

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 (1) of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 as amended by Act, No. 54 of 2006

Believers Church
No. 54, Jayasooriya Mawatha,
Kandana.

S.C. Case No: SC/HCCA/LA 184/2023

CP/HCCA/KANDY/67/2021(LA)

D.C. Nawalapitiya Case No. 80/16/SPL Vs.

Plaintiff

Rev. Father Paneer Selvam
(Now Deceased)
Believers Church
No. 26, Dekinda Road,
Nawalapitiya.

Defendant

Paneer Selvam Jenita Enriya
No. 5B, Dekinda Road, Bawwagama,
Nawalapitiya.

Substituted Defendant

THEN BETWEEN

Believers Church
No. 54, Jayasooriya Mawatha,
Kandana.

Plaintiff – Petitioner

And

Paneer Selvam Jenita Enriya
No. 5B, Dekinda Road, Bawwagama,
Nawalapitiya.

Substituted Defendant – Respondent

NOW BETWEEN

Believers Church
No. 54, Jayasooriya Mawatha,
Kandana.

Plaintiff – Petitioner – Petitioner

Vs.

Paneer Selvam Jenita Enriya
No. 5B, Dekinda Road, Bawwagama,
Nawalapitiya.

**Substituted Defendant -Respondent-
Respondent**

AND NOW BETWEEN

Believers Church
No. 54, Jayasooriya Mawatha,
Kandana.

Plaintiff – Petitioner – Petitioner – Petitioner

Vs.

Paneer Selvam Jenita Enriya
No. 5B, Dekinda Road, Bawwagama,
Nawalapitiya

**Substituted Defendant – Respondent –
Respondent – Respondent**

Before: Hon. Vijith K. Malalgoda, PC, J.
Hon. A. L. Shiran Gooneratne, J.
Hon. Janak De Silva, J.

Counsel:

C. Sooriyaarachchi with G.C. Gunawardhena for the Plaintiff – Petitioner – Petitioner –
Petitioner

Ishan Alawathurage for the Substituted Defendant – Respondent – Respondent –
Respondent

Argued on: 12.01.2024

Decided on: 12.03.2024

Janak De Silva, J.

This is an application for leave to appeal from the judgment of the Civil Appellate High Court of the Central Province (Holden in Kandy) (“Civil Appellate High Court”) dated 17.03.2023 by which leave to appeal against the order of the learned District Judge of Nawalapitiya dated 16.12.2021 was dismissed.

The Plaintiff-Petitioner-Petitioner-Petitioner (“Petitioner”) instituted action against the Defendant-Respondent-Respondent-Respondent (“Respondent”) seeking a declaration of title to the land more fully described in the schedule to the plaint, and an order of eviction against the Respondent and all persons claiming under him.

The Petitioner as well as his registered Attorney-at-Law were absent when the matter was taken up for further trial on 24.09.2020. Hence, the action was dismissed.

The Petitioner made an application in terms of Section 87(3) of the Civil Procedure Code to have the dismissal set aside. After inquiry, the learned District Judge refused to set aside the judgment entered upon the default of the Petitioner.

Aggrieved by the said order of the learned District Judge, the Petitioner filed a leave to appeal application in the Civil Appellate High Court. The Respondent raised a preliminary objection that the application was misconceived in law and that the Petitioner should have come by way of final appeal. This was upheld by the Civil Appellate High Court and the Petitioner has filed this leave to appeal application against the said judgment.

The question that arises for determination is whether a party aggrieved by a default judgment must come by way of appeal or leave to appeal.

The learned counsel for the Petitioner submitted that the proper application is a leave to appeal application and relied on the judgment of ***S.R. Chettiar and Others v. S.N. Chettiar*** [(2011) BALR 25, (2011) 2 Sri.L.R. 70] and ***Dona Padma Priyanthi Senanayake v. H.G. Chamika Jayantha*** [(2017) BALR 74]. There this Court held that an appeal could be filed in respect of judgments or orders which are final. In respect of other orders, leave to appeal should be first obtained. It was further held, that in order to decide whether an order is a final judgment or not, the proper approach is to apply the application approach test and not the order approach test which was applied earlier.

Relying on the above authorities, the learned Counsel for the Petitioner submitted that the proper application was a leave to appeal application which was challenged by the learned Counsel for the Respondent who relied on the decisions in ***Wijeyanayake v. Wijeyanayake*** [III Srikantha's Law Reports 28] and ***A.S. Sangarapillai & Bros. v. Kathiravelu*** [II Srikantha's Law Reports 99] where it was held that the proper application was a final appeal.

Section 88(2) of the Civil Procedure Code reads as follows:

“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.”

This provision was examined by a fuller bench of this Court in **Barbara Iranganie De Silva v. Hewa Waduge Indralatha** [(2017) BALR 68] and it was held that the application approach test enunciated in **S.R. Chettiar and Others v. S.N. Chettiar** (supra.) and **Dona Padma Priyanthi Senanayake v. H.G. Chamika Jayantha** (supra.) have no application to an application made pursuant to Section 88(2) of the Civil Procedure Code. It was held that Section 88(2) provides for a special procedure and that Section 754(2) of the Civil Procedure Code has no application to such an application. Accordingly, Court concluded that a party aggrieved by a judgment entered upon default must file an appeal pursuant to Section 88(2) of the Civil Procedure Code.

I am in respectful agreement with the decision in **Barbara Iranganie De Silva v. Hewa Waduge Indralatha** (supra.). Hence, the leave to appeal application made by the Petitioner is misconceived in law. The Civil Appellate High Court was correct in dismissing the application on the preliminary objection raised by the Respondent. Accordingly, leave to appeal must be refused in this application.

Before parting, I must make reference to the fact that the learned Counsel for the Respondent assisted Court by drawing our attention to the amendment made to Section 88(2) of the Civil Procedure Code by Act No. 5 of 2022 which now reads as follows:

“The order setting aside or refusing to set aside the judgment entered upon default shall accompany the facts upon which it is adjudicated and specify the grounds upon which it is made, and shall be liable to an appeal to the relevant High Court

established by Article 154P of the Constitution, with leave first had and obtained from such High Court.”

Accordingly, the position now is that a party aggrieved by a judgment entered upon default must file a leave to appeal application pursuant to Section 88(2) of the Civil Procedure Code.

The Petitioner filed the appeal before the Civil Appellate High Court on 03.01.2022. The Civil Procedure Code (Amendment) Act No. 17 of 2022 became law on 17.02.2022.

I am mindful that Parliament has power, pursuant to Article 75 of the Constitution, to make laws, including laws having retrospective effect. In fact, recently it passed the Civil Procedure Code (Amendment) Act No. 17 of 2022 where Section 3 provides for the retrospective application of the amendments by the use of the words *“case or appeal pending on the date of coming into operation of this Act”*. No such intention is reflected in the Civil Procedure Code (Amendment) Act No. 5 of 2022. Accordingly, the amendment does not have any retrospective application.

For all the foregoing reasons, I hold that leave to appeal must be refused. Application is dismissed. Parties shall bear their costs.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C., J.

I agree.

Judge of the Supreme Court

A. L. Shiran Gooneratne, J.

I agree.

Judge of the Supreme Court