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

Dona Padma Priyanthi Senanayake
No. 48/3 Kottagewatta Road
Battaramula

Plaintiff-Appellant-Appellant

SC Appeal No. 41/2015
CA No. 399/99(F)

Vs.

1. H.G. Chamika Jayantha
   No. 494/1, Udumulla Road
   Battaramulla

2. Leelawathi Siriwardena
   2nd Floor, Cycle Bazaar Building
   Galle Road,
   Bambalapitiya

3. H.D. Susila Anuruddhika
   No. 494, Udumulla Road
   Battaramulla.

Defendant-Respondent-Respondent

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

In the matter of an Appeal to the Supreme Court under section 5(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read together with section 6 thereof and sections 754(1) read together with sections 755(3) and 758 of the Civil Procedure Code.

Mohamed Woleed Mohamed Zawahir
No. 103, Sirikulam Watta
Mallawapitiya.

Plaintiff-Appellant

SC CHC Appeal No. 37/2008
HC (Civil No. 44/2007 MR

Vs.

Amana Takaful Company Limited
"Amana House"
No. 550 , R.A. De Mel Mawatha
Colombo 03

Head Office,
Baddhaloka Mawatha
Colombo 4.

Defendant-Respondent

Before : Priyasath Dep, PC., C J.
S.E. Wanasundera PC., J.
Sisira J. de Abrew, J.
Priyantha Jayawardana PC.
Upaly Abeyrathne, J.
Anil Gooneratne, J.
K.T. Chitrasiri, J.

Counsel : Rohan Sahabandu ,PC with Ms. Hasitha Amarasinghe for the Plaintiff-Appellant-Appellant in SC Appeal No. 41/2015

Rasika Dissnayake with Rajith Hathurusinghe for the 1st Defendant-Respondent-Respondent in SC Appeal No. 41/2015.

Niranjan de Silva with Pravi Karunaratne and Nadine Puvimanasinghe for Plaintiff-Appellant in SC CHC Appeal No. 37/2008.

K. Kanag Iswaran , PC with K.M. Basheer Ahmed for Defendant-Respondent in SC CHC Appeal No. 37/2008

Argued on : 06.10.2016

Written Submissions : 11.11.2016 &
Filed on : 15.12.2016

Decided on : 04.08.2017

Priyasath Dep, PC, CJ.

SC Appeal No.41/2015 and SC/CHC Appeal 37/2008 were taken up together as the questions of law raised in both cases are identical and it was decided to deliver a single judgment.

SC Appeal No. 41/2015

The Plaintiff instituted action on 03-10-1995 against the Defendant in the District Court of Colombo in Case No. 17633/L to demarcate the boundary. The case was taken up for trial and the court recorded the issues raised by the parties. The Defendant moved to take up issues Nos. 7-11 as preliminary issues. The learned District Judge decided to try issue No. 7 as a preliminary issue.

It is the position of the Defendants that the Plaintiff had failed to comply with section 40 (d) of the Civil Procedure Code when he failed to state in the plaint as to where and when the cause of action arose. The learned District Judge upheld the preliminary objections raised by the Defendants and dismissed the Plaintiff's action on 12.05.1999.

The Plaintiff appealed against the judgement to the Court of Appeal . When this matter was taken up for hearing in the Court of Appeal, the Defendants took up the position that the order made by the District Court is an interlocutory order and proper remedy to challenge the decision of the District Court is by way of a leave to appeal application and not by way of an appeal. Both parties made oral submissions and also filed written submissions.

It is the position of the Plaintiff that the order made by the District Judge is a final judgement. The Learned Counsel for the Petitioner submitted that when the District Judge delivered the judgement on 12.05.1999, Siriwardana vs. Air Ceylon Ltd. (1984) (1) SLR 286 had a binding effect and according to that judgement the order rejecting the plaint could be interpreted as a final judgement. Therefore, remedy is by way of an appeal.

