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

In the matter of an Application for Leave to Appeal under and in terms of Section 5C of the High Court of Provinces (Special Provisions) (Amendments) Act No. 54 of 2006 from the Order of the Provincial High Court of the Northern Province (Holden in Jaffna) dated 26th March 2009 read together with the Constitution of the Democratic Socialist Republic of Sri Lanka and the Rules of the Supreme Court.

1. Storer Duraisamy Yogendra,
   No. 21/1, Alfred House Gardens,
   Colombo 3, and
   No. 136, Hulftsdorp Street,
   Colombo 12.

2. Balasubramaniam Thavabalan,
   Nallur Cross Road,
   Nallur.

1ST & 2ND DEFENDANT-RESPONDENT-APPELLANTS

S. C. Appeal No. 87/09
S. C. (HCCA) L. A. No. 84/09
Provincial High Court of the Northern Province
- Civil Appeal No. 14/07
D. C. Jaffna Case No. 130/Misc.

-VS-

Velupillai Tharmaratnam
Sampanthar Kandy,
Karainagar.

PLAINTIFF-APPELLANT-RESPONDENT

Karthgesu Sivaharan,
Araly North, Vaddukkodai,
Presently of Bresinaweg 1,
59404, Soest Germany.

3RD DEFENDANT-RESPONDENT – RESPONDENT

BEFORE	:	Hon. Saleem Marsoof, P.C., J., Hon. P. A. Ratnayake, P.C., J., and Hon. S. I. Imam, J.
COUNSEL	:	S. A. Parathalingam, P.C., with P. Sivaloganathan, Jaliya Bodinagoda and Nishkan Parathalingam for the 1st and 2nd Defendant-Respondent-Appellants. 3rd Defendant-Respondent-Respondent absent and unrepresented. Plaintiff-Appellant-Respondent appearing in person.
ARGUED ON	:	18.11.2010
DECIDED ON	:	06.07.2011

SALEEM MARSOOF, J.

The only point argued in this appeal was whether the procedure for appealing from an order made by a District Court rejecting a plaint on the ground that it is barred by a positive rule of law, was the procedure set out in Section 754(1) of the Civil Procedure Code or that set out in Section 754(2) of the said Code. The question has arisen in the context of an action instituted in the District Court of Jaffna in May 2005 by the Plaintiff-Appellant-Respondent (hereinafter referred to as the Respondent), against the 1st and 2nd Defendant-Respondent-Appellants and one Karthigesu Sivaharan, who is the 3rd Defendant-Respondent-Respondent, to recover damages in a sum of Rs. 25 million for the loss of reputation and pain of mind alleged to have been suffered by him. The Respondent who is a highly qualified academic and former Professor of Mathematics attached to the University of Colombo and the University of Jaffna, had claimed in his plaint that his reputation and dignity had been injured by certain statements forming part of the pleadings in another action, namely, D.C. Jaffna case No. 130/Misc., which had been filed against him by the said Karthigesu Sivaharan, whose pleadings in the case were alleged to have been prepared by the said Appellants in their professional capacities as Attorneys-at-law.

It is common ground that the District Judge had, by his order dated 30th July 2007, rejected the plaint in terms of Section 46(2)(i) of the Civil Procedure Code, without trying the case on its merits. The gist of the order of the learned District Judge was that the action appeared from the statement in the plaint to be barred by a positive rule of law, namely, that Attorneys-at-law were entitled to immunity from suit with respect to the contents of the pleadings they file on the instructions of their clients who retain their services. In the final paragraph of the said order, the learned District Judge stated as follows:-

> "நான் விபரமாகக் கூறிய காரணங்களில் முக்கியமாக 1988ம் ஆண்டு அரசியல் அமைப்பின் (Constitution) 136ம் பிரிவின் பிரகாரம் இலங்கை உயர் நீதிமன்றம் 07.12.1988ம் திகதிய அதிவிசேட வர்த்தமானி (Gazette) மூலம் பிரகடனப்படுத்தப்பட்ட விதிகளில் காணப் படுகின்றவாறு, சட்டத்தரணி தமது கடமை செயற்பாடுகளில் பூரண சிறப்புரிமை கொண்டுள்ளார்கள் என்பதும், இது உரோம டச்சு சட்ட தத்துவங்களுக்கு முரணாக இருந்த

