

**LINGANATHAN AND ANOTHER
VS
JAFFERJEE AND OTHERS**

COURT OF APPEAL,
SOMAWANSA, J (P/CA), AND
WIMALACHANDRA, J, CALA 176/2004,
DC COLOMBO 1917/L,
APRIL 29, 2005.

Civil Procedure Code, sections 87 (1), 88 (2), 754(1) 754(2), and 754 (5)-Plaintiff's action dismissed-No appearance for plaintiff-Application to purge default dismissed-Is this order a judgment or an interlocutory order?

HELD:

In applying the provisions of sections 87 and 88 to the facts of the case, it is clear that a direct appeal would lie and there was no provision in law for leave to appeal.

APPLICATION for leave to appeal from an order/judgment of the District Court of Colombo.

Cases referred to :-

1. *A. S. Sangarapillai and Brother vs. Kathiravelu*-Sri Skantha Law Reports Vol 2-99
2. *Wijenayake vs. Wijenayake* - Sri Skantha Law Reports Vol 5-28

Romesh de Silva, PC with S. Amerasekera for plaintiffs-petitioners-petitioners.

Sunil Cooray with Sisira Siriwardene for defendant-respondents-respondent.

Cur.adv.vult

July 01, 2005

ANDREW SOMAWANSA, J. (P/CA)

When this application for leave to appeal was taken up for inquiry counsel for the defendants-respondents took up a preliminary objection to the maintainability of this application on the basis that the order dated 07.05.2004 marked X12 which is the order against which the plaintiffs-petitioners are seeking leave to appeal in the instant application, is an order refusing to set aside the judgment dated 11.09.2002 by which the plaintiffs-petitioners action was dismissed for default in appearance in terms of Section 87(1) of the Civil Procedure Code and that therefore in terms of Section 88(2) of the Civil Procedure Code the aforesaid order dated 07.05.2004 marked X12 is liable to an appeal to the Court of Appeal

On the aforesaid preliminary objection taken by the defendants-respondents both parties agreed to tender written submissions and both parties have tendered their written submissions.

The relevant facts are on the completion of pleadings the trial commenced and on an order made by this Court proceedings of the trial was stayed. Thereafter the case had been called in the District Court on several occasions and it was finally fixed for trial on 11.09.2002 on which date the plaintiffs-petitioners' action was dismissed on the basis that there was no appearance for the plaintiff-petitioners. The plaintiffs-petitioners sought to set aside the said order of dismissal of their action on the basis that their attorney-at-law had inadvertently taken down a wrong date as the date of the trial. At the conclusion of the inquiry the learned Additional District Judge by his aforesaid order dated 07.05.2004 marked X12 dismissed the plaintiffs-petitioners' application.

It is contended by counsel for the plaintiffs-petitioners that it is imperative for the plaintiffs-petitioners to maintain an application for leave to appeal for the reason that the order of the learned Additional District Judge marked X12 is being challenged mainly due to his failure to consider the affidavits of the plaintiffs-petitioners on the basis that they were not challenged as per the proceedings dated 29.05.2003 and the learned Additional District Judge has to be directed to make an order on the basis that the affidavits are unchallenged. In the circumstances he submits that it is imperative for the plaintiffs-petitioners to challenge the order of the learned Additional District Judge marked X12 by way of leave to appeal rather than await a final appeal in this regard. He further submits that due to the dismissal of the plaintiffs-petitioners' action the injunction granted by Court preventing the defendants-respondents from obstructing the plaintiffs-petitioners use of the road way has also come to an end which can cause untold hardship to the plaintiffs-petitioners, if the plaintiffs-petitioners were to await the hearing of the final appeal.

I am unable to subscribe or agree that the aforesaid reason submitted by Court would entitle the plaintiffs-petitioners to proceed with this leave to appeal application. At this stage it would be useful to consider the relevant provisions of the Civil Procedure Code.

Section 87(1) "Where the plaintiff or where both the plaintiff and the defendant make default in appearing on the day fixed for the trial, the court shall dismiss the plaintiff's action.

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- (2) Where an action has been dismissed under this Section, the plaintiff shall be precluded from bringing a fresh action in respect of the same cause of action.
 - (3) The plaintiff may apply within a reasonable time from the date of dismissal, by way of petition supported by affidavit, to have the dismissal set aside, and if on the hearing of such application, of which the defendant shall be given notice, the court is satisfied that there were reasonable grounds for the non-appearance of the plaintiff, the court shall make order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the action as from the stage at which the dismissal for default was made.”