However the case of Ranjith vs. Karunawathi which was decided in 1998 and reported in (1998) 3 SLR 232 is in conflict with Siriwardana vs. Air Ceylon Ltd. (supra) as it adopted a different approach. The learned Counsel for the Plaintiff submitted that Rajendra Chettiar vs. Narayanan Chettiar [2011] BALR 25 and[2011] 2 SLR 70 (decision of a bench consist of five judges) which was decided in 2010 has no application to this case as this case was instituted in 1995 and decided in 1999 and the appeal was filed in the same year. The Court of Appeal rejected the submissions of the learned Counsel for the Plaintiff and dismissed the Appeal on the basis that the order dismissing the action for failure to comply with section 40(d) of the Civil Procedure Code is an interlocutory order.

Being aggrieved by the order of the Court of Appeal, Plaintiff-Appellant-Petitioner filed this leave to appeal application seeking leave on following questions of law.

1. Is the impugn order an interlocutory order or a final order?

2. Is the impugn judgement decided on 12.5. 1999 and Chettiar case was decided 10.6.2010 and the case law permitted the Plaintiff to appeal against the said order, could it be said that the appeal is misconceived in law?

3. Did the ratio in Chettiar case have a retrospective effect, to apply to judgments decided in 1999, when Chettiar case was decided in 2010 a decade later, when during that period of 10 years, the procedure followed was not the procedure enunciated in Chettiar 's case?

4. In any event Chettiar's case specially laid down that to appeal against an order as in the instant case, the procedure under section 754 (1) should be followed?

This special leave to appeal was supported on 02.03.2015 and the Court granted leave on the following question of law only:-

' Was the judgment in Rajendran Chettiyar vs. Narayan Chettiyar relied on by the Court of Appeal wrongly decided'

When this matter was taken up for hearing the Learned President Counsel for the Appellant Rohan Sahabandu submitted that *i*n order to decide the question of law it is necessary to re-examine or review the rationale or the approach adopted in Chettiar vs Chettiar case which is a decision of a bench comprising five judges and move that a numerically higher bench to be constituted. The docket was submitted to the Hon. Chief Justice who constitutes a bench comprising seven judges to hear this appeal

When this matter was taken up for hearing on 05-09-2016 Kanag -Iswaran PC who is appearing in SC CHC 37/2008 raised a preliminary objection stating that a judgment given by the Supreme Court cannot be reviewed by another bench.

Rohan Shabandu PC moved for time to reply to the preliminary objection and the appeal was refixed for hearing 06-10-2006. The learned President Counsel who is appearing for the Appellant moved to raise the 2nd question of law which reads thus:

" Whether the decision enunciated in Chettiyar vs. Chettiyar reported in [2011] 2 SLR 70 deciding that the application approach test should be preferred over the order approach test in deciding whether an order is a final or interlocutory order in civil proceedings be revisited in this appeal".

The learned Counsel for the Respondent in SC 41/2015 did not object to the raising of the 2nd issue. The appeal was taken up for hearing and oral submissions concluded. The parties were permitted to file written submissions and accordingly parties filed their written submissions.

The learned President Counsel for the Appellant submitted that to determine whether the judgment or order is a final judgment or interlocutory or not the proper approach that

should be adopted is the order approach and not the application approach adopted by the judgments in Ranjith vs Kusumawathi (supra) and Chettiar vs Chettiar (supra).

When deciding whether the order or judgment is a final judgment or interlocutory order our courts were throughout influenced by the judgments of the English Courts. The Courts of England adopted two different approaches from time to time.

Sir John Donaldson MR in White v. Brunton[1984] 2 ALL ER pp 606-608 referred to these approaches as the order approach and the application approach.

The order approach was adopted In Shubrook v.Tufnell, (1882) 9QBD621, [1881-8] ALL ER Rep 180 where Jessel, MR and Lindely, LJ held that an order is final if it finally determines the matter in litigation. Thus the issue of final and interlocutory, depended on the nature and the effect of the order made.

In Salaman v. Warnar & others , the Court of Appeal consisting of Lord Esher, MR, Fry and Lopes, LJJ. adopted the application approach and held that a 'final order' is one made on such an application or proceeding that, for whichever side the order was given, it will, if it stands, finally determine the matter in litigation.

In the above s case the Court held that an order made under Order xxv,, rr2 and 3 before the trial dismissing an action upon the hearing of a point of law raised by the Defendant that the statement of claim does not disclose a cause of action is not a final order within order lviii, r.3.

