

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

In the matter of an appeal after granting of Leave to Appeal in terms of Article 172 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka read together with Section 5C of the High Court of the Provinces (Special Provision) Act NO.19 of 1990 as amended by the High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

**SC APPEAL NO:-193/2012**

**SC/HC/CALA/18/2013**

**PHC Kandy No.CP/HCCA/CA/49/10**

**DC Gampola D 82/06**

W.D.M.Ganga Prasath Tikiri Banda  
Dissanayake,  
Pethum Uyana, Pallekelle, Kundasale

**PLAINTIFF**

**V.**

R.G.R.M Hemali Priyantha Menike  
Ratnayake,  
50, Keerapane, Gampola.

**DEFENDANT**

**AND BETWEEN**

W.D.M.Ganga Prasath Tikiri Banda  
Dissanayake. Pethum Uyana,  
Pallekelle, Kundasale.

**PLAINTIFF-APPELLANT**

**V.**

R.G.R.M. Hemali Priyantha Menike  
Ratnayake.  
50, Keerapane, Gampola.

**DEFENDANT-RESPONDENT**

**AND NOW BETWEEN**

W.D.M.Ganga Prasath Tikiri Banda  
Dissanayake, Pethum Uyana,  
Pallekelle, Kundasale.

**PLAINTIFF-APPELLANT-APPELLANT**

**V.**

R.G.R.M. Hemali Priyantha Menike  
Ratnayake.

50, Keerapane, Gampola.

**DEFENDANT-RESPONDENT-RESPONDENT**

**BEFORE:- B.P.ALUWIHARE, PC, J.**

**UPALY ABEYRATHNE, J.**

**H.N.J.PERERA, J.**

**COUNSEL:-**Sunil Abeyratne with Thashira Gunatileke for Plaintiff-  
Appellant-Appellant.

Thishya Weragoda with Chinthaka Sugathapala instructed by  
Thamila Dinushi Perera for the Defendant-Respondent-  
Respondent.

**ARGUED ON:-**24.05.2017.

**DECIDED ON:-**04.08.2017

**H.N.J.PERERA, J.**

The Plaintiff-Appellant-Appellant(here-in-after referred to as Plaintiff) instituted action in the District Court of Gampola seeking inter alia a Divorce dissolving the marriage between the Plaintiff and the Defendant-Respondent-Respondent(here-in-after referred to as the Defendant).

The Defendant filed answer and sought a dismissal of the Plaintiff's action and counter sued for a dissolution of marriage between the parties on grounds of desertion on the part of the Plaintiff.

At the trial both the Plaintiff and the defendant reached a settlement and accordingly, the Plaintiff agreed to pay permanent alimony to the Defendant, the Defendant to leave from the house situated at Keerapne, Gampola and handover possession of the same and three vehicles and documents relevant to the same and other items mentioned in the schedule of the plaint to the Plaintiff. As a result, the Plaintiff had to deposit Rs.2,950,000/- in favour of the Defendant. The parties to fulfil their respective obligations on or before 1<sup>st</sup> December 2007. On such basis the marriage between the Plaintiff and the Defendant to be dissolved on the matrimonial fault of constructive desertion of the Defendant by the Plaintiff. Accordingly the Defendant's evidence was led and the learned trial Judge delivered judgment and entered decree Nisi on 08.10.2007.

Thereafter the Plaintiff by way of a petition supported by affidavit sought an order or judgment declaring that the settlement entered into on 8<sup>th</sup> October 2007 is declared null and void, to re-fix the case for re-trial and to permit the Plaintiff to withdraw the said sum of Rs.2,950,000/-deposited in court. The Plaintiff also sought an interim order preventing the Defendant from withdrawing the said Rs.2,950,000/-until the determination of the said application.

The plaintiff pleaded that he granted a Power of Attorney in favour of the Defendant in 2005 when he was out of the country from 18<sup>th</sup> March until 5<sup>th</sup> April 2005.The Plaintiff states that the Defendant using the said Power of Attorney had transferred a land to the Defendant's father on or about 10<sup>th</sup> May 2006 and thereafter the Defendant's father had transferred the said land in favour of the Defendant on or about 9<sup>th</sup> June 2006. It is the Plaintiff's position that he was unaware of the said transaction at the time of entering into the settlement in the divorce case on 8<sup>th</sup> October 2007.

