1931

Present: **Macdonell C.J. and Akbar J.**

LALL *v.* EMMANUEL

138—D. C. (Inty.) Jaffna, 5,870.

Privy Council—Judicial settlement of accounts—Order against administrator to bring money into Court—Finality—Ordinance No. 31 of 1909, schedule I., rule 1 (a).

Where, in the course of proceedings for judicial settlement of an estate, the District Judge orders an administrator to bring into Court a certain sum of money, appearing in the accounts filed by him,—

Held that the order was not a final order within the meaning of Rule 1 (*a*) of the first schedule to the Appeals (Privy Council) Ordinance, No. 31 of 1909.

APPLICATION for leave to appeal to the Privy Council.

H. V. Perera (with him *Gratiaen*), for the appellant.

Hayley, K.C. (with him *Navaratnam*), for the present administrator, showed cause—

No appeal lies to the Privy Council, as this is not a " civil suit or action " within the meaning of the Ordinance. The words " suit " and " action " have a well-known legal signification, and presuppose the existence of

parties. Any other form of proceedings is a " matter " (*Halsbury's Laws of England I., p. 2*). Here the only person before the Court was the appellant, over whose conduct as official administrator the Court exercises disciplinary control. The provisions of the Appeals (Privy Council) Ordinance, No. 31 of 1909, clearly indicate that there must be a respondent to the appeal *(vide* also *1 N. L. R. 196, 3 Lov. 234, 3 C. L. R. 45, 18 N. L. R. 117, 13 N. L. R. 207, 5 C. L. R. 17, 7 C. L. R. 70, 4 Moore's P. C. Cases 374.)*

In any event the order of the District Judge is not a " final judgment of of the Court ". The appellant has been ordered to bring a sum of money into Court pending the judicial settlement. There is no finality regarding the destination or ownership of this money until a decree of judicial settlement has been entered *(vide Civil Procedure Code, ss. 734, 739, 740)*. A judgment or order is not " final " if it does not finally decide the rights of the parties regarding the matter in dispute *(12 N. L. R. 367; 27 N. L. R. 65)*. As to the effect of a decree for judicial settlement (*vide Re Kiritisinghe Kuda Banda* [1] and *Perera v. Fernando.*[2]) In any event, until the judicial settlement proceedings are finally determined, the appellant cannot be heard to say that the " value of the matter in dispute " is over Rs. 5,000, as required by the Ordinance. It will be open to the appellant in those proceedings to furnish proof that the money which he has been ordered to bring into Court forms no part of the estate.

H. V. Perera in reply.—The objections taken by the respondent come too late. The appellant has already been granted conditional leave to appeal to the Privy Council, and as the conditions imposed have been satisfied, this Court has no jurisdiction to withhold final leave to appeal.

[MACDONELL C.J.—It seems to me that this Court has an inherent power to vacate any order which has been made *per incuriam.*]

Conditional leave was rightly granted. The proceedings in question come within the meaning of the term " suit ", which has a wider significance than is attached to the term " action " in English law. The term " suit " embraces all contentious proceedings of an ordinary civil kind (*Blenpendra Narayan v. Boroda Prasad* [3]). The order is "final " in that it finally compels the appellant to bring into Court a sum of money before a certain date. To this extent the order is one which cannot be reconsidered at a later stage of the proceedings (*vide 27 N. L. R. 65*). The appellant disputes his liability to pay that money until the determination of the proceedings for a judicial settlement of the estate. The amount involved exceeds Rs. 5,000, and an appeal therefore lies to the Privy Council.

March 19, 1931. MACDONELL C.J.—

This was an application for leave to appeal to the Privy Council against an order of the District Judge, Jaffna, dated April 15, 1930, which was affirmed on appeal by this Court. The applicant was Secretary of the

[1] *2 Bala. 87.*

[2] *2 S. C. R. 54.*

[3] *18 Cal. 500.*

District Court, Jaffna, and is now Secretary of the District Court, Kurunegala, and was the sole official administrator of the above estate until October 15, 1929, since when he has been joint official administrator with the present Secretary of the District Court, Jaffna, the respondent on this application. The administration of the estate has dragged on for a number of years and it does not seem to be disputed that a former District Judge at Jaffna exercised insufficient supervision over the doings of the applicant as its administrator. The present District Judge, not being satisfied with the position of things or with the accounts filed by the applicant, appointed January 8, 1930, for the examination of the applicant, who on the same day filed a petition for judicial settlement. The applicant was examined on sundry days in January, 1930, and again on March 28, 1930. Thereafter, the District Judge made an order on April 15, 1930, that the applicant should file an amended account and bring into Court certain sums of money, said to be the property of the estate, amounting in all to Rs. 42,357.47. He appealed on April 25, 1930, against the whole of this order so far as it required him to bring monies into Court.

