

**RATNAYAKE
VS
TIKIRI BANDA AND OTHERS**

COURT OF APPEAL
WIMALACHANDRA, J.
CA 1882/2004
DC KANDY 13301/P
26TH APRIL, 2005

Civil Procedure Code, sections 189, 754(4), 755, 755(3) and 839 - Can the trial judge reject a petition of appeal on the ground that the order is not an appealable order ?

Held :

- (i) It is not for the trial judge to decide that the order or judgement appealed against is not an appealable order - that question is for the Court of Appeal.

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- (ii) If the petition of appeal is in accordance with the provisions of section 755(3), it is mandatory for the District Judge in terms of section 755(4) to forward the petition of appeal with the opinion of the judge as to whether or not there is a right of appeal against the judgment.
- (iii) The District Judge erred in refusing to accept the petition of appeal which amounts to the rejection of the appeal.

APPLICATION in revision from the order of the District Court of Kandy.

J. C. Boange for 8th defendant appellant petitioner.

Plaintiff respondent respondent absent and unrepresented.

01st August, 2005,

L. K. WIMALACHANDRA, J.

The 8th defendant-appellant-petitioner (petitioner) has filed this application in revision from the order of the District Judge of Kandy dated 06.08.2003. By that order the learned judge rejected the petition of appeal filed by the petitioner.

Briefly the facts as set out in the petition of appeal are as follows :

The plaintiff-respondent-respondent (plaintiff) instituted the partition action to partition a land called Hitinagederawatte *alias* Gamagederawatte about two pelas in extent. When the case was taken up for trial, the parties intimated to Court that there was no contest as to the pedigree and the evidence of the plaintiff was led and there was no cross-examination. Thereafter the judgment was delivered allotting 84/160 shares to the plaintiff, 20/160 to the 3rd defendant, 20/160 shares to the 5th, 6th, 7th, 9th to 14th defendants and 36/120 shares to the 8th defendant. The 8th defendant discovering an error in the calculation of the shares and the computation of shares according to the evidence led, moved to have the errors corrected in terms of sections 189 and 839 of the Civil Procedure Code. The Court, after an inquiry into the application made by the 8th defendant, corrected the error of 36/120 to 36/160, but held that the other error, that is the computation of the share of the 8th defendant was not an arithmetical error and refused to consider the correction of the error alleged to have been made in the computation of shares. Being aggrieved with the judgment of the court

dated 21.11.2003 in refusing to correct the computation of shares according to the evidence led at the trial, the 8th defendant filed a notice of appeal and a petition of appeal. The plaintiff objected to the said appeal. The Court held an inquiry and made order on 06.08.2004 rejecting the petition of appeal of the 8th defendant. It is against this order the 8th defendant has filed this application in revision.

The 8th defendant's position is that the learned District Judge had no power to reject the petition of appeal. The learned counsel for the 8th defendant in his written submission, submitted that the notice of appeal and the petition of appeal were in conformity with the provisions of section 755 of the Civil Procedure Code, as the notice of appeal and the petition of appeal were filed within the prescribed time period in terms of sections 754(4) and section 755(3) of the Civil Procedure Code. In the impugned order the learned judge has not faulted with the 8th defendant that her notice of appeal and the petition of appeal are not in conformity with the provisions of sections 754 and 755 of the Civil Procedure Code, but he has rejected the petition of appeal on the sole ground that the said order dated 06.08.2004 is not an appealable order.

Section 755(4) of the Civil Procedure Code states that upon the petition of appeal being filed, the Court shall forward the petition of appeal together with all the papers relevant to the judgment appealed against, as speedily as possible to the Court of Appeal, retaining however an office copy of the judgment for the purpose of execution if necessary. Hence, if the judge is of the view that the judgment appealed from or the impugned order is not an appealable order, he must, with his opinion as to whether or not there is a right of appeal against the judgment or order, forward the petition of appeal to the Court of Appeal as speedily as possible in terms of section 755(4) of the Civil Procedure Code.

In the circumstances, I am of the view that it is not for the learned District Judge to decide that the order or judgment appealed against is not an appealable order and that question is for the Court of Appeal to decide. Accordingly, if the petition of appeal is in accordance with the provisions of section 755(3), it is mandatory for the District Judge in terms of section 755(4) of the Civil Procedure Code to forward the petition of appeal with the opinion of the judge as to whether or not there is a right of appeal against the judgment appealed against. Hence I am of the view that the learned

District Judge erred in refusing to accept the petition of appeal of the 8th defendant, which amounts to the rejection of the petition of appeal.

For these reasons I allow the application in revision and set aside the order of the District Judge dated 06.08.2003 and direct the learned District Judge to forward the petition of appeal to this Court in terms of section 755(4) of the Civil Procedure Code. The application is allowed with costs fixed at Rs. 7,500.

Application allowed ; District Judge directed to forward the appeal to the Court of Appeal.
