1961 *Present :* **H. N. G. Fernando, J. and L. B. de Silva, J.**

A. K. DAVID, Appellant, *and* M. A. M. M. ABDUL CADER, Respondent

S. C. 180/1961—Application for Conditional Leave to appeal to the Privy Council in S. C. 234/D. C. Puttalam, 6327

Privy Council—Right of appeal thereto—Dismissal of action on the ground that Court has no jurisdiction to entertain it—" Final order "—Appeals to the Privy Council Rules.

A judgment dismissing an action on the ground that the Court has no jurisdiction to entertain it is a final judgment within the meaning of the Appeals to the Privy Council Rules, unless there is a further explicit or implicit determination that some other authority has the jurisdiction to entertain the plaintiff's claim.

Plaintiff sued the Chairman of an Urban Council, in his individual capacity, for the recovery of damages sustained by reason of the alleged malicious refusal of the defendant to issue to the plaintiff a licence under the Public Performances Ordinance. The Supreme Court, on appeal, decided that the proper remedy, if any, of the plaintiff was by way of an application for *Mandamus* calling upon the proper authority to issue the licence and not by way of an ordinary action in a civil court.

Held, that the decree dismissing the action prevented the plaintiff from asserting his alleged claim as against the defendant as an individual. It was, accordingly, a final order for the purpose of the Appeals to the Privy Council Rules.

APPLICATION for conditional leave to appeal to the Privy Council.

C. Ranganathan, with *Nimal Senanayake*, for plaintiff-appellant.

H. V. Perera, Q.C., with *M. T. M. Sivardeen* and *M. A. M. Isaki*, for defendant-respondent.

Cur. adv. vult.

December 15, 1961. H. N. G. FERNANDO, J.—

This is an application for conditional leave to appeal to Her Majesty-in-Council against the judgment of this court delivered on 24th March 1961, on an appeal to the court from a judgment and decree of the District Judge of Puttalam. The cause of action stated in the plaint was for damages alleged to have been sustained by the plaintiff by reason of the alleged malicious refusal of the defendant to issue to the plaintiff a licence under the Public Performances Ordinance (Cap. 134) authorising the use of the plaintiff's cinema for the presentation of " public performances ". On a preliminary issue, namely the question whether the plaint disclosed a cause of action against the defendant, the learned District Judge held that if the refusal to grant the licence had been malicious, a cause of action for damages would enure to the plaintiff. But

in his view such an action would lie, not personally against the individual who had refused the licence, but rather against the person in his capacity as the authority empowered by law to grant the licence, that is, as the Chairman of the Urban Council of Puttalam. The District Judge dismissed the action on the ground that the action had been brought against the defendant personally and not in his capacity as the Chairman of the Council.

In the Supreme Court the dismissal was affirmed but on the different ground that the proper remedy if any is by way of an application to this court for a Mandamus calling upon the proper authority to issue the licence and not by way of an ordinary action in a civil court.

Assuming that the plaintiff's action was properly dismissed, whether upon the ground stated in the District Court or alternatively that stated in the judgment of this court, it seems clear that the result of the order dismissing the action is that the question whether in the circumstances alleged in the plaint the plaintiff may recover damages on the ground that the licence was unlawfully refused has been finally terminated. The plaintiff chose to assert the existence of a right in him to sue the defendant as an individual for damages alleged to have been suffered by an alleged wrongful act of the defendant as an individual, and the effect of the judgment of this court on appeal is that the plaintiff cannot again seek in the courts to recover damages on the same ground from the defendant as an individual. Even though the ground of the dismissal of the plaintiff's action may be that the District Court has no jurisdiction to entertain it, a plaintiff who alleges that the court has such jurisdiction is entitled to a determination on the question of jurisdiction, and a determination that there is no jurisdiction would appear to be an order finally determining the rights of the parties unless there is a further explicit or implicit determination that some other authority has the jurisdiction to entertain the plaintiff's claim. No indication of any such further express or implied determination is to be found in the judgment of this court against which the plaintiff now seeks to appeal.

