

**CHITRA MANOHARI PERERA
VS
SHANTHI PERERA**

SUPREME COURT

S.N. SILVA, CJ

DISSANAYAKE, J. AND

FERNANDO, J.

SC APPEAL No. 83/2003

C.A. No. 792/2000 (F)

D. C. COLOMBO CASE No. 4307/T

9TH JUNE AND 9TH JULY, 2004

Civil Procedure Code - Testamentary procedure-Citation under section 712 and order under section 716 of the Code— Whether order under section 716 is a final order giving a right of appeal under section 754(1) and 754(3) of the Code or an incidental order giving only a right of appeal under section 754(2) by way of an interlocutory appeal, with leave to appeal.

This appeal relates to the estate of Emmanuel Perera who died on 13.07.1965 leaving a will. The appellant who is described in the judgement as the petitioner (Chitra Manohari Perera) was finally appointed in the room of the deceased executor. This appeal is in respect of an order made by the District Judge under section 716 of the Civil Procedure Code upon a citation made under section 712 of the Code against the respondent (to give up property of the estate which had been withheld by the respondent).

An appeal was lodged against the District Judge's order under sections 754(1) and 754(3) of the Code. The Court of Appeal set it down for argument.

Held :

The order made by the District Judge was an incidental order in respect of which an (interlocutory) appeal had to be made with leave of court under section 754(2) as such order did not finally dispose of the rights of parties, while the testamentary case was pending. It was not a final order from which an appeal under sections 754(1) and 754(3) could be made.

Cases referred to :

1. *Siriwardena vs Air Ceylon Limited* (1984) 1 Sri. L. R. p. 286
2. *Ranjith vs. Kusumawathi and Others* (1998) Sri L. R. 232
3. *Salaman vs. Warner and Others* (1891) 1 Q B 734

APPEAL from the judgement of the Court of Appeal.

Romesh de Silva, P. C. with H. Amarasekera, H de Livera and Sugath Caldera for appellant.

M. B. Ratnayake for respondent.

Cur. adv. vult

June 16, 2005

NIMAL DISSANAYAKE, J.

J. K. Emmanuel Perera died on 13th July, 1965, leaving a last will and testament naming his brother J. K. Eugene Perera as Executor. The said J. K. Eugene Perera instituted testamentary proceedings bearing No. 4307/T in the District Court of Negombo wherein the said last will was proved and probate obtained, in the name of the original petitioner J. K. Eugene Perera.

. On an appeal made to the Supreme Court against the said grant of Probate, a re-trial was ordered.

Thereafter the said J. K. Eugene Perera had died and his widow K. Emalin Perera had been substituted in his place. Subsequently the said Emalin Perera had been granted Probate.

The said Emalin Perera by her application dated 1st February, 1999, applied for citation under Section 712 of the Civil Procedure Code on the 6th Respondent-Respondent-Appellant-Respondent.

Emalin Perera died and her daughter Chitra Perera the 4 (b) Respondent-petitioner-respondent applied to be substituted in the place of the deceased Emalin.

The learned District Judge by his two orders both dated 8th September, 2000, permitted the citation and permitted Chitra Perera (who shall hereinafter be referred to as the petitioner) to be substituted in the room of the deceased substituted Petitioner Emalin Perera.

The Respondent filed a notice of appeal followed by a petition of appeal purporting to act under Sections 754(1) and 754(3) of the Civil Procedure Code.

When the said appeal had come up for hearing before the Court of Appeal, the following two preliminary objections had been taken on behalf of the petitioner, namely-

- (1) that the petition of appeal was out of time and warranted rejection,
- (2) that there was no right of appeal from the order of the learned District Judge in terms of Section 754 of the Civil Procedure Code.

Both parties have consented before the Court of Appeal to conclude the matter by way of written submissions.

However, it appears that the petitioner had abandoned her 1st preliminary objection before the Court of Appeal and had referred only to the 2nd preliminary objection in her written submissions.

The learned Judge of the Court of Appeal by his order dated 18.06.2003 dismissed the preliminary objections and set down the appeal for argument.

Special leave has been granted by this Court on the following two questions of law :-

- (a) whether the order dated 08.09.2000, is a final judgement or order not having the effect of a final order ?
- (b) whether in the circumstances of the case should the 6th Respondent have filed a leave to appeal application ?

