1962 *Present :* **Basnayake, C.J., Herat, J., and Abeyesundere, J.**

I. D. JAYASUNDERA, Petitioner, *and* WEERAPPERUMA and another, Respondents

S. C. 406—Application for Final Leave to Appeal to the Privy Council in S. C. 220/D. C. Galle 1218 M.B.

Privy Council—Objection as to right to appeal thereto—Right to take it at the stage of application for final leave—Application by a person to be added as a party to a pending action—Refusal by Supreme Court—Right to appeal therefrom to Privy Council—" Final judgment in a civil suit or action "—Civil Procedure Code, s. 18—Mortgage Act, s. 16—Appeals (Privy Council) Ordinance, s. 3, Schedule, Rules 1 (a), 2, 3, 20, 21, 22.

There is nothing in the Rules of the Schedule to the Appeals (Privy Council) Ordinance which bars the party respondent to an application for leave to appeal to the Privy Council from submitting to the Court at any stage before the grant of final leave that no appeal lies to the Privy Council ; the Court is free at any stage to determine that question *ex mero motu* or on objection taken. The grant of conditional leave to appeal, without the respondent being heard, is not conclusive on the question of the petitioner's right to appeal.

A judgment of the Supreme Court reversing an order of a District Judge allowing the application of a person to be added as a party to a pending mortgage action is not a final judgment in a civil suit or action within the meaning of section 3 and rule 1 (*a*) of the Rules in the Schedule to the Appeals (Privy Council) Ordinance. Nor does the claim to be added as a party to the action have a monetary value.

APPLICATION for final leave to appeal to the Privy Council.

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatte*, for 2nd Defendant-Appellant-Petitioner.

H. V. Perera, Q.C., with *M. T. M. Sivardeen*, for Plaintiffs-Respondents.

Cur. adv. vult.

October 10, 1962. BASNAYAKE, C.J.—

This is an application by Indrapala Dias Jayasundera (hereinafter referred to as the petitioner) for leave to appeal to the Privy Council from the judgment of this Court by which it set aside the following order of the District Judge :—

" Having heard both sides, in the interests of justice, I make order under section 18 of the C. P. C. read together with section 16 of the Mortgage Act allowing the petitioner to file answer in this case. He will however pay a sum of Rs. 52/50 as costs of today to the lawyers for the pltff. I add the petitioner as the 2nd deft in the case. The 2nd deft's answer on 8.10.1956. "

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The material facts relating to the petitioner's application to be added as party are fully set out in the judgment from which the petitioner seeks to appeal reported under the name of *Weerapperuma v. de Silva* in 61 N. L. R. 481. For the purpose of this judgment it is sufficient to give a resume of those facts.

By Bond No. 18 of 18th October 1945 Balage Justin de Silva Warnakulasuriya Gunawardena the 1st defendant-respondent (hereinafter referred to as the 1st defendant-respondent) and his wife mortgaged to Don Cyrus Amerasinghe for a sum of Rs. 41,800 the lands described in the schedule to that bond. On 28th January 1948 the 1st defendant-respondent's wife transferred to him all her rights in the lands mortgaged by Bond No. 18. On 1st February 1948 by Bond No. 3514 for a sum of Rs. 47,500 the 1st defendant-respondent mortgaged to Dangedera Gamage Seeli Weerapperuma and Don Fredrick Subasinghe the plaintiffs-respondents (hereinafter referred to as the plaintiffs-respondents) the lands mortgaged by Bond No. 18. It is stated in the attestation clause of Bond No. 3514 that the sum of Rs. 47,500 was retained in the hands of the mortgagees for the purpose of paying off the debt due on Bond No. 18. On 11th March 1949 the petitioner filed an action No. 1077/Special in the District Court of Galle against Don Cyrus Amerasinghe for a declaration that Don Cyrus Amerasinghe held half share of Bond No. 18 in trust for him. To that action the 1st defendant-respondent and his wife were made parties. The petitioner succeeded in that action and in June 1952 the following decree was entered in his favour :—