For the argument that the decree of this court against which leave to appeal is now sought is not a final order within the meaning of the Appeals to the Privy Council Rules, counsel for the respondent relies greatly on the decision of the Court of Appeal in England in *Salaman v. Warner* [1]. That decision construed the meaning of the terms 'final order' and 'interlocutory order' in a certain rule of procedure. The defendants in that action raised the point of law that the statement of claim did not disclose any cause of action, and the Judge at Chambers ordered the point to be set down for argument and disposed of before trial. The Divisional Court after hearing argument ordered that the action should be dismissed. Thereupon the plaintiff gave notice of appeal against the order dismissing his action. The question whether the order dismissing the action was final or interlocutory arose in connection with the notice of motion to appeal which was given by the plaintiff. Under *Order LVIII*

[1] *(1891) 1 Q. B. 734.*

Rule 3 of the English Rules of the Supreme Court, the notice of appeal from a final order must be a " fourteen days' notice ", while the notice of appeal from an interlocutory order is a " four day notice ". The " fourteen days " and " four day " period, in this context, is not the period within which the notice must be given (that matter is dealt with in *Order LVIII Rule 15*) ; *Rule 3* refers to the day which should be mentioned in the notice of motion to appeal, being the first day which can be named in the official list as the day of hearing of the motion to appeal and the notice should be given for that day. In other words, the notice of appeal against a final order must state the motion to appeal will be set down for hearing on the 14th day after the date of the service of the notice, whereas the day to be so specified where the appeal is against an interlocutory order must be the 4th day after service of the notice. This was the effect of *Order LVIII Rule 3* as it stood in 1955, and the Rule existing at the time of the decision in *Salaman v. Warner* [1] could not have been substantially different.

In considering the applicability of the decision of the Court of Appeal in construing the Rules in Ceylon regulating appeals to Her Majesty-in-Council, it is necessary to cite fairly fully from the judgments of Lord Esher, M.R. and Fry, L.J., and for convenience of comment I shall italicise parts of the *dicta* which seem to me of much importance.

" *Taking into consideration all the consequences that would arise from deciding in one way and the other respectively,* I think the better conclusion is that the definition which I gave in *Standard Discount Co. v. La Grange* (*3 C. P. D. 67 at p. 71*) is the right test *for determining whether an order for the purpose of giving notice of appeal under the rules* is final or not. The question must depend on what would be the result 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. That is the rule which I suggested in the case of *Standard Discount Co. v. La Grange* (*supra*), and which on the whole *I think to be the best rule for determining these questions ;* the rule which will be most easily understood and involves the fewest difficulties ". (*per Lord Esher, M.R. at p. 735*)

" The 3rd and 15th rules of Order LVIII have raised considerable difficulties because they use the term " interlocutory order ", of which no definition is to be found in the rules themselves or, so far as I know, by reference to the earlier practice, either of the Common Law or of Chancery Courts. These difficulties are well illustrated by various cases that have been decided. *We must have regard to the object of the distinction drawn in the rules between interlocutory and final orders as to the time for appealing.* The intention appears to be to give a longer

[1] (*1891*) *1 Q. B. 734.*

time for appealing against decisions which in any event are final, a shorter time in the case of decisions where the litigation may proceed further. I think that the true definition is this. 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". (*per Fry. L.J. at p. 736*)

It will be seen that the Court of Appeal has for the purposes of the rules which regulate giving of the notice of appeal adopted a test which will enable a party or his lawyers to determine beforehand whether the order ultimately obtained in a proceeding will be final or else interlocutory; a proceeding for this purpose would appear to fall necessarily or at least ordinarily into one of three categories :—(1) If the point raised in the proceeding is such that the order ultimately made will result in the final termination of the proceeding in the court before which it is held, *whichever way the order will go*, then the order will be 'final' for the purposes of the rules. (2) If the order which will ultimately be made, whichever way it goes, will not be a final termination and if after the order is made the action will continue, then the order is 'interlocutory'.

