

**INAYA AND ANOTHER
VS.
FATHIMA**

COURT OF APPEAL.
SOMAWANSA, J. (P/CA).
WIMALACHANDRA, J.
CALA 362/2004.
DC KALUTARA 4709/L.
OCTOBER 12, 2005.

Civil Procedure Code, section 754(5) - Leave to appeal application - No prayer for leave to appeal - No prayer to set aside any order - Maintainability - Fatal ?

HELD:

In the absence of a prayer seeking leave to appeal from a specific order made by the original court and without praying to set aside that order one cannot seek a declaration and a direction to be give to the trial Judge. The application cannot be maintained.

APPLICATION for leave to appeal from an order of the District Court of Kalutara, on a preliminary objection taken.

*Iftikhar Hasan with A. J. M. Thahir for petitioner.
S. N. Wijithsinghe for respondent.*

Cur. adv. vult.

May 27, 2006.

ANDREW SOMAWANSA, J (P/CA).

This is an application praying for a declaration that the order of the learned District Judge dated 19.08.2004 marked P 13 is an interlocutory order in terms of the provisions in section 754 (5) of the Civil Procedure Code and that the 2nd defendant-respondent is not entitled in law to appeal from the said order in terms of section 754(1) of the Civil Procedure Code by tendering a notice of appeal, for a direction to the learned District Judge of Kalutara to reject the said notice of appeal tendered by the 2nd defendant-respondent and also for a direction to the learned District Judge to execute the writ of possession issued by him to the Fiscal dated 26.08.2004 marked P 15.

When this application was taken up for inquiry both counsel agreed to tender written submissions and accordingly both parties have tendered their written submissions.

Counsel for the 2nd defendant-respondent has taken up a preliminary objection to the maintainability of this application inasmuch as there is no prayer for leave to appeal from any order or a prayer for setting aside any order. I would say there is force in the aforesaid preliminary objection for in the prayer to the petition tendered to this Court by the plaintiffs-petitioners there is no prayer seeking permission of this Court to appeal from any order but seeks only a declaration and for certain directions to the learned District Judge.

It is also to be seen that in the caption to the petition as well as in the affidavit it is stated that the instant application is for leave to appeal from an order of the District Court of Kalutara dated 3rd September 2004 in terms of the provisions of section 754(2) of the Civil Procedure Code. However there is no such prayer seeking leave to appeal from the order dated 3rd September 2004 or from any other order made by the District Court of Kalutara. It must also be stated that no such order dated 3rd September 2004 has been tendered to this Court nor does the journal entry no. 65 dated 03.09.2004 indicate that any order has been made on that day which reads as follows :

පැ. නී.-බන්දුල පරාක්‍රම විරසිත මහතා වි. නී. රජනී පුංචිආචාර්ය මිය විත්තිකාරිය වෙනුවෙන් එන්. ඩී. ආර්. පෙරේරා මහතා.

- I. කා.ස. (62) අනුව පැමිණිලිකරුගේ නීතිඥ තැන බුක්කිය සාරගැනීම සඳහා අවශ්‍ය බුක්කි බලපත්‍ර ඉදිරිපත් කර ඇත.
- II. කා.ස. (63) අනුව 2 විත්තිකාරියගේ නීතිඥ තැන අභියාචනා දැන්වීම ඉදිරිපත් කර ඇත.
- III. කා. ස. (64) අනුව කැඳවන ලදී.

It appears that in the absence of a prayer seeking leave to appeal from a specific order made by the original Court and without praying to set aside that order one cannot seek a declaration and for directions to be given to the trial Judge as the petitioner is seeking to do in the instant application.

For the foregoing reasons, I would uphold the preliminary objection taken by the 2nd defendant-respondent to the maintainability of this application and have no hesitation in rejecting the application. Application is dismissed with costs fixed at Rs. 20,000/-.

WIMALACHANDRA, J. – I agree.

Application dismissed.