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

SETHA *v.* MUTTUWA.

41—*D. C. Kandy, 5,299.*

Privy Council—Application for conditional leave—Value of subject-matter—Appreciation in value—Value of appellant's interest—Rule of succession in Kandyan Law—Matter of general or public importance—Privy Council (Appeals) Ordinance (Cap. 85), Rule 1 (a) and 1 (b).

Where, in an application for conditional leave to Appeal to the Privy Council, the property which is the subject-matter of the application has appreciated in value since the institution of proceedings the applicant should be allowed to prove its value at the time of appeal unless there is evidence of a fraudulent under-valuation.

***De Alwis v. Appuhamy* (30 *N. L. R.* 421) followed.**

In determining the right of appeal the test that should be applied is, how does the judgment affect the interests of the party who is prejudiced by it and who seeks to relieve himself from it by appeal ?

A question of intestate succession arising in Kandyan law in circumstances that are more of uncommon than of common occurrence is not one of great general or public importance within the meaning of Rule (1) (*b*) of the Rules in the Schedule to the Privy Council (Appeals) Ordinance.

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

H. V. Perera, K.C. (with him *N. Nadarajah, K.C.*, and *E. B. Wikremanayake*), for the applicant.— This application is made under rule 1 (*a*) of the Schedule to the Privy Council (Appeals) Ordinance (Cap. 85) or, alternatively, under rule 1 (*b*) of the same Schedule.

Although the subject-matter of the action was valued in the District Court at less than Rs. 5,000 the value of it has now appreciated and, according to the affidavit and report of a recognized assessor, exceeds Rs. 10,000. What is material is the value of the subject-matter at the point of time when application is made for leave to appeal to the Privy Council. Vide *de Alwis v. Appuhamy* [1].

The question involved in the appeal is one which, " by reason of its great general or public importance or otherwise ", ought to be submitted to His Majesty in Council for decision under rule (1) (*b*). A rule of Kandyan Law which was regarded as finally settled in 1922 in the case of *Seneviratne v. Halangoda,* [2] has been disturbed by the decision of the Supreme Court in the present case. In *Seneviratne v. Halangoda* it was decided that where a Kandyan wife married in *diga* dies issueless, the husband does not inherit any portion of the wife's landed property acquired before marriage. The ruling in that case was accepted as final in the Report of the Kandyan Law Commission (1935) and has always been acted upon. Titles that are settled would become unsettled in consequence of the present decision.

[1] (*1929*) *30 N. L. R. 421.*

[2] (*1922*) *24 N. L. R. 257.*

N. K. Choksy (with him *S. R. Wijayatilake*) for the respondent.—The value put upon the matter in dispute in the District Court is the determining factor and cannot be altered at this stage—*Appuhamy v. Victor Corea*[1]. Further, in a testamentary action, the valuation given in the inventory decides the value of the action—*Balahamy v. Dinohamy*[2].

Even if the total value of the estate is worth more than Rs. 5,000 the applicant's interest in it is only in respect of one-third and does not amount to Rs. 5,000. The test for determining value for the purpose of the present application is the extent to which the judgment of the Supreme Court affects the interest of the petitioner who is prejudiced by it—*Allan v. Pratt*[3]; *Thevagnanasekeram v. Kuppammal et al.*[4]; *Ahamadu Lebbe et al. v. Abdul Cader et al.*[5]; *Sathasiva Kurukkal v. Subramaniam Kurukkal*[6]; *Pemaratna Thero v. Indasara Thero*[7].

The question involved in this case is not one of great general or public importance. No settled practice has been upset by the judgment of the Supreme Court. The present case can be distinguished from *Seneviratne v. Halangoda* (*supra*) and is more similar to *Jasingedera Naide Appu v. Palingurala et al.*[8] and *Kalu v. Lami*[9]. Questions of greater general importance, such as concerning registration, partition, the incumbency of a historic Buddhist temple, were not regarded as important enough for reference to the Privy Council—*Gooneratne v. Bishop of Colombo*[10]; *Pemaratna Thero v. Indasara Thero* (*supra*). The words "or otherwise" in rule 1 (*b*) must receive an *ejusdem generis* interpretation and the Supreme Court, in exercising its powers under this rule, should be guided by the principles on which the Privy Council itself acts in dealing with applications for special leave to appeal in civil cases—*Pitche Tamby et al. v. Cassim Marikar et al.*[11].

