RANJIT
v.
KUSUMAWATHIE AND OTHERS

SUPREME COURT
DHEERARATNE, J.,
WIJETUNGA, J. AND
GUNAWARDANA, J.
S.C. APPEAL NO. 154/97
C.A. APPEAL NO. 649/86 (F)
D.C. NEGOMBO NO. 1980 P
JUNE 24TH 1998

Appeal – S. 754 of the Civil Procedure Code – Meaning of "judgment" for purposes of appeal – Partition Law, No. 21 of 1977 – Order made by a District Court on an application made under S. 48 (4) (a) (iv) of the Law – Appeal procedure.

Where the District Court rejected an application made by a defendant in terms of S. 48 (4) (*a*) (iv) of the Partition Law, No. 21 of 1979.

Held:

The Order of the District Court is not a "judgment" within the meaning of sections 754 (1) and 754 (5) of the Civil Procedure Code for the purpose of an appeal. It is an "order" within the meaning of S. 754 (2) of the Code from which an appeal may be made with the leave of the Court of Appeal first had and obtained.

Cases referred to:

1. *Subramanium Chetty v. Soysa* (1923) 25 NLR 344.
2. *Palaniappa Chetty v. Mercantile Bank of India et. al* (1942) 43 NLR 352.
3. *Settlement Officer v. Vander Pooten* (1942) 43 NLR 436.
4. *Fernando v. Chittambaram Chettiar* (1948) 49 NLR 217.
5. *Usoof v. Madarakaj Chettiar* (1957) 58 NLR 436.
6. *Usoof v. The National Bank of India Ltd.* (1958) 60 NLR 381.
7. *Arlis Appuhamy et. al. v. Simon* (1947) 48 NLR 298.
8. *Marikar v. Dharmapala Unanse* (1934) 36 NLR 201.
9. *Rasheed Ali v. Mohamed Ali and Others* (1981) (1) NLR 262.
10. *Siriwardene v. Air Lanka Ltd.* (1984) (1) SLLR 286.
11. *White v. Brunton* (1984) 2 All ER 606.
12. *Shubrook v. Tufnell* (1882) 9 QBD 621; (1881-8) All ER 180.
13. *Salaman v. Warner and others* (1891) 1 QB 734.
14. *Bozson v. Atrincham Urban District Council* (1903) 1 KB 547.
15. *Salter Rex & Co. v. Gosh* (1971) 2 All ER 865 and 866.
16. *Standard Discount Co. v. La Grange* 1877 3 CPD 67.
17. *Hunt v. Allied Bakeries Ltd.* 1956 3 Aller 513 (1956) 1WLR 1326.
18. *Anglo Auto Finance (Commercial) Ltd. v. Robert Dick* – unreported.

APPEAL from the judgment of the Court of Appeal.

Anil Silva for 4th defendant-appellant.

S. F. A. Cooray with *C. Liyanage* for plaintiff-respondent.

Cur. adv. vult.

August 20, 1998

DHEERARATNE, J.

In this partition action the original 4th defendant filed his statement of claim on 14.9.1972. On the day of trial namely 27.9.1982, all parties except the plaintiff, were absent. Evidence was led for the plaintiff only and the judgment and the interlocutory decree were entered accordingly. On 4.10.1983, the original 4th defendant applied to the trial court, in terms of subsection 48 (4) (*a*) (iv) of the Partition Law, for special leave to establish his right, interest and title to the corpus, seeking to explain his failure to appear at the trial.

The 4th defendant died on 5.11.1983 and on 13.4.1984 and 4A defendant (the appellant) was substituted in his place. The application for special leave was rejected by the District Court by its order made

on 6.3.1986. The appellant then preferred an appeal to the Court of Appeal against that order, in terms of subsection 754 (1) of the Civil Procedure Code, as if that order made by the District Court was a "judgment". The Court of Appeal rejected the appeal on the basis that what was appealed from was an "order" within the meaning of subsection 754 (2) of the CPC and that therefore an appeal could lie only with leave of the Court of Appeal first had and obtained. This appeal relates to that rejection.

