

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an application for Leave to Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka preferred under the provisions of Section 754 Part V111 of the Civil Procedure Code , as subsequently amended , vide High Court of the Provinces (special provisions) Act No. 10 of 1996, to be read together with Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C.(L.A.) Application S.C.(HC)LA 42/2013
Case No. CHC/18/2013/MR

Munasinghege Don Eranga Indrajith
105/4, 1st Lane Parakrama Mawatha
Thalahena, Malabe.

Plaintiff-Petitioner

Vs.

George Steuart Finance Limited
"City Office"
No. 15, Station Road
Colombo 03.

Defendant-Respondent

Before : Dep, PC J
R. Marasinghe, J &
B.P. Aluwihare, PC J

Counsel : Panduka Abeynayake with Yalith Wijesundera for the
Plaintiff-Petitioner.

Shanaka de Livera, for the Defendant-Respondent
Instructed by Livera Associates.

Supported on : 28.04.2014

Decided on : 24.10.2014

Priyasath Dep, PC, J

The Plaintiff- Petitioner (hereinafter sometimes referred to as the "Plaintiff") filed this application to obtain leave to appeal to set aside the judgment dated 07.05.2013 delivered by the High Court of Colombo established under High Court of Provinces (Special Provisions) Act No. 10 of 1996 commonly referred to as the Commercial High Court.

The Plaintiff filed action in the High Court claiming reliefs against the arbitrary and wrongful termination of the rescheduled lease agreement No. FL 1107 KAL 00048 RS 01. The Petitioner obtained a leasing facility under contract No. FL 1107 KAL 00048 from Asia Commerce Ltd., to acquire a Toyota Allion motor car valued at Rs. 6,900,000/-. The Asia Commerce Ltd. was first succeeded by Divasa Finance Ltd. which was succeeded by the George Steuart Finance(PVC) Ltd, the Defendant-Respondent(hereinafter sometimes referred to as "Defendant") The Defendant rescheduled the loan under a new number FL 1107 KAL 00048 RS 01 (by the addition of 'RS 01' to the existing number) with effect from 14th November 2012. The Plaintiff submitted that the Defendant contrary to law repossessed the vehicle on 19th November 2012. The Plaintiff filed action in the High Court claiming the following reliefs:

- i. A declaration to the effect that the defendant arbitrarily determined the rescheduled contract.
- ii. Order the defendant to pay a sum of Rs. 3,215,953/- with legal interest (the sum paid under the contract.)
- iii. Alternatively prayed for restitutio in integrum of the motor vehicle .
- iv. Grant an enjoining order and an interim injunction restraining sale of the motor vehicle.

The Plaintiff obtained an enjoining order restraining the Defendant from selling the vehicle. The Defendant filed a statement of objections and objected to the extension of the enjoining order and granting of an interim injunction.

By way of preliminary objections the Defendant pleaded that:

- (a) The Plaintiff cannot have and maintain this action in as much as inter alia;
 - i. The Plaintiff does not disclose a cause of action for the Plaintiff to sue the Defendant.
 - ii. The Plaintiff does not conform to the imperative provisions of Sections 40 and 46 of the Civil Procedure Code.
 - iii. The reliefs prayed for by the Plaintiff are in any event relief that the Plaintiff is not entitled in law to pray for in this action.
 - iv. The Court has no jurisdiction to hear and determine this action as there is an Arbitration clause in the lease Agreement and the Defendant has not consented and is objecting to the Court exercising jurisdiction in this matter.

- (b) In any event, the Plaintiff is not entitled to an interim injunction and/or to an extension of the Enjoining Order in- as-much as:-
- i. The Plaintiff has not made out a prima facie case;
 - ii. The Plaintiff has obtained the Enjoining Order issued in this case by the suppression and misrepresentation of material facts and
 - iii. The balance of convenience lies with the Defendant.

The Defendant submitted that the Plaintiff violated the lease agreement which was marked as V3 by the Defendant (marked as P1 in the plaint) and neglected to pay the defendant the lease rentals as agreed. The Defendant admitted that as the absolute owner in order to minimize the damages re-possessed the vehicle. The Defendant further submitted that the Plaintiff contrary to the agreement had handed over the possession of the vehicle to a 3rd party and the Defendant repossessed the vehicle when it was hidden.

The learned High Court Judge took up the preliminary objection as regard to the maintainability of this action. It is the position of the Defendant that in view of the arbitration clause the Court has no jurisdiction to hear and determine the action. Both parties filed written submissions in respect of the preliminary objection raised by the Defendant. In his order dated 7th May 2013 the learned High Court Judge upheld the preliminary objection and dismissed the plaint subject to costs. The High Court held that section 36 of the lease agreement marked P1(V3) has an arbitration clause and in view of the arbitration clause under section 5 of the Arbitration Act No. 11 of 1995 the High Court has no jurisdiction to hear and determine this case. The learned High Court Judge in support of his order referred to the case of Elgitread Lanka (Pvt) Ltd., vs. Bino Tyres (Pvt) Ltd. (2011) Bar Association Law Reports at page 130. The learned High Court Judge upheld the preliminary objection and dismissed the Plaintiff's action.