The appeal was heard on November 6, 1930, by my brother Akbar and myself when it was argued, not that the order to bring money into Court was wrong as a whole, but only in so far as it required the appellant to bring in Rs. 1,200 which he had paid himself as commission and an item of Rs. 9,000 which he showed in his accounts as paid to a certain proctor. During argument, however, the contention that the order was wrong as to the Rs. 1,200 was abandoned, so eventually it was only the Rs. 9,000 paid to the proctor as to which the order was challenged. The appeal so narrowed down was dismissed by the Court on November 13, 1930, my brother Akbar delivering a written judgment. The appellant, thereupon, applied for leave to appeal to the Privy Council and obtained, on December 9, 1930, conditional leave to appeal, the Court which granted it making order at the same time that application for final leave should not be made until January 19, 1931, and that notice of the application should be issued to the co-administrator of the estate. The applicant stated that he appealed against the whole order of the District Judge requiring him to bring money into Court and not merely against those items of that order against which he had appealed to this Court on November 9, 1930. On the order of December 9, 1930, giving conditional leave to appeal, the co-administrator intervened as respondent and opposed the application for final leave. The matter was eventually argued before us on March 2 and 4, 1931, when the application for leave to appeal was dismissed with costs. We intimated that we would give our reasons later and we now do so.

It was argued that the matter before the Court was not " a final judgment of the Court "—*vide* rule 1 (*a*) in schedule I to Ordinance No. 31 of 1909—in "a civil suit or action," *vide* section 4 of Ordinance No. 31 of 1909, and that in consequence no appeal lay to the Privy Council thereon. This argument involved, and was put forward as involving, two propositions, first that this was not a " judgment " in a " civil suit or action ", and secondly that it was not a " final judgment ". In support of the first contention section 64 of the Civil Procedure Code was cited, giving

jurisdiction to District Courts in all " testamentary matters ", and it was contended that this was a " matter " only and not an action; and see *Re Insolvent Estate Marikar* [1]. It was argued that an action requires more parties than one, while here the applicant was the only party, and that this order was rather a disciplinary one by the Court to its official than a " judgment in an action ". I express no opinion on this argument since I think the application can be better decided on the second contention involved, namely, that the order appealed from was not " final ".

We must remember what the order was and in what proceeding. The applicant had petitioned under section 729 of the Civil Procedure Code for a judicial settlement and that petition was and is still pending. Sections 739 and 740 state the matters as to which a judicial settlement is " conclusive " and amongst these, section 739 (1), are " items allowed to the accounting party for money paid to creditors. . . . for his necessary expenses and for his services ", and this means that until judicial settlement as to them has been decreed, these items are not conclusively settled. Section 734 provides for the manner in which " items of expenditure " can be vouched, and allowed. When so vouched and allowed, these items will duly become " conclusive " by decree of judicial settlement, as provided by sections 739 and 740. Now the applicant here is an accounting party, and the monies he has been ordered to bring into Court can, all or most of them, be brought under one or other of the headings of " money paid to creditors " (*i.e.*, of the estate) or " necessary expenses " or " services " rendered by the accounting party, and section 734 gives him the means of vouching, and so of being allowed, these items at any time up to the decree of judicial settlement.

This statement of the present position in law of the applicant seems to me to go far to show that this order to the applicant to bring certain monies into Court cannot be a final one. The order determines nothing as to the final destination or ownership of the monies to be brought into Court, for, until decree of judicial settlement it is always open to the applicant to prove that these monies have been properly expended for the use of the estate and that consequently they are chargeable to the estate and not to him. This can best be tested by a particular and concrete case, that of the Rs. 9,000 that applicant says he paid to a certain proctor and which was the point argued on the appeal to this Court from the order of the District Judge. The applicant can produce to the District Judge the vouchers for this payment which perhaps were not available to him when the order to bring this money into Court was made, and on those vouchers being in order he can claim to take the Rs. 9,000 out of Court again, with the right of appeal to this Court if the District Judge refuses to allow him to do so.

