

Present : Schneider and Garvin JJ.

1929.

DASSANAIKE v. DASSANAIKE.

[Application for Conditional Leave to Appeal to the Privy Council—D. C. Ratnapura 4,191.]

Privy Council—Conditional leave to appeal—Order setting aside a decree entered in pursuance of an adjustment—Appeals (Privy Council) Ordinance, No. 31 of 1909, rule 1 (a).

The defendant in the action pleaded that the matter in suit had been adjusted by an agreement entered into between the parties in the course of another action and moved that decree be entered according to the adjustment.

The District Court upheld the plea, but in appeal that order was set aside and the case sent back for proceedings in due course.

Held, that the order of the Supreme Court was not a final one within the meaning of rule 1 (a) of the rules in the schedule I., of the Privy Council Ordinance.

APPPLICATION for conditional leave to appeal to the Privy Council.

Ameresekere (with Navaratnam), in support.

N. E. Weerasooria, for respondent.

October 29, 1928. SCHNEIDER J.—

This application for conditional leave to appeal to the Privy Council is opposed on the ground that the judgment sought to be appealed against is not "final" within the meaning of rule 1 (a);

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of the rules in schedule I. of the Appeals (Privy Council) Ordinance, 1909.¹ The application is in the form to be found in schedule II. of "The Appellate Procedure (Privy Council) Order, 1921,"² and contains only a bare statement that the judgment is final besides the allegations as to the date the judgment was pronounced and the value of the matter in dispute. But Counsel supplied us with the following facts.

The defendant amended his answer long after the institution of the action by pleading that the action had been adjusted by an agreement entered into by and between the same parties during the course of another action, and subsequently moved under section 408 of the Civil Procedure Code to notify the adjustment pleaded and that a decree be passed according to the adjustment. The plaintiff opposed this motion and denied the adjustment relied on. The defendant succeeded in the lower Court, but on appeal the order of that Court was set aside by this Court and the action was sent back to the lower Court for trial and proceedings in due course. It was submitted on behalf of the applicant that the judgment was final inasmuch as it finally disposed of the question whether the adjustment relied on can be offered as a defence to the plaintiff's claim. I am unable to agree with this submission. The decision of this Court has not disposed of the action finally, but has ordered it to be tried in due course. The question, "What is a final judgment?" was considered by a Bench of Three Judges of this Court *In re Estate of Kirtisinghe Kuda Banda*.³ Perera J., with whose judgment the Chief Justice agreed, cited the case of *Salmon v. Warner* and adopted the interpretation of a final judgment given in that case. It was held in that case that "an order is final only when it is made upon an application or other proceeding which must, whether such application fail or succeed, determine the action." The decision of this Court in that case is binding upon me, but apart from that I agree with the definition of a final order given in that case. Although the words "final judgment" considered in that case were words used in section 42 of the Courts Ordinance⁴ which was repealed by the Appeals (Privy Council) Ordinance, 1909,¹ in my opinion that makes no difference as in both enactments the words appear to bear the same meaning. I hold that the judgment of this Court is not final.

I therefore dismiss the application.

GARVIN J.—I agree.

Application refused.

¹ Ordinance No. 31 of 1909.

² "Ceylon Government Gazette" No. 6,950 of June 21, 1921.

³ 2 *Balasingham* 87.

⁴ No. 1 of 1889.