1948 *Present:* **Howard C.J. and Dias J.**

FERNANDO *et al.*, Petitioners, *and* CHITTAMBARAM CHETTIAR, Respondent.

S. C. 600—APPLICATION FOR CONDITIONAL LEAVE TO APPEAL TO THE PRIVY COUNCIL IN D. C. COLOMBO, 6,225.

Privy Council—Conditional leave to appeal—Setting aside order of abatemen of action—Is it a final order?—Test of finality—Chapter 85—Rule 1 (a) of Schedule to Cap. 85.

Plaintiff, the administrator of a deceased Chettiar, brought this action against the defendant for the recovery of a sum of money due to the estate of the Chettiar in November, 1936. In July, 1940, the District Judge entered an order of abatement under section 402 of the Civil Procedure Code. The attorney of the heirs of the Chettiar to whom letters of administration had subsequently been issued moved to have the order for abatement set aside but his application was dismissed. The Supreme Court vacated the order of the District Judge, set aside the order of abatement and sent the case back for trial.

Held, that the order of the Supreme Court was not a final order and that no appeal lay to the Privy Council.

APPLICATION for conditional leave to appeal to the Privy Council.

E. F. N. Gratiaen, K.C., with *Kingsley Herat*, for the petitioners.

H. V. Perera, K.C., with *P. Navaratnarajah* and *T. K. Curtis*, for the respondent.

February 6, 1948. HOWARD C.J.—

This is an application by the defendants-appellants for conditional leave to appeal to His Majesty the King in Council under Rule 1 (*a*) of the Schedule to the Appeals (Privy Council) Ordinance (Cap. 85) against a judgment of this Court dated December 1, 1947, vacating the order of the District Court and remitting the case to the Court below for trial. The application is opposed by the plaintiff-respondent on the ground that the judgment appealed from is not a "final" judgment of the Court and hence under the said Rule no appeal lies as of right. The respondent, therefore, asks for the dismissal of the application. The facts leading up to this application are as follows. One Parathasarthy, the administrator of the estate of a Chettiar, instituted in the District Court of Colombo on November 30, 1936, the present action against the defendants for the recovery of a sum of Rs. 272,062.50 due to the estate of the deceased. The action was fixed for trial on December 9, 1937, but was postponed for March 9, 1938, owing to the illness of the plaintiff. On July 13, 1940, the District Judge entered an order of abatement *ex mero motu* under section 402 of the Civil Procedure Code on the ground that a period exceeding twelve months had elapsed since the last order made in the case without the plaintiff taking steps to prosecute the

action. Subsequently the District Judge disallowed the petition of the respondent who is the attorney of the heirs of the deceased Chettiar and to whom letters of administration had been issued, to have the order of abatement set aside. On December 1, 1947, this Court vacated the order made by the District Judge on July 13, 1940, and remitted the case to the Court below for trial.

The only question for consideration is, therefore, whether the order of this Court on December 1,1947, allowing the plaintiff's appeal from the refusal of the District Court to set aside the order of abatement and directing the case to be restored to the list was a " final " order. Mr. H. V. Perera for the plaintiff respondent has referred to the judgment of this Court in *Palaniappa Chetty v. Mercantile Bank of India*[1]. In that case, an action on a mortgage bond, the morgage decree was affirmed in appeal and by consent the parties entered into an agreement with regard to the execution of the mortgage decree. Thereafter an application for execution of the decree was made in the District Court and allowed. On appeal the order allowing execution was affirmed. It was held that this was not a " final " order inasmuch as the rights of the parties to the action were finally determined by the decree of this Court dated May 10, 1938, in pursuance of the agreement. In my judgment in this case I referred to the judgment of Fry L.J. in *Salaman v. Warner* [2] in which a final order was defined as follows :—

> " I think the true definition is this. I conceive that an order is ' final ' only where it is made upon an application or ther 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."

In connection, however, with this definition Mr. Gratiaen on behalf of the defendants-appellants has invited our attention to the later case of *Settlement Officer v. Vander Poorten* [3] in which I pointed out that when citing this definition in *Palaniappa Chetty v. Mercantile Bank of India*, I was misled by a passage form the judgment of Viscount Cave in *Ramchand Manjimal and others v. Goverdhandas Vishandas Ratnachand and others* [4]. That passage was to the effect that the decision in *Salaman v. Warner* was followed by the Court of Appeal in *Bozsch v. Altricham Urban District Council* [5], whereas in fact *Salaman v. Warner* was not followed, but an earlier case *Shubrook v. Tufnell* [6]. In this case an arbitrator had stated a case for the opinion of the Divisional Court on a question of law. On this case being argued before the Divisional Court composed of Manisty and Williams JJ. the latter ordered judgment to be entered for the plaintiffs. On appeal to the Court of Appeal it was held that it was a final order on the ground that if they differed from the Court below it was the end of the action as judgment had to be entered for the defendant. In the event of the appeal being dismissed the judgment in favour of the plaintiffs stood. So it was a final order. In the present case the order of this Court did not put an end to the action

[1] *(1942) 43 N. L. R. 352.*
[2] *(1891) 1 Q. B. 734.*
[3] *(1942) 43 N. L. R. 436.*
[4] *A. I. R. (1920) P. C. 86.*
[5] *(1903) 1 K. B. 547.*
[6] *(1882) 9 Q. B. D. 621.*

and settle the rights of the parties. The matter is governed by the case of *Abdul Rahman v. D. H. Casim & Sons and another*[1]. In this case the test of finality was stated as follows :—

> " The test of finality is whether the order ' finally disposes of the rights of the parties ' where order does not finally dispose of those rights, but leaves them ' to be determined by the Courts in the ordinary way, ' the order is not final. That the order ' went to the root of the suit, namely, the jurisdiction of the Court to entertain it, ' is not sufficient. The finality must be a finality in relation to the suit. If, after the order, the suit is till a live suit in which the rights of the parties have still to be determined, no appeal lies against it under section 109 (*a*). "

The order of the Court in the present case did not " finally dispose of the rights of the parties ". It left them " to be determined by the Courts in the ordinary way ". The finality was not a finality in relation to the suit which was still a live one in which the rights of the parties have still to be determined. There is moreover the case of *Mumtaz-Ud-Daula Mukarram Ali Khan v. Skinner*[2] the headnote of which is as follows :—

> " Where an application is set aside abatement of suit by excusing delay of two days in making it was rejected and in appeal from the order, the High Court accepted the appeal and directed the lower Court to re-hear the application.
>
> *Held*, that the order of remand was not a final order. *Salaman v. Warner* (*1891*) *Q. B. D. 734* (*foll.*) "

This case is also concerned with the setting aside of an abatement order and hence most relevant.

Having regard to the decisions I have cited I have come to the conclusion that the order appealed from was not a " final " one and hence the application must be dismissed with costs.

DIAS J.—I agree.

Application dismissed.