The learned District judge rejected the said application of the Plaintiff summarily without holding an inquiry on 10.12.2007 and being dissatisfied with the said order the Plaintiff filed a Leave to Appeal application against the same before the High Court of Province, Kandy (Civil Appellate) and upon the agreement of both parties to refer the case back to the District Court for a proper inquiry in to the said application of the Plaintiff, the said court made order vacating the order made by the District Judge on 8.10.2007 and sent back the case for a fresh inquiry. The learned District judge thereafter after inquiry delivered the order on 2.10.2008 rejecting the application of the plaintiff once again.

Being aggrieved by the said order made by the learned District Judge on 02.10.2008 rejecting the said application made by the Plaintiff, the Plaintiff has preferred an appeal to the Civil Appellate High Court Kandy and the said appeal was dismissed by the Civil Appellate High Court on the basis that the Plaintiff has no right of appeal under section 754(1) of the Civil Procedure Code against the order dated 02.10.2008.

Being aggrieved by the said judgment of the High Court of Province (Civil Appellate), Kandy, the Plaintiff sought leave to appeal from this court and this court granted leave on the following questions of law.

(1) Whether the order dated 02.10.2008 was in the nature of final order and the Petitioner has a right of appeal against the same?

(2) Whether the learned judges of the High Court of Province (Civil Appellate), Kandy erred in facts and law of this case?

(3) Whether the learned judges of the High Court of Province (Civil Appellate) Kandy and the learned District Judge , Gampola have been misled by the submission of the Respondent and failed to consider that the Appellant has entered into terms of settlement before the judgment

without the knowledge of the aforesaid fraudulent act of the Respondent?

(4) Whether the learned Judges of the High Court of Province (Civil Appellate) Kandy have failed to consider the fact that if the Appellant had known the said fraudulent act of the Respondent, the Appellant would have not entered into terms of settlement of the said case?

(4) Whether the learned judges of the High Court of Province (Civil Appellate) Kandy have erroneously declared that the Appellant cannot challenge the order of the District Court dated 02.10.2008 under provisions of section 754(1) of the Civil Procedure Code?

The main contention of the plaintiff in this case is that the order dated 02.10.2008 is an order having the effect of a Final judgment and therefore the Plaintiff is entitled to canvass the same by way of a Final Appeal in terms of section 754(1) of the Civil Procedure Code.

The Defendant submits that the position of the Plaintiff is untenable in law and that the order dated 02.10.2008 is an interlocutory order.

The Counsel of the Defendant has sighted the decision of the Supreme Court in the case of S. Subramaniam Chettiar V.S.Narayan Chettiar and Others SC Appeal Nos 101/A/2009, 101B/2009(SC HCCA LA 174/2008, 175/2008) In support of his contention that the order dated 02.10.2008 is not a final order having the effect of a judgment within the meaning of sub-section 754(1) and 754(5) of the Civil Procedure Code, but is only an inter-locutory order.

In Chettiar's case the Supreme Court held that:-

“In terms of section 754(5) of the Civil Procedure Code a judgment would mean any judgment or order having the effect of a ‘final judgment’ made by any civil court and an order would mean the final expression of any decision in any civil action, proceeding of matter, which is not a

judgment. Although section 754(5) of the Civil Procedure Code had laid down the meaning of the judgment and order, it had not been easy to give a comprehensive definition of the term 'final judgment'.

The question of the test that should be applied to decide as to whether an order has the effect of a final judgment was considered by the Supreme Court in *Siriwardene V. Air Ceylon Ltd* (1984)(1) S.L.R. 295 and *Ranjith V. Kusumawathie and others* 1998 (3) S.L.R.232. In *Siriwardene and Air Ceylon Ltd* in his judgment Sharvananda, J. had referred to a number of cases and had held that for an order to have the effect of a final judgment and to qualify to be a 'judgment' under section 754(5) of the Civil Procedure Code:-

- (1) It must be an order finally disposing the rights of the parties;
- (2) The order cannot be treated to be a final order if the suit of 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 or important issue determined in the case, is not enough to make an order a final one.

