1931

Present : **Lyall Grant and Drieberg JJ.**

PERERA *v.* MOHAMED YOOSOOF

189—*D. C. Colombo*, 33,232.

Privy Council—Application for leave to appel—Final judgment—Ordinance No. 31 *of* 1909—*Schedule I., rule* 1 (*a*).

The plaintiffs sought to vindicate title to property sold by their parents to the defendant's testator on the ground that the property was subject to a *fidei commissum* in their favour.

The learned District Judge gave judgment in favour of the defendant, who claimed title to the property by prescription. In appeal, the Supreme Court reversed this decision and remitted the case to the District Court to decide certain issues relating to damages payable by the defendant and his right to recover compensation for improvements.

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

APPLICATION for conditional leave to appeal to the Privy Council.

H. V. Perera, for applicant.

Weerasooria, for respondent.

April 29, 1931. LYALL GRANT J.—

This is an application for conditional leave to appeal to His Najesty the King in Council from the judgment of this Court pronounced on March 4. Notice has been issued of the defendant's

intention to appeal and the plaintiff's are represented. They object to leave being granted on the ground that the judgment against which it is sought to appeal is not a final judgment, or alternatively if the judgment was a final judgment that the matter in dispute does bot amount in value to Rs. 5,000.

There were seven plaintiffs in this action, which was in respect of lands and buildings which had been conveyed to one S. L. M. Mohamed Ismail Hadjiar. He is now dead and the defendant is his executor.

The plaintiffs sought to recover the property on the ground that their ancestors who sold to Mohaned Ismail Hadjiar held it subject to a *fidei commissum*.

After discussion of various matters in dispute between the parties, the case went to trial upon three issues :—

(1) Whether the title of defendant's vendors was an absolute title or subject to a *fidei commissum* in favour of their children, the plaintiffs and their descendants.

(2) Whether on the provisions of P 1 (the deed containing the fiduciary clause) the children of Robert, who predeceased Joseph, inherit any interest at all in the land, and if so, what was the extent of such interest.

(3) Assuming the existence of a *fidei commissum*, whether defendant obtained a title by prescription in respect of the interests of the children of Sophia ; Sophia having died in 1906.

It was agreed that these issues should be decided first and for the purpose of this issue it was assumed that the defendant had been in possession of the entire land since 1902. There is a note by the District Judge in the record that issues could arise " including improvements, compensation, and damages ".

The learned District Judge found in favour of the defendant but his judgment was reversed on appeal. On appeal this Court held that there was a valid *fidei commissum* and remitted the case back to the District Court to proceed in accordance with that finding. The question now arises whether this is a final judgment from which the defendant has a right of appeal.

The main argument for the defendant was that it was a final decision against him in regard to the greater part of the lands in dispute and that it was arithmetically ascertainable that this proportion of the land was of a value of higher than Rs. 5,000. He says that this was the main subject of the dispute between the parties and that it had been finally decided by this judgment.

On the other hand, the plaintiffs argued that various questions remained to be decided, such as their claims against the defendant for damages, for wrongful occupation, and a counter claim of the defendant for compensation in respect of improvements to the property ; that these were all matters outstanding which had yet to be decided upon, and upon the determination of which both the effect and the value of the final decree will depend.

It was also pointed out that, even as regards the ownership of the land, there was no final judgment, inasmuch as the question of prescriptive rights affecting part of the land still remained to be decided.

We were referred to a number of cases both local and English on the question of what is and what is not a final judgment. No very satisfactory definition easily applicabale to all cases appears to have been arrived at. In one case (*The Ceylon Tea Plantation Co. Ltd. v. Carry*)[1] the decree was held to be a final decree where the question between the parties was as to the length of time for which accounts should be rendered. The Ceylon Courts had ordered the defendant to account for a longer period of time than that for which he was

[1] (1909) 12 *N. L. R.* 367.

prepared to account. It was urged that this was not a final order but Hutchinson C. J. said that it was a final order inasmuch as it finally decided the rights of the parties on the principal question at issue between them, and the working out of the decree was merely a matter of account. This case was followed in *Balahamy v. Dinohamy* [1]. I do not think, however, that these cases help the appellant. In the present case very much more remains to be done than mere accounting.

