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

The Maharaja Organisation Limited,
No.146, Dawson Street,
Colombo 02.
Petitioner

SC APPEAL NO: SC/CHC/APPEAL/4/2002
CHC NO: HC/CIVIL/33/2000(3)

Vs.

1. Viacom International Inc.,
   1515, Broadway, New York,
   United States of America.
2. The Director General of
   Intellectual Property,
   "Samagam Medura",
   D.R. Wijewardena Mawatha,
   Colombo 10.
   Respondents

AND NOW BETWEEN

The Maharaja Organisation Limited,
No.146, Dawson Street,
Colombo 02.
Petitioner-Appellant

Vs.

1. Viacom International Inc.,
   1515, Broadway, New York,
   United States of America.
2. The Director General of
   Intellectual Property,
   "Samagam Medura",
   D.R. Wijewardena Mawatha,
   Colombo 10.

Respondent-Respondents

Before: P. Padman Surasena, J.
E.A.G.R. Amarasekara, J.
Mahinda Samayawardhena, J.

Counsel: Romesh De Silva, P.C., with R. Balasubramaniam, Sugath Caldera and Shanaka Cooray for the Petitioner-Appellant.

Dr. K. Kanag-Isvaran, P.C., with Dr. Harsha Cabral, P.C., and Kushan Illangatillake for the 1st Respondent-Respondent.

Argued on: 19.02.2021

Written submissions:

by the Petitioner-Appellant and the 1st Respondent-Respondent on 16.03.2021.

Decided on: 30.06.2021

Mahinda Samayawardhena, J.

The Petitioner-Appellant, The Maharaja Organisation Limited (Petitioner), filed an appeal by way of a Petition of Appeal dated 15.09.2000 before the Commercial High Court in terms of section 182 of the Code of Intellectual Property Act, No. 52 of 1979, against the order of the Director of Intellectual Property dated 28.05.1998, made after an inquiry held under section 107(13) of the Code. By this order, the Director of Intellectual Property decided to register Mark No. 61297 of the 1st Respondent-Respondent, Viacom International Inc. (1st Respondent) despite opposition by the Petitioner.

The 1st Respondent in the answer *inter alia* took up a preliminary objection seeking dismissal of the appeal of the Petitioner *in limine* on the basis that the Petitioner should have come before the Commercial High Court against the order of the Director of Intellectual Property not by way of a Petition of Appeal but by way of a plaint. The Commercial High Court by order dated 14.12.2001 upheld this preliminary objection without going into the merits of the appeal and rejected the Petition of Appeal allowing the Petitioner to come before the same Court by way of a plaint, if so advised. The Petitioner did not file a plaint in the Commercial High Court but instead filed a final appeal against the said order under section 754(1) of the Civil Procedure Code read with section 754(5) of the Civil Procedure Code and sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996.

At the argument before this Court, in addition to the merits of the appeal, learned President's Counsel for the 1st Respondent, drawing attention to the Full Bench decision of this Court in

Chettiar v. Chettiar [2011] BLR 25, [2011] 2 Sri LR 70, submitted that this appeal of the Petitioner from the order of the Commercial High Court shall be dismissed *in limine* as it is misconceived in law in that the Petitioner should have come before this Court against the order of the Commercial High Court not by way of a final appeal made under section 754(1) read with section 754(5) of the Civil Procedure Code and sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996, but with the leave of this Court first had and obtained, i.e. by way of a leave to appeal application made under section 754(2) read with section 754(5) of the Civil Procedure Code and sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996.

Although learned President's Counsel for 1st Respondent has stressed this point in his further written submissions filed after the argument, learned President's Counsel for the Petitioner has refrained from addressing this matter in his further written submissions.

Let me first reproduce sections 754(1), (2) and (5) of the Civil Procedure Code and sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996:

> *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 by 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 purposes 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.

