

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALISTS
REPUBLIC OF SRI LANKA**

C. A. 445/97 (F)

D. C., Kurunagela Case No. 3051/P

Wannahaka Mudiyansele Heen
Amma *alias* Hemalatha,
Nindapalla,
Gokaralla.

Plaintiff

VS.

1. Wijesingha Mudiyansele
Punchi Banda Wanaduragala,
Thirangandahe Korale
2. Bannahake Mudiyansele Ran
Banda Ihala Gokarella,
Hatayaya Korela.
3. Bannahake Mudiyansele
Ukku Amma, Ihala Gokarella,
Hataya Korele.
4. Bannahake Mudiyansele
Dingiri Amma,
Arapola, Mawathagama.
5. Dissanayake Mudiyansele
Diisanayake,
Arapola, Mawathagama.
6. Dissanayake Mudiyansele
Jayathilake,
Gampaha Hotel, Malsiripura.
7. Dissanayake Mudiyansele
Ranbanda,
Aradigedara Kade,
Bogahamula.

Defendants

AND

Wannahaka Mudiyansele Heen
Amma *alias* Hemalatha,
Nindapalla,
Gokaralla.

Plaintiff-Petitioner

VS.

1. P. Appuma
2. P. Sumanadasa
Both of them at No. 243,
Waduragala Road, Kurunagela

Respondents

AND NOW

1. P. Appuma
2. And 1A P. Sumanadasa
Both of them at No. 243,
Waduragala Road, Kurunagela

Respondent-Appellants

VS.

Wannahaka Mudiyansele Heen
Amma *alias* Hemalatha,
Nindapalla,
Gokaralla. (Deceased)

Plaintiff-Petitioner-Respondent

R. R. P. M. A. M. R. Sarath Bandara'
Gopallawa,
Gokeralla Junction,
Gokaralla.

Plaintiff-Petitioner-Substituted
Respondent

1. Wijesingha Mudiyansele
Punchi Banda Wanaduragala,
Thirangandahe Korale

- 1A. W. M. Padma Srimathi
Wijesingha,
Wilbawa Road,
Waduragala,
Kurunegala.

2. Bannahake Mudiyansele Ran
Banda Ihala Gokarella,
Hatayaya Korela.

- 2A. B. M. Nimal Wickramaratne
Bandara “Kesera Niwasa”,
Hambanpola,
Malsiripura.

3. Bannahake Mudiyansele Ukku
Ammam, Ihala Gokarella, Hataya
Korele.

4. Bannahake Mudiyansele
Dingiri Ammam,
Arampola, Mawathagama.

5. Dissanayake Mudiyansele
Diisanayake,
Arampola, Mawathagama.

- 5A. D. M. Chandrasoma Banda,
Aramapola. Mawathagama

6. Dissanayake Mudiyansele
Jayathilake,
Gampaha Hotel,
Malsiripura.

7. Dissanayake Mudiyansele
Ranbanda, Aradigedara Kade,
Boghamula.

- 7A. Parasad Kulathunga “Prasad
Enterprizes”, Kandy Road,
Mawathagama

Defendant-Respondents

Before : **M. M. A. Gaffoor, J.**

Counsel : Kaminda De Silva for the Respondent-Appellants
Gayanga Wijethunga for the 7A Noticed Defendant-Respondent

Written Submission filed on : 15.11.2018 (by the Respondent-Appellants)
02.11.2018 (by the 7A Noticed Defendant-Respondent)

Decided on : **05.04.2019**

M. M. A. Gaffoor, J.

The original Plaintiff-Respondent above-named (Plaintiff) instituted the above styled action in the District Court of Kurunegala to partition the land called *Watakeiyapotha Kumbura* morefully described in the schedule to the plaint.

In the trial, the Plaintiff had given evidence before the learned District Judge. Since the Defendants of the action had contested, only on Plaintiff's evidence case concluded and interlocutory decree and the final decree were entered on 27.12.1990 and 30.06.1994 respectively (vide page 122 of the appeal brief).

It is important to note that the Appellants already made an application dated 04.11.1994 after final decree to intervene and obtain certain relief in terms of Section 328 of the Civil Procedure Code. Thereafter, an application had been made by the 1st and 2nd Respondents-Appellants (Appellants) were affected by the execution

thereof, accordingly, the Appellants filed a petition dated 27.09.1996 a requested an order from the District Court directing the Plaintiff to hand over possession of the land to the Appellants (vide page 345 of the appeal brief).

After an inquiry, the learned District Judge dismissed the above application of the Appellants. Being aggrieved by the said decision, the Appellant preferred this appeal to vary the said decision of the learned District Judge.

