SIRIWARDENA

v.

AIR CEYLON LIMITED

SUPREME COURT
SHARVANANDA, J., COLIN-THOME', J. AND RANASINGHE, J.
S.C. NO. 35/83 ; S.C. SPECIAL LA/21/83 ; C.A./L.A. 67/82 ; D.C. COLOMBO 3336/Z.
APRIL 2, 1984.

Appeal – Order of Court to amend decree under section 189 of the Civil Procedure Code – Whether such an order has the effect of a final judgment of a civil court ? – Test to be applied – Procedure to appeal – Direct appeal or application for leave to appeal ? – Civil Procedure Code, sections 184, 189, 754 (1), 754 (2) and 754 (5).

Where the appellant had filed an application for leave to appeal from an Order of the District Judge made under section 189 of the Civil Procedure Code directing the amendment of a decree and the question was whether such an order is one having the effect of a final judgment of a civil court for the purpose of determining whether the correct procedure should have been a direct appeal and not an application for leave to appeal.

Held–

To decide whether a party dissatisfied with the order of a civil court should lodge a direct appeal under section 754 (1) of the Civil Procedure Code or appeal with the leave of Court first had and obtained under section 754 (2) of the Civil Procedure Code the definitions of 'judgment' and 'order' in section 754 (5) should be applied.

In view of the definition in section 754 (5) of the Civil Procedure Code the procedure of direct appeal is available to a party dissatisfied not only with a judgment entered in terms of section 184 of the Civil Procedure but also with an order having the effect of a final judgment, that is, a final order. Orders which are not judgments under section 184 of the Civil Procedure Code or final orders are interlocutory orders from which a party dissatisfied can appeal but only with leave to appeal.

The tests to be applied to determine whether an order has the effect of a final judgment and so qualifies 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 the parties.

(2) The order cannot be treated as a final order, if the suit or the action is still left a live suit 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 one.

By these tests an order amending a decree made under section 189 of the Civil Procedure Code is a final order. Hence the appellant's application for leave to appeal was misconceived and could not be entertained.

Cases referred to

(1) *Salaman v. Warner and others, (1891) 1 Q.B. 734, 735, 736, 737 (C.A.)*

(2) *Bozson v. Altrincham Urban District Council, (1903) 1 K.B. 547, 548, 549 (C.A.)*

(3) *Isaacs & Sons v. Salbstein, (1916) 2 K.B. 139, 147.*

(4) *Abdul Rahman and others v. Cassim & Sons, AIR 1933 P.C. 58, 60.*

(5) *Ramchand Manjimal v. Goverdhandas Vishandas Ratanchand and others, AIR 1920 P.C. 86, 87.*

(6) *Haron v. Central Securities, [1982] 2 All ER 481.*

(7) *Settlement Officer v. Vander Poorten, (1942) 43 N.L.R. 436.*

(8) *Fernando v. Chittambaram Chettiar, (1949) 49 N.L.R. 217, 219.*

(9) *Krishna Pershad Singh v. Moti Chand, (1913) 40 Cal. 635. (P.C.)*

(10) *Usoof v. The National Bank of India Ltd. (1958) 60 N.L.R. 381, 383.*

(11) *Subramaniam v. Soysa, (1923) 25 N.L.R. 344.*

(12) *Mohamed Haniffa Rasheed v. Mohamed Ali, S.C. 6/81 : D.C. Colombo 3290/L – S.C. Minutes of 20.11.81*

(13) *Ex parte Chinery, [1884] 12 Q.B.D. 342, 345*

(14) *Onslow v. Commissioners of Inland Revenue, [1890] 25 Q.B.D. 465, 466*

(15) *Ex parte Moore, [1885] 14 Q.B.D. 627, 632.*

APPEAL from an Order of the Court of Appeal.

Nimal Senanayake, President's Counsel, with *K. Gunaratne, L. V. P. Wettasinghe,* and *Saliya Mathew* for plaintiff-appellant.

H. W. Jayewardene, Q.C. with *R. Thevarajah* and *S. Sittampalam* for defendant-respondent.

Cur. adv. vult

May 30, 1984

SHARVANANDA, J.

The plaintiff-appellant on 22.11.1979 filed action against the Air Ceylon Ltd., praying :

(*a*) for a judgment and decree declaring that the plaintiff continues to be in the employment of the defendant Corporation under a service agreement in and after September 1979 ;

(*b*) for a judgment and decree ordering the defendant Corporation to pay to the plaintiff his salary at Rs. 1,620 per month from September, 1979 ;

(*c*) for a judgment and decree ordering the defendant Corporation to pay to the plaintiff a sum of Rs. 3,240 being the salary for the months of September and October 1979, together with legal interest thereon ;

(*d*) for judgment and decree ordering the defendant Corporation to pay to the plaintiff damages of Rs. 40,000 together with legal interest thereon from the date hereof until payment in full ;

(*e*) for costs together with legal interest and

(*f*) for such other and further relief as to this court shall seem meet.