போதிலும் உயர்நீதிமன்ற விதிகள் மற்றும் ஆங்கில சட்டத்தைப் பின்பற்றி இந்திய சான்றுக் கட்டளைச் சட்டத்தை (Indian Evidence Ordinance) வழிகாட்டியாகக் கொண்டு இலங்கையில் உருவாக்கப்பட்ட சான்றுக் கட்டளைச் சட்டத்தின் பிரிவு 126 இன் பிரகாரமும், குடியியல் நடைமுறைச் (Civil Procedure) சட்டக் கோவையின் பிரிவு 46(2) (ஏ) இன் பிரகாரமும், தன்னுறுதிச் சட்ட விதிகளால் தடை செய்யப்பட்டுள்ள விபரமாக 1ம், 2ம் எதிராளிகள்-மனுதாரர்களின் சிறப்புரிமையை மீறுவதான பிராதாக அமைந்துள்ளதால் வழக்காளியின் பிராதை நிராகரித்து கட்டளை இடுகின்றேன். வழக்கு செலவு பற்றி ஒப்புரவான நீதியின் (Equity) அடையாளமாக எதுவித கட்டளையும் இடவில்லை.

It is clear from the above quoted passage that the District Judge was of the opinion that the action filed by the Respondent was barred by a positive rule of law, insofar as it concerned the 1st and 2nd Defendant-Respondent-Appellants, and that the plaint had to be rejected as provided in Section 46(2)(i) of the Civil Procedure Code. It is noteworthy that the reference in the above passage to "குடியியல் நடைமுறைச் சட்டக் கோவையின் பிரிவு 46(2) (ஏ)" was an obvious error for பிரிவு 46(2)(ஐ) of the Tamil version of the Civil Procedure Code which corresponds to Section 46(2)(i) of the Code. It is important to note that the learned Judge did not purport to dismiss the action, but simply made order rejecting the plaint against the said Appellants using the words "பிராதை நிராகரித்து கட்டளை இடுகின்றேன்".

Being aggrieved by the said decision of the District Court, the Respondent filed notice of appeal followed by a petition of appeal in terms of the procedure set out in Section 754(1) read with Sections 754(3) and 754(4) of the Civil Procedure Code against the said order. When the appeal lodged by the Respondent came up before the Provincial High Court of the Northern Province exercising civil appellate jurisdiction and holden in Jaffna (hereinafter referred to as the "Provincial High Court"), the Appellants took up a preliminary objection and contended that the appeal should be dismissed *in limine* as it was not properly constituted. It was submitted by learned Counsel for the Appellants that the Respondent was only entitled to seek leave to appeal in terms of Section 754(2) of the Civil Procedure Code, and that insofar as the order sought to be appealed against was not a "judgement", the purported appeal should be dismissed. On the other hand, the Respondent argued that that the order rejecting the plaint made by the District Judge was an "order having the effect of a final judgement" within the meaning of the definition of "judgement" found in Section 754(5) of the Civil Procedure Code, and that the procedure adopted by him is correct and appropriate.

After hearing the submissions on the preliminary objection, the Provincial High Court, by its order dated 26th March 2009, overruled the preliminary objection, and set down the appeal for hearing on its merits. The Appellants filed an application seeking leave to appeal from the said order of the Provincial High Court, and this Court has on 14th July 2009 granted leave to appeal on the questions set out in paragraph 25(a) and (b) of the petition of appeal, which are reproduced below:-

(a) Did the Civil High Court of the Northern Province err in law to duly consider whether the order dated 30.07.2007 was a 'final order' or an 'interlocutory order' within the meaning of Section 754(5) of the Civil Procedure Code?

(b) Did the Civil High Court of the Northern Province err in law to duly consider whether there was no right of Appeal under Section 754(1) of the Civil Procedure Code against the order dated 30.07.2007?

By the order of this Court dated 3rd August 2009, the proceedings in the Provincial High Court were also stayed pending the determination of this Court. The appeal was taken up for hearing in this Court on 15th December 2009, and while this matter was being argued before this Court, on 10th June 2010, a Divisional Bench of this Court consisting of five Judges, pronounced the judgement in *S. Rajendran Chettiar and Two Others v. S. Narayanan Chettiar* SC

Appeal No. 101A/2009 (SC Draft Minutes dated 10.6.2010). The judgement in this case, which was delivered by Hon. Dr. Shirani A. Bandaranayake, J. (as she then was) with Hon. J. A. N. de Silva, C.J., Hon. N. G. Amaratunga, J., Hon. P. A. Ratnayake, P.C., J. and I concurring, dealt with the very same issues which arise for decision in this appeal. The Bench of five Judges which heard the case had come to the conclusion that the correct procedure for appeal in a case where a plaint had been rejected in terms of Section 46(2) of the Civil Procedure Code, was the one set out in Section 754(1) of the Civil Procedure Code, for the reason that such an order is not one "having the effect of a final judgment".

