

**In the Court of Appeal of the Democratic
Socialist Republic of Sri Lanka**

CA 1133/96 (F)

DC Bandarawela : 118/L

**R Lisa,
Care of Velu,
Jalashaya Road,
Bandarawela
Plaintiff-Appellant
Vs.**

**K A Nandasena,
Medakumburepathana,
Perahettigoda,
Pattiyagedara**

**R M Nanadawathie,
Medakumburepathana,
Perahettigoda,
Pattiyagedara**

Defendant-Respondent

Before : A.W.A. Salam, J.

**Counsel : Lal Kumarasingha for the plaintiff-appellant and Shanil Rajapakse
for the defendant-respondents.**

Argued on : 21/03/2011

Decided on : 12/05/2011

A.W. Abdus Salam, J.

The plaintiff filed action against the defendants for a declaration that she is the permit holder of the subject matter and for the ejectment of the defendants. The learned District Judge entered judgment for the plaintiff dated 13.12.1989 against which the plaintiff preferred an appeal. Whilst the appeal was pending the plaintiff (judgment-creditor) made an application for writ pending appeal. The learned District Judge by order dated 18.12.1996 held that the plaintiff is entitled to execute the decree for damages and not entitled to a writ of ejectment. Being dissatisfied with the said order the plaintiff preferred the instant appeal.

The pivotal question that arises for determination in this appeal at this stage is the availability of a statutory appeal. Admittedly the impugned order has been made not as a final order in the case but as an incidental step arising on the application for writ pending appeal. The final decision on the action filed by the plaintiff had been pronounced long time ago and a statutory appeal had been preferred by the plaintiff. The learned counsel for the defendants has submitted that the impugned order should be treated as an interlocutory order as

there cannot be two statutory appeals stemming from a single case.

In the case of Cadiraman Pulle vs Ceylon Paper Sacks Ltd 2001 3 SLR 1, it was held that an application to execute writ pending appeal is special procedure. It is incidental to the principal object of the action. As the rights of parties have not been finally disposed of, it is an interlocutory order.

The test to be applied to ascertain whether an order has the effect of final judgment has been laid down by Sharvananda J (as he then was) in Siriwardena vs. Air Ceylon, Limited 1984 SLR 1 286. Accordingly it must satisfy the following tests.

- (1) It must be an order finally 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 alive 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."

In the light of the above, it is quite clear that the appeal of the plaintiff is misconstrued in law and the right course that

should have been adopted by the plaintiff was to file a leave to appeal application. For reasons stated above this court has no option but to dismiss the appeal. There shall be no costs.

Judge of the Court of Appeal

JMR/-