When this matter was called for steps for Substitution, Counsel for the Person Noticed as 7A Defendant-Respondent brought to the attention of Court on two Preliminary Objections as to the maintainability of this appeal.

It was the submission of the 7A Defendant-Respondent that this appeal is not maintainable on the following grounds:

- a. There is no right of appeal as this was not an order having the effect of a final order but only and interlocutory order.
- b. There is in any event no right of appeal as Section 328 of the Civil Procedure Code.

I would like deal the issue (a) whether the questioned order of the learned District Judge is a final judgment or an order which comes under Section 754 (2) of the Civil Procedure Code.

Section 754 (1) and 754 (2) read as follows:

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

In order to decide this question, I would like to consider certain judicial decisions.

In ***Shubrook vs. Tufnell*** [(1882) 9 QBD 621], 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 and the effect of the order made.

In ***Ranjith vs. Kusumawathie*** [(1998) 3 SLR 232], the Supreme Court held that the interlocutory decree is not final and the order of the District Court is not a judgment within the meaning of Section 754 (1) and 754 (5) of Civil Procedure Code for purpose of an appeal.

In ***Salter Rex and Co. vs. Gosh*** [(1972) 2 All ER 865] Lord Denning, M. R. stated that:

“If their decision whichever way it is given, will if it stands finally dispose of 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 order, will allow the action to go on, then I think it is not final, but interlocutory.”

Counsel for the 7A Defendant-Respondent referring the ***Senanayake vs. Jayantha*** case, strenuously submitted that the in the District Court, if the application was allowed, the Appellants would intervene and file objections to their dispossession and the inquiry would continue (that means that one of the possible orders contained the possibility of the action continuing), therefore, Counsel for the 7A Defendant-Respondent has taken up a position that the order impugned is not an application for final appeal, it should have been a leave to appeal.

In ***Senanayake Vs. Jayantha*** [SC Appeal No. 41/15 and SC CHC 37/08, SC Minutes dated: 04.08.2017] a bench of seven judges was held that:

In order to decide whether a order is a final judgment or not. it is my considered view that the proper approach is the approach adopted by lord Esher in Salaman vs Warner (supra) which was cited with approval by Lord Denning in Salter Rex vs Gosh (supra). It stated:

“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”.

Therefore orders given in both cases are interlocutory orders and the proper course of action is to file leave to appeal application under section 754 (2) and not preferring and appeals under section 754(1) of the Civil Procedure Code.

After having heard these submissions and the judicial literature, I am agreeable with the 7A Defendants-Respondent that the said order of the learned District Judge is an order which is fell under Section 754(2) of the Civil Procedure Code.

Further, this Court was invited to consider Section 328 of the Civil Procedure Code.

Counsel for the 7A Defendant-Respondent submitted that, it is quite clear from the Appellant’s application dated 04.11.1994 before the District Court is under Section 328 of the Civil Procedure Code. Therefore, Counsel for the 7A Defendant-Respondent has taken up a position that no appeal shall available under this Section.

Section 329 reads as follows:

“No appeal shall lie from any order made under section 326 or section 327 or section 328 against any party other than the judgment-debtor. Any such order shall not bar the right of such party to institute an action to establish his right or title to such property.”

Therefore, in this juncture, I wish to re-call the findings of Anil Gunaratne, J. on Section 329, in **C. A. 1911/1997 (F) [CA Minutes dated 27.10.2011]**.

*“The follow up to Section 241 is found in Sections 242 - 245. Under section 244 court could release the property claimed and under Section 245 disallow the claim after investigation. **The question is whether there is a right of appeal to the dissatisfied party? The Draftsman of these provisions and the legislature had not included a provision to enable parties to appeal or to state that there is no such right of appeal. It is silent. Does it mean that one could infer or imply a right of appeal to a party dissatisfied? In comparison I prefer to look at Section 328 of the Civil Procedure Code relating to claims of bone fide possessors who are dispossessed. Effect of final order under Section 326, 327 & 328 is subject to same conditions of appeal. As such denial of a right of appeal is embodied in the section itself. (Section 329).”***

In the above case, Anil Gunaratne, J. had taken a view that *there is no appeal lie from any order made under Section 244 and 326 of the Civil Procedure Code* (vide page 22-23). Therefore, my conclusion is fortified as I gather more supports from the above mentioned case namely, C. A. 1911/1997(F) [CA Minutes dated 27.10.2011].

For the forgoing reasons, I allow the preliminary objections of the Respondent and dismiss the appeal without cost.

JUDGE OF THE COURT OF APPEAL