The Respondent, who appeared in person, conceded that this Bench, as presently constituted, is bound by the decision of the Bench of 5 Judges of this Court in the *Rajendran Chettiar* case, but strenuously urged that this appeal be referred for consideration by a Bench which would be numerically superior to the Bench that made the *Rajendran Chettiar* decision, as otherwise, irreparable prejudice would be caused to him. However, learned President's Counsel for the Appellant submitted that the conflict between the decisions of numerically equal benches of the Supreme Court in *Siriwardene v. Air Ceylon* [1984] 1 Sri L.R. 286 and *Ranjit v. Kusumawathie and others* [1998] 3 Sri LR 232, which in turn reflected the difference in judicial opinion that prevails in England, had been finally resolved by the decision of a Bench of five Judges of this Court in the *Rajendran Chettiar* case in the context of an order to reject the plaint under Section 46(2) of the Civil Procedure Code, and that it was therefore not necessary to look into the question any further.

I have carefully considered the question as to whether it is appropriate, in the circumstances of this case to have this matter placed before the Hon. Chief Justice to consider referring the matter to a numerically superior Bench, for further consideration. The two substantive questions on which leave to appeal has been granted involve the interpretation of Section 754(5) of the Civil Procedure Code in the context of the question whether the decision of the District Court dated 30th July 2007 was a "final order" as opposed to an "interlocutory order" within the meaning of Section 754(5) of the Civil Procedure Code, although this provision, which is quoted below, does not in fact use the said the phraseology, which appear to be borrowed from English law, but instead use the word "judgement" and "order" to refer to the same dichotomy:-

> "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, proceedings or matter which is not a judgment."

The distinction between a "final order" and an "interlocutory order", which the Respondent as well as the learned President's Counsel for the Appellants concede correspond to the dichotomy between "judgement" and "order" as used in our Civil Procedure Code, has been considered in a large number of judicial decisions in England. The polarization of judicial thought in that country can best be visualized by referring to the contrasting approaches of the courts in *Salaman v. Warner* [1891] 1 QB 734 and *Bozson v. Altrincham Urban District Council* [1903] 1 KB 547. In the first of these cases Lord Esher, M.R. observed at page 735–

> "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 that for the purposes 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. "

However, in *Bozson v. Altrincham Urban District Council*, Lord Alverstone, C.J. at pages 548 to 549 adopted a contrary approach and said –

> "It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not it is then, in my opinion, an interlocutory order."

A similar conflict of judicial opinion existed in Sri Lanka as well, where in *Siriwardena v. Air Ceylon Ltd.* [1984] 1 Sri LR 286, Sharvananda, J. (as he then was) chose to follow the approach adopted by Lord Alverstone, C.J. in *Bozson v. Altrincham Urban District Council*, while in *Ranjit v. Kusumawathie* [1998] 3 Sri LR 232, Dheerarathne, J. preferred the opinion of Lord Esher, M.R. in *Salaman v. Warner*. As these Sri Lankan decisions both emanated from Divisional Benches which consisted of three Judges, the conflict of judicial opinion was referred to a Bench of five Judges in *Rajendran Chettiar and Two Others v. S. Narayanan Chettiar*, which preferred the test adopted by Lord Esher, M.R. in *Salaman v. Warner* and applied by Dheerarathne, J. in *Ranjit v. Kusumawathie*.

In my opinion, in the context of a plaint that has been rejected in terms of Section 46(2) of the Civil Procedure Code, the application of either of the two tests would lead to the same result. If a District Judge faced with an application under Section 46(2) of that Code, decides not to reject the plaint, the case will have to be tried until it is finally disposed of, and on the test adopted by Lord Esher, M.R. in *Salaman v. Warner,* his order would clearly be interlocutory and not a final one. Similarly, if one applies the test adopted by Lord Alverstone, C.J. in *Bozson's* case, even a District Judge who allows an application under Section 46(2) of the Civil Procedure Code and rejects the plaint, does not by his judgment or order finally disposed of the rights of the parties, as it is expressly stated in the very last sentence of Section 46(2) of the Code that the rejection of the plaint "shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action."