The procedural law relating to appeals in partition actions

In terms of section 67 of the Partition Law, No. 21 of 1977, an appeal lies to the Court of Appeal against any judgment, decree, or order, made or entered in a partition action; and all provisions of the CPC are made applicable to any such appeal as though a judgment, decree, or order, made or entered in any action as defined for the purposes of the CPC. Thus section 67 of the Partition Law attracts the provisions of section 754 of the CPC.

Section 754 reads:

(1) 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.

(2) 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 law, with the leave of the Court of Appeal first had and obtained.

(subsections (3) and (4) omitted)

(5) Notwithstanding anything to the contrary in this Ordinance, for the purposes of this chapter–

"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.

For the sake of completeness, though not strictly relevant, I may mention here that since the Partition (Amendment) Act No. 17 of 1997 (certified on 12th August, 1997) came into operation, an appeal by a person dissatisfied with an order to enter final decree after summary inquiry by court (*a*) confirming with or without modification the scheme of partition; or (*b*) ordering the sale of any lot which the commissioner has reported to court that the extent of which is less than the minimum extent required by written law relating to the subdivision of land for development purposes; and an appeal by a person dissatisfied by an order made by court in relation to confirming of a sale after inquiry, have to be filed with leave of the Court of Appeal first had and obtained. See new sections 36A and 45A. However, the provisions of the former section 67 regarding appeals [now amended to read 67 (1)] stand substantially the same, subject to the provisions of new sections 36A and 45A (referred to above), and subsection 67 (2) (requiring court to retain duplicate of plan and report in the event of an appeal) and subsection 67 (3) (empowering court to make interim orders to prevent waste or damage to the corpus pending appeal). These amendments brought about by the 1997 (Amendment) Act have no bearing on any order made under subsection 48 (4), except that, an application under subsection 48 (4) (*a*) has now to be made, on or before the date fixed for consideration of the scheme of partition under section 35; or at any time not later than 30 days after the return of the person responsible for the sale under section 42, is received by court.

Learned counsel for the appellant contends that the order made by the learned trial judge rejecting the 4th defendant's application for special leave under subsection 48 (4) (*a*) is a "judgment" within the meaning of subsection 754 (1) of the CPC, in as much as the 4th defendant's claim is concerned, that is finally disposed of.

The test to determine a "final judgment or order" or an "order" within the meaning of subsection 754 (5) of the CPC.

The determination whether an order (if I may use that word generically) in a civil proceeding, is a judgment or an order having the effect of a final judgment; or, an order not having the effect of a final judgment, has not been an easy task for courts. This problem has cropped up principally in the consideration by courts of four distinct legislative provisions. The first of those is the schedule to the repealed Appeals (Privy Council) Ordinance No. 31 of 1909, wherein the term "final judgment" appears. See eg the cases of, *Subramanium Chetty v. Soysa*[1]; *Palaniappa Chetty v. Mercantile Bank of India et. al*[2]; *Settlement Officer v. Vander Pooten*[3]; *Fernando v. Chittambaram Chettiar*[4]; *Usoof v. Nadarajah Chettiar*[5] and *Usoof v. The National Bank of India Ltd*[6]. The second, is section 36 of the repealed Courts Ordinance, wherein the term "final judgment or any order having the effect of a final judgment" in relation to the Court of Requests, appears. See eg. the cases of, *Arlis Appuhamy et. al. v. Simon*[7] and *Marikar v. Dharmapala Unanse*[8]. The third is Article 128 (1) of the Constitution wherein the term "final order" appears. See eg the case of *Rasheed Ali v. Mohamed Ali and others*[9]. The fourth, is section 754 (5) of the CPC wherein mutually exclusive terms "judgment" and "order" appear. See eg *Siriwardene v. Air Ceylon Ltd.*[10]. In most of those instances judicial interpretations in the UK, where the terms "final order" and "interlocutory order" were considered, had been referred to for guidance.

There have been two virtually alternating tests adopted by different judges from time to time in the UK to determine what final orders and interlocutory orders were. In *White v. Brunton*[11], Sir John Donaldson MR labelled the two tests as the order approach and the application approach. The order approach was adopted in *Shubrook v. Tufnell*[12], where Jessel, MR and Lindely, LJ. held that an order is final if it finally determines the matter in litigation. Thus the issue of final and interlocutory, depended on the nature of the order made.