Thus according to Salaman vs Warner (supra) the issue of final or interlocutory depended on the nature of the application or proceedings giving rise to the order and not the order itself.

In Bozson v Altrincham Urban District Council,(1903) 1 KB 547,548,549 (C.A.)the Court of Appeal consisting of Earl of Halsbury, Lord Alverstorn, CJ, and Jeune P. reverted to the order approach.

Rohan Shabandu PC who is appearing for the Appellant submitted that the proper approach is the order approach which was adopted by Sharvananda J (then he was) in Siriwardena Vs Air Ceylon (supra) and not the application Approach adopted in Ranjith vs Kusumawathi (supra) and Chettiar vs Chettiar. (However it is to be noted that nowhere in the judgment in Siriwardena vs.Air Ceylon there is an indication that Sharvananda J adopted the order approach.)

It is appropriate at this stage to refer to the cases of Siriwardene vs Air Ceylon (supra,) Ranjith vs Kusumawathi (supra) and Chettiar vs Chettiar(supra) to consider as to how this question was addressed and conclusions reached in those cases.

Siriwardana Vs. Air Ceylon Limited [1984] 3 Sr LR 286

In this case the Plaintiff obtained an exparte judgment against the Defendant and the decree was entered. The Defendant filed an application under section 189 of the Civil Procedure Code to amend the judgment and decree and accordingly the District Court by its order dated 10.05.82 amended the decree. The Plaintiff moved the Court of Appeal for leave to appeal against the order under section 754(1) of the Civil Procedure Code.

At the hearing of the application for leave, the Counsel for the Defendant-Respondent opposed the application of the Plaintiff on the ground that the order dated 10.05.82 made by the District Judge was a 'final order' having the effect of a final judgement under section 754(5) of the Civil Procedure Code , and that an appeal lay direct to the Court of Appeal under section 754(1) not with the leave of court, first had and obtained, in terms of section 754(2) of the Civil Procedure Code. He submitted that the application for leave to appeal was misconceived.

The Counsel for the Plaintiff contended that the order of the District Judge dated 10.5.82 was not a 'Judgement' but an "order" within the meaning of section 754(2) read with 754(5) of the Civil Procedure Code.

The Court of Appeal by its order dated 09.07.82 upheld the objection of the Counsel for the Defendant -Respondent and held that that the order made amending the Judgment and decree was a final order from which an appeal lay direct to that court under section 754(1) of the C.P.C. and refused with costs the application for leave to appeal.

The Plaintiff-Appellant has with the leave from this Court preferred this appeal against the order of the Court of Appeal dated 9.7.82 refusing his application for leave to appeal. The question that arose for determination is whether the order of the District Judge dated 10.5.82, amending the judgement and decree dated 13.03.80 is a "judgement" within the meaning of section 754(1) and 754(5) of the C.P.C. or and "order" within the meaning of section 754(2) and section 754(5) of the C.P.C.

It is appropriate at this stage to refer to section 754 of the Civil Procedure Code.

" 754(1) Any person who shall be dissatisfied with any judgement, 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 judgement 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.

(3) …

(4) ….

(5) Notwithstanding anything to the contrary in this Ordinance, for the purpose of this Chapter-

> "judgement" means any judgement or order having the effect of a final judgement 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 judgement"

In this case the Court had to consider whether the amending of the judgment and decree under section 189 of the Civil Procedure Code is a judgment under section 754(1) or an order under section 754(2) of the Civil Procedure Code..

On this point Sharvananda J (as he then was) considered several English cases and judgements of the Privy Council which he referred to as guiding light followed by our Courts.
In Salaman Vs. Warner,(supra) , a question arose as to whether the order in question was a final order or an interlocutory one, Lord Esher M.R. laid down the test for determining the question as follows:

> " 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 that 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, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory".

In Bozson v. Altrincham Urban District Council(supra) an order was made in an action brought to recover damages for breach of contract, that the question of liability and breach of contract only was to be tried and that the rest of the case if any, was to go to an official referee. The trial Judge held that there was no binding contract between the parties and made an order dismissing the action. The question arose whether the order was a final or interlocutory order, for the purpose of appeal.