The decision of five judges of this Court in the *Rajendran Chettiar* case is not only binding on this Bench as it is presently constituted, but also reflects the practice of Court both in England as well as in Sri Lanka. As Lord Denning, M. R. observed in *Salter Rex and Co. v. Ghosh* [1971] 2 All ER 865 at page 866 –

> "Lord Alverstone CJ was right in logic but Lord Esher MR was right in experience. Lord Esher MR's test has always been applied in practice."

The above quoted observation is pertinent to the decision of this case, as it emphasizes the importance of precedent in deciding difficult questions, and it is important to recognize that the *Rajendran Chettiar* case is hardly distinguishable from the instant case as the plaint had been rejected by the original Court in both cases in terms of Section 46(2)(i) of the Civil Procedure Code on the ground that it was barred by a positive rule of law, and in that case a Bench of five judges of this Court have unanimously held that such an order is interlocutory in nature and not final, and that accordingly the procedure for appeal laid down in Section 754(2) has to be followed, which made it imperative to seek and obtain "leave to appeal".

In support of his application that this case be put up to the Hon. Chief Justice to consider referring it to a numerically superior Bench, the Respondent has also made a submission which was not presented and considered by the Bench of five judges that heard the *Rajendran Chettiar* case. Simply put, the Respondent's submission is that since an order rejecting a plaint is a "decree" as defined in Section 5 of the Civil Procedure Code, an appeal may be lodged against such an order by filing notice of appeal (as an appeal against a "final order") in terms of Section 754(3) and subsequent sections of the said Code. The Respondent has contended with great force that in interpreting Section 754 of the Civil Procedure Code, one should not lose sight of Section 754(3) of the Code which provided that-

> " Every appeal to the Court of Appeal [and now to the Provincial High Court] from any *judgment or decree* of any original court, shall be lodged by giving notice of appeal to the original court within such time and in the form and manner hereinafter provided."*(emphasis added)*

He went on to stress that accordingly, the procedure set out in Section 754(1) read with Section 754 (4) and Section 755 of the Civil Procedure Code will govern the form and manner of the procedure to be followed in appealing against any judgement or *decree*, and that the word "decree" which is not found in Section 754(1), Section 754(2) or defined in Section 754 (5) should be interpreted in the light of the definition of the said word contained in Section 5 of the Code, which is as follows:-

> ""decree" means *the formal expression of an adjudication* upon any right claimed or defence set up in a civil court, when such *adjudication, so far as regards the court expressing it, decides the action* or appeal *(An order rejecting a plaint is a decree within this definition)*." *(emphasis added)*

The Respondent, in the course of his submissions, cited Prof T. Nadarajah in *The Legal System of Ceylon in its Historical Setting* (1972 - E.J. Brill, Leyden) at page 233 as authority for the proposition that the Civil Procedure Code of our country in its original form was modelled on "the Indian Civil Code of 1882 with some features from the New York Civil Procedure Code of 1880 and the English rules of Court framed in 1883 and 1885" and that whereas in England a definition of "final order" was introduced for the first time by the Rules Committee in 1988 in the lines of the test adopted by Lord Esher in *Salaman v. Warner*, the definition of "decree" found in Section 5 of our Code was based on the Indian Code and adopted the test enunciated by Jessel, M.R. in *Shubrook v. Tufnell* (1882) 9 QBD 621, which was followed with some refinement by Lord Alverstone C.J. in *Bozson v. Altrincham Urban District Council.* It was the contention of the Respondent that since the said definition, contained in the original version of the Civil Procedure Code enacted in 1889 has remained unaltered despite the many amendments introduced by our legislatures to the other provisions of the Code, and changes of judicial attitude, both in Sri Lanka and other jurisdictions, and since Section 754 or any other provision of the Code does not contain any other definition of "decree", the "notice of appeal" procedure set out in Section 754(3) would apply in the light of the meaning of "decree" set out in Section 5 of the Code to an order rejecting a plaint.

While this submission, very ably presented by the Respondent, is at first sight somewhat plausible, learned President's Counsel for the Appellants has submitted that the Civil Procedure Code provides only two gateways to appellate review, namely those found in Sections 754 (1), which conferred a direct right of appeal and Section 754 (2) which is more stringent in that it can only be opened with the "leave" of court, and that access to each gateway depended on whether the decision appealed from was contained in a "judgement" or "order", which for the purpose of these provisions have been defined comprehensively in Section 754 (5) of the Code. He further submitted that the word "decree" is not used in either

of the gateway sections, and that there cannot be a "decree" without a judgement as it is clear from the definition of that word in Section 5 as well as the procedure outlined in Section 188 of the Code that a "decree" is a formal expression of an adjudication, and that there can be no adjudication where a plaint is rejected without hearing on the merits.

