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

Wille Arachchige Madushani Perera
or Mille Arachchige Madushani
Perera,
No. 231/2, School Lane,
Wedamulla, Kelaniya.
Plaintiff

SC APPEAL NO: SC/APPEAL/107/2023
HCCA NO: WP/HCCA/GAMPAHA/44/2019 (F)
DC GAMPAHA NO: 2789/L

Vs.

Indrani Silva,
No. 99, Naramminiya Road,
Kelaniya.
Defendant

AND

Indrani Silva,
No. 99, Naramminiya Road,
Kelaniya.
Defendant-Appellant

Vs.

Wille Arachchige Madushani Perera
or Mille Arachchige Madushani
Perera,
No. 231/2, School Lane,
Wedamulla, Kelaniya.
Plaintiff-Respondent

AND NOW BETWEEN

Wille Arachchige Madushani Perera
or Mille Arachchige Madushani
Perera,
No. 231/2, School Lane,
Wedamulla, Kelaniya.
Plaintiff-Respondent-Appellant

Vs.

Indrani Silva,
No. 99, Naramminiya Road,
Kelaniya.
Defendant-Appellant-Respondent

Before: Hon. Justice E.A.G.R. Amarasekara
Hon. Justice Achala Wengappuli
Hon. Justice Mahinda Samayawardhena

Counsel: Dinesh de Alwis for the Plaintiff-Respondent-Appellant.
Defendant-Appellant-Respondent is absent and
unrepresented.

Written Submissions:

By the Appellant on 28.12.2023

Argued on: 16.01.2024

Decided on: 13.02.2024

Samayawardhena, J.

The plaintiff filed action in the District Court of Gampaha seeking a declaration of title to, and ejectment of the defendant from, the land described in the schedule to the plaint, and damages. The defendant filed answer seeking dismissal of the plaintiff's action and a declaration that the defendant is the owner of the land.

On the 5th date of trial, the defendant being absent and unrepresented, the case was fixed for *ex parte* trial. After the *ex parte* trial, the judgment was pronounced on 17.11.2017. Upon the *ex parte* decree being served on the defendant, the defendant made an application under section 86(2) of the Civil Procedure Code to vacate the *ex parte* decree.

At the inquiry into this application, learned counsel for the plaintiff raised a preliminary objection to the maintainability of the application on the basis that the application was bad in law since the defendant had not prayed for setting aside the *ex parte* judgment and the decree. This preliminary objection was upheld by the District Court and the plaintiff's application was dismissed *in limine* by order dated 31.05.2019.

The defendant filed a final appeal against this order in terms of section 754(1) read with section 754(5) of the Civil Procedure Code (by way of Notice of Appeal followed by Petition of Appeal as stipulated in section 755 of the Civil Procedure Code).

The defendant did not participate in the argument before the High Court of Civil Appeal.

As seen from the post-argument written submissions filed on behalf of the plaintiff before the High Court of Civil Appeal, the principal submission of learned counsel for the plaintiff before the High Court was that the final appeal filed against the order of the District Court dated 31.05.2019 was misconceived in law. By citing *Chettiar v. Chettiar* [2011] 2 Sri LR 70 in support, his argument was that the defendant ought to have come before the High Court by way of a leave to appeal application, not by way of final appeal.

The second submission of learned counsel before the High Court was that the application filed by the defendant before the District Court under section 86(2) was misconceived in law, as there was no relief seeking to set aside the *ex parte* judgment and the decree.

The learned High Court Judge identified these two arguments presented before him in the impugned judgment but, for reasons best known to him, only dealt with the second submission and allowed the appeal by judgment dated 31.05.2022. The learned High Court Judge completely ignored the first submission.

This appeal by the plaintiff is against the judgment of the High Court. This Court granted leave to appeal against the said judgment mainly on two questions of law:

(a) Did the High Court of Civil Appeal err in law by not dismissing the final appeal filed by the defendant since the correct remedy would have been to file a leave to appeal application against the impugned order dated 31.05.2019?
(b) Did the High Court of Civil Appeal err in law by concluding that the defendant intended to set aside the *ex parte* judgment and the

decree dated 17.11.2017 in the absence of a prayer to that effect in the application filed under section 86(2)?

The approach of the learned High Court Judge is completely erroneous. He ought to have initially decided on the first submission, and thereafter considered the second submission, if he ruled against the plaintiff on the first. If he accepted the first submission, he had no choice but to dismiss the appeal *in limine*. In such circumstances, consideration of the second submission does not arise. The High Court cannot decide only on the second submission and allow the appeal.

The main statutory provisions relevant to the first question of law are sections 754(1), (2) and (5) of the Civil Procedure Code and section 5 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990.

Sections 754(1), (2) and (5) of the Civil Procedure Code read as follows:

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.