During the pendency of the action steps were taken by the President of the Republic, as Minister of Defence to dissolve the respondent Corporation and a liquidator was appointed from 1.1.80. On 13.3.80 the case was taken up for trial and in view of the absence of the respondent, judgment was entered ex parte for the plaintiff-appellant as prayed for, in terms of paragraphs (*a*), (*b*) and (*d*) and costs of the action. Decree was thereafter entered in accordance with the judgment.

On 7.5.1980 the Liquidator, Air Ceylon Ltd., filed petition and affidavit to set aside the judgment and decree. The District Judge by his order dated 20.1.81 dismissed this application of the Liquidator. The Liquidator then moved the Court of Appeal in revision to have the said order set aside, but the Court of Appeal on 16.12.81, dismissed the application with costs.

Thereafter the Liquidator on 15.2.82 and on 19.3.82 filed papers in the District Court to amend the judgment and decree, in terms of Section 189 of the Civil Procedure Code on the ground of an accidental slip or omission made by the District Judge in his judgment, by the deletion of the relief in prayer "d" and by specifying that the plaintiff is entitled to damages at the rate of Rs. 1620/–per month, namely, from September to December 1979.

After inquiry the District Judge by his order dated 10.5.82 held that the defendant's claim to delete prayer 'd' was not tenable and that the plaintiff was entitled to Rs. 40,000/– with interest, as damages under prayer 'd'. He however directed that the decree should be amended in regard to the relief claimed in paragraph 'b' of the prayer to the plaint as follows :

"To pay the plaintiff Rs. 6480/– as salary from September 1979 to December 1979 at the rate of Rs. 1620/– per month."

From this order dated 10.5.82, allowing the amendment in the manner set out above, the plaintiff moved the Court of Appeal for leave to appeal under Section 754(1) of the Civil Procedure Code.

At the hearing of the application for leave, Counsel for the defendant-respondent opposed the application of the plaintiff on the ground that the order dated 10.5.82, made by the District Judge was a "final order" having the effect of a final judgment under section 754(5) of the Civil Procedure Code, and that an appeal lay direct to

the Court of Appeal under Section 754(1) and not with the leave of court, first had and obtained, in terms of section 754(2) of the Civil Procedure Code. He submitted that the application for leave to appeal was misconceived.

Counsel for the plaintiff contended that the order of the District Judge dated 10.5.82 was not a "Judgment" but an "Order" within the meaning of the said terms in section 754(5) of the Civil Procedure Code.

The Court of Appeal by its order dated 9.7.82 upheld the objection of Counsel for the defendant-respondent and held that the order made amending the judgment and decree was a final order from which an appeal lay direct to that court under section 754(1) of the C.P C. and refused with costs the application for leave to appeal.

The plaintiff-appellant, has with the leave of this court preferred this appeal against the order of the Court of Appeal dated 9.7.82 refusing his application for leave to appeal. The question that arises for determination is whether the order of the District Judge dated 10.5.82, amending the judgment and decree dated 13.3.80 is a "judgment" within the meaning of section 754(1) and 754(5) of the C.P.C., or an "order" within the meaning of section 754(2) and section 754(5) of the C.P.C.

Section 754(1) provides "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 "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."

Section 754(5) provides "Notwithstanding anything to the contrary in this Ordinance for the purposes of this 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."

The only question that is in issue in this appeal is whether the order of the Court of Appeal dated 9.7.82 refusing the plaintiff's application for leave to appeal is correct or not. The ground on which the Court of Appeal refused the application for leave to appeal was that the plaintiff-appellant should have canvassed the order of the District Judge dated 10.5.82 amending the decree entered earlier by preferring an appeal and not by applying for leave to appeal, for the reason that the said order is a "Judgment", within the meaning of section 754(5) of the C.P.C.

Counsel for the defendant-respondent submitted that the order dated 10.5.82 for the amendment of the decree is a final order ; since it finally determines the rights and liabilities of the parties and has the effect of a final judgment and brings to an end the dispute between the parties.