> " It is hereby ordered and decreed that the 1st defendant abovenamed holds a one half share of mortgage bond No. 18 dated 18th October 1945 attested by Mr. G. D. Jayasundera of Colombo, Notary Public, and of all moneys due and payable thereunder and of the security hypothecated thereby and of all moneys received by the said 1st defendant thereunder in trust for the plaintiff abovenamed.
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> " It is hereby also ordered and decreed that the 1st defendant abovenamed do pay to the plaintiff above named the sum of Rupees Twenty Thousand Nine Hundred (Rs. 20,900) and a one half share of all interest received by the said 1st defendant under the aforesaid mortgage bond No. 18 from 14th January 1946 up to the date of this action, namely, 11th March 1949. "

An appeal to this Court from that order was dismissed. The petitioner thereupon took steps to execute his decree by obtaining writ of execution against Don Cyrus Amerasinghe. He also caused Don Cyrus Amerasinghe to be examined under section 219 of the Civil Procedure Code. The present action on Mortgage Bond No. 3514 in which the petitioner seeks to appeal to the Privy Council was instituted thereafter by the plaintiffs-respondents against the 1st defendant-respondent to enforce the bond. The petitioner sought to intervene and asked that he be added as a party defendant. The plaintiffs-respondents opposed it. The District Judge allowed the application, but in appeal his judgment was reversed. The petitioner now seeks to appeal to the Privy Council and leave has been

granted in the first instance under rule 3 of the Rules in the Schedule to the Appeals (Privy Council) Ordinance (hereinafter referred to as the Schedule). The leave so granted is known in practice as conditional leave and is so referred to in some of the rules in the Schedule (rules 20 and 21). Having complied with the conditions the petitioner now asks for final leave to appeal. His application is opposed by the plaintiffs-respondents on the ground that no appeal lies as of right from the judgment of this Court under section 3 and rule 1 (*a*) of the Rules in the Schedule to the Appeals (Privy Council) Ordinance [1].

Learned counsel for the petitioner at the outset of this hearing, by way of preliminary objection, contended that the plaintiffs-respondents were not entitled to oppose his application at the stage of final leave as the petitioner had already been granted leave under rule 3 of the Rules in the Schedule and that the objections that may be taken at the present stage were only objections on the ground that the conditions subject to which leave had been granted had not been fulfilled. Learned counsel's submission proceeds on the assumption that at the stage of the grant of leave under rule 3 the Court in every case decides, and has in this case decided, that the petitioner is as of right entitled to appeal to the Privy Council. The grant of leave under rule 3 does not in our view presuppose that the Court has decided that the person seeking to appeal to the Privy Council has a right to do so. It is not usual for this Court, and the Rules do not require it, to examine the question of the applicant's right to appeal to the Privy Council unless the application is opposed. It is generally assumed that the applicant has the right. The Rules do not provide that, at the stage at which the conditions are imposed, notice of the hearing of the application for leave under rule 3 should be given to the respondent. But rule 22 provides that the Court, on an application for final leave to appeal, may inquire whether notice or sufficient notice of the application has been given by the appellant to all parties concerned, and if not satisfied as to the notice given, may defer the granting of the final leave to appeal. This rule speaks of notice of the application and not of the intended application provided for in rule 2. By implication it seems to impose on the appellant the obligation of giving notice of the application " to all parties concerned ", and not merely to the opposite party as in the case of the intended application. What is the application contemplated in rule 22 ? It would appear from the context that it is the application for final leave. It is inconceivable that so much importance would be attached to the notice of the application for final leave being given " to all the parties concerned " if the only objection a party

[1] *Rule 1 of the Rules in the Schedule to the Appeals (Privy Council) Ordinance :*

1. Subject to the provisions of these rules, an appeal shall lie

(*a*) as of right, from any final judgment of the Court, where the matter in dispute on the appeal amounts to or is of the value of five thousand rupees or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the value of five thousand rupees or upwards : and

(*b*) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.