Lord Alverstone, C.J. then proceeded to lay down the proper test in the following words "It seems to me that the real test for determining this question ought to be this: Does the judgement 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" the Earl of Halsbury also took the view that the order appealed from was a final order.

Swinfen Eady L.J. , in Isaac & Sons v. Salbstein (1916) 2 K.B. 139,147 reviewed all the earlier authorities and approved the test of finality stated by Lord Alverstone C.J. as putting the matter on the true foundation that what must be looked at is the order under appeal and whether it finally dispose of the rights of the parties.

Sharvananda J (as he then was) referred to several Privy Council cases which followed the test set down in Bozson's case. They are: Ramchand Manjimal v Goverdhandas

Vishandas Ratanchand and others,, AIR 1920 P.C. 86,87 and Abdul Rahman and others v Cassim &Sons, AIR 1933 P.C. 58. 60

In the case of Ramachand Manjimal v. Goverdhandas Vishandas Ratanchand (supra) The question that arose is whether order refusing the stay was a final order or not. Viscount Cave in his judgement referred to the test laid down in Bozson's case (supra) and observed as follows:

> "The effect of those and other judgements is that an order is final if it finally disposes of the rights of the parties. The orders now under appeal do not finally dispose of those rights, but leave them to be determined by the courts in the ordinary way. "

In Abdul Rahman and others v Cassim &Sons (supra) cited the judgment in of Ramachand Manjimal v. Goverdhandas Vishandas Ratanchand (supra)with approval and held:

> "The effect of the Order from which it is here sought to appeal was not to dispose finally the rights of the parties. It no doubt decided an important and even a vital issue in the case, but it leaves the suit alive and provided for its trial in the ordinary way." It must be an order finally disposing of the rights of the parties.

Sharvananda J (as he then was) in Siriwardena Air Ceylon referred to the above cases with approval and proceeded to adopt test laid down in Bozsons case and held:

1) It must be an order finally disposing of the rights of the parties

2) The order cannot be treated to be a final order if the suit or action is still left a live suit or action 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.

Sharvananda J stated that in his view the word "Judgement" in 754(1) read with 754(5) of the C.P.C. has been used in the sense of a final determination of the rights of the parties in the proceedings, and comprised final orders besides the final declaration or determination of rights of parties which culminates in the entering of a decree in terms of section 188 of the CP.C. It is not restricted to the judgement referred to in section 184 of the CPC it is much wider.

Ranjit v. Kusumawathie and others [1998] 3 Sri L.R 233

This is partition action where the original 4th Defendant having filed his statement of claim failed to appear at the trial and the evidence was led for the Plaintiff, other parties been absent the judgement and the interlocutory decree were entered accordingly. The original 4th Defendant applied to the trial Court, in terms of sub section 48(4)(a)(iv) of the Partition Law, for special leave which permits a defaulting party to make an application to enter the case. The application for special leave was rejected by the District Court. The appellant then preferred an appeal to the Court of Appeal against the order, in terms of subsection 754(1) of the Civil Procedure Code as if that order made by the District Court was a "judgement". The Court of Appeal rejected the appeal on the basis that what was appealed from was an "order" within the meaning of subsection 754(2) of the CPC and that therefore an appeal could lie only with leave of the Court of Appeal first had and obtained. This appeal relates to that rejection.

The main issue is whether the refusal of the Application made under section 48 (4) (a) (iv) is a judgment contemplated under section 754 (1) or an order under 754 (2) of the Civil Procedure Code.

Dheerarathne J in his judgment referred to two virtually alternating tests that is the 'order' approach and 'application' approach adopted by different judges from time to time in the UK to determine what final orders and interlocutory orders were. He referred to several English cases which adopted the order approach as well as application approach.

The order approach was adopted in Shubrook v.Tufnell, where Jessel, MR and Lindely, LJ. held that an order is final if it finally determines the matter in litigation. Thus the issue of final and interlocutory, depended on the nature of the order made.

The application approach was adopted in Salaman v. Warnar & others (supra). It was held that the final order is one made on such application or proceeding that, for whichever side the order was given, it will, if it stands, finally determine the matter in litigation. Thus the issue of final or interlocutory depended on the nature of the application or proceedings giving rise to the order and not the order itself.

