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Present: Dalton J. and Jayewardene A.J.

BALAHAMY *v.* DINOHAMY *et al.*

114—D. C. Tangalla, 789.

Privy Council—Application for conditional leave to appeal—Testamentary suit—Final order—Value of matter in dispute—Ordinance No. 31 of 1909, rule 1 (a).

An order in a testamentary suit adjudicating upon the rights of claimants to the estate is a final order within the meaning of rule 1 (*a*) of Ordinance No. 31 of 1909.

The value of the matter in dispute in the suit, for the purpose of an appeal to the Privy Council, would be determined by the value of the particular interest in claim.

Ceylon Tea Plantation Company v. Cary [1] followed.

APPLICATION for conditional leave to appeal to the Privy Council. The application arose out of testamentary proceedings, the respondents to which were the administrator of the estate of the late Don Andris de Silva and his wife, a daughter of the deceased. The petitioners claimed to be the wife and children of the deceased by a second marriage, and asked that the first respondent be directed to admit their claim, and allot to them their lawful shares of the estate. The Supreme Court allowed their claim. The respondents applied for leave to appeal to the Privy Council.

J. S. Jayewardene (with him *Soertsz*), in support.

H. V. Perera, contra.

February 23, 1926. DALTON J.—

This is an application for conditional leave to appeal to the Privy Council from a judgment of this Court dated December 18, 1925. The petitioners are the respondents in the testamentary proceedings. Objection is taken to the granting of leave on two grounds: firstly, that the judgment of December 18 is not a final judgment of the court within the meaning of rule 1 (*a*) of the schedule to Ordinance No. 31 of 1909, regulating the procedure on appeals to His Majesty in Council, and secondly, that it cannot be said that the appeal involves a claim respecting property amounting to the value of Rs. 5,000 or upwards.

The proceedings out of which this application arises were testamentary proceedings, the respondents in those proceedings being the administrator of the estate of the late Don Andris de Silva and his

[1] *12 N. L. R. 367.*

wife a daughter of the deceased man. The petitioners claimed to be the wife and children of the deceased by a second marriage, and asked that the first respondent be directed to record and admit their claim, and allot to them their lawful shares of the estate.

By its order of December 18 this Court allowed the petitioners' claim.

It is now urged that that order is no final order in the testamentary proceedings, Mr. Perera citing *In re the Estate of Kiritisinghe Kuda Banda*[1] in support of his contention. That was an application for a judicial settlement of the affairs of an intestate estate, one of the respondents claiming to be the adopted son of the deceased and to be entitled to a larger share of his estate than that which the applicant was prepared to allot to him. The Supreme Court affirmed the decision of the District Judge holding that this respondent was the nephew and not the adopted son of deceased. Upon the respondent seeking leave to appeal to the Privy Council, Layard C.J. and Pereira J., Grenier J. dissenting, held that this was not a final judgment or an order having the effect of a definite sentence, and no appeal to the Privy Council lay therefrom.

This decision was cited in a later Full Bench decision and it would seem that the decision of the majority of the Court in the earlier case has not been followed. In the *Ceylon Tea Plantation Co., Ltd. v. Carry*[2] the plaintiff sought to compel the defendant to render an account generally from the beginning of his employment under the Company. The District Court, and the Supreme Court on appeal, ordered defendant to account for a longer period of time than that for which he was prepared to account. He thereupon sought leave to appeal to the Privy Council. For the Company it was urged that this was not a "final order," being purely interlocutory. Hutchinson C.J. says :—

> "I agree that this was a final decree inasmuch as it finally decides the rights of the parties on the principal question at issue between them, and the working out of the decree is merely a matter of account."

And, adopting the words of Wood Renton J., in that case, as a matter of interpretation, I do not see how a judgment such as that of December 18, which determined the main point at issue in the case, whether or not the applicant was the wife of the deceased, can be held not to have possessed the characteristic of finality as between the parties to the proceedings, I would hold that the order of December 18 is a final judgment of the Court within the meaning of the rule applicable.