noticed may raise is that the security is bad or insufficient and is precluded from raising the objection that the appeal does not lie. All the parties concerned are a wider group than the " opposite party " to whom notice of the intended application is required to be given and if all the parties concerned are not respondents to the application it would be futile to give them notice if the only objection those who are not respondents can take is that the security is insufficient for the reason that not being respondents they would not be concerned about the sufficiency or otherwise of the security, but they may be interested in opposing the application on the ground that an appeal does not lie. The Court would, unless it is precluded by any positive rule of law, be acting contrary to law if it permitted an appeal that does not lie to go forward. Even where notice has been given of the application under rule 3, if the Court is satisfied even at the stage of final leave that the applicant is in law not entitled to leave the Court is not powerless to so hold. This rule would fail of its purpose if, when a person so noticed takes objection to the grant of final leave on the ground that there is no right of appeal, the Court is precluded from upholding his objection. There is nothing in the Rules which bars the party respondent to an application for leave to appeal to the Privy Council from submitting to the Court at any stage before the grant of final leave that no appeal lies to the Privy Council, and the Court is free at any stage to determine that question *ex mero motu* or on objection taken. This Court would be acting contrary to law if it were to grant final leave in a case in which there is no right of appeal merely on the ground that the grant of conditional leave is conclusive on the question of the petitioner's right to appeal. The Court cannot be regarded as having decided any matter to which its attention has not been drawn and which it has not been invited by the parties to decide.

It was contended by learned counsel for the petitioner that the notice under rule 2 afforded the respondent an opportunity of being heard in opposition to the application. We are unable to agree with that contention. Rule 2 of the Rules in the Schedule requires that the application to the Court for leave to appeal should be made by petition within thirty days from the date of the judgment to be appealed from and that the applicant shall, within fourteen days from the date of the judgment, give the opposite party notice of such intended application. This rule means that the application should be lodged in the Registry within the thirty days and not that it should come up for hearing within that time. So that the notice that the opposite party receives is a notice that the applicant intends to apply for leave to appeal to the Privy Council within the number of days specified in the notice, which can never be more than thirty nor less than sixteen. The notice of the intended application is in effect a notice that the applicant intends to lodge in the Supreme Court Registry a petition for leave to appeal to the Privy Council. According to the present practice the application is listed for hearing on a date on which the counsel for the petitioner informs the Registrar that he is ready to support the application. That date is in some cases many months after the application has been lodged in the Registry. In the

instant case the application was lodged on 8th October 1958 and it came up for hearing for the first time on 16th January 1959. The Rules in the Schedule do not require that the respondent should be given notice of the actual date of hearing of the application and applications are granted in the first instance under rule 3, as in the instant case, without the respondent being heard. Nevertheless some Judges do not grant leave in the first instance except after notice has been issued and served on the respondent. If the notice under rule 2 is treated as a notice of the hearing of the application for leave, an obligation which the Rules do not provide would be imposed on the opposite party so noticed. It would become obligatory on him or his proctor to keep in touch with the Registry from the day he receives the notice under rule 2 till the application is lodged, and thereafter to ascertain when it would be listed for hearing. Such an obligation is not implied in rule 2 and the opposite party is under no legal obligation to retain counsel and undergo the expense of visiting the Registry in person or by proctor in order to ascertain first whether an application has been lodged in pursuance of the notice of intention to apply for leave to appeal and if such an application is lodged when it would come up for hearing. As the Rules do not impose such an obligation a respondent who has not been noticed by the Court to appear at the hearing of the application in the first instance cannot be said to have been afforded an opportunity of being heard and no order can be made to his prejudice without offending the rule of *audi alteram partem*. In dealing with applications for leave to appeal to the Privy Council the better course would be for the Court to issue notice on the respondent before granting leave under rule 3. In the instant case that has not been done and the respondent is not in our opinion precluded from objecting to the grant of leave at this stage, although leave under rule 3 has been granted. It cannot be said that in granting that leave the Court decided the question that the petitioner was entitled as of right to leave under rule 1 (*a*). We therefore overruled the preliminary objection and permitted learned counsel for the respondent to make his submission that there was no appeal as of right from the judgment of this Court, and called upon him to begin as he was the objector.