In Bozson v Altrincham Urban District Council, the Court of Appeal consisting of Earl of Halsbury, Lord Alverstorn, CJ, and Jeune P. reverted to the order approach.

In Salter Rex & Co. v. Gosh, Lord Denning, MR considered both approaches and he held that the application approach is the correct approach. He stated that:" There is a note in the Supreme Court Practice 1970 under RSC Ord 59, from which it appears that different tests have been stated from time to time as to what is final and what is interlocutory. In Standard Discount Co. v.. La Grange and Salaman v. Warner (supra) Lord Esher MR said that the test was the nature of the application to the court and not to the nature of the order which the court eventually made. But in Bozson v. Altrincham Urban District Council (supra) the court said that the test was the nature of the order as made. Lord Alverstone, CJ. said that test is; " ……that the test is whether the judgement or order, as made, finally dispose of the rights of the parties". 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 . For instance, an appeal from a judgement under RSC Ord 14(even apart from the new rule) has always been regarded as interlocutory and notice of appeal has to be lodged within 14 days . An appeal from an order striking out an action as being frivolous or vexatious, or as disclosing no reasonable cause of action, or dismissing it for want of prosecution – every such order is regarded as interlocutory; see Hunt v. Allied Bakeries Ltd. So I would apply Lord Esher MR's test to an order refusing a new trial. I look to the application for a new trial not to the order made."

Dheerarathne in his judgment stated that:
" A party to a partition action making an application in terms of subsection 48(4) (a) (iv) in order to establish his right, title or interest, has two hurdles to surmount . First he has to satisfy court, in terms of subsection (c) that (i) having filed his statement of claim and registered his address, he failed to appear at the trial owing to accident, misfortune or other unavoidable cause, and (ii) that he had a prima facie right, title or interest in the corpus, and (iii) that such right , title or interest has been extinguished or such party has been otherwise prejudicially affected by the interlocutory decree. Then only the court will grant special leave. After granting special leave , in terms of subsection (d), the court will settle in the form of issues the questions of fact and law arising from the pleadings relevant to the claim and then appoint a day for trial and determination of the issues. The second hurdle the party has to surmount is the determination of those issues by court after trial, in terms of subsection (e).

The order appealed from is an order made against the appellant at the first hurdle. Can one say that the order made on the application of the 4th defendant is one such that whichever way the order was given, it would have finally determined the litigation?. Far from that, even if the order was given in favour of the appellant, he has to face the second hurdle, namely the trial to vindicate his claim"

Dheerarathne J followed the judgments of Lord Esher in Salaman vs Warner (supra), and Lord Denning's judgment in Salter Rex vs Gosh (supra) which adopted the application approach and held that the order appealed from is not a "judgement" within the meaning of subsections 754(1) and 754(5) of the CPC. The appeal was dismissed.

S.Rajendra Chettiar and others v. S.Narayanan Chettiar [2011] BALR 25, [2011] 2 SLR 70

The Plaintiff instituted action in the District Court of Colombo in case No. 428/T against the Trustees of the Hindu Temple known as "Kathirvelayuthan Swami Kovil" in terms of section 101 of the Trustees Ordinance.The 2nd and 3rd Appellants and later the1st and 4th Respondent by way of motions, brought to the attention of court that the Plaintiff's action is barred by positive rule of law and that the plaint ought to be rejected and the plaintiff's action be dismissed in limine under section 46(2) of the Civil Procedure Code. The Learned Additional District Judge upheld the preliminary objections and dismissed the action of the plaintiff.

The Plaintiff filed a leave to appeal application in terms of section 754(2) of the Civil Procedure Code. The learned Counsel for the Defendants raised a preliminary objection that the Plaintiff is not entitled to maintain the leave to appeal application, as the order dated 14.05.2008 is an order having the effect of a judgement and that the application of the Plaintiff seeking leave to appeal in terms of section 754 (2) of the Civil Procedure Code is misconceived in law.