Sections 5 and 6 of Act No. 10 of 1996 whereby the Commercial High Court was established read as follows:

(5) (1) Any person who is dissatisfied with any judgement pronounced by a High Court established by Article 154P of the Constitution, in the exercise of its jurisdiction under section 2, in any action, proceeding or matter to which such person is a party may prefer an appeal to the Supreme Court against such judgement, for any error in fact or in law.

(2) Any person who is dissatisfied with any order made by a High Court established by Article 154P of the Constitution, in the exercise of its jurisdiction under section 2, in the course of any action, proceeding or matter to which such person is, or seeks to be, a party, may prefer an appeal to the Supreme Court against such order for the correction of any error in fact or in law, with the leave of the Supreme Court first had and obtained.

(3) In this section, the expressions "judgement" and "order" shall have the same meanings respectively, as in section 754(5) of the Civil Procedure Code (Chapter 101).

(6) Every appeal to the Supreme Court, and every application for leave to appeal under section 5 shall be made as nearly as may be in accordance with the procedure prescribed by Chapter LVIII of the Civil Procedure Code (Chapter 101).

The question whether an appeal or leave to appeal lies against an order of the District Court or Commercial High Court was a subject of much controversy for a long period of time. There were two approaches: "the order approach" and "the application approach".

In the Supreme Court case of *Siriwardena v. Air Ceylon Ltd [1984] 1 Sri LR 286*, Sharvananda J. (later C.J.) followed the order approach adopted by Lord Alverstone C.J. in *Bozson v. Altrincham Urban District Council [1903] 1 KB 547*.

Conversely, in the Supreme Court case of *Ranjit v. Kusumawathie [1998] 3 Sri LR 232*, Dheeraratne J. followed the application approach adopted by Lord Esher M.R. in *Salaman v. Warner [1891] 1 QB 734* and Lord Denning M.R. in *Salter Rex & Co. v. Ghosh [1971] 2 QB 597*.

The order approach contemplates only the nature of the order. When taken in isolation, if the order finally disposes of the matter and the parties' rights in litigation without leaving the suit alive, the order is final and a direct/final appeal is the proper remedy against such order.

The application approach contemplates only the nature of the application made to Court, not the order delivered *per se*. In accordance with this approach, if the order given in one way will finally dispose of the matter in litigation, but if given in the other way will allow the action to continue, the order is not final but interlocutory, in which event, leave to appeal is the proper remedy. In other words, according to the application approach, if the order, whichever way it is given, will, if it stands, finally determine the matter in litigation, the order is final.

The Full Bench of the Supreme Court (comprising five Justices) was called upon to decide on this vexed question in *Chettiar v. Chettiar [2011] 2 Sri LR 70* and *[2011] BLR 25*. The Court, having discussed both approaches stemming from English decisions, unanimously decided that the application approach (as opposed to the order approach) shall be the criterion in deciding whether appeal or leave to appeal is the proper remedy against an order of the District Court or Commercial High Court.

This Full Bench decision of the Supreme Court was consistently followed in later Supreme Court decisions. *(Yogendra v. Tharmaratnam (SC/Appeal/87/2009, Supreme Court Minutes of 06.07.2011), Ranasinghe v. Madilin Nona (SC/Appeal/03/2009, Supreme Court Minutes of 16.03.2012), Prof. I.K. Perera v. Prof. Dayananda Somasundara (SC/Appeal/152/2010, Supreme Court Minutes of 17.03.2011)*

However, notwithstanding this was a Full Bench decision of the Supreme Court, there were lingering doubts about the correctness of the decision. Therefore, in *Priyanthi Senanayake v. Chamika Jayantha [2017] BLR 74*, a Fuller Bench of the Supreme Court (comprising seven Justices) revisited the

decision in *Chettiar*'s case. Eventually, the Fuller Bench also reached the same conclusion, i.e. the test to be applied is the application approach and not the order approach.

