1942 *Present :* **Howard C.J. and Hearne J.**

PALANIAPPA CHETTY *v.* MERCANTILE BANK OF INDIA *et. al.*

113—D. C. (Inty.) Colombo, 49,541.

Privy Council—Conditional leave to appeal—Date of application and notice of application—Computation of period—Mortgage action—Application for execution of decree—Appeal from order—Finality of order—The Appeals (Privy Council) Ordinance, Cap. 85, Rules 1 (a) and 2.

In an action on a mortgage bond the mortgage 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.

***Held,* that the order allowing execution was not a final order within the meaning of Rule (1) (*a*) of the Rules in the Schedule to the Appeals (Privy Council) Ordinance.**

***Held, further,* that in computing the period of thirty days within which an application for leave to appeal should be made under Rule (2) and the period within which notice of such application should be given, the days included in vacation of the Supreme Court should not be reckoned.**

***Pathmanathan v. Imperial Bank of India* (39 *N. L. R.* 103), followed.**

THIS was an application for conditional leave to appeal to the Privy Council.

H. V. Perera, K.C. (with him *Walter Jayewardena*), for the petitioner.

N. E. Weerasooria, K.C. (with him *E. B. Wickremanayake* and *H. A. Koattegoda*), for the first and sixth to sixteenth defendants, respondents.

Cur. adv. vult.

January 13, 1942. HOWARD C.J.—

This is an application for conditional leave to appeal to the Privy Council against a judgment of this Court, dated December 19, 1941, dismissing an appeal of the applicants from an order of the District Court of Colombo, dated September 8, 1941. The application is made under

rule 2 in the Schedule to The Appeals (Privy Council) Ordinance (Cap. 85). This rule provides as follows :—

> "2. Application to the Court for leave to appeal shall be made by petition within thirty days from the date of the judgment to be appealed from, and the applicant shall, within fourteen days from the date of such judgment, give the opposite party notice of such intended application."

The respondents contend that the application to the Court for leave to appeal has not been made within thirty days from the date of the judgment to be appealed from nor has the applicant within fourteen days from the date of such judgment given the opposite party notice of such intended application. The judgment appealed from was delivered on December 19, 1941, and the application is dated January 30, 1942. Counsel for the respondents has made reference to section 8 (3) of the Interpretation Ordinance (Cap. 2) and contended that, inasmuch as the time prescribed by law for making the application exceeded six days, intervening Sundays and holidays are not excluded from the computation of such time. In this connection we were referred to *Murugesu v. Arumugam and another*[1]. In the present case, however, a question arises with regard to section 8 of the Supreme Court (Vacation) Ordinance (Cap. 10). This section is worded as follows:—

> "8. Where, by an Ordinance, or rule, regulating civil procedure or by any special order of the Court, any limited time not exceeding one month is appointed or allowed for the doing of any act or the taking of any proceeding in the Supreme Court, no days included in a vacation shall be reckoned in the computation of such time unless the Court otherwise directs."

It was held in *Pathmanathan v. The Imperial Bank of India*[2] that in computing the period of thirty days within which an application for leave to appeal should be made under Rule 2 of Schedule I. of the Appeals (Privy Council) Ordinance, the days included in a vacation of the Supreme Court should not be reckoned. For the same reasons that are given in the judgment of Poyser J., in *Pathmanathan v. The Imperial Bank of India*, I am of opinion that section 8 of the Supreme Court (Vacation) Ordinance can be invoked in this case. In these circumstances the application was in time for, during the period December 19, 1941, to January 30, 1942, there is the Christmas vacation of twenty-one days. In calculating whether the respondents have been given fourteen days' notice of the intended application the days which fall within the period of the Christmas vacation must be excluded. Having regard to this, fourteen days' notice has been given so far as notice of the intended application on each of the respondents is concerned. Compliance has, therefore, been made with the rule.

The respondents, however, take the further point that the order appealed from is not a "final judgment of the Court" within the meaning of that expression in rule 1 (*a*) of the Schedule to Cap. 85. The question as to what constitutes a "final order" was considered by the Privy Council

[1] *16 C. L. R. 228*

[2] *39 N. L. R. 103*

in *Abdul Rahaman v. D. K. Cassim* [1] when the test of finality was laid down. The test to be applied was whether the order " finally disposes of the rights of the parties ". This case followed the judgment of Viscount Cave in *Ramchand Manjimal v. Goverdhandas Vishindas* [2]. In that judgment Viscount Cave referred to and followed the English cases of *Salaman v. Warner* [3] and *Bozsch v. Altricham Urban District Council* [4]. In *Salaman v. Warner* Fry L.J. stated 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 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."

Can it be said that the order from which it is intended to appeal to the Privy Council finally disposed of the rights of the parties? In order to elucidate this question it is necessary to examine the history of the case. On December 6, 1935, a mortgage decree was entered in the District Court in favour of the respondents. This decree was affirmed by the Supreme Court on May 18, 1937. On December 16, 1937, by consent, the parties entered into an agreement with regard to the execution of the mortgage decree of May 18, 1937. On May 10, 1938, judgment was delivered by the Supreme Court in pursuance of this agreement and decree entered in terms of such judgment on the same day. On December 19, 1939, application was made for execution against the appellants of the decree of December 16, 1935, and varied of consent of parties as per decree of May 10, 1938. On September 8, 1941, this application was allowed with costs. The decision of the District Court allowing the application was affirmed by this Court on December 19, 1941. In my opinion the rights of the parties to the action were finally determined by the decree of this Court dated May 10, 1938. We have been referred by Counsel for the appellants to the case of *Subramaniam Chetty v. Soysa* [5]. In that case the Supreme Court set aside a sale by an execution-creditor through the Fiscal of the property of the judgment-debtor on the ground of a material irregularity in its conduct. The purchaser applied for conditional leave to appeal to the Privy Council. It was held that the order setting aside the sale was a final judgment within the meaning of rule 1 (*a*) in Schedule I. of Ordinance No. 31 of 1909. This judgment was based on the ground that the order setting aside the sale finally disposed of the case between the parties to the proceedings, that is to say, the purchaser and the execution-creditor. The case has no material bearing on the question involved in the present case wherein the rights of the parties to the action were determined by the decree of May 10, 1938. If the argument put forward by Counsel for the applicant were to succeed, it would enable every judgment-debtor on an application for execution to question the validity of the decree on which the application was based in spite of the fact that the time for appealing against such decree was past.

[1] *A. I. R. (1933) P. C. 58*
[2] *A. I. R. (1920) P. C. 86*
[3] *(1891) 1 Q. B. 734*
[4] *(1903) 1 K. B. 547*
[5] *25 N. L. R. 344*

For the reasons I have given, I am of opinion that the judgment appealed from was not a final one. The application is, therefore, dismissed with costs.

HEARNE J.—I agree.

Application dismissed.