The Provincial High Court of Civil Appeal held that the order dated 14.5.2008 of the District Judge is an interlocutory order and that in view of the test laid down by Sharvananda, J (as he then was) in Siriwardana v Air Ceylon Ltd.(supra), the order of the learned Additional District Judge was not an order having the effect of a Final Order. The Provincial High Court of Civil Appeal further held that the order made in terms of section 46 of the Civil Procedure Code, the rights of the parties have not yet been considered and therefore the rights of the parties have not been determined. Further under section 46(2) of the Civil Procedure Code the plaintiff is not precluded from presenting a fresh plain in respect of the same cause of action.

The Defendant Appellants filed a leave to appeal Application and obtained leave. The main question that has to be determined is whether the order made under section 46(1) of the Civil Procedure Code dismissing the action is a judgement contemplated under 754(1) or an order under 754(2).

At the time of granting leave there were two decisions of this court by numerically equal benches of this court , namely, Siriwardana v. Air Ceylon Ltd (supra) and Ranjit v. Kusumawathi (supra). In Siriwardana v Air Ceylon Sharvananda J. (as he then was) according to Dheerarathne J adopted what is known as the 'order' approach whereas in Ranjith v. Kusumawathi (supra) Dheerarathne J adopted the application approach. In view of different approaches adopted by two numerically equal benches, on an application made by the Learned Counsel a direction was given to the Registrar to refer this matter to His Lordship the Chief Justice. His Lordship the Chief Justice nominated a bench comprising 5 judges which proceeded to hear this case. The bench presided over by Shirani Bandaranayake, J (as she then was) considered all the cases referred to in the judgements in Siriwardana v Air Ceylon and Ranjith v. Kusumawathi.

When the matter was argued before the bench, the learned Counsel for the Appellants submitted that there can be only one judgement in an action that is under section 184 read with section 217 of the Civil Procedure Code and that judgement is considered as a final judgement. The orders having the effect of final judgement are the orders made under sections 387 and 388 in summery proceedings. All other orders are interlocutory orders contemplated under section 754(2) of the Civil Procedure Code.

Shirani Bandaranayake J.(as she then was) emphasized the fact that the interpretation given to judgement or order in section 754(5) applies only to appeals and revisions. The phrase " notwithstanding anything to the contrary in this ordinance for the purpose of this chapter" confirms this position.

Shirani Bandaranayake J (as she then was) did not follow the order approach adopted in Shubrook v Tufnel (supra) and Bozson v. Altrinchan Urban District Council (Supra). Shirani Bandaranayake J. cited with approval the judgements of Lord Esher MR in Standard Discount Co. v. La Grange(supra) and Salaman v Warner (supra), which adopted the application approach which was cited with approval by Lord J. Denning Salter Rex and Co. v. Gosh (supra).

According to the facts in this case action was dismissed under section 46(2) of the Civil Procedure Code for not complying with the positive rule of law. The merits of the case were not considered and the rights and liabilities of the parties were not determined. The case was dismissed purely on a procedural defect. Further in terms of Salaman v Warner if the decision is given in either way the case should be finally determined. But in this case objections were upheld and the action was dismissed. On the other hand if the objection were overruled case would have proceed to trial. Therefore it was held that the dismissal of the action is not a final order or a judgment.

The question of law to be determined.

In cases before us the question of law that has to be determine is whether the dismissal of actions are final judgments coming under section 754 (1) or orders made in the course of the action under 754 (2) of the Civil Procedure Code.

The section 754(1) refers to preferring of an appeal against a judgment pronounced by an original court in any civil action proceeding or matter whereas 754(2) refers to a leave to appeal application to be filed in respect an order.

It is advisable to refer to section 754(5) which interprets what is a final judgment and an order. The subsection reads thus:

"Notwithstanding anything to the contrary in this Ordinance, for the purpose of this chapter:

"judgement" means any judgement or order having the effect of a final judgement 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 judgement"

According to this interpretation section, appeals could be filed in respect of judgments or orders which are final judgements. In respect of other orders which are not final and considered as interlocutory orders leave to appeal applications have to be filed. In view of this definition it appears that judgements fall into two categories. Similarly orders also fall into two categories.

