1990 - Amended by Act, 9 of 1994 - Decree Nisi entered - Objections filed - Decree Nisi made absolute - Is it an Interlocutory Order or a Final Order ?

The Court entered Decree *Nisi* in the first instance and after Objections were filed by the Defendant, the Court made the Decree *Nisi* absolute. The Defendant sought leave to appeal from the said Order.

HELD -

- (i) The Order has the effect of finally disposing of the rights of the parties, it has the effect of a final Judgment - only the execution of the decree remains.
- (ii) The impugned order is a final Judgment in terms of Section 754(5). Leave to appeal does not lie against the said Order.

APPLICATION for Leave Appeal from an Order of the District Court of Maho.

Cases referred to :

1. *Siriwardana vs Air Ceylon Ltd.*, - 1984 1 Sri LR 286.

S. B. Dissanayake for Defendant Appellant.

Ronald Perera for Plaintiff Respondent

November 17, 2004

WIMALACHANDRA, J:

It was agreed between the parties that this judgment should apply to the C. A.L. A. No. : 07/2004.

The plaintiff-respondent (hereinafter referred to as the plaintiff) instituted the two actions No. 5700/M and No. 5701/M in the District Court of Maho against the 1st defendant-petitioner (hereinafter referred to as the 1st defendant) and against the 2nd and 3rd respondents (hereinafter referred to as the 2nd and 3rd defendants) in terms of the provisions of the Debt Recovery Act, No. 2 of 1990 as amended by Act, No. 9 of 1994 for the recovery of sums of Rs. 169,887.74 and Rs. 166,600 respectively.

In both cases the plaintiff sought order *nisi* in the first instance. The learned District Judge entered order *nisi* to be made absolute in the event of the defendants not showing cause on a day appointed for that purpose. Thereafter the defendants filed objections and the matter was taken up for inquiry on 19.12. 2003, and after the inquiry, the learned Judge made the decree *nisi* absolute, in both cases. It is against this order the defendants have filed these two applications.

When these two applications were taken up in this Court for inquiry, the plaintiff raised a preliminary objection that leave to appeal does not lie and as such the defendants ought to have filed a final appeal and an application in revision if they so desired.

Section 6(3) of the Debt Recovery (Special Provisions) Act, No. 2 of 1990 as amended by Act, No. 9 of 1994, states thus ;

"Where the defendant either fails to appear and show cause or having appeared, his application to show cause is refused, the Court shall make the decree nisi absolute "

Section 13 (1) states as follows :

"Subject to orders of court, where a decree nisi entered in an action instituted under this Act is made absolute, it shall be deemed a writ of

*execution duly issued to the fiscal in terms of 225(3) of the Civil Procedure Code, and notwithstanding anything to the contrary in any other written law, the execution of the same shall not be stayed.**

Therefore, upon a plain reading of the aforesaid sections it appears that once the decree absolute is entered, it will have the effect of a final judgment in this case.

The defendant has filed a leave to appeal application from the order dated 19.12.2003 in terms of Section 757 of the Civil Procedure Code.

Section 754 speaks of mode of preferring an appeal. Section 754(5) states that ;

**Notwithstanding anything to the contrary in this Ordinance, for the purpose of this Chapter -*

'Judgment' means any judgment or order having the effect of a final judgment made by any Civil Court ; and

*'Order' means the final expression of any decision in any Civil action proceeding or matter, which is not a judgment.**

It appears that the word "judgment" given in the section, encompasses not only judgment which finally disposes of the rights of the parties but also all those orders made in the course of civil proceedings which have the effect of a final judgment.

In the case of *Siriwardena Vs. Air Ceylon*⁽¹⁾, Sharvananda, J. (as then he was) after analysing several English authorities, laid down the following 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 :

- (i) It must be an order finally disposing of the rights of the parties.
- (ii) 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 of the parties in the ordinary way.
- (iii) The finality of the order must be determined in relation to the suit.

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- (iv) The mere fact that 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 order.

Accordingly, if the order has the effect of finally disposing of the rights of the parties, it has the effect of a final judgment. In the instant case the impugned order dated 17.12.2003 finally disposes of the rights of the parties and only the execution of the decree remains.

In the circumstances, I am of the view that the order dated 19.12.2003 is a final judgment in terms of section 754(5) of the Civil Procedure Code and hence the defendant is not entitled to file a leave to appeal application against this order in terms of Section 754(2) of the Civil Procedure Code. Therefore, leave to appeal does not lie against the said order of the learned District Judge.

For these reasons the preliminary objection raised by the plaintiff is upheld and the two applications, namely, C. A. L. A. No. : 7/2004 and C.A. L. A. No. : 8/ 2004, are dismissed with costs.

Amaratunga, J., – I agree.

Application dismissed
