

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

In the matter of an application for Special Leave to Appeal under Article 128 (2) of the Constitution read with Sections 754 and 757 as amended by Act No. 46 of 2006.

SC. Appeal No. 03/09

SC. (H.C) LA No. 147/08
H.C.C.A.(Col) No.18/08 LA
DC. Colombo No.19976/L

Galkissa Dewage Suneetha
Ranasinghe,
No.26, Mirissawatta Lane,
Peliyagoda.

Plaintiff

1. Pattiya Dewage Madilin Nona
2. R.D. Sriyani Jayanthi Kumari
Both of
No. 43, Mirissawatta Lane,
Peliyagoda.
3. Pattiya Dewage Lily Nona
No. 41, Mirissawatta Lane,
Peliyagoda.
4. Pattiya Dewage Siriyawathi
(dead)
- 4A. Pattiya Dewage Sajeewa Jayalath
5. Pattiya Dewage Upasena
6. D.D. Priyanthi Jayalath
7. Pattiya Dewage Adlin Nona
(dead)
- 7A. Pattiya Dewage Upasena
All of
No. 45, Mirissawatta Lane,
Peliyagoda
8. R.B. Anie Nona
No. 32, Mirissawatta Lane,
Peliyagoda.

Defendants

And

Galkissa Dewage Suneetha
Ranasinghe,
No. 26, Mirissawatta Lane,
Peliyagoda

Plaintiff -Petitioner

Vs.

1. Pattiya Dewage Madilin Nona
2. R.D. Sriyani Jayanthi Kumari
Both of
No. 43, Mirissawatta Lane,
Peliyagoda.
- 3 Pattiya Dewage Lily Nona
No. 41, Mirissawatta Lane,
Peliyagoda.
4. Pattiya Dewage Siriyawathi
(dead)
- 4A. Pattiya Dewage Sajeewa Jayalath
5. Pattiya Dewage Upasena
6. D.D. Priyanthi Jayalath
7. Pattiya Dewage Adlin Nona
- 7A. Pattiya Dewage Upasena
All of
No. 45, Mirissawatta Lane,
Peliyagoda.
8. R.B. Anie Nona
No. 32, Mirissawatta Lane,
Peliyagoda.

Defendants-Respondents

And Now Between

1. Pattiya Dewage Madilin Nona

2. R.D. Sriyani Jayanthi Kumari
Both of
No. 43, Mirissawatta Lane,
Peliyagoda.
- 3 Pattiya Dewage Lily Nona
No. 41, Mirissawatta Lane,
Peliyagoda.
- 4A. Pattiya Dewage Sajeewa Jayalath
5. Pattiya Dewage Upasena
6. D.D. Priyanthi Jayalath
- 7A. Pattiya Dewage Upasena
All of
No. 45, Mirissawatta Lane,
Peliyagoda.

**Defendant-Respondent-
Petitioners**

Galkissa Dewage Suneetha Ranasinghe,
No.26, Mirissawatta Lane,
Peliyagoda.

**Plaintiff-Petitioner-
Respondent**

B. Anie Nona
No. 32, Mirissawatta Lane,
Peliyagoda.

**8th Defendant-
Respondent- Respondent**

* * * *

SC. Appeal No. 03/09

BEFORE : P.A. Ratnayake, PC. J.
Suresh Chandra, J. &
Priyasath Dep, PC.J.

COUNSEL : S.N. Vijithsingh for the Defendant-Respondent-
Petitioners.

M.U.M. Ali Sabry with Shamith Fernando for the Plaintiff-Petitioner-
Respondent.

ARGUED ON: 17-11-2011

DECIDED ON : **16-03-2012**

* * * * *

P.A. Ratnayake, PC. J.

Plaintiff-Petitioner-Respondent (hereinafter referred to as the Respondent) instituted a case in the District Court of Colombo against the Defendant-Respondent-Petitioner (hereinafter referred to as the Petitioner) seeking a demarcation of the boundaries of the corpus morefully described in the first schedule to the plaint, and ejection of the Petitioners from a portion of the subject matter allegedly encroached by the Petitioners.

The Petitioners in their answer sought a dismissal of the Respondent's case and by way of a claim in reconvention moved for a judgment to eject the Respondent from the subject matter of the case. When the trial was taken up on 04.06.2007, the Respondent objected to the issues of the Petitioners that were based on their claim in reconvention. The Petitioners moved that issue No. 9 framed on their behalf be taken up as a preliminary issue of law prior to leading evidence.

Issue No. 9 states as follows:-

- " 9 (i) meusKs,sldrsh jsiska fuu kvqj mjrd we;af;a meusKs,af,a 2jk Wmf,aLKfha ijsia;rj olajd we;s bvug ysuslus m%ldYhla ,nd .ekSug iy meusKs,sldrsh yd js;a;slrejka w;r we;s bvus j,g udhsus jk fmdoq udhsus ksYaph Ir fmdf,dfjs i,l=Kq lr .ekSu i|ydo@
- (ii) whs;sh m%ldY lrjd .ekSug iy fmdf,dfjs udhsus ksrAkh lsrSug fuu kvqj ;=,ska isoq lsrSug meusks,sldrshg whs;shla fkeue;so@
- (iii) tfia kus" meusKs,a, kslam%Nd l< hq;=o@"

Thereafter, the Court directed that written submissions be filed in respect of both matters. The learned District Judge delivered his Order on 08.02.2008 answering the preliminary issue framed on behalf of the Petitioners in favour of the Petitioners and dismissing the Respondent's case and fixing the case for further trial based on the claim in reconvention, thereby he also refused the objection taken on behalf of the Respondent in respect of issues framed based on the claim in reconvention.