(A) Judgements which are final judgements
(B) Judgements which are not final.
(C) Orders which area final judgements

(D) Orders which are interlocutory orders.

Therefore appeal could be filed in respect of judgements or orders which are final. In respect of other orders leave has to be first obtained. Therefore it appears that finality of the judgement or order that matters and not the name given as judgement or order.

In AG v. Piyasena 63 NLR pages 489 -501 dealing with orders of discharge and acquittal it was held that what is material is not the use of the language but the effect of the order. In a criminal case if a person is acquitted and if tried again, the accused could plead autrofois acquit similar to res judicata in a civil case. The acquittal is made on the merits of the case unlike an order of discharge. Therefore, one has to consider the nature and the effect of the judgement or order in determining whether it is a final order or a judgement. The issue is whether judgement or order finally determined the rights and liabilities of the parties.

At this stage it is appropriate to refer to section 184 of the Civil Procedure Code dealing with judgment and decree which reads thus:

184 (1) The Court, upon the evidence which has been duly taken or upon the facts admitted in the pleadings or otherwise, and after the parties have been heard either in person or by their respective counsel or registered attorneys (or recognized agents), shall, after consultation with the assessors (if any), pronounce judgement in open court, either at once or on some future day, of which notice shall be given to the parties or their registered attorneys at the termination of the trial.

There is no doubt that a judgment delivered under section 184 is a final judgment. It is given after considering the merits of the case and decides the rights and liabilities of the parties.

In Siriwardana v Air Ceylon (supra) leave to appeal application was filed against an amended judgement and decree entered under section 189 of the Civil Procedure Code. It was argued that there cannot be two judgments in a case. The amended judgement cannot be considered as a judgement. However, Sharvananda, J rejected that argument and held that "the amended judgment supersedes the earlier judgment made under section 184 and finally disposes of the rights of the parties, leaving nothing to be done for the purpose of determining the rights and liabilities of the parties''.

In Chettiar v Chettiar (Supra) the learned President Counsel for the Appellant submitted that there could be only one judgement in a case and the other orders are which are not final are all incidental orders. He submitted that "order having the effect of a final judgement" is only applicable in cases where no judgements are given and those are cases which are instituted under summery procedure. The counsel's contention is that the term judgements would mean judgements and decrees entered in terms of section 184 read with 217 of the Civil Procedure Code. The orders having the effect of a final judgement are in terms of section 387 and 388 of the Civil Procedure Code given under summery procedure. All other orders are considered as interlocutory orders.

The question that arises is what are the orders considered as final judgments. The orders made under summary procedure under sections 387 and 389, execution proceedings as held in Usoofs case (supra) and similar orders deciding finally the rights of the parties could be considered as final judgments. The orders made in the course of a civil action, proceeding or matter are considered as interlocutory orders.

In Usoof v. the National Bank of India (1958) 60 NLR 381 at 383 Sansoni J stated that" I do not see why there cannot be a final order or judgement even in execution proceedings, whether those proceedings are between the parties to the action or not; and so far that the judgement debtors in this case are concerned, they have, by the judgement of this court, finally lost their rights in the mortgaged property, and the execution proceedings are no longer live proceedings".

The court further held that the judgement of the Supreme Court dismissing an appeal from the order of the District Court refusing to set aside the sale of a property in execution of a mortgage decree is a "final judgement" within the meaning of Rule 1A of the schedule to the Appeals (Privy Council) Ordinance

In Ex parte Moore In Re Faithful 1885 QBD VOL XIV 627 ,632, the Earl of Selborne, L.C., expounded the meaning of final judgement in the following words:

> "To constitute an order a final judgement nothing more is necessary than that there should be a proper litis contestatio, and a final adjudication between the parties to it on the merits

In two cases before us orders are made in respect of points of law raised by the parties. If the preliminary objections were rejected cases would have proceeded to trial. In both case at the time of dismissal rights of the parties were not determined.

In order to decide whether a order is a final judgment or not. it is my considered view that the proper approach is the approach adopted by lord Esher in Salaman vs Warner (supra) which was cited with approval by Lord Denning in Salter Rex vs Gosh (supra).It stated:

> "If their decision which ever way it is given, will if it stands finally dispose of the matter in dispute, I think that 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, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory".