Section 88(1) “No appeal shall lie against any judgment entered upon default.

- (2) The order setting aside or refusing to set aside the judgment entered upon default shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made, and shall be liable to an appeal to the Court of Appeal.”

In the instant action the order dated 11.09.2002 had been made in terms of Section 87(1) of the Civil Procedure Code and the order dated 07.05.2004 marked X12 has been made in terms of Section 88(2) therefore the order marked X12 was liable to an appeal to the Court of Appeal and the remedy sought by the plaintiffs-petitioners is misconceived in law. In applying the provisions contained in Sections 87 and 88 of the Civil Procedure Code to the facts of the instant action, it is clear that a direct appeal would lie from the order marked X12 and there was no provisions in law for leave to appeal as sought by the plaintiffs-petitioners.

Applicability of Section 88(2) was fully considered by the Court of Appeal in the decision in *A. S. Sangarapillai and Bros. vs. Kathiravelu*⁽¹⁾ wherein it was held that an order made under Section 88(2) of the Civil Procedure Code gives rise to a direct appeal and not leave to appeal. The facts of that case were as follows : The plaintiff filed action to eject the defendant from

certain shop premises. On the summons returnable date the defendant did not appear and the case was taken up *ex parte* and thereafter judgment and decree were entered in favour of the plaintiff. After the writ was executed the defendant filed an application to set aside the *ex parte* judgment entered against him for default on the ground that summons were not served on him. After inquiry order was made setting aside the judgment entered against the defendant for default of appearance and allowing the defendant to file answer and also restoring possession to the defendant. Against this order the plaintiff filed a leave to appeal application and revision. Certain preliminary objections were taken to this application one of which was that leave to appeal is not available as the order complained of was an appealable order and therefore notice of appeal should be filed. At page 103 per Siva Selliah, J :

“In the instant case I am of the view that the determination of the District Judge made on 01.09.1983 setting aside the judgment entered against the defendant for default of appearance due to non-service of summons and allowing him to file answer is an ‘order’ made under Section 88(2) of the Civil Procedure Code and that due to the special provision contained therein and the in-built safeguard provided thereby and considering the tenor of the judgments of Vaitilingam, J and Abdul Cader, J and O. S. M. Seneviratne, J quoted above, I hold that a direct appeal is provided for in the circumstances and that an application by way of leave to appeal does not lie”.

Again in *Wijeyanayake vs. Wijeyanayake*⁽²⁾ the facts were : the defendant made an application to set aside the *ex parte* judgment entered in favour of the plaintiff on the ground that summons had not been served on him, the learned District Judge made order refusing to set aside the *ex parte* judgment and decree and against this order the defendant preferred a leave to appeal application to which a preliminary objection was taken on the basis that the remedy sought by the defendant is misconceived in law. At page 29 per Palakidnar, J :

"The section referred to above sets out clearly and unambiguously the right of appeal given to a party in either event. The order though so described is accompanied by judgment adjudication upon the facts. Thus any misconception with regard to the appealability of the order under Sec. 88(2) is clearly removed. It is a final order accompanied by a judgment deciding the rights of the parties in a conclusive way within the contemplation of the term judgment set out in Section 754(1) of the Civil Procedure Code. An order as interpreted in Section 754(5) is a final expression of any decision action which is not a judgment. In the instant case statute requires that the order has to be accompanied by a judgment adjudication on the facts. Thus it is clearly a judgment as defined in Sec. 754(5)."

The right of appeal is given by the words 'shall be liable to appeal'. Thus one cannot conceive it to be an order to appeal from which leave from the Court of Appeal should be first had and obtained as set out in Section 754(2) of the Civil Procedure Code. The remedy sought is therefore misconceived. In the circumstances the reason adduced by counsel for the plaintiffs-petitioners cannot override the specific provisions set out in the Civil Procedure Code.

For the foregoing reasons, irrespective of the merits of this application as there is no statutory provisions for leave to appeal against the order dated 07.05.2005 marked X12 the instant application cannot be maintained or proceeded with and has to be dismissed. Accordingly the application for leave to appeal made by the plaintiffs-petitioners is dismissed with costs fixed at Rs. 5000.00.

WIMALACHANDRA, J. — I agree.

Application dismissed.