I shall now turn to the objection that the judgment of this Court by which it set aside the learned District Judge's order allowing the petitioner to file answer in the case is not a judgment from which the petitioner is entitled to leave as of right. Section 3 of the Ordinance states that the right of parties to civil suits or actions in the Supreme Court to appeal to Her Majesty against the judgments and orders of such Court shall be subject to and regulated by the Rules in the Schedule. Rule 1 (*a*) of the Rules in the Schedule states that an appeal shall lie as of right from any final judgment of the Court where the matter in dispute on the appeal amounts to or is of the value of five thousand rupees or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the value of five thousand rupees or upwards. It would appear from rule 1 (*b*) that the words "final judgment" contemplated in rule 1 (*a*) is the final judgment

in a civil suit or action as contradistinguished from an interlocutory judgment in such suit or action. Now the suit or action before us is the action on the Mortgage Bond No. 3514. That action is still pending and has not yet been decided and in that action no judgment has yet been given. The application of the petitioner to be added as a party is not a civil suit or action and the order thereon does not dispose of the action in which that application was made. The words "final judgment" have acquired a meaning which is now well established. It is a judgment which leaves nothing open to further dispute and which sets at rest the cause of action between the parties. It may also be defined as a judgment (which expression includes an order or decision) which decides the rights of parties respecting the subject-matter of the suit and concludes them until reversed or set aside in appeal. Of the various definitions of this expression which are to be found in law dictionaries I prefer that given in Sweet's Law Dictionary which is as follows: "A final judgment is one which puts an end to the action by declaring that the plaintiff has or has not entitled himself to the remedy he sued for, so that nothing remains to be done but to execute the judgment." The meaning I have given to the expression "final judgment" and the definition quoted from Sweet's Law Dictionary are in harmony with the opinion expressed in *Fernando v. Chittambaram Chettiar* [1] and in *Abdul Rahman & others v. D. K. Cassim & Sons* [2] cited to us by learned counsel. Although in the latter case the Board was construing the words "final order" in section 109 (*a*) of the Indian Civil Procedure Code, the considerations referred to therein are applicable to the words "final judgment" in this context. Section 109 (*a*) [3] is not widely different from rule 1 (*a*) and the following observations of the Board on that provision support the meaning I have given to the expression "final judgment":—

> "Lord Cave in delivering the judgment of the Board laid down, as the 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 those 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."

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[1] (*1948*) *49 N. L. R. 217.*

[2] (*1933*) *A. I. R. (Privy Council) 59.*

[3] *Section 109 (a) of the Indian Civil Procedure Code :*

109. Subject to such rules as may, from time to time, by His Majesty in Council regarding appeals from the Courts of British India and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—

(*a*) from any decree or final order passed on appeal by a High Court or by any other Court of final appeal jurisdiction.

In the instant application not only is the judgment from which the applicant seeks to appeal to the Privy Council not a final judgment but the subject of the dispute is also not of the value prescribed in the rule. The matter in dispute was the claim to be added as a party to the action. That claim has no monetary value. Nor did the appeal involve directly or indirectly a claim or question to or respecting property or some civil right amounting to five thousand rupees or upwards. Rule 1 (*b*) provides an appeal from other judgments than final judgments, whether they be final or interlocutory, where the grant of leave is at the discretion of the Court, if in the opinion of the Court the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision. The petitioner does not seek to come under the rule 1 (*b*) and it is not necessary to consider that limb of rule 1. The application is therefore refused with costs.

We were referred by learned counsel on both sides to several decisions both of this Court and of Courts elsewhere. But it is not necessary for the purpose of this application to refer to them specifically as those decisions rest on the special circumstances of each case.

HERAT, J.—I agree.

ABEYESUNDERE, J.—I agree. *Application refused.*