Therefore orders given in both cases are interlocutory orders and the proper course of action is to file leave to appeal application under section 754 (2) and not preferring and appeals under section 754(1)of the Civil Procedure Code.

Judgments

SC Appeal No.41/2015

In the case the Plaintiff's action was dismissed as the Plaintiff failed to aver in the plaint when and where the cause of action arose and thereby failed to comply with an imperative provision of the law. At the time of dismissal the rights and liabilities of the parties were not considered or determined .

The Plaintiff filed an appeal against the order under sec 754(1) of the Civil Procedure Code. The Defendants took up the position that dismissal of action under section 46 of the Civil Procedure Code is an order made under 754(2) of the Civil Procedure Code and the Plaintiff has no right of appeal as the said order is an interlocutory order and not a judgment. The Court of Appeal upheld the preliminary objection and dismissed the appeal. Against this order the Plaintiff-Appellant-Appellant filed a Leave to appeal application and obtained leave. We affirmed the Judgment of the Court of Appeal and dismissed the Appeal. No Costs.

SC CHC Appeal 37/2008

The Plaintiff-Appellant filed case No. HC (Civil) 44/07/MR in the High Court of Western Province (exercising Civil Jurisdiction) known as Commercial High Court of Colombo against the Defendant-Respondent to enforce a Fire Insurance Contract entered into between the Defendant and claiming Rs. 5,350,000/- from the Defendant as compensation for damages caused to his stock in trade of his business due to a fire on 1st January 2006.

In the Answer the Defendant took up the position that;

i. The Plaintiff has failed to institute this action within three months of the date of rejection of the clam by the Defendant as required by clause 13 of the Fire Insurance Contract.

ii. The Plaintiff has failed to institute the said action within twelve months of the fire as required by clause 20 of the Fire Insurance Contract.

iii. The Plaintiff's action is time barred by clause 13 and 20 of the said Fire Insurance Contract.

iv. Therefore the Plaintiff action is prescribed and should be dismissed in limine.

The parties framed issues and the preliminary issues No 10 and 14 pertaining to prescription was taken up first. The Learned High Court Judge decided issue No. 10

to14 in favour of the Defendant and held that the Plaintiff's action is time barred under Clause 13 and 20 of the Fire Insurance Contract and the cause of action was prescribed. The Plaintiff's action was dismissed.

Being aggrieved by the said Order of the High Court Judge the Plaintiff-Appellant filed an appeal to this Court. It is the position of the Plaintiff-Appellant that section 6 of the Prescription Ordinance prevails over the clauses in Fire Insurance Contract.

The learned Counsel for the Defendant-Respondent raised a preliminary objection to the effect that the Plaintiff should have invoked the jurisdiction of the Court by way of a Leave to Appeal application and not by way of a final appeal. He submitted that Chettiar Vs. Chettiar reported in [2011] BALR page 25 and also report in [2011] 2 SLR page 70 is applicable to this case. However, Learned Counsel for the Plaintiff-Appellant submitted that judgement in Chettiar Vs. Chettiar was not delivered at the time the order was made in this case and he submitted that this an appropriate case to review the principle enunciated in Chettiar Vs. Chettiar.

In this case the High Court exercising Civil Jurisdiction commonly known as Commercial High Court upheld a preliminary objection and dismissed the plaint on the basis that the action is prescribed. The Plaintiff Appellant filed an appeal instead of a leave to appeal application. We hold that the order made by the High Court is an interlocutory order and the Plaintiff should have filed a leave to Appeal Application under section 754 (2) instead of filing an appeal under section 754 (1) of the Civil Procedure Code. We dismissed the Appeal. No. Cost.

Chief Justice

S.E. Wanasundera, PC J
I agree

Judge of the Supreme Court

Sisira J. de Abrew, J.
I agree

Judge of the Supreme Court

Priyantha Jayawardene, PC, J
I agree

Judge of the Supreme Court

Upaly Abeyrathne, J
I agree

Judge of the Supreme Court

Anil Gooneratne, J
I agree

Judge of the Supreme Court

K.T. Chitrasiri, J
I agree

Judge of the Supreme Court