

PUWALAWATHIE PERERA
v
SOMARATNE AND ANOTHER

COURT OF APPEAL
UDALAGAMA, J. AND
WIJEYARATNE, J.
C.A.766/2001/F)
D.C. MT. LAVINIA 1192/P
APRIL 4, 2003

Civil Procedure Code, Sections 387, 388, 754(2) and 754(5) – Partition Law, No.21 of 1977, section 48(4) – Acceptance or rejection of schedule of shares – Order or judgment?

Held:

- (i) A schedule of shares on the face of it at most could form only a part of an interlocutory decree. Even if one was to consider an interlocutory decree to be final, such interlocutory decree would not consist only of a schedule of shares and would by no means be a complete interlocutory decree having the effect of a final judgment.
- (ii) The impugned order is admittedly an interlocutory one attracting the provisions of section 754(2), as the trial judge had only to "decide shares" and he accepted the "shares" filed by the plaintiff-respondent by the impugned order.

APPEAL from the order of the District Court of Mt. Lavinia.

Cases referred to :

1. *Ranjith v Kusumawathie* – (1996) - 3 SRI LR 232
2. *Salaman v Warner and others* – 1 QB 784

Kanishka Vithana for appellant.

N.R.M. Daluwatte, PC for substituted plaintiff-respondent

Nihal Guneratne for 1st defendant-respondent

Cur.adv.vult

July 17, 2003

UDALAGAMA, J.

When this matter was mentioned on 04.04.2003. Mr. Daluwatte, President's Counsel who appeared for the substituted plaintiff-respondent objected to the appeal on the basis that same was misconceived, in that the 3rd defendant-appellant had no right to a final appeal.

Counsel appearing for parties indicated to court thereafter that the preliminary objection could be disposed of by way of written submissions.

This order pertains to the preliminary objection.

The preliminary objection which was originally submitted to court by way of a motion dated 05.08.2002 stated, *inter alia*, as follows:-

This action filed in the District Court of Mount Lavinia bearing case No.1192/P, the trial Judge subsequent to evidence allowed the partition of the corpus.

Aggrieved, the 3rd and 5th defendants appealed therefrom.

By the judgment of the Court of Appeal the case was sent back to the District Court for the purpose of deciding shares. The 3rd defendant being aggrieved by the order of the Court of Appeal moved the Supreme Court by way of leave to appeal which was rejected. The earlier order of the Court of Appeal directing the District Judge to decide shares had been taken up for inquiry and the District Judge accepted the shares filed by the plaintiff by order dated 11.06.2001.

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This appeal arises on the application of the 3rd defendant-appellant who appears to be once again aggrieved by the order of the learned District Judge accepting the shares as tendered by the plaintiff. The said plaintiff-respondent in his preliminary objection maintains that the 3rd defendant-appellant ought to have come by way of leave to appeal as contemplated by the provisions of section 754(2) of the Civil Procedure Code as the order canvassed is not a final judgment nor an order having the effect of a final judgment as provided by section 754(5) of the Civil Procedure Code.

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That a distinction lies between the terms "final judgment" and an "order" is manifest. It is also manifest that there could be only one judgment in one case.

However several orders could have the effect of a final order, for example orders made under Chapter 20 of the Civil Procedure Code in respect of Summary Procedure which orders have the effect of a final judgment. Provisions of section 387 and 388 could be cited as such example.

In *Ranjith v Kusumawathie* ⁽¹⁾ His Lordship Justice Dheeraratne subsequent to considering 18 authorities has set out a test to determine a final judgment or an order having the effect of a final judgment. His Lordship citing Lord Esher in *Salaman v Warner & others*.⁽²⁾ quoted the test to be 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 dis-

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pute, I think for the purpose of these rules it is final. On the other hand if their decision if given 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". Significantly in *Ranjith v Kusumawathie* 50 (*supra*) the matter considered was an application under section 48(4)(a)(iv) of the Partition Law.

In the instant case the impugned order which is the subject matter of this final appeal arises from a "Schedule of shares" filed by the plaintiff-respondent in the court below. A schedule of shares on the face of it at most could form only a part of an interlocutory decree. Even if one was to consider an interlocutory decree to be final in terms of the provisions of the Partition Law as also stated by the learned Counsel for the appellant, such interlocutory decree would not consist "only" of a schedule of shares and would by no means be a complete 60 interlocutory decree having the effect of a final judgment. Besides, even if one was to apply the test as stated by Lord Esher, referred to in *Ranjith v Kusumarwathie* (*supra*) and even if one assumes that the 3rd defendant-appellant would succeed in the appeal and the District Judge's order accepting the plaintiff-respondent's schedule of shares is rejected, the action would have to go on and will not dispose of the matter in dispute.

Accordingly the impugned order is undoubtedly an interlocutory one attracting the provisions of section 754(2) of the Civil Procedure Code necessitating the 3rd defendant-appellant to prefer an appeal 70 with the leave of the Court of Appeal first had and obtained.

This appeal is therefore clearly misconceived and needs to be dismissed *in limine*.

The determination of a final judgment or an interlocutory order would not apply differently to partition actions although the procedure in partition could be termed to be unique.

For the aforesaid reasons the preliminary objection is upheld and the appeal is dismissed with costs.

WIJAYARATNE, J. - I agree.

Appeal dismissed.