On the other hand, counsel for the plaintiff-appellant contended that the said order is an interlocutory order, that in an action there can be only one judgment or order having the effect of a final judgment and that is the one entered in terms of section 184 of the C.P.C and that all the orders made by court in the course of the action prior to or subsequent to judgment entered under section 184 of the C.P.C are orders within the meaning of "Order" under section 754(5) of the C.P.C. He submitted that the order of the District Judge dated 10.5.82 directing the decree to be amended to limit payment of the plaintiff's salary till December 1979, is an order within the meaning of section 754(2) and 754(5) of the C.P.C. He stated that the plaintiff had adopted the correct procedure to appeal. He argued that to prefer an appeal from the said order dated 10.5.82 he had to proceed by first obtaining leave of the Court of Appeal and not by appealing direct to that court.

I shall first discuss the argument of counsel for the defendant-respondent that the order in question is a judgment or order having the effect of a "final judgment". He submitted that a direct appeal to the Court of Appeal lies not only from a judgment entered in terms of section 184 of the C.P.C., but also from any final order which finally disposes of the rights of parties, and that any other order made in the course of any action is an interlocutory order and an appeal to the Court of Appeal against such an order lies only by obtaining the leave of the Court of Appeal.

Section 754 provides for appeal from decisions of the original court in any civil action to the Court of Appeal. These decisions may take the form of –

(*a*) Judgment
(*b*) Order having the effect of a final judgment (final orders) and
(*c*) Any other orders (interlocutory orders)

Thus a final order is one that has the effect of a final judgment between the parties. All other orders are interlocutory. In connection with the correct procedure for appeal, a crucial question arises ;–what is the test for determining whether an order is "final" or 'interlocutory"?.

On this point certain English cases and judgments of the Privy Council, which have been followed by our courts serve as a guiding light. In *Salaman v. Warner,* (1) the defendants had in their defence raised a point of law that the statement of claim filed by the plaintiff did not disclose any cause of action. The Divisional Bench, before which the case came up for hearing, upheld the defendants' plea and dismissed the action with costs. In appeal, a question having arisen as to whether the order in question was a final order or an interlocutory one, Lord Esher M.R.,laid down the test for determining the question 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 dispute, I think that for the purpose 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."

Fry, L. J., expounded the same test in the following words :

> "I conceive that an order is 'final' only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is interlocutory where it cannot be affirmed that in either event the action will be determined. Applying this test to the present case, it is obvious that the order here was made on an application of which the result would not in one event be final. Therefore this is an interlocutory order."

"Lopes L.J., enunciated the same test thus :

"I think that a judgment or order will be final within the meaning of the Rules, when whichever way it went it would finally determine the rights of the parties."

In *Bozson v. Altrincham Urban District Council* (2) an order was made in an action brought to recover damages for breach of contract, that the question of liability and breach of contract only was to be tried and that the rest of the case, if any, was to go to an official referee. The trial Judge held that there was no binding contract between the parties and made an order dismissing the action. The question arose whether the order was a final or interlocutory order, for the purpose of appeal.

Lord Alverstone, C. J., then proceeded to lay down the proper test in the following words : "It seems to me that the real test for determining this question ought to be this : Does the judgment or order, as made, finally dispose of the rights of the parties ? If it does, then I think it ought to be treated as a final order, but if it does not, it is then, in my opinion an interlocutory order". The Earl of Halsbury also took the view that the order appealed from was a final order. Swinfen Eady L.J., in *Isaac & Sons v. Salbstein* (3) reviewed all the earlier authorities and approved the test of finality stated by Lord Alverstone C J., as putting the matter on the true foundation that what must be looked at is the order under appeal and whether it finally disposes of the rights of the parties.

In the case of *Abdul Rahman and others v. Cassim & Sons* (4) the Privy Council made a clear pronouncement on these conflicting views, by adopting the test set down in *Bozson's* case. In this case it would appear that the suit was dismissed by the trial court on a preliminary point. The High Court reversed the decision of the trial court and passed an order remanding the suit for trial on the other issues. The High Court thereafter granted the necessary certificate under section 109 of the Indian C.P.C. Before the Privy Council however a preliminary objection was taken on behalf of the respondent that a certificate was wrongly granted and, as the order appealed from was an interlocutory order, the appeal was incompetent. Their Lordships of the Privy Council held that the order of remand would no doubt decide an important and even vital issue in the case. But, in spite of it, it could not be treated to be a final order, as it left the suit alive and provided

for its trial in the ordinary way. The preliminary objection was accordingly allowed by Their Lordships of the Privy Council and the appeal dismissed. With regard to the test for determining the finality of the order, in this case the Privy Council after referring to the judgment of Lord Cave in the case of *Ramchand Manjimal v. Goverdhandas Vishandas Ratanchand and others* (5) clearly accepted the test laid down in *Bozson's* case mentioned above.

