
**LEELAWATHIE
VS.
EKANAYAKE**

COURT OF APPEAL.
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J,
CALA 374/2004.
DC COLOMBO 15179/L.
SEPTEMBER 21, 2005.

Civil Procedure Code, sections 82(2), 88(1), 88(2), 752, 754(2), and 754 (5) - Vacating previous order of dismissal of plaintiff's action for non appearance - Restoring the case back to the trial roll - Right to a direct appeal or leave to appeal? - What is a judgment?-What is an Order?.

Held :

- (1) Section 88(1) lays down that no appeal shall lie against any judgment entered upon default, and order setting aside or refusing to set aside the judgment entered upon default shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made.
- (2) The statute states that the order shall be accompanied by a judgment adjudicating on the facts; it is a judgment as defined in section 754(5) and a direct appeal lies from the said final order.

APPLICATION for leave to appeal from an order of the District Court of Colombo.

Cases referred to :

1. *Siriwardane vs. Air Lanka Ltd* (1984) SLR 286
2. *Salaman vs. Warner* (1891) QB 734

3. *Bonzon vs. Altrichan Urban Development Council (1903) KB 547 at 549*
4. *A. S. Sangarapillai and Brothers vs. Kathiravelu - 2 Sri Kantha Law Reports - 99*
5. *Wijenayake Vs. Wijesinghe - Sri Kantha Law Reports 28*

D. Alwis for respondent - petitioner,

S. A. D. S. Suraweera for plaintiff-respondent.

Cur. adv.vult.

December 09, 2005

Andrew Somawansa, J. (P/CA)

This is an application for leave to appeal from the order of the learned District Judge of Colombo dated 10. 09. 2004 vacating the previous order of dismissal of the plaintiff - petitioner - respondent's action for non appearance and restoring the case back to the trial roll and if leave is granted to quash and set aside the aforesaid order dated 10.09.2004 and dismiss the plaint of the plaintiff-petitioner-respondent.

When this application was taken up for hearing counsel for the plaintiff petitioner-respondent (hereinafter called the respondent) took up a preliminary objection to the maintainability of this application for the reason that the impugned order gives the right to a direct appeal and not an application for leave to appeal.

Both counsel agreed to tender written submissions on the aforesaid preliminary objection taken by Counsel for the respondent and accordingly both parties have tendered their written submissions.

Counsel for the defendant - respondent - petitioner (hereinafter called the petitioner) submits that section 82(2) of the Civil Procedure Code states that an order in terms of the said section shall be liable to an appeal to the Court of Appeal. However the said section does not specify whether leave of the Court of Appeal should be first had and obtained with regard to such an appeal. He submits that when one examines the provisions of sections 754 (1) and 754(2) of the Civil Procedure Code, it is clear that a leave to appeal application is instituted against an order made in the course of any civil action as opposed to a final appeal which as the

word “final” itself indicates is instituted against a judgment finally adjudicating the rights of parties. Thus as in the instant action when an order made under section 82(2) sets aside the judgment made in default and refixes the case for trial the said order quite obviously does not finally adjudicate the rights of parties but leaves the rights of parties to be decided by way of further trial. For this proposition of law he cites several authorities both local as well as foreign decisions.

The local case cited was the Supreme Court decision in *Siriwardena vs. Air Lanka*⁽¹⁾.

“To decide whether a party dissatisfied with the order of a civil court should lodge a direct appeal under section 754(1) of the Civil Procedure Code or appeal with the leave of Court first had and obtained under section 754(2) of the Civil Procedure Code the definitions of ‘judgment’ and ‘order’ in section 754(5) should be applied.

In view of the definition in section 754(5) of the Civil Procedure Code the procedure of direct appeal is available to a party dissatisfied not only with a judgment entered in terms of section 184 of the Civil Procedure Code but also with an order having the effect of a final judgment, that is a final order. Orders which are not judgments under section 184 of the Civil Procedure Code or final orders are interlocutory orders from which a party dissatisfied can appeal but only with leave to appeal.

The 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 are —

- (1) It must be an order finally disposing of the rights of the parties.
- (2) The order cannot be treated as a final order, if the suit or the action is still left alive 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.”

Counsel for the petitioner also has cited Privy Council decision in the case of *Salaman vs Warner*⁽²⁾.

"I think that a judgment or order will be final within the meaning of the rule when whichever way it went it would finally determine the rights of the parties. On the other hand if the 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".

A similar view been expressed by Lord Alverstone, CJ in the case *Bonzon vs. Altricham Urban District Council* at 549.

However I am not impressed with the aforesaid submission for the reason that provisions contained in section 88(2) clearly indicates that what is contemplated therein is not a interlocutory order but a judgment adjudicated upon the facts and specifying the ground upon which it is made. It is from this judgment that an appeal lies to the Court of Appeal.

Section 88(1) and (2) of the Civil Procedure Code reads as follows:

"88(1) No appeal shall lie against any judgment entered upon default".

(2) The order setting aside or refusing to set aside the judgment entered upon default shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made, and shall be liable to an appeal to the Court of Appeal".

At this point it would be pertinent to consider section 754(a) (2) and (5) of the Civil Procedure Code which reads as follows:

" 754(1) Any person who shall be dissatisfied 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 dissatisfied with any order made in any original court in the course of any civil action, proceeding, or matter to which he 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 first had and obtained.

(5) 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”.

The aforesaid sections were considered in the case of *A. S. Sangarapillai and Bros. Vs. Kathiravelu*⁽⁴⁾ wherein the judgment were as follows:

- (i) Ex-parte decree entered for default—defendant ejected - application in court that no summons served and to have the proceedings vacated - Court set aside all proceedings - Civil Procedure Code Sections 84, 88, 753 and 754.
- (ii) Meaning of “Judgment” and “Order” -Revisionary powers of court-when revision lies.