H. V. Perera, K.C., in reply.—Not only the applicant's right but the rights of his brother and sister also are involved in this appeal. If the applicant succeeds, the two others also succeed, although formally they are respondents to the present application. Rule 1 (*a*) allows a right of appeal not only where the appeal involves directly but also *indirectly* a claim or question respecting property of the value of Rs. 5,000 or upwards.

The words "or otherwise" in rule 1 (*b*) are intended to give the Supreme Court a very wide discretion. The present decision is definitely in conflict with *Seneviratne v. Halangoda* (*supra*) and settled law has been unsettled.

Cur. adv. vult.

November 11, 1942. SOERTSZ J.—

This is an application for conditional leave to appeal to His Majesty in Council, from a judgment of two Judges of this Court. The application purports, in the first instance, to be made as of right, under rule 1 (*a*) of the Privy Councils (Appeal) Ordinance, on the footing that "the matter in dispute on the appeal" is over Rs. 5,000 in value; or, alternatively, under rule 1 (*b*) "at the discretion of the Court", on the ground that

[1] (*1900*) *1 Browne 165.*
[2] (*1926*) *27 N. L. R. 410 at 414.*
[3] (*1888*) *13 A. C. 780.*
[4] (*1934*) *36 N. L. R. 404.*
[5] (*1931*) *33 N. L. R. 337.*
[6] (*1929*) *31 N. L. R. 165.*
[7] (*1938*) *13 C. L. W. 9.*
[8] (*1879*) *2 S. C. C. 176*
[9] (*1905*) *11 N. L. R. 222.*
[10] (*1931*) *33 N. L. R. 63.*
[11] (*1914*) *18 N. L. R. 117.*

the matter involved in the appeal is of great general importance for the reasons stated in paragraphs 4 (*a*), (*b*) and (c) of the petition to which I shall presently refer.

This application is made by the third respondent in D. C. Kandy, No. 5,299 (Testamentary). The first and second respondents to those proceedings are his brother and sister, respectively. The petitioner in those proceedings is their brother-in-law, the husband of one Kuda Ridi, sister of the three respondents, who died intestate leaving an estate valued in the inventory at Rs. 4,245.

There was a contest in the Court below which raised the question whether Kuda Ridi's heirs were her two brothers and her sister or whether her *diga*-married husband was her sole heir. The trial Judge found in favour of the brothers and the sister, relying on the authority of the judgment in the case of *Seneviratne v. Halangoda* (*supra*). On appeal, the judgment of the trial Judge was reversed, and the husband was declared to be heir. It is from this order that conditional leave to appeal is sought.

The application is resisted by the husband on two grounds:—Firstly, on the ground that there is no *right* of appeal inasmuch as the property involved in the case is not worth Rs. 5,000 or, alternatively, inasmuch as the applicant's share of the property, if he is entitled to a share, is not worth Rs. 5,000. Secondly, on the ground that, so far as we are asked to exercise our *discretion*, under rule 1 (*b*), that the matter in dispute is not of great general importance, nor of public importance, nor otherwise a matter calling for the exercise of that discretion.

In regard to the first objection, the value put upon the estate in the inventory is as already pointed out, Rs. 4,245. Counsel relies on the old case of *Appuhamy v. Corea* (*supra*), in which the plaintiff was held to the value he had put upon the property in his plaint, and was refused leave to appeal to the Privy Council because that value was under Rs. 5,000. A request for a re-valuation was refused largely for the reason that, on the plaintiff's own showing, he had deliberately undervalued the property, and had so avoided payment of the proper stamp duty. But, as pointed out by Lyall-Grant J. in the case of *De Alwis v. Appuhamy* (*supra*), the established principle appears to be that where there has been no fraud on the part of the appellant and where he has not consented to a lower valuation for the purpose of obtaining some advantage, he should be allowed to prove the value of his claim, and that where the value has appreciated since the date when action was first taken, he should be allowed to prove the value at the time of appeal".

The present case falls clearly within that principle. There is no indication whatever of a fraudulent under-valuation. It was a valuation put upon the estate not by the applicant, but by his brother-in-law, who now opposes this application, and the applicant's case is that the properties have appreciated in value since that date. We are satisfied upon the material before us that the whole estate is presently, worth Rs. 10,000, a fact not seriously disputed.

