

**HEWAGE  
vs  
PUBLIC TRUSTEE**

COURT OF APPEAL  
SOMAWANSA, J. (P/CA) AND  
WIMALACHANDRA, J.  
CALA 398/2004  
DC COLOMBO 35481/T  
MAY 5, 2005

*Civil Procedure Code — Testamentary proceedings — Probate issued — Application to have fixed deposits excluded from inventory — Application rejected — Is it a final order or an interlocutory order. ?*

The District Court issued probate of the will to the Public Trustee. Intervient petitioner filed an application objecting to the inclusion of certain fixed deposits of the deceased in the inventory, on the ground that the said fixed deposits were deposited by the deceased in The Finance Company and the intervenient petitioner was designated as the nominee. The District Judge rejected the application as such disputed claim can only be tried in a separate action.

The petitioner sought leave to appeal from the said order.

The respondent raised a preliminary objection that the impugned order is a final order and hence the said order should have been canvassed by way of final appeal revision ; and not by way of leave to appeal.

**APPLICATION** for leave to appeal on the preliminary objection whether leave to appeal lies or not.

**HELD :**

- (1) When the District Judge made order that the intervenient's remedy is to file a separate action and vindicate his rights, the dispute between the intervenient and the Public Trustee remains until it is finally decided.
- (2) Hence the order will not finally dispose of the matter in dispute. The said order is not a judgment with the meaning of section 754(5).

**Cases referred to :**

1. *Ranjith vs. Kusumawathie and others* (1998) 3 Sri LR 232 at 236
2. *White vs. Brunton* (1984) 2 All ER 606
3. *Shubrook vs. Tufnel* (1882) (QBD 621 : (1881-8) All ER 180
4. *Salaman vs. Warner and others* (1891) 1 QB 734

*Kuwera de Zoysa* with *D. de Alwis* for the intervenient petitioner.  
*M. U. M. Ali Sabry* with *Sanjeewa Dasanayake* for executor-petitioner-respondent.

*Cur.adv.vult.*

October 11, 2005

**L. K. WIMALACHANDRA, J.**

This is an application for leave to appeal from the order of the Additional District Judge of Colombo dated 08.10.2004. Briefly the facts relevant to this application are as follows :

The petitioner-respondent (hereinafter referred to as the "Public Trustee") instituted these proceedings in the District Court of Colombo praying for the Probate of a Last Will which he claimed to have been executed by late Jayasena Weerasekera. This Last Will left the entirety of the deceased's estate to five charitable institutions in the Island. As there were no objections, the District Court issued the probate of the will to the Public Trustee. In the meantime, the intervenient-petitioner filed an application objecting to the inclusion of certain immovable properties, in that certain fixed deposits of the deceased be excluded from the inventory on the ground that the said "fixed deposits" were deposited by the deceased in "The Finance Company" and the intervenient-respondent-petitioner (petitioner) was designated as the nominee in all the said fixed deposits. Accordingly he made an application to Court to have the said 'fixed deposits' excluded from the inventory. On this application, the learned Judge made order dated 08.10.2004 rejecting the petitioner's application to have the said 'fixed deposits' in the inventory excluded therefrom on the ground that when the executor or administrator is not prepared to admit the claim of an intervenient to a property in the inventory, such disputed claim can only be made by way of a separate action. Thereafter the petitioner filed this application for leave to appeal from the said order of the learned Judge.

When the matter was taken up for inquiry, a preliminary objection was raised by the Public Trustee, that the impugned order is a 'Final Order' in the nature of fully and finally adjudicating the rights of the parties in respect of this dispute and hence the said order should have been canvassed either by way of final appeal and/or by application in revision and not by way of an application for leave to appeal, which is meant to challenge interlocutory orders.

When the matter was taken up, both counsel agreed to tender written submissions on the said preliminary objection. Accordingly, written submissions were tendered by both parties.

The learned counsel for the "Public Trustee" contended that the impugned order made by the learned Judge rejecting the petitioner's application to exclude the said "fixed deposits" from the inventory is an order which has the effect of a final judgment which can be canvassed only by

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way of a final appeal or by a revision application.

Section 754(5) of the Civil Procedure Code reads as follows :

**“Notwithstanding anything to the contrary in this Ordinance, for the purpose 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 action proceeding or matter, which is not a judgment.”**

After examining several legal decisions in Sri Lanka and the U. K. on the question whether an order in a civil proceeding is a judgment or an order having the effect of a final judgment, Dheeraratne, J. in the case of *Ranjith vs. Kusumawathie* and others<sup>(1)</sup> made the following observation :

**“There have been two virtually alternating tests adopted by different judges from time to time in the U. K. to determine what final orders and interlocutory order were. In *White vs. Brunton*<sup>(2)</sup> Sir John Donaldson MR labeled the two tests as the order approach and the application approach. The order approach was adopted in *Shubrook vs Tufnel*<sup>(3)</sup> where Jessel, MR and Lindley, 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 vs. Warner and others*<sup>(4)</sup> 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

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**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.”**

Then at 239 Dheeraratne, J. cited with approval the following passage of Lord Esher in *Salaman’s* case (*supra*).

**“The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be giving 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.”**

I have quoted extensively from the decision in *Ranjith vs. Kusumawathie and others* (*supra*) as I find that the decision in that case will help to answer the question before us.

In the circumstances I am of the view that the order must determine the rights of the parties conclusively, completely and finally to be considered as a final order which falls into the category of “judgment” in terms of Section 754(5) of the Civil Procedure Code. Essentially, the distinction between “final” and “interlocutory” lies in the nature of the decision, in that, whether it finally disposes of the matter in dispute. An order is not a final order if such an order does not finally dispose of any dispute or claim in the suit itself.

In the instant case, the learned Judge held that the question as to the title to the “fixed deposits” in the inventory cannot be decided in the testamentary action and the Court does not have jurisdiction in the testamentary proceedings to determine disputes as to the title in respect of such

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property between the administrator and an intervenient. The learned Judge further held that the intervenient's remedy is to file a separate action. If the deceased's title to a property included in the inventory is disputed, the question arises whether that question could be decided in the same proceedings or whether it is necessary to file a separate action. When the learned Judge made the order that the intervenient's remedy is to file a separate action and vindicate his rights, in my view the dispute between the intervenient and the Public Trustee remains until it is finally decided. Hence it can be clearly seen that the order of the learned Judge will not finally dispose of the matter in dispute. Accordingly the order made by the learned Judge is not a judgment within the meaning of Section 754(5) of the Civil Procedure Code.

For these reasons the preliminary objection raised by the Public Trustee is overruled but in all the circumstances we make no order as to costs.

**SOMAWANSA, J. (P/CA)** — I agree.

*Preliminary objection overruled.*

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