I am of the opinion that the submission of the Respondent that an "order" rejecting a plaint, by itself, constitutes a "decree" even without a judgement, is altogether irreconcilable with the scheme of the procedure set out in the Civil Procedure Code, and in particular the provisions of Chapter XX of the Code, and would clearly lead to manifest absurdity. The fallacy of the said submission can more readily be understood in the light of the changes that have been introduced into the original version of the Civil Procedure Code of 1889, through subsequent legislation. For the purposes of this appeal, it would suffice to look first at Section 754 of the Civil Procedure Code as found in Chapter 101 of the Legislative Enactments of Ceylon (1956 Revised Edition). That section did not distinguish between final and interlocutory orders and provided the same procedure for "every appeal to the Supreme Court from any judgement, decree, or order of any original court……". The appeal was to be lodged by filing a petition of appeal (not notice of appeal) in the original court but addressed to the Supreme Court within 10 or 7 days (depending on whether it is an appeal from the District Court or Court of Requests) from the date on which the decision sought to be appealed was pronounced, and there was no requirement as we now have, that the leave of the appellate court had to be first obtained for appealing against an order made by the original court in the course of any action. The Civil Procedure Code was repealed and replaced by the Administration of Justice (Amendment) Law No. 25 of 1975 with effect from 1st January 1976, and thereafter the provisions of the Code were resurrected with some modifications with effect from 15th December 1977, by Section 2 of the Civil Courts Procedure (Special Provisions) Law, No. 19 of 1977, with effect from 15th December 1977.

The current provisions of Section 754 of the Civil Procedure Code, which provide for two separate procedures for appealing against a "judgement" and an "order" respectively, found in Chapter 105 of the Legislative Enactments of the Republic of Sri Lanka were introduced by Act No. 20 of 1977, and the subsequent amending Act No. 79 of 1988 only amended Section 754(4) though it reproduced the rest of the sub-sections of Section 754. The Respondent heavily relied on the word "decree" which is found in Section 754(3), but did not refer us to Section 754(4), probably because the latter sub-section did not further his argument. Curiously though, in these two subsections the word "decree" is found in quit contrasting combinations. In Section 754(3), the reference is to "judgement or decree" though in Section 754(4) the words used are "decree or order", and while these peculiar combinations can continue to excite adventurous lawyers and even enlightened laymen such as the Respondent, and confound judges, until they are rectified by more cautious draftsmen, they have very little relevance in choosing between the two procedures for appeal outlined very clearly in Sections 754(1) and 754(2) of the Civil Procedure Code. It is trite law as well as well-established practice of our Courts that there are only two gateways to appellate review of a decision of an original court in a civil action or proceeding, namely through a "final" appeal in terms of Section 754 (1) and "interlocutory" appeal in terms of Section 754(2) of the Civil Procedure Code, and accordingly, I find no merit in the submission of the Respondent that Section 754(3) constitutes a third gateway to appellate review.

The Respondent has endeavoured to impress upon Court that irreparable prejudice that will be caused by a decision to reject the plaint under Section 46(2) of the Civil Procedure Code. However, I cannot see how any prejudice will be caused by such a rejection as it is expressly stated in that Section that such rejection "shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action." It is obvious that such a rejection does not operate as *res judicata*.

For the foregoing reasons, I am of the opinion that no useful purpose will be served by putting up this appeal to Hon. Chief Justice to nominate a numerically superior Bench to further consider the question which arose on this appeal. This Bench is clearly bound by the judgement of the Bench of five Judges of this Court in *Rajendran Chettiar and Two Others v. S. Narayanan Chettiar*, and accordingly, I answer questions (a) and (b) on which leave to appeal has been granted, in the affirmative. I hold that the procedure followed by the Respondent for the purpose of this appeal from the decision of the District Court of Jaffna, is not the proper procedure applicable to such appeal.

I accordingly, make order setting aside the order of the High Court of the Northern Province dated 26th March 2009. The appeal filed by the Respondent to the said High Court will stand dismissed. In all the circumstances of this case, I do not make any order for costs of this appeal or the appeal filed in the Provincial High Court.

JUDGE OF THE SUPREME COURT

HON. RATNAYAKE, J.
I agree.

JUDGE OF THE SUPREME COURT

HON. IMAM, J.
I agree.

JUDGE OF THE SUPREME COURT