HELD :

- (a) “Order made under section 88(2) of the Civil Procedure Code gives rise to a direct appeal and not leave to appeal.
- (b) The onus is on the defendant to prove that summons were not served on him.”

At page 103 Siva Selliah, J. made the following observations:

“The facts material for the determination of these applications are as follows: The plaintiff filed action in D. C. Chavakachcheri No. 5933 on 7.8.80 praying for ejectment of the defendant from certain shop premises. Summons was served on the defendant returnable on 12. 11. 81 on which date the defendant did not appear and the case was thereafter fixed for ex-parte trial on 04.12.80 and judgment and decree were entered in favour of the plaintiff. The decree was served on the defendant on. 01. 01. 81 and on 23.01. 81 plaintiff moved for issue of writ which was allowed and the writ was executed on 27., 01. 81. On 9. 02. 81 the defendant filed application to set aside the ex- parte judgment against him for default on the ground that summons had not been served on him. This was set down for inquiry and order delivered on 1. 9. 83 setting aside the judgment entered against him for default of appearance and allowing the defendant to file answer and also ordering restoration of possession of the premises to the defendant. Against this order the plaintiff-appellant has filed these present applications for leave to appeal and revision. Certain preliminary objections were taken to these applications: (a) that leave to appeal is not available as the order complained of is an appealable order and therefore notice of appeal should have been filed”.

"In the instant case I am of the view that the determination of the District Judge made on 1.9.83 setting aside judgment entered against the defendant for default of appearance due to non service of summons and allowing him to file answer is an 'order' made under section 88(2) of the Civil Procedure Code and that due to the special provision contained therein and the in built safeguard provided thereby and considering the tenor of the judgments of Vaitilingam, J. and Abdul Cader, J. and O. S. M. Senevirate, J. quoted above, I hold that a direct appeal is provided for in the circumstances and that an application by way of leave to appeal does not lie".

Also in the case of *Wijenayake vs. Wijenayake*⁽⁵⁾ the aforesaid section viz : Section 88 (1) and (2) and also section 754 of the Civil Procedure Code were considered. The facts as narrated by Palakidnar, J. are as follows:

The defendant petitioner Gamini Wijenayake is seeking the leave of this Court to appeal from a judgment of the District Judge of Mount Lavinia dated 18.08.1986 entered ex-parte in favour of the plaintiff-respondent Sunil Wijenayake in a rent and ejection matter (No. 2534/Re-D. C. Mount Lavinia).

On 02.09.1986 the defendant made an application to set aside this order on the grounds that summons was not served on him. On 12.05.1987 the learned District Judge made order refusing to set aside the ex-parte judgment and decree. An earlier application for revision of this judgment 536/87 to this court was withdrawn.

A preliminary objection was taken to this application by counsel for the respondent that this remedy sought by the defendant in this manner is misconceived in law. It was the learned counsel's contention that a direct appeal lies from this order and there was no provision in law for leave to appeal as prayed for by the defendant. This although it has been averred that there are other serious factual irregularities which made the defendant-petitioner's position untenable before this Court.

This section 88(2) sets out clearly and unambiguously the right of appeal given to a party in either event, the order though so described is accompanied by judgment adjudicated upon the facts. Thus any misconception with regard to the appealability of the order under section 88(2) is clearly removed. It is a final order accompanied by a judgment deciding the rights of the parties in a conclusive way within the contemplation of the term judgment

set out in section 754(1) of the Civil Procedure Code. An order as interpreted in section 754(5) is a final expression of any decision in any civil action proceeding or matter which is not a judgment. In the instant case statute requires that the order has to be accompanied by a judgment adjudicating on the facts. Thus it is clearly a judgment as defined in section 754(5).

The right of appeal is given by the words "shall be liable to appeal"> Thus one cannot conceive it to be an order to appeal from which leave from the Supreme Court should be first had and obtained as set out in section 754, subsection (2). The remedy sought is therefore misconceived.

It was contended by learned counsel for the respondent that section 752(2) repeals section 88(2), in that it confers a right to appeal from any order for the correction of any error of fact or law with the leave of the Supreme Court first had and obtained. If section 88 (2) did not contain the requirement that the order shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds on which it is made, one may deem it to be an order contemplated in section 752(2), and that the instant application was correctly made. But section 88(2) makes it very plain that the order shall be accompanied by a judgment and is an appealable order as distinct from an order for which leave has to be had and obtained from the Supreme Court. On the mere reading of the two sections 754(2) and section 88(2) one has to reject without hesitation the argument that the former repeals the latter, . Therefore this application for leave to appeal has to be rejected as a relief misconceived in the circumstances and the application is dismissed with costs fixed at Rs. 205.

I have no hesitation in agreeing with the reasoning of Palakidnar, J. I might also add that there is no ambiguity in the words used in section 88(2) of the Civil Procedure Code which provides a specific statutory right of a final appeal. This is clearly spelt out when it is stated very clearly in the section that the order setting aside or refusing to set aside the judgment entered upon default shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made and shall be liable to an appeal to the Court of Appeal'.

For the foregoing reasons, I would hold that the petitioner has failed to resort to the statutory remedy provided by law in not lodging a direct appeal to this Court and the instant application for leave to appeal is

misconceived in law and hence the petitioner cannot have and maintain this action. In the circumstances the preliminary objection raised with regard to the maintainability of this application is well taken. Accordingly the application for leave to appeal will stand rejected with costs fixed at Rs. 10,000/-

WIMALACHANDRA, J - I agree.

Appeal dismissed.
