

YASEEM OMAR
v
P.I.A. CORPORATION

COURT OF APPEAL
UDALAGAMA, J., AND
NANAYAKKARA, J.
CA NO. 202/93 (F)
D.C. COLOMBO 694/M
AUGUST 1, 2002 and
FEBRUARY 28, 2003

Civil Procedure Code, section 754 (2) – Bill of costs allowed – Application for writ – Moved for postponement – Refused – Order allowing writ – Is this an order or judgment?

- (i) The impugned order if it was to be given in favour of the plaintiff-appellant, whereby he would have succeeded in obtaining a postponement, further proceedings would ensue – in which event the order would be an interlocutory one. Furthermore, the impugned order would not vary the judgment already entered.
- (ii) The impugned order is an interlocutory order.

APPEAL from the Order of the District Court of Colombo.

Cases referred to:

1. *Ranjit v Karunawathie* (1998 -3) SRI LR 232, 239,
2. *Salaman v Salamon* - 1 QB 734
4. *Peter Singho v Wideman* - Vol.I. Srikantha - 88
5. *Perera v Perera* - 50 - NLR 61

Manohara de Silva for appellant.

Respondent absent and unrepresented.

June 25, 2003

UDALAGAMA, J.

The plaintiff-appellant instituted D.C. Colombo Case No. C/694/M under the former Administration of Justice Law to restrain the defendant from terminating the agreement referred to in the pleadings to the plaint entered into between the plaintiff and the defendant.

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Admittedly, after trial by the judgment dated 31.01.79 the learned District Judge dismissed the plaintiff's action with costs.

It is apparent that subsequently the defendant-respondent tendered his bill of costs on 31.07.86 and after an inquiry before the District Judge the latter allowed the bill of costs and the defendant-respondent thereafter applied for writ.

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When the objection of the plaintiff-appellant to the aforesaid application for writ was filed and the matter was taken up for inquiry on 11.01.93 learned Counsel for the plaintiff-appellant moved for a postponement on the ground of ill-health. The learned District Judge by his impugned order of the same date refused the plaintiff's application and allowed the defendant-respondent his right to an issue of writ.

Aggrieved, the plaintiff-appellant appeals.

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Firstly it is manifest that the order against which this final appeal had been presented was in fact not a final judgment, nor is it an order having the effect of a final judgment.

As held in *Ranjith v Kusumawathe*,⁽¹⁾ Justice Dheeraratne consequent to considering 18 reported cases inclusive of the definition found in the text of E.R.S.R. Coomaraswamy's Law of Evidence, Vol. 1. p. 532 quoted with approval Lord Esher (*Salamon v Salamon*⁽²⁾) who observed as follows: on the test to determine whether the order was final or interlocutory - "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, which ever way it is given, will if it stands, finally dispose of the matter in dispute, I think for the purpose of the rules it is final. On the other hand, if their decision given one way, will final-

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ly 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."

The impugned order in the instant case if it was to be given in favour of the plaintiff-appellant whereby he would have succeeded in obtaining the postponement, further proceedings would ensue in which event considering the above test I would hold that the order to be an interlocutory one. 40

The impugned order would not vary the judgment admittedly already entered as far back as 31.01.79. As held in *Perera v Perera*.⁽³⁾ if an order purports to vary a decree it is a final order from which an appeal would lie. Hereto I would hold that the impugned order would not vary the decree already entered in the above case.

As also held in *Peter Singho v Wideman*⁽⁴⁾. when an application refers to an order dismissing an application under the provisions of section 86 of the Civil Procedure Code it would be a final order where a direct appeal would lie. The impugned order is not one arising from an order under the provisions of section 86 of the Civil Procedure Code. 50

Accordingly I am inclined to the view that the impugned order is an interlocutory one attracting the provisions of section 756 (2) whereby the appellant ought to have proceeded by way of leave to appeal.

Accordingly this appeal is misconceived and is dismissed with costs.

NANAYAKKARA, J. - I agree

Appeal dismissed.