The distinction between the two kinds of orders respectively mentioned above is a straightforward one, distinguishing between orders which on the one hand are manifestly interlocutory and on the other hand manifestly final. But in the third class of case, where such a distinction is inapplicable, the Court of Appeal decided that an order, which if I may say so with respect, is not manifestly 'interlocutory', will be regarded as being interlocutory for the purposes of the Rules. (3) The third class of case is one where, although the order may finally determine the rights of the parties in the sense that it has the effect of finally terminating the action in the court, it is nevertheless regarded as interlocutory because if the decision had been given the other way the action would have continued in that court.

With much respect to the learned Judges of the Supreme Court of Ceylon who have referred to the judgments in *Salaman v. Warner* [1] in considering the meaning of the expression "final order" in our rules regulating appeals to the Privy Council, it seems to me that those parts of the *dicta* of the Court of Appeal which I have italicised did not receive due attention. In determining whether the third class of case mentioned above should be regarded as leading to an order which is final or interlocutory the Court of Appeal appears to have had strong reason for considering it proper and convenient that the order should be treated as an interlocutory order *for the purposes of determining which of the two notices required by the English Rules should be given.* I have little doubt that if what was involved was, not merely the question of the day to be mentioned in the notice, but the more important and fundamental question whether an appeal lies at all, the third class of order would not have been regarded as interlocutory, having regard to the consequence that it would then be non-appealable.

[1] *(1891) 1 Q. B. 734.*

The decision of the Privy Council in *Abdul Rahman v. Cassim & Sons* [1] did not adopt the ruling of the Court of Appeal in *Salaman's case* (*supra*) in the same sense in which that ruling was relied upon in the argument before us. The order from which an appeal was there taken to the Privy Council was one which reversed a decree of dismissal and which remanded the suit to the original court for trial on the merits. In fact therefore the order appealed against to the Privy Council did not finally determine the rights of the parties, for those rights were left to be determined by the original court.

> " 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 section 109 (A) of the Code. "

But there is nothing in the judgment of the Privy Council to show that if the Appellate Court in India had confirmed the decree of dismissal the order of confirmation would not be a final order against which the party aggrieved had his right of appeal. The case of *Amatul Fatema v. Abdul Alim* [2] which was followed was equally one where the order appealed from, being an order which refused a stay of suit, left the rights of the parties to be determined by the courts and therefore did not finally dispose of those rights.

The decision in *Salaman's case* (*supra*) has been referred to more than once in judgments of this court relating to the construction of the term ' final order ' in the context now under consideration. In regard to those judgments to which our attention has been drawn in the argument, *Lall v. Emanuel* [3], *Palaniappa Chetty v. Mercantile Bank of India Ltd.* [4], *Settlement Officer v. Vander Poorten* [5], I note that in each of them, although leave to appeal was properly refused, there was no necessity to rely upon the ruling in *Salaman v. Warner* [6].

As has been stated above the effect of the order made by the Supreme Court against which the plaintiff now seeks to appeal is that he is finally prevented from asserting his alleged claims as against the defendant as an individual. Unless the test laid down in *Salaman's case* (*supra*) is to be applied (and for reasons already stated that test is in my opinion inapplicable), I find no ground upon which to hold that the decree dismissing the plaintiff's action is not a final order for the purposes of the rules regulating appeals to Her Majesty-in-Council.

The application for conditional leave to appeal is allowed with costs fixed at Rs. 315.

L. B. DE SILVA, J.—I agree.

Application allowed.

[1] *(1933) A. I. R. 58 (P. C.).*
[2] *(1920) A. I. R. 86 (P. C.).*
[3] *(1931) 33 N. L. R. 91.*
[4] *(1942) 43 N. L. R. 352.*
[5] *(1942) 43 N. L. R. 436.*
[6] *(1891) 1 Q. B. 734.*