Among the English cases relied upon for the appellant was *Macdonald v. Belcher* [2]. There the question was whether the British Columbia Court was right in treating as a final judgment a decision of the Judge of the Yukon Territorial Court who in an action by executors to recover certain sums of money from the appellant selected one of the items and on the evidence taken in regard to that claim directed that the action in respect thereof should be dismissed. He then rererred the other items to a referee.

The question of whether this was a final order in regard to the sum adjudicated upon depended in part on the terms of the Yukon Territorial Act, 1899, which is not available to us.

On general principles however that case also seems to be distinguishable from the case before us. The only connection between the various matters in the Yukon case was that they were all claims against the appellant by an executor.

In *Dassanaike v. Dassanaike* [3], which was an application for conditional leave to appeal to the Privy Council in this Court, Schneider J. referred to a previous case reported in 2 *Balasingham Rep.*, *p.* 87, in which an English case, *Salmon v. Warner* [4], was cited as giving a definition of the words " final judgment ". In that case it was held 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 case of *Salmon v. Warner* (*supra*), was referred to in *Boxson v. Altrincham Urban District Council* [1]. The attention of the Judges, Lord Halsbury, Lord Alverstone, and Sir F. H. Jeune, was called to the fact that the case of *Salmon v. Warner* (*supra*) was not in conformity with a previous case, *Shubreck v. Tufnell* [2], and the earlier decision was followed. In the case of *Boxson v. Altrincham Urban District Council* (*supra*) Lord Alverstone gave as the test for the purpose of determining whether an order was a final order the question whether, as made, it finally disposed of the rights of the parties. If it did, it ought to be treated as a final order, but if not; then in his opinion it was an interlocutory order. In that case the principal question was whether there was a binding contract between the parties, the action being one for damages for breach of contract.

The learned Judge held there was no binding contract and dismissed the action. That order was held to be a final order. That case again is widely different from the present one.

On the other hand, in *Croasdell v. Cammell, Laird & Co.* [3], where a Divisional Court made an order setting aside an arbitrator's award on the ground of misconduct on the part of the arbitrator, it was held that the order was an interlocutory one and not a final order. The decision was given on the ground that an order which does not determine any of the disputes between the parties but leaves them where they are is only an interlocutory order.

It has also been held in England that if an order finally determines the rights of the parties then it is final. See *Norton v. Norton* [4]. In the case of *Croasdell v. Cammell, Laird & Co.* (*supra*), the Bench

[1] (1926) 27 *N. L. R.* 410.
[2] (1904) *A. C.* 429.
[3] (1928) 9 *C. L. R.* 203.
[4] 2 *Bal.* 87.

[1] (1903) 1 *K. B.* 547.
[2] (1882) 9 *Q. B. D.* 621.
[3] (1906) 2 *K. B.* 569.
[4] 99 *L. T.* 709.

was composed of the Master of the Rolls and six Lords Justices of Appeal. But this Court declined to formulate any general rule on the question of what orders were final and which were interlocutory on the ground that this was a matter which properly fell within the jurisdiction of the Rules Committee. Following this example I think it is better that I should not express any general opinion, to apply in all circumstances, as to what is a final and what is an interlocutory order. I would confine myself to expressing my view that the present judgment is not a final one. It is not one upon which a decree could issue. It is not one even upon which a decree could issue after figures have been worked out. There are a number of matters outstanding between the various parties, all of which will have to be determined, probably after evidence has been led; before a decision can be given in regard to the claims and counter claims made by the parties.

Leave to appeal must, therefore, be refused with costs.

DRIEBERG J.—I agree.

Leave refused.