The application approach was adopted in *Salaman v. Warner & others*[13], in which the Court of Appeal consisting of Lord Esher, MR, Fry and Lopes, LJJ. held that the final order is one made on such application or proceeding that, for whichever side the order was given, it will, if it stands, finally determine the matter in litigation. Thus the issue of final or interlocutory depended on the nature of the application or proceedings giving rise to the order and not the order itself.

In *Bozson v. Altrincham Urban District Council*[14], the Court of Appeal consisting of Earl of Halsbury, Lord Alverstone, CJ. and Jeune P. reverted to the order approach. I may mention here that Sharvananda, J. (as he then was) followed Bozson (*supra*) in *Siriwardene v. Air Ceylon* (*supra*). In *Salter Rex & Co. v. Gosh*[15] Lord Denning, MR said;

> "There is a note in the Supreme Court Practice 1970 under RSC Ord 59, R4, from which it appears that different tests have been stated from time to time as to what is final and what is interlocutory. In *Standard Discount Co. v. La Grange*[16] and *Salaman v. Warner* (*supra*) Lord Esher, MR said that the test was the nature of the *application* to the court and not to the nature of the *order* which the court eventually made. But in *Bozson v. Altrincham Urban District Council* (*supra*) the court said that the test was the nature of the *order* as made. Lord Alverstone, CJ. said the test is; at 548, 'Does the judgment or order, as made, finally dispose of the rights of the parties?' Lord Alverstone, CJ. was right in logic but Lord Esher MR was right in experience. Lord Esher, MR's test has always been applied in practice. For instance, an appeal from a judgment under RSC Ord 14 (even apart from the new rule) has always been regarded as interlocutory and notice of appeal has to be lodged within 14 days. An appeal from an order striking out an action as being frivolous or vexatious, or as disclosing no reasonable cause of action, or dismissing it for want of prosecution – every such order is regarded as interlocutory; see *Hunt v. Allied Bakeries Ltd.*[17] So I would apply Lord Esher MR'S test to an order refusing a new trial. I look to the application for a new trial not to the order made. If the application for a new trial were granted,

it would clearly be interlocutory. So equally when it is refused, it is interlocutory. It was so held in an unreported case, *Anglo-Auto Finance (Commercial) Ltd. v. Robert Dick*[18] (4th December, 1967), and we should follow it today.

The question of 'final' and 'interlocutory' is so uncertain that only thing for practitioners to do is to look up the practice books and what has been decided on the point. Most orders are now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way".

Lord Esher's test and the nature of the application of the 4th defendant leading to the order appealed from.

A party to a partition action making an application in terms of subsection 48 (4) (*a*) (iv) in order to establish his right, title or interest, has two hurdles to surmount. First he has to satisfy court, in terms of subsection (*c*) that (i) having filed his statement of claim and registered his address, he failed to appear at the trial owing to accident, misfortune or other unavoidable cause, and (ii) that he had a *prima facie* right, title or interest in the corpus, and (iii) that such right, title or interest has been extinguished or such party has been otherwise prejudicially affected by the interlocutory decree. Then only the court will grant special leave. After granting special leave, in terms of subsection (*d*), the court will settle in the form of issues the questions of fact and law arising from the pleadings relevant to the claim and then appoint a day for trial and determination of the issues. The second hurdle the party has to surmount is the determination of those issues by court after trial, in terms of subsection (*e*).

The order appealed from is an order made against the appellant at the first hurdle. Can one say that the order made on the application of the 4th defendant is one such that whichever way the order was given, it would have finally determined the litigation? Far from that, even if the order was given in favour of the appellant, he has to face the second hurdle, namely the trial to vindicate his claim. In the words of Lord Esher in Salaman's case (*supra*) at 735:

"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 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".

For the above reasons I hold that the order appealed from is not a "judgment" within the meaning of subsections 754 (1) and 754 (5) of the CPC. The appeal is dismissed but in all the circumstances we make no order as to costs.

WIJETUNGA, J. – I agree.

GUNAWARDANA, J. – I agree.

Appeal dismissed.