According to Article 154P to the Constitution introduced by the 13th Amendment, there shall be a High Court for each Province. The High Court of the Provinces (Special Provisions) Act, No.19 of 1990, made provisions regarding the procedure to be followed in, and the right to appeal to and from, such High Court, and for matters connected therewith. By this Act, the High Courts of the Provinces were granted appellate jurisdiction primarily against the judgments and orders of the Magistrates' Courts, Primary Courts and Labour Tribunals within the respective Provinces.

By the High Court of the Provinces (Special Provinces) (Amendment) Act, No. 54 of 2006, sections 5A, 5B and 5C were introduced to Act No. 19 of 1990. This was done to grant appellate jurisdiction to the Provincial High Courts against the judgments and orders of the District Courts within the respective Provinces. Those High Courts, although it is a misnomer, are conveniently known as High Courts of Civil Appeal.

After the said amendment by Act No. 54 of 2006, section 5A of the principal Act, No.19 of 1990 (without the proviso) reads as follows:

5A(1) A High Court established by Article 154P of the Constitution for a Province, shall have and exercise appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court or a Family Court within such Province and the appellate jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such District Court or Family Court, as the case may be.

(2) The provisions of sections 23 to 27 of the Judicature Act, No. 2 of 1978 and sections 753 to 760 and sections 765 to 777 of the Civil

> *Procedure Code (Chapter 101) and of any written law applicable to the exercise of the jurisdiction referred to in subsection (1) by the Court of Appeal, shall be read and construed as including a reference to a High Court established by Article 154P of the Constitution for a Province and any person aggrieved by any judgment, decree or order of a District Court or a Family Court, as the case may be, within a Province, may invoke the jurisdiction referred to in that subsection, in the High Court established for that Province:*

According to section 5A(2), the appellate procedure to be adopted in the High Court of Civil Appeal is the same procedure which is being followed in the Court of Appeal.

The issue of whether an appeal or leave to appeal is permissible against an order of the District Court has been a matter of prolonged controversy. Two approaches emerged: 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 solely considers the nature of the order. If the order, when taken in isolation, conclusively disposes of the matter in litigation without leaving the suit alive, it is deemed final, and a final appeal is the appropriate remedy against such an order.

The application approach solely considers the nature of the application made to Court by a party, not the order delivered by Court on that application. Following this approach, if the order, given in one way, will conclusively dispose of the matter in litigation, but if given in the opposite way, will allow the action to continue, the order is considered interlocutory, in which event, leave to appeal is deemed the appropriate remedy.

The Full Bench of the Supreme Court, consisting of five Justices, was tasked with deciding this contentious issue in *Chettiar v. Chettiar* [2011] 2 Sri LR 70. After discussing both approaches derived from English decisions, the Supreme Court unanimously decided that the application approach, as opposed to the order approach, shall be the criterion for deciding whether an appeal or leave to appeal is the proper remedy against an order of the District 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, despite *Chettiar v. Chettiar* being a Full Bench decision of the Supreme Court, doubts about the correctness of the decision persisted.

Hence, in *Priyanthi Senanayake v. Chamika Jayantha* [2017] BLR 74, a Fuller Bench of the Supreme Court, consisting of seven Justices, revisited the decision in *Chettiar's* case. In the end, the Fuller Bench also arrived at the same conclusion, namely, that 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 a direct appeal does not lie against the impugned order of the District Court dated 31.05.2019, whereby the Court rejected the application of the defendant made under section 86(2) of the Civil Procedure Code upholding the preliminary objection raised by the plaintiff. A direct appeal does not lie against that order because, had the District Court overruled the preliminary objection, the main inquiry would have proceeded, and the application would have been decided on its merits. If I may repeat the test, if the order, given in one way, will conclusively dispose of the matter in litigation, but if given in the opposite way, will allow the action to continue, the order is considered interlocutory, in which event, leave to appeal is deemed the appropriate remedy.

To avoid any confusion, let me add one more point in connection with *Chettiar's* judgment. A Fuller Bench of the Supreme Court, comprising seven Justices, held 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, as seen in section 88(2) of the Civil Procedure

Code prior to the Civil Procedure Code (Amendment) Act, No. 5 of 2022, which stated, "*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. This is despite the fact that, under ordinary circumstances, the application approach does not allow for a final appeal to be filed against such an order.

The Petitioner should have gone before the High Court against the order of the District Court not by way of a final appeal made under section 754(1) read with section 754(5) of the Civil Procedure Code and section 5A of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, 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 section 5A of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990.

I answer the first question of law in the affirmative. The consideration of the 2nd question of law does not arise. The judgment of the High Court of Civil Appeal is set aside and the appeal is allowed. The final appeal filed in the High Court against the order of the District Court dated 31.05.2019 shall stand dismissed.

Judge of the Supreme Court

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

Judge of the Supreme Court

Achala Wengappuli, J.
I agree.

Judge of the Supreme Court