The Respondent sought Leave to Appeal to the Civil Appellate High Court of Colombo under Section 754(2) of the Civil Procedure Code against the Order of the Learned District Judge dated 08.02.2008. Civil Appellate High Court with the consent of parties decided to take both the Leave inquiry and the arguments together. When the matter was taken up in the Civil Appellate High Court on 08.10.2008, the Petitioners took up a preliminary objection to the effect that no Leave to Appeal lies from the impugned Order of the Learned District Judge dated 08.02.2008 and therefore, the Respondent should have come before Court by way of a final appeal. Civil Appellate High Court by its Order dated 08.10.2008 rejected the preliminary objection of the Petitioners. The Petitioners have instituted the present appeal before this Court challenging the aforesaid

order. Leave to Appeal was granted by this Court on the questions of law set out in paragraphs 6(a) and 6(b) of the Petition of Appeal which are as follows:-

- (a) Whether the High Court of Civil Appeal erred in law by deciding that Leave to Appeal lies from the dismissal of the Plaintiff's action?
- (b) Whether leave to appeal lies to the High Court of Civil Appeal from that part of the order of the Learned District Judge dated 02.08.2008, pertaining to the dismissal of the action of the Plaintiff-Respondent.?

The date 02.08.2008 mentioned in paragraph 6(b) of the Petition of Appeal appears to be a mistake as the District Court Judgment is dated 08.02.2008.

Learned Counsel for the Appellants submitted that the Respondent was only entitled to proceed in this matter as a final appeal on the basis that the Order given by the Learned District Judge was an "Order having the effect of a final judgment" within the meaning of the definition of "judgment" found in Section 754(5) of the Civil Procedure Code and accordingly the Order of the Civil Appellate High Court should be set aside and the appeal of the Respondent to the Civil Appellate High Court be dismissed. The Respondent on the other hand argued that the Order made by the District Judge was not an order within the meaning of the definition of "Judgment" found in Section 754(5) of the Civil Procedure Code.

A Divisional Bench of this Court consisting of 5 Judges pronounced a judgment in S. Rajendran Chettiar and Two others vs. S. Narayanan Chettiar SC. Appeal No. 101A/2009 on 10th June 2010 where it decided that the correct procedure of appeal in a case where a plaint had been rejected in terms of Section 46(2) of the Civil Procedure Code was the procedure set out in Section 754(2) of the Civil Procedure Code and as such the order rejecting the plaint is not an order "having the effect of a final judgment". In this case the Supreme Court referred to the two well known English cases which dealt with the difference between the "Judgment" and the "Order" (referred to in the said English cases as "final order"

and "interlocutory order") i.e. Salaman v. Warner [1891] 1 QB 734 and Bozson v. Altrincham Urban District Council [1903] 1 KB 547.

The Supreme Court upheld the following reasoning in the judgment of Salaman v. Warner (supra) where Lord Esher MR observed 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 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."

Lord Denning MR in Salter Rex and Co. v Ghosh (1971) 2 All ER 865 refers to Bozon v. Altrincham Urban District Council (Supra) and Salaman v. Warner (Supra) and states to the effect that in "determining whether an application is final or interlocutory what needs to be considered is the nature of the application and not the nature of the order. He appears to have agreed with the reasoning of Lord Esher MR in Salaman V. Warner (Supra).

This reasoning was preferred by the Supreme Court even in the much quoted case of Ranjith vs. Kusumawathie 1998 3 Sri LR 232.

In the instant case, the District Court is to continue the hearing of the case based on the counter claim of the Petitioner. If there was no counter claim of the Petitioner but the Court has dismissed the preliminary objection of the Petitioner, the case would nevertheless continue. Accordingly, in terms of the reasoning of the Supreme Court in the case of S. Rajendran Chettiar and two others vs. S. Narayanan Chettiar (supra), the procedure to be followed is the procedure laid down in Section 754(2) of the Civil Procedure Code for the reason that such an order is not one "having the effect of a final judgment".

Accordingly, in terms of the above reasoning the question of law contained in paragraph 6(a) of the Petition of Appeal of the Petitioner is answered in the

negative and the question of law in paragraph 6(b) of the Petition of Appeal is answered in the affirmative.

The Learned Counsel for the Appellant also submitted in Court that the Order in the Civil Appellate High Court does not contain a comprehensive reasoning. I am of the view that this fact has not been canvassed by him in the Petition of Appeal nor do the questions of law on which leave to appeal has been granted cover this position of the Petitioner. In any event I observe that the Order not containing a comprehensive reasoning has not prejudiced the substantial rights of the parties nor occasioned a failure of justice.

In the circumstances mentioned above, I dismiss the appeal of the Petitioners. I make no order as to costs.

JUDGE OF THE SUPREME COURT

Suresh Chandra, J.

I agree

JUDGE OF THE SUPREME COURT

Priyasath Dep, PC.J.

I agree

JUDGE OF THE SUPREME COURT