The relevant portion of Their Lordships judgment is as follows :

> "Lord Cave in delivering the judgment of the Board laid down, as a result of an examination of certain cases decided in the English Courts, that the test of finality is whether the order 'finally disposes of the rights of the parties', and he held 'that the order then under appeal did not finally dispose of their rights, but left them to be determined by the courts in the ordinary way. It should be noted that the appellate Court in India was of opinion that the order it had made went to the root of the suit, namely, the jurisdiction of the court to entertain it, and it was for this reason that the order was thought to be final and the certificate granted. But this was not sufficient. The finality must be a finality in relation to the suit. If after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it under s. 109 (a) of the Code (India)."

To put the matter beyond the pale of doubt Their Lordships again clarified the position by applying the same test to the facts of the case before them :–

> "The effect of the Order from which it is here sought to appeal was not to dispose finally the rights of the parties. It no doubt decided an important and even a vital issue in the case, but it leaves the suit alive and provided for its trial in the ordinary way."

In the case of *Ramchand Manjimal v. Goverdhandas Vishandas Ratanchand* (supra) an application was made to the trial court for a stay of proceedings with a view to the issue being referred to an Arbitrator.. The first court granted stay, but on appeal this was reversed by the High Court. The court however granted the necessary certificate to appeal to the Privy Council on the ground that the order refusing the stay was a final order. On a preliminary objection being taken on behalf of the respondent, the Privy Council held that the order was not a final order and the appeal therefore was incompetent.

Viscount Cave, in his judgment, referred both to the test in *Salaman's* case (supra), as well as to the test laid down in *Bozson's* case (supra) and observed as follows :

"The effect of those and other judgments is that an order is final if it finally disposes of the rights of the parties. The orders now under appeal do not finally dispose of those rights, but leave them to be determined by the courts in the ordinary way."

It will thus appear that the Privy Council finally laid down in *Abdul Rahman's case* (supra) the test formulated in *Bozson's* case as the test to be adopted by the court to distinguish an interlocutory order from a final order.

As recently as 1982, in *Haron v. Central Securities* (6) the Privy Council approved the practice of the Federal Court of Malaysia applying Lord Alverston, C.J.'s test in *Bozson's* case, in determining whether an order is final or interlocutory and observed that Their Lordships were unable to find any error in this reasoning and that, on the contrary, they felt entitled to say that the test was both sound and convenient.

The test laid down in *Bozson's* case has been applied by our courts in order to determine whether an order is final or interlocutory. Following *Bozson's* case it was held in *Settlement Officer v. Vander Poorten* (7)

" The test of finality is whether the order 'finally disposes of the rights of the parties.' Where the order does not finally dispose of those rights, but leaves them 'to be determined by the courts in the ordinary way', the order is not final."

This view of the law was reiterated in *Fernando v. Chittamparam Chettiar,* (8). In this case where the Supreme Court vacated the order of abatement entered by the District Court under section 402 of the Civil Procedure Code and sent the case back for trial, it was held that the order of the Supreme Court was not a final order for the purpose of right of appeal under Rule 1 (A) of the schedule to the Appeals (P.C.) Ordinance. The court held that the order of the Supreme Court did not finally dispose of the rights of the parties.

"It left them 'to be determined by the court in the ordinary way'. The finality was not a finality in relation to the suit which was still a live one in which the rights of the parties have still to be determined."

Following the judgment of the Privy Council in *Krishna Pershad Singh v. Moti Chand*, (9) it was held in the case of *Usoof v. The National Bank of India Ltd.* (10) that there can be a final order or judgment even in execution proceedings, whether those proceedings are between the parties to the action or not. The court held that the judgment of the Supreme Court dismissing an appeal from the order of the District Court, refusing to set aside the sale of a property in execution of a mortgage decree is a "final judgment" within the meaning of Rule 1A of the schedule to the Appeals (Privy Council) Ordinance. The court held that "so far as the judgment debtors in this case are concerned, they have, by the judgment of this court, finally lost their rights in the mortgaged property, and the execution proceedings are no longer live proceedings."

In the judgment of the Privy Council in *Krishna Pershad Singh v. Moti Chand* (supra) which has been followed in *Subramaniam v. Soysa* (11) and in *Usoof v. The National Bank of India Ltd.* (supra), Lord Moulton held that the order of the High Court refusing to set aside the sale, where the property sold in execution of the decree was purchased by the judgment creditor, was a final order which dealt finally with the rights of the parties. Referring to the decision of the Privy Council, Sansoni, J. observed in the *Usoof v. The National Bank of India Ltd.* (supra)

> "I regard that decision as authority for the view that there can be a final order or judgment even in execution proceedings between the parties to the action. It seems to me to dispose of the argument that when the mortgage decree was entered in this action, it had been finally determined, and that there should be no further final judgment as between the parties. While it is true that the judgment is not final unless it finally disposes of the rights of the parties, I do not see why there cannot be a final judgment in execution proceedings, whether these proceedings are between the parties to the action or not ; and so far as the judgment debtors in this case are concerned, they have, by the judgment of this court, finally lost their rights in the mortgaged property, and the execution proceedings are no longer live proceedings."

