Present: Dalton and Lyall Grant JJ.

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MUHEETH *v.* WAHID *et al.*

107—D. C. Colombo, 1,338.

Administration—Judicial settlement—Default of administrator—Civil Procedure Code, Chapter LV.

In proceedings for the judicial settlement of an estate an executor may be charged with the value of property, which he has failed through negligence to sell and realize.

APPEAL from an order of the District Judge of Colombo.

H. V. Perera, for executor, appellant.

Kouneman (with him, *Ferdinands*), for respondents

November 27, 1929. DALTON J.—

The appellant here is the eldest son and executor of the late M. M. H. Cassim Lebbe Marikar. The appeal arises out of an application by the respondents, heirs of the deceased, for a judicial settlement of the accounts of the executor. The deceased died as long ago as January 12, 1923. The inquiry was fixed, as the learned Judge says, in the interests of the Parties that the matter should be finally and conclusively decided at the earliest opportunity. As a result of the inquiry he directed, amongst other things,—

(1) that the executor do charge himself with the sum of Rs. 50,000 as the value of the premises No. 76, Messenger street,

(2) that he be charged with rent for the premises Nos. 7 and 8, Keyzer street, at the rate of Rs. 500 per mensem.

The executor appeals against this order, whilst there is a cross-appeal by the respondents in respect of the second item. They urged that the amount of rent for the premises at Keyzer street should be Rs. 725 per mensem, and not Rs. 500.

The appeal of the executor is based solely on the argument that in an application for a judicial settlement under the provisions of Chapter LV. of the Civil Procedure Code no order can be made against an executor in respect of any money or property that has not in fact come into his hands, and that questions of negligence, waste, or anything involving damage to the estate, except in respect of money or property that has actually come into his hands, must be the subject of a separate action. In support of this argument we

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were referred to the case of *Mohamado Jan v. Ussen Bebe*,[1] where Middleton J. expressed the opinion that the Court, on a judicial settlement, cannot charge an administrator with moneys that have not reached his hands, but that if parties entitled to distribution think he has been negligent or fraudulent, they should bring an action based upon such allegations.

This view, it seems to me, may possibly have been influenced by the procedure in force prior to the enactment of Chapter LV. of the Civil Procedure Code, for which we appear to be inbebted to the State of New York. Unfortunately no New York authorities are available here for guidance as to the extent of an order for judicial settlement there. Under the old practice in Ceylon, however, there was no right to compel a judicial settlement (vide *In re Estate of A. P. Dharmagoonawardena* [2]), and if any question arose in the ordinary course of testamentary proceedings of a character unfit to be settled therein, the interested party was referred to an administration or other appropriate action in which the questions raised could be dealt with. The argument adduced in support of this appeal would in effect, so it seems to me, place an interested party in a position no more advantageous than that in which he was prior to the enactment of the provisions to compel a judicial settlement. Even under the old practice and procedure to be pursued in taking accounts, as pointed out by Phear C.J. in *Fernando v. Fernando*,[3] the accounts directed to be made might include an account of not only the estate of the deceased that comes to the hand of the administrator, but also what might, but for his default, have come to his hands. As pointed out by Pereira J. in *Koranchihamy v. Angohamy*,[4] the old practice and procedure followed in the administration suit fell into disuse as a result of the provisions of the Code as to the rendering of accounts by administrators and the judicial settlement of the estates of deceased persons. The purpose of a judicial settlement, as stated by the same learned Judge in *Vallipillai v. Ponnusamy*,[5] is to achieve finality.

The opinion of Middleton J. above referred to has been discussed in *Holsinger v. Nicholas*. [6] Bertram C.J., with whom de Sampayo J. agreed, points out that this opinion was *obiter*. He continues: "It may very well be that in the course of a judicial settlement a matter may come up as to which the Judge may think that it is a matter of such complication and importance that it can only be inquired into by a regular action . . . . But it would be a most serious limitation of a most salutary procedure to declare that where a complaint is made against an executor of negligence or waste, the Court cannot inquire into the matter in a judicial settlement."

[1] *(1909) 1 Current Law Rep. 53.*
[2] *1 S. C. R. 296.*
[3] *1 S. C. C. 52.*
[4] *4 Balasingham Notes of Cases 15.*
[5] *17 N. L. R. 126.*
[6] *20 N. L. R. 417.*

He then repeats what Pereira J. had already said as to the object of the judicial settlement, to effect as promptly and expeditiously as possible a final winding up of the estate.

The ground upon which the appeal is based has therefore no sufficient or good ground to support it. It has not been suggested, nor do I see that the questions decided could not conveniently be decided in these proceedings. The evidence shows that the respondents had very strong reasons for their objections raised at the inquiry in respect of the matters to which the appeal relates, and I see no reason why the order of the learned Judge in respect of the premises at No. 76, Messenger street, should be interfered with.

With regard to the cross-appeal, in fixing the rent of the premises at Keyzer street at Rs. 500 the learned Judge may well have been taking an average for the years for which the executor has to account. His evidence does show that the rent for No. 8, at the time he gave evidence in 1929, was Rs. 500 a month, but all rents have no doubt increased, and there is nothing to show that that was obtainable at earlier periods of his executorship. I do not think any sufficient ground has has been shown for varying the learned Judge's order on this point.

In the result, therefore, both the appeal and cross-appeal must be dismissed with costs.

LYALL GRANT J.—I agree.

Appeal dismissed.