

DE COSTA AND OTHERS
v.
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COURT OF APPEAL
WEERASEKERA, J.,
WIGNESWARAN, J.
C.A. 767/88 (F)
C.A. 739/88 (F)
D.C. GALLE 3949/P
MARCH 31, MAY 16, JUNE 9 AND
JULY 2, 1997.

Partition Act 21 of 1977 – S. 48 (4) (a) (iv), 48 (5) and 67 – Special Leave to Appeal – Dismissed – Is it a final order having the effect of a Final Judgment – Civil Procedure Code – S. 754 (1) and S. 754 (2) (5).

The question that arose for determination is whether the order made in terms of S. 48 (4) (a) (iv) of Act 21 of 1977 is a judgment within the meaning of S. 754 (1) and S. 754 (5) of the Civil Procedure Code or an order made within the meaning of S. 754 (2) and 754 (5), read with S. 67 of the Partition Act 21 of 1977.

Held:

- (1) The finality of these orders must be determined according to the Partition Act. Under the Partition Act if no complaint was alleged with regard to the judgment and the consequential interlocutory Decree, and if no steps were taken under S. 48 (1) (a), (iv) the Special Provisions relating to Decrees in S. 48 (1) (2) (3) and S. 67 of the Partition Law would come to operate.

"In such a situation the only irresistible inference that could be drawn is that such an order finally disposed of all the rights of the parties and the suit was not alive but finally disposed of."

- (2) If the order of the application of the appellants was in their favour, the result would have been the variation of the judgment and interlocutory decree and such a variation would have carried the same finality contained in S. 48 (1), (3) and S. 67 of the Partition Law.

APPEALS from an order of the District Court of Galle.

Cases referred to:

1. *Siriwardene v. Air Ceylon* – 1984 – 1 SLR 287.
2. *Salaman v. Warner* – 1891 1QB 734-737.

N. R. M. Daluwatte PC with *Nilanthi de Silva* for 5th and 12A defendant–appellants in CA 739/88 (F).

S. Ediriweera for 21st defendant-appellant in CA 768/88 (F).

Francis Ekanayake for 5th defendant-respondent.

D. R. P. Gunatilake with *S. Suraweera* for plaintiff-respondent in both appeals.

C. S. Hettihewa with *G. Pieris* for 11th defendant-respondent in both appeals.

Cur. adv. vult.

August 29, 1997.

WEERASEKERA, J.

The plaintiff-respondents sought to partition the land called *Kithulthuduwwatta* alias *Walawwatta* morefully described in the schedule to the plaint.

On 08.09.87 when the action was taken up for hearing the parties who were present and were represented informed court that they had resolved their disputes regarding the corpus and devolution of interests and accordingly after evidence was led judgment was pronounced.

Thereafter the 6th, 65th and 12A defendants and 21st defendant by petition and affidavit in terms of section 48 (4) (a) (iv) of the Partition Act, No. 21 of 1977 made application for special leave to establish their right title and interest and to vary the judgment.

The learned District Judge of Galle after inquiry on 07.03.88 dismissed the applications of the 6th, 65th, 12A and 21st defendants. These two appeals were from that order.

At the hearing of this appeal counsel for the defendant-respondents took up as a preliminary question of law that the order dated 07.03.88 was not a "final order" having the effect of final judgment under section 754 (5) of the Civil Procedure Code and that an appeal does not lie direct to the Court of Appeal under section 754 (1) but only with leave of court first had and obtained in terms of section 754 (2) of the Civil Procedure Code.

I have given my best consideration to all the written submissions filed by parties.

It is not disputed that the learned District Judge made his order dated 07.03.88 within the framework of section 48 (4) (a) (iv) of the Partition Act and that he had the jurisdiction to do so as envisaged by section 48 (5) of the Partition Act.

The question that arises for determination is whether the order made in terms of section 48 (4) (a) (iv) of the Partition Act by the learned District Judge on 07.03.88 is a judgment within the meaning of section 754 (1) and 754 (5) of the Civil Procedure Code or an "order" within the meaning of section 754 (2) and 754 (5) of the Civil Procedure Code read with section 67 of the Partition Act.

Section 67 of the Partition Act provides for an appeal to the Court of Appeal against any judgment, decree or order made or entered in a partition action to which all the provisions of the Civil Procedure Code shall apply accordingly.

Section 754 (1) provides that 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.

Section 754 (2) provides that 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.

Counsel for the respondents urged that the order of 07.03.88 was an interlocutory order and not a judgment entered in terms of section 184 of the Civil Procedure Code read with section 67 of the Partition Act. On the other hand it was the appellants' case that the order of 07.03.88 was an order having the effect of a final judgment containing the final expression of its decision.

Section 754 (5) provides notwithstanding anything to the contrary in the Ordinance for the purposes of chapter LVIII "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.

It was held in the case reported in *Siriwardene v. Air Ceylon Ltd.*⁽¹⁾ that the tests to be applied to determine whether an order has the effect of a final judgment and so qualified as a judgment under section 754 (5) of the Civil Procedure Code are:

1. It must be an order finally disposing of the rights of parties.
2. The order cannot be treated as a final order if the suit or action is still left a live 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 order.

In this case the order dated 07.03.88 was made under section 48 (4) (a) (iv) of the Partition Act. The finality of the orders must be determined according to the Partition Act. Under the Partition Act if no complaint was alleged with regard to the judgment of 08.09.87 and the consequential interlocutory decree and if no steps were taken under section 48 (4) (a) (iv) the special provisions relating to decrees in section 48 (1), (2) and (3) and section 67 of the Partition Law would come to operate. In such a situation the only irresistible inference that could be drawn is that such an order finally disposed of all the rights of the parties and the suit was not alive but finally disposed of.

I would in those circumstances prefer to apply the test formulated by Lord Esher MR in the case of *Salaman v. Warner*⁽²⁾. He said:

"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 the parties. If their decision whichever way it is given, will if it stands finally disposed of the matter in dispute, I think for the purpose of the 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 doing so if the order of the application of the appellants was in their favour, the result would have been the variation of the judgment and interlocutory decree and such a variation would have carried the same finality contained in section 48 (1), (2) and (3) and section 67 of the Partition Law.

Therefore looking at it from both points of view the irresistible conclusion that I could come to is that the orders on the applications of the defendant-appellants dated 07.09.88 made by the learned District Judge of Galle disposed of their rights finally and determined their rights and liabilities under the Partition Act with finality.

The orders dated 07.03.88 which were appealed from, in my view were final orders, from which orders final appeals in terms of section 754 (1) of the Civil Procedure Code would be available.

In those circumstances I reject the objections of the defendant-respondent to the final appeals lodged by the 6th, 65th, 12A and 21st defendant-appellants under section 754 (1).

The 6th, 65th, 12A and 21st defendant-appellants will be entitled to taxed costs of this inquiry from the 3rd defendant, plaintiff-respondent and 11th defendant-respondent.

The appeals will now be fixed for argument in due course.

WIGNESWARAN, J. – I agree.

Preliminary objection overruled.