In my judgment in *Mohamed Haniffa Rasheed v. Mohamed Ali* (12), agreed with this statement of the law.

What is a final judgment ? A final judgment has been defined to be a "judgment obtained in an action by which a previously existing liability

of the defendant to the plaintiff is ascertained or established, – unless there is something to show an intention to use the words in a more extended sense"–Per Cotton, L. J., in *Ex parte Chinery*(13).

This definition was adopted by Lord Esher in *Onslow vs. Commissioners of Inland Revenue* (14). *In Ex parte Moore* (15) the Earl of Selborne, L.C., expounded the meaning of a final judgment in the following words :

> " To constitute an order a final judgment nothing more is necessary than that there should be a proper litis contestatio, and a final adjudication between the parties to it on the merits."

Black in his book on Judgments defined "judgment" as the determination or sentence of the law, pronounced by a competent judge, or court as a result of an action or proceedings instituted in such court affirming that upon the matters submitted for decision, a legal duty or liability does or does not exist. An 'interlocutory' judgment is one which determines some preliminary or subordinate point or plea or settles some step, question of default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties or finally put the case out of the court."

It would appear from the above authorities, for an 'order' to have the effect of a final judgment and to qualify to be a 'judgment' under section 754 (5) of the C.P.C.–

(1) It must be an order finaly disposing of the rights of the parties.

(2) The order cannot be treated to be a final order if the suit or action is still left a live suit 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 one.

The order that is referred to in Section 754 (2) and defined in 754 (5) is an interlocutory order in contradistinction to an order which finally disposes of the rights of the parties. An interlocutory order does

not have the effect of a final judgment, as it does not finally dispose of the rights of the parties, but leaves the suit alive for the purpose of determining the rights of parties in the ordinary way.

In my view the word "judgment" in 754 (1) and 754 (5) of the C.P.C. has been used in the sense of a final determination of the rights of the parties in the proceedings, and comprises final orders besides the final declaration or determination of the rights of parties which culminates in the entering of a decree in terms of Section 188 of the C P.C. It is not restricted to the judgment referred to in section 184 of the C P C. It is much wider.

I cannot, in view of the special definition of "judgment" in section 754 (5) of the C.P.C., accept the restricted construction sought to be placed by counsel for the plaintiff-appellant that there can be only one judgment and that is the judgment referred to in section 184 of the C.P.C. A court may in the course of an action pronounce judgment in terms of section 184 of the C.P.C., and also make orders having the effect of a final judgment. Against such orders the proper remedy is a direct appeal to the Court of Appeal. It may also make interlocutory orders which do not finally dispose of the rights and liabilities of the parties ; against such orders the remedy is an application for leave to appeal under section 754 (2) of the C.P.C.

In the instant case, the District Judge, in the exercise of the court's power under section 189 of the C.P.C. amended the earlier decree entered in this case by his order dated 10.5.82. The amended decree supersedes the earlier decree and finally disposes of the rights of the parties, leaving nothing to be done for the purpose of determining the rights and liabilities of the parties. Though the rights of the parties had been determined by the original judgment dated 13.5.1980, yet as section 189 of the C.P.C. provides for the amendment of such judgment and decree, the amended judgment and decree dated 10.5.82, gets substituted for the original judgment and it is the amended judgment and decree which, unless revised in appeal, finally decides the rights of the parties and binds them. The order which is sought to be appealed against is the order that has to be looked at for deciding whether it is a "judgment" or "order" within the meaning of section 754 (5) of the C.P.C.

For the reasons stated above, the order dated 10.5.82, amending the earlier judgment and decree, is a "judgment" within the meaning of section 754 (1) and 754 (5) of the C.P.C. Since an appeal lay direct to the Court of Appeal from the order dated 10.5.82, under section 754 (1) of the C.P.C., the application for leave to appeal to the Court of Appeal, made by the plaintiff-appellant from the said order is misconceived.

The appeal is dismissed with costs. In terms of the order of this court dated 13.5.84, the plaintiff-appellant shall pay the defendant-respondent the costs of the application for special leave to appeal also.

COLIN-THOME, J.—I agree

RANASINGHE, J.—I agree.

Appeal dismissed.