The meaning of 'judgment' for the purpose of appeal was also examined by Dheeraratne, J in *Ranjit V. kusumawathie and others*. Justice Dheeraratne ,J. in *Ranjit V. Kusumawathie* had examined several cases including those which were referred to by Sharvananda, J. and had referred to the two tests, which was referred to as the 'order approach' and the 'application approach' by Sir John Donaldson MR; in *White V. Brunton*. (supra)

At the time leave to appeal was granted in 'Chettiar's case both learned Presidents Counsels who appeared in that case had invited the Court that in order to resolve the apparent conflict between the two judgments; viz *Siriwardene V. Air Ceylon Ltd* and *Ranjith V. Kusumawathie* that the appeal be referred to a Bench of five judges . Accordingly a Bench of five judges were nominated by the then Chief Justice to consider this matter.

The Supreme Court after considering all these cases has held in Chettiar's case that:-

"It is therefore quite obvious that final judgment or order should be interpreted for the purpose of Chapter LV111 of the Civil Procedure Code not according to the meaning given in section 5 of the Civil Procedure Code, but that of the definition given in section 754(5) of the Civil Procedure Code.

Considering the provisions contained in section 754(5) of the Civil Procedure Code, it is abundantly clear that decision of an original civil court could only take the form of a judgment or an order having the effect of a judgment or of the form an interlocutory order.....

Accordingly in terms of section 754(5) there could be only a judgment, order having the effect of a final judgment and an order, which is not a judgment and therefore only an interlocutory order.

The Court further held:-

"In these circumstances, it is abundantly clear that, in interpreting the words, judgment and order in reference to appeals and revisions, it would not be possible to refer to any other section or sections of Civil Procedure Code, other than section 754(5), and therefore an interpretation based on the procedure of an action cannot be considered for the said purpose. Therefore to ascertain the nature of the decision made by a civil court as to whether it is final or not, in keeping with the



provisions of section 754(5) of the Civil Procedure Code, it would be necessary to follow the test defined by Lord Eshert MR in *Standard Discount Co. V. La Grange* (supra) 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, whichever way it is given, will, if it stands, finally dispose 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.’

Considering the decision given by Bandaranayake, J. in *S. Subramaniam Chettiar V. S. Narayan Chettiar* and others this court cannot agree with the submissions made by the learned Counsel for the Plaintiff that the order made by the learned District Judge have the effect of a final judgment under section 754(5) of the Civil Procedure Code and therefore appeal lay direct to this court under section 754(1). Had the District Judge answered the issue in Plaintiff’s favour he would have to continue with the case and would have allowed the action to go on. In such circumstances it would not be probable to state that the said order made by the learned District Judge had finally settled the litigation between the Plaintiff and the Defendant. It is abundantly clear that the order dated 02.10.2008 is not a final order, having the effect of a judgment within the meaning of sub-sections 754(1) and 754(5) of the Civil Procedure Code, but is only an interlocutory order.

Therefore plaintiff is not entitled make a final appeal as the Plaintiff’s remedy was to make an application by way of a leave to appeal. Therefore the learned Provincial High Court Judge was correct in holding that the order dated 02.10.2008 was not an order having the effect of a

judgment but an interlocutory order and that the Plaintiff had no right of appeal in terms of section 754(1) of the Civil Procedure Code.

Accordingly I answer the questions of law No. 1, 2 and 5 in the negative in Defendant's favour. In view of the above findings I see no reason to consider questions of law No. 3 and 4. Therefore for the aforementioned reasons I dismiss the Appeal of the Plaintiff-Appellant-Appellant with costs.

**JUDGE OF THE SUPREME COURT**

**B.P.ALUWIHARE, PC, J.**

**I agree.**

**JUDGE OF THE SUPREME COURT**

**UPALY ABEYRATNE, J.**

**I agree.**

**JUDGE OF THE SUPREME COURT**