

1958

*Present* : Gunasekara, J., and Sansoni, J.

A. E. M. USOOF *et al.*, Petitioners, and THE NATIONAL  
BANK OF INDIA, LTD., Respondent

Application for Conditional Leave to appeal to the Privy Council

*S. C. Inty. 35—D. C. Colombo, 3,455/M. B.*

*Privy Council—Order made in execution proceedings between the parties to an action—  
Right to appeal therefrom—“Final judgment”—Appeals (Privy Council)  
Ordinance (Cap. 85), Schedule, Rule 1 (a).*

A judgment of the Supreme Court dismissing an appeal from an order of a District Court refusing to set aside a sale of property in execution of a decree is a final judgment within the meaning of Rule 1 (a) of the Schedule to the Appeals (Privy Council) Ordinance, although the property sold in execution was purchased by the judgment-creditor himself and not by a third party.

# APPLICATION for conditional leave to appeal to the Privy Council.

*Sir Lalita Rajapakse, Q.C., with V. C. Gunatilaka, for the Defendants-Petitioners.*

*H. V. Perera, Q.C., with S. J. Kadirgamar and W. T. P. Goonetilleke, for the Plaintiff-Respondent.*

*Cur. adv. vult.*

June 10, 1958. SANSONI, J.—

This is an application by the defendants for conditional leave to appeal, to the Privy Council against the judgment of this Court dated 20th January 1958. By that judgment this Court dismissed the appeal of the defendants from an order of the District Judge of Colombo refusing to set aside a sale held by an auctioneer in execution of a mortgage decree entered against the defendants.

The mortgage decree ordered the defendants to pay the plaintiff the sum of Rs. 1,101,658/38, interest and costs. Upon an order to sell issued to the auctioneer the mortgaged property which was valued at Rs. 700,000 was purchased by the plaintiff. The District Judge characterised the application to set aside the sale as “a frivolously dilatory application”, and the defendants’ appeal was dismissed, the Court giving no reasons. The only matter for our decision, however, is whether the judgment of this Court is a “final judgment”, within the meaning of Rule 1 (a) of the Schedule to The Appeals (Privy Council) Ordinance (Cap. 85), from which an appeal lies as of right.

The question would appear to have been answered in *Usoof v. Nadarajah Chettiar*<sup>1</sup> where it was held, following *Subramaniam Chetty v. Soysa*<sup>2</sup>, that a judgment of the Supreme Court dismissing an appeal from an order of a District Court refusing to set aside a sale of property in execution of a decree is a final judgment. But it was urged for the plaintiff-respondent at the hearing of this application that a distinction should be drawn between an application to set aside a sale at which the property sold has been purchased by the judgment-creditor, and one at which the property sold has been purchased by a third party. The present application falls within the first category, while the application in *Subramaniam Chetty v. Soysa*<sup>2</sup> fell within the second category.

I do not think such a distinction can be validly drawn for the reason that the Privy Council decision in *Krishna Pershad Singh v. Moti Chand*<sup>3</sup> which was followed in *Subramaniam Chetty v. Soysa*<sup>2</sup> was given in a case where the property sold in execution of the decree was purchased by the judgment-creditor. The judgment-debtor appealed to the Privy Council against the decision of the High Court refusing to set aside the sale, and one of the objections taken at the hearing was that no appeal lay.

<sup>1</sup> (1957) 58 N. L. R. 436.

<sup>2</sup> (1923) 25 N. L. R. 344.

<sup>3</sup> (1913) 40 Cal. 635.

Lord Moulton held that the order was a final order which dealt finally with the rights of the parties, and an appeal lay. At the time that decision was given it was the Civil Procedure Code of 1882 which governed the matter. Section 595 of that Code provided that an appeal lay from a "final decree" and Lord Moulton said that the word "decree" must be read as equivalent to "decree, judgment or order". Bertram C.J. followed that decision in *Subramaniam v. Soysa*<sup>1</sup> and I think that we should follow it ourselves.

It was also urged for the plaintiff-respondent that the words "final judgment" in rule 1 (a) must be construed in the light of the Privy Council decisions in *Ramchand Manjimal v. Goverdhandas Vishandas Ratanchand*<sup>2</sup> and *Abdul Rahman v. Cassim and Sons*<sup>3</sup>. In the former decision Viscount Cave considered what the words "final order" meant, and said: "An order is final if it finally disposes of the rights of the parties". His Lordship clearly approved of the definition in *Bozson v. Altrincham Urban Council*<sup>4</sup> where the Lord Chief Justice said: "It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order". Viscount Cave then went on to say: "The orders now under appeal do not finally dispose of those rights, but leave them to be determined by the Courts in the ordinary way. In their Lordships' view, the orders were not final and accordingly the appeals cannot proceed". In 1933 the Privy Council applied this same test and elaborated it, saying: "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".

Now neither of the two later decisions of the Privy Council to which I have referred related to execution proceedings, whereas the decision in *Krishna Pershad Singh v. Moti Chand*<sup>5</sup> dealt directly with the question raised in this appeal. I regard that decision as authority for the view that there can be a final order or judgment even in execution proceedings between the parties to the action. It seems to me to dispose of the argument that when the mortgage decree was entered in this action it had been finally determined, and that there could be no further final judgment as between the parties. While it is true that a judgment is not final unless it finally disposes of the rights of the parties—and it was for this reason that no appeal was held to lie in the two later Privy Council decisions—I do not see why there cannot be a final judgment in execution proceedings, whether those proceedings are between the parties to the action or not; and so far as the judgment-debtors in this case are concerned, they have, by the judgment of this Court, finally lost their rights in the mortgaged property, and the execution proceedings are no longer live proceedings.

<sup>1</sup> (1923) 25 N. L. R. 344.

<sup>2</sup> A. I. R. (1920) P. C. 86.

<sup>3</sup> A. I. R. (1933) P. C. 58.

<sup>4</sup> (1903) 1 K. B. 547.

<sup>5</sup> (1913) 40 Cal. 635.

I do not think that the view I have taken conflicts with the decision in *Palaniappa Chetty v. Mercantile Bank of India* <sup>1</sup> to which we were referred. In that case it was held that an order allowing an application for execution of a mortgage decree was not a final judgment. Such an order may be equated to an order that an action should proceed to trial, which the Privy Council in *Abdul Rahman v. Cassim and Sons* <sup>2</sup> held was not a final order.

For these reasons I am of the opinion that the judgment in question is a final judgment. The defendants-petitioners are therefore entitled to conditional leave to appeal, which is allowed with costs.

GUNASEKARA, J.—I agree.

*Application allowed.*

<sup>1</sup> (1942) 43 N. L. R. 352.

<sup>2</sup> A. I. R. (1933) P.C. 58.