One can test the point yet further. Part of the order of April 15, 1930, was that the applicant should file further accounts, and from this part of the order he has not appealed. Let us suppose him to obey, voluntarily or on compulsion, this part of the order and file further accounts. It is always possible, both in law and fact, that those further accounts, when filed, might show conclusively that these monies he has been ordered

[1] *1 N. L. R. 196.*

to bring into Court, had been properly expended for the use of the estate and that thus they were not chargeable to him the applicant. He would then be permitted to take them out of Court. Such order might be made just before the Privy Council was called on to decide whether he should bring these monies into Court at all. Then the Privy Council would be in this position, that it would be determining a matter already determined and on which any decision it gave, must be nugatory. This consideration must raise yet further doubt whether this order to bring these monies into Court can be a final one.

Authority is against the order being a final one. In *The Ceylon Tea Plantation Co., Ltd., v. Carry* [1]. Hutchinson C.J. speaks of a final decree as something that " finally decides the rights of the parties on the principal question between them ". Here the principal question at issue is whether the applicant owes these monies to the estate or not, and, as has been shown, the order appealed from does not decide that question. In *Re Kiritisinghe Kuda Banda,*[2] Pereira A.J. says at page 91 " The proceeding for a judicial settlement commences with a petition upon which certain citations issue as in the case of a plaint in an ordinary civil action." As laid down by Mr. Justice Withers in *Perera v. Fernando* [3], ' the object of a judicial settlement is to bring the administration to a close, and the effect of it is to conclude all parties cited to attend the proceedings and their privies in estate with regard to certain facts connected with the administration, *e.g.*, the correctness of items allowed to creditors, legatees, heirs, and next of kin.' So that, unless these items are determined upon, it cannot be said that there is a final order in the proceeding. As held in *Salamon v. Warner,* [4] ' an order is final only when it is made upon an application or other proceeding which must, when such application or other proceeding fail or succeed, determine the action ' . . . . . The District Judge held that the applicant as a nephew of the deceased, was entitled to a sixth share of the estate and he adjudicated upon the interest of the other parties also to the application, and ordered the filing of an account on that footing. So that the applicant still had an interest in the further steps to be taken in the proceeding. Any way, the order did not, in terms of the judgment in the case I have cited, " determine " the proceeding. The Code, it is clear from section 740, provides for a decree to be entered up in a proceeding for a judicial settlement, and the order in question appears to me to be merely incidental to the steps leading up to that decree." This case is a stronger one than the present and if an order deciding what share of the estate an applicant was entitled to is not final, I do not see how an order merely to bring money into Court can be final. It was argued that the order here is final anyway to this extent, that it finally compels the applicant to do something, namely, to produce some money, but to accede to this argument would, it seems to me, be going far towards obliterating the distinction between what is final and what is interlocutory. Every interlocutory order is final in this sense that it has to be obeyed.

I would test it yet another way. The order came on appeal to this Court. Would the decision of this Court, whatever way it was given,

[1] *12 N. L. R. 367.*
[2] *2 Bal. 87.*
[3] *2 S. C. R. 54.*
[4] *(1891) 1 Q. B. 734.*

have finally disposed of the matter in dispute? Clearly not. If this Court had discharged the order of the District Judge there would still have been the question, does applicant owe these monies to the estate or not, and this Court having affirmed the order of the District Judge, precisely the same question still remains to be determined.

But there is yet a further difficulty about holding this order to be a final one. Until the decree in the judicial settlement determines how much money, if any at all, the applicant must pay to the estate, it is difficult to say what is the " value " of " the matter in dispute ", for it is conceivable that the amount the applicant may eventually be ordered to pay to the estate will be less than Rs. 5,000. Per Hutchinson C.J. in *The Ceylon Tea Plantation Co., Ltd. v. Carry* (*supra*). "It is the amount which the appellant is ordered to pay which is the test; and it may be that he will only be ordered to pay a sum less than Rs. 5,000."

For the foregoing reasons I am of opinion that the order appealed from does not come within the requirements of rule 1 (*a*) of schedule I to Ordinance No. 31 of 1909, in that it is not final nor of the value of five thousand rupees, and that consequently leave to appeal against it to the Privy Council ought not to be granted.

AKBAR J.—I agree.

Leave refused.