But the question still remains whether, for the purpose of determining the applicant's right of appeal, the total value of the estate or the value of the share the applicant would be entitled to, is the relevant value.

In regard to this question, the applicant's brother and sister do not associate themselves with the applicant in this application. Indeed, it was conceded that they are content with the order made on appeal, and it is difficult to see how the applicant can claim that the value of their shares too should be taken into account in valuing the matter in dispute on the appeal. What would the position have been, for instance, if, from the outset, the applicant's brother and sister had supported the case of their brother-in-law, that he was the lawful heir? Would the applicant have been able, in that event too, to ask that the value of their shares be reckoned? It seems to me that the principle enunciated by Lord Selborne in *Allan v. Pratt* (*supra*) governs the question; that principle is "that the judgment is to be looked at as it affects the interests of the *party who is prejudiced by it and who seeks to relieve himself of it by appeal*". That was the principle by which this Court guided itself in *Bandara v. Bandara* [1], to cite one case. Looked at in this way, I do not think it can be said that the matter in dispute, on the proposed appeal, is any more than one-third of ten thousand rupees.

The applicant, therefore, has no *right* of appeal.

The next question is whether this is a case which is properly within rule 1 (*b*) and, as such, one in which we ought to exercise our discretion and grant the applicant leave.

The grounds upon which we are asked to exercise our discretion are stated in paragraphs 4 (*a*), (*b*), and (c) of the petition. The gist of those averments is that the judgment given in this case rules that a *diga*-married widower is the sole heir of his childless wife so far as immovable property acquired before coverture is concerned; and that he excludes the wife's next of kin, whereas a different view was taken in the case of *Seneviratne v. Halangoda* (*supra*). It is also said that a committee appointed in recent times to report on Kandyan law and custom adopted the rule in this latter decision as having correctly laid down the law on the point. The result of this conflict, it is urged, would be to leave the law on this question in an unsettled and unsatisfactory state.

But there are, in our reports, conflicting decisions on several other questions, and if that were sufficient reason for granting leave, our reports would afford precedents. But I can find none. Leave could be properly sought, and would properly be given only if the matter in dispute is of great general importance, or of public importance, or is otherwise of an equally substantial character.

I do not think it can be said that the question in this case falls within the condition of great general importance or of public importance. The most that can be said in regard to it is that it concerns a question of intestate succession arising in Kandyan law in certain circumstances that are more of uncommon than common occurrence. Nor, is it, otherwise, a matter of such a substantial character as would justify us to give a leave. We ought to be careful not to attempt too lightly to add to the onerous duties of the Judicial Committee, or similarly interfere with the ordinary rights of a successful litigant in a case of this value not to be vexed any further.

[1] *Cur. L.R. p. 52*

It seems to me that the latter part of the opinion of Lord Selborne in *Allan v. Pratt* (*supra*) applies to this branch of the question. He said "of course their Lordships will not at present go into the merits of the case at all, and they will assume that there may be such a question and that it may be important; but the present question is, whether this appeal, being incompetent, they ought to give, under the circumstances of the case, an opportunity of asking for special leave to appeal. No doubt there may be cases in which the importance of the *general* question of law involved may induce their Lordships to give leave to appeal, though the value of the matter in dispute is not sufficient; but their Lordships must be governed in the exercise of that discretion by a consideration of all the circumstances of each particular case". Their Lordships then went on to point out that in the case before them the respondent did not appear to be a man who could comfortably bear the expense of such a proceeding, even if he contrived to be represented at the hearing. The same can, I think, be fairly said of the respondent to this application. If, however, he decided not to incur the necessary expenditure and failed to be represented at the hearing, their Lordships would not have the fullest assistance in a matter that, after all, arises under a foreign or, at least, an unfamiliar law, and as observed by Lord Selborne, such assistance their Lordships "must necessarily desire". Moreover, if as the applicant's Counsel stated at the Bar, cases have already been instituted in view of the ruling given in this case, a proper opportunity is likely to arise for this question to be reagitated and, if necessary, decided by a Full or Divisional Bench or, may be, even by the Privy Council.

I would, for these reasons, refuse the application with costs.

HOWARD C.J.—I agree.

Application refused.