Chief Justice Dep (with the concurrence of the other six Justices of the Supreme Court) held:

> *In order to decide whether an order is a final judgment or not, it is my considered view that the proper approach is the approach adopted by Lord Esher in Salamam v. Warner [1891] 1 QB 734, which was cited with approval by Lord Denning in Salter Rex & Co. v. Ghosh [1971] 2 QB 597. It stated: "If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for that 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."*

It is abundantly clear that an appeal does not lie against the impugned order of the Commercial High Court whereby the Court only rejected the petition of the Petitioner allowing the Petitioner to present a plaint. This is the relevant part of the High Court order:

> *In the circumstances I uphold the preliminary objection raised by the 1st Respondent and accordingly I reject the petition of the Petitioner but the rejection of the petition shall not preclude the Petitioner from presenting a plaint according to law.*

There is no necessity to apply the decision in *Chettiar's* case to this case. The order of the Commercial High Court is *prima facie* interlocutory and not final.

What happens if the application approach is adopted? If the Commercial High Court had overruled the preliminary objection of the 1st Respondent, the case would not have ended there but the trial/inquiry would have proceeded and a Judgment on the merits of the case would have been delivered. Hence the impugned order is not final.

It is crystal clear that there is no right of appeal against the impugned order and the final appeal filed by the Petitioner is misconceived in law. The Petitioner should have come before this Court against the order of the Commercial High Court not by way of a final appeal made under section 754(1) read with section 754(5) of the Civil Procedure Code and sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996, but by way of a leave to appeal application made under section 754(2) read with section 754(5) of the Civil Procedure Code and sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996.

Although no submission was made on behalf of the 1st Respondent on the applicability of *Chettiar's* Judgment to the facts of this case, perhaps for obvious reasons, let me add the following to clear any doubt.

Chettiar's case was decided on 10.06.2010. There was a doubt about the applicability of this Judgment to final appeals filed against the orders of the District Court and Commercial High Court pronounced prior to 10.06.2010. This matter, i.e.

whether *Chettiar's* Judgment had retrospective effect, was specifically raised as a question of law when the decision in *Chettiar's* case was revisited by the Seven Judge Bench of this Court in *Priyanthi Senanayake v. Chamika Jayantha [2017] BLR 74*. However, the Seven Judge Bench of the Supreme Court did not even think it fit to grant leave on this question. The Court only granted leave to appeal to revisit the Five Judge Bench decision in *Chettiar's* case. Two appeals were amalgamated before the Seven Judge Bench. In both appeals, the Plaintiffs' cases had been dismissed by the Trial Courts (one by the District Court and the other by the Commercial High Court) on preliminary objections taken up by the Defendants. In both appeals, the impugned orders had been made and final appeals filed long before *Chettiar's* case was decided. Despite submissions on this point before the Seven Judge Bench of the Supreme Court, the Court dismissed the appeals on the basis that the Plaintiffs should have filed leave to appeal applications and not final appeals against the impugned orders.

I must state that this is not an application of *Chettiar's* Judgment retrospectively. By *Chettiar's* Judgment, the Supreme Court did not make new law. It only declared what has always been the law. The task of the Court is *jus dicere* (to say what the law is) and not *jus dare* (to make the law). The doctrine of separation of powers is in harmony with this view. This is sometimes known as the declaratory theory of law: that judges do not make the law but only declare what it has always been. Because the law pre-exists the decision, the question of retrospective or retroactive application does not arise.

Let me add one more point in connection with *Chettiar's* Judgment. It was held by a Fuller Bench of the Supreme Court (comprising seven Justices) in *Iranganie De Silva v. Indralatha [2017] BLR 68* that when the language of a statute is clear and the right of appeal is given in express terms, such as in section 88(2) of the Civil Procedure Code, which enacts "*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*", the decision in *Chettiar's* case has no application.

The preliminary objection raised by the 1st Respondent in the instant appeal cannot be disregarded as a mere technicality. It goes to the root of the Petitioner's appeal. I uphold the preliminary objection and dismiss the appeal of the Petitioner with costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.
I agree.

Judge of the Supreme Court