The contention of learned Counsel for the petitioner in brief was that there can only be one judgment in a summary case and as against the other orders the correct procedure to be followed, in the event of an appeal was by way of a leave to appeal application, under Section 754(2) of the C. P. C.

Therefore he has contended that the procedure for appeal against the impugned order of 8th September, 2000 is by way of an application for leave to appeal. Since no application for leave to appeal has been filed, the appeal had to be rejected and therefore dismissed.

On the other hand, learned counsel for the Respondent contended that the order dated 8th September 2000, permitting the application for citation has to be issued under Section 715 of the Civil Procedure Code only after an Inquiry, and has to be proceeded in like manner and with like effect as

upon a trial, and that after the conclusion of the trial like inquiry, judgement must be entered.

Therefore, in terms of Section 754(5) the impugned order of 08.09.2000 has the effect of a judgment and therefore a right of final appeal lay against the said order and he argued that hence the judgment of the Court of Appeal was correct. It is apparent that the learned District Judge has acted under Section 712 and had held an inquiry and had made an order of citation under Section 716 of the Civil Procedure Code, to bring into the credit of the case all rents admittedly received by the Respondent in respect of a number of premises bearing numbers 179 and portions of No. 181 which are morefully depicted in plan bearing No. 1662/1.

The question before this Court presently is whether the order dated 08.09.2000 has the effect of a final judgment in terms of Section 754(1) and (5) and therefore whether the Respondent had a right of final appeal in terms of Section 754(1) of the Civil Procedure Code.

In *Siriwardena vs. Air Ceylon, Limited* ⁽¹⁾ Sharvananda J (as he then was) after an analysis of a number of English decisions, at page 297, laid down some tests to be applied to determine the question whether an order has the effect of a final judgment and has stated :

“It would appear from the above authorities, for an order to have the effect of a final judgment and to qualify to be a judgment under Section 754(5) of the C.P.C.-

- (1) It must be an order finally disposing of the rights of the parties,
- (2) The order cannot be treated to be a final 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 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.”

In the case of *Ranjith vs. Kusumawathi and others* ⁽²⁾ Dheeraratne, J. who too had embarked on an analysis of a number of English and Sri Lankan judgments has stated at page 236 :

"There have been two virtually alternating tests adopted by different judges from time to time in the U. K. to determine what final orders and interlocutory orders were. In *White vs. Brunton* (1984) 2 All E. R. 606), Sir Donaldson MR, labeled the two tests as the order approach and the application approach. The order approach was adopted in *Shubrook vs. Tufnel* (1882) 9 QBD 621 ; 1881-8) All E. R. 180) where Jessel, MR. and Lindel, L. J. held that an order is final if it finally determines the matter in litigation. Thus the issue of final and interlocutory, depended on the nature of the order made."

At page 239 Dheeraratne, J. had quoted the words of Lord Esher in *Salamon Vs. Warner and Others*⁽⁹⁾ and stated that -

"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 purpose 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."

Dheeraratne, J. has applied the order approach in coming to his decision in the said case of *Ranjith Vs. Kusumawathi and Other (Supra)*.

In the case at hand ,the impugned order dated 08.09.2000 is an order of citation, made under Sections 712 and 716 of the C. P. C.

This is an incidental order, as the testamentary proceedings was the main matter before Court, which has commenced under Section 516 of the C. P. C. and will be concluded only after filing of final accounts in terms of Section 551 of the C. P. C and with the closing of the estate.

The testamentary matter is still pending before the District Court. Therefore, an order of the learned District Judge under Sections 712 and 716 of the C. P. C. will not finally dispose of the matter, whichever way it is given.

Thus the impugned order dated 08.09.2000 of the learned District Judge is an interlocutory order and not a final order.

It is my view that therefore, the Respondent who was dissatisfied with the said order should have first filed an application for leave to appeal to the Court of Appeal in terms of Section 754(2) of the C. P. C. and not a petition of Appeal under Section 754(1) and 754(4) of the Civil Procedure Code. The learned Judge of the Court of Appeal has erred in dismissing the preliminary objection taken by the Petitioner.

I allow the appeal of the petitioner and set aside the judgment of the Court of Appeal and reject the petition of appeal tendered against the order of the District Court by the Respondent.

S. N. SILVA, C. J.—I agree.

RAJA FERNANDO J.—I agree.

Appeal allowed.