The Plaintiff- Petitioner is seeking leave to appeal to set aside the order of the Learned High Court Judge. When this matter was taken up for support the counsel for the Defendant-Respondent raised the following preliminary objections:

- i. This matter was not referred to Arbitration.
- ii. The Plaintiff-Petitioner cannot maintain this application as the order made by the Learned High Court Judge is a final order and therefore the proper remedy is by way of an appeal.

First I will deal with the second preliminary objection dealing with the maintainability of this application in this court. It is the contention of the Defendant –Respondent that the plaintiff–Respondent should have preferred an appeal instead of filing a leave to appeal application.

The learned High Court Judge having considered the preliminary objection raised by the Defendant dismissed the Plaint on the basis that High Court has no jurisdiction to hear and determine the action. The question is whether this order of dismissal is a judgment or an order. In other words whether the impugned order is a judgment or a final order under section 754 (1) read with 754 (5) of the Civil Procedure Code or an order made in the course of the

action (interlocutory order) within the meaning of section 754 (3) read with(5) of the Civil Procedure Code. There is no doubt that this order is not given on the merits of the case. On the other hand if the preliminary objection was overruled the court has to proceed to trial. The order will be an order finally disposing the case provided the aggrieved party does not appeal against the order.

In *Siriwardena vs. Air Ceylon Ltd.*(1984) 1SLR 286, Sharvananda J held that for an order to have the effect of a final judgment under section 754(5) of the Civil Procedure Code it must be an order finally disposing of the rights of the parties. The approach adopted in this case is referred to as 'order approach'. In the present case if the aggrieved party did not appeal the order, had the effect of finally disposing of the rights of the parties. If the reasoning of *Siriwardena vs Air Ceylon Ltd* (supra) is accepted the order of dismissal made by the learned High Court Judge could be considered as a final order or a judgment.

In *Ranjith vs. Kusumawathi* (1998 3 Sri.LR 232) a different approach was adopted. In that case Dheerathne J adopted the 'application approach' applied in the English case of *Salamon vs. Warner and others* (1881) 1QB 734 where lord Esher held that '---whichever way it is given, will 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 given in the other way, will allow the action to go on , then I think it is not final, but interlocutory'

A divisional bench of five judges in *S.R. Chettiar and others Vs S.N.Chettiar* 2011, Bar Association Law Journal at 25 followed *Ranjith vs Kusumawathi* (supra) and applied the 'Application Approach' in deciding whether an order is a judgment or not.

In the present case if the High Court rejected the preliminary objections it has to proceed with the trial and the order of dismissal cannot be considered as a final Order. Therefore, Petitioner had correctly invoked the jurisdiction of the Supreme Court by filing a Leave to Appeal Application. Therefore, we overrule the objection raised by the Defendant-Respondent and proceed to consider the leave to appeal application on its merits.

The first preliminary objection relates to the fact that the matter has not referred to arbitration. This same objection was raised in the High Court with clarity and precision in the following manner.

'The Court has no jurisdiction to hear and determine this action as there is an arbitration clause in the lease Agreement and the Defendant has not consented and is objecting to the Court exercising jurisdiction in this matter'.

The Learned High Court Judge held with the Defendant and dismissed the Plaintiff's action and the said order is challenged in these proceedings. This Court has to consider whether the said order is in accordance with the law or not or whether this court should grant leave or not.

There is no dispute regarding the fact that the Defendant –Respondent is the successor of Divasa Finance Ltd. which succeeded Asia Commerce Ltd. The lease agreement was entered into between Asia Commerce Ltd and the Plaintiff- Petitioner. The said agreement was marked as P1 in the Plaint and V3 in the Statement of Objections of the Defendant-Respondent. The said lease agreement was rescheduled by the Defendant-Respondent. Rescheduling was done under the original agreement and in respect of the payment of the balance sum. Both parties agree that the lease agreement govern the rights and liabilities of the parties. Section 36 of the lease agreement has an arbitration clause requiring parties to the agreement to refer disputes arising from the contract for arbitration. Therefore it attracts section 4 of the Arbitration Act No 11 of 1995. Section 4 reads thus:

‘ Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the matter in respect of which the arbitration agreement is entered into is contrary to public policy or is not capable of determination by arbitration.’

The Plaintiff –Petitioner did not submit the dispute to arbitration which is mandatory and instead filed action in the Commercial High Court. Therefore section 5 of the Arbitration Act No. 11 of 1995 applies to the disputes arising from the lease agreement. Section 5 of the Arbitration Act read as follows:

“Where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement, the court shall have no jurisdiction to hear and determine such matter if the other party objects to the court exercising jurisdiction in respect of such matter.’

In the lease agreement referred to above, the parties have agreed to submit any dispute for arbitration. The Defendant –Respondent objected to the High Court exercising jurisdiction to hear and determine the case. In view of section 5 of the Arbitration Act, the High Court has no jurisdiction to hear and determine this action. The order made by the High Court upholding the preliminary objections and dismissing the Plaintiff-Petitioner’s action is in order. Therefore I refuse to grant leave. The leave to appeal application is dismissed. No costs.

Judge of the Supreme Court

R.Marasinghe, J.
I agree

Judge of the Supreme Court

B.P.Aluvihare, P.C., J.
I agree

Judge of the Supreme Court