The second objection raised is that until the estate is judicially settled it is impossible to say what is the value of the interest that the applicant and her children claim. *In re the Estate of Kiritisinghe Kuda*

[1] *(1905) 2 Bal. 87.* [2] *(1909) 12 N. L. R. 367.*

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Banda (*supra*) it was held that the question whether the order involves directly or indirectly title to property exceeding the value of Rs. 5,000 could not be determined until the final decree in the judicial settlement. On the other hand it was admitted that appeals had gone to the Privy Council in such cases before the final decree in the settlement. It was suggested in such cases no objection had been raised. In *Ceylon Tea Plantation Co., Ltd. v. Carry* (*supra*), whilst holding that the decree questioned was a final decree, the Court there held, it being a matter of accounts, an appeal to the Privy Council, would not lie, inasmuch as it was impossible to say until the account had been taken that the decree was for or in respect of a sum or matter at issue above the amount or value of Rs. 5,000. And we have been referred to *Pate v. Pate*,[1] an action for accounting by one partner against another, in which the Supreme Court's decision was given in 1907, whilst leave to appeal to the Privy Council was only granted in 1912. In *Periamen Chetty v. Rahappa Chetty*[2], also a partnership matter, in which the Court ordered an account to be taken, it was held, that leave to appeal could not be allowed as the order was not a final and definitive sentence in respect of a matter above the value of Rs. 5,000.

In my opinion the case now before us can be distinguished from all these authorities cited on the facts. The respondent in the testamentary proceedings had filed in the Court what he swore to as a full, true, and correct inventory of the property of the deceased, the nett value being sworn at Rs. 21,571·50. The District Judge has pointed out in his judgment that a low value was put upon the property for the paying of estate duty. Even if this had not been so for the purpose of paying duty, I think it could very safely be assumed that there was no over valuation, or omission of any debts or encumbrances known to the respondent. This inventory is dated May 21, 1923, although the deceased had died as early as 1921. He had ample time therefore to ascertain all the information he required. It is not alleged now that any other debts have come to his notice; on the other hand, in giving evidence before the District Judge on June 24, 1925, he states that, in his opinion, the immovable property of the estate was worth from Rs. 25,000 to Rs. 26,000, considerably increasing the value which he had previously sworn to. It is admitted that the applicant and her children, if her status as wife is upheld, is entitled to half the estate, which is, therefore, considerably more than Rs. 5,000. There is no question of accounts between the parties to be gone into, the nett amount of the estate being admitted by one side and not questioned by the other. On the respondent's own showing the claim of the petitioner and her children is respecting property amounting to or of the value of Rs. 5,000 and upwards. I would, therefore, hold on the facts here that it is not necessary to wait until the final decree

[1] *18 N. L. R. 239.*

[2] *3 S. C. C. 39.*

in the judicial settlement to determine the value of the claim put forward. If Mr. Perera's argument is sound, he admits, it follows that even if an estate is admitted to be worth twenty lakhs of rupees according to the inventory, after deduction of all liabilities, and a claim to half the estate be put forward and allowed, it could not be said that the order allowing the claim involved directly or indirectly the value of Rs. 5,000, until the final decree in the judicial settlement, which in practice would be absurd.

In my opinion the judgment from which it is sought to obtain leave to appeal is a final judgment within the meaning of rule 1 (*a*) cited above, and involves a claim respecting property amounting to the value of Rs. 5,000 or upward.

I would, therefore, grant conditional leave to appeal, as prayed.

JAYEWARDENE A.J.—

Two objections have been taken to the allowance of this application. In the first place it is objected that the judgment is not a "final judgment," and secondly, that there is no proof that the appeal involves a claim to property amounting to or of the value of Rs. 5,000 or upwards. There can be no doubt that the judgment of this Court finally decided the right of the respondents to this application to a half share of the estate of Don Andris de Silva, deceased, which is valued in the inventory at Rs. 21,571·50. The case has been sent back to the District Court for further proceedings to be taken upon this basis. Learned Counsel for the respondents relying on the case of *In re the Estate of Kiritisinghe Kuda Banda* (*supra*) contends that the judgment is not a "final judgment" within the meaning of rule 1 (*a*) of the schedule to Ordinance No. 31 of 1909, which regulates appeals to the Privy Council. It was there held that a judgment declaring that a person was not an adopted son of an intestate, thus depriving him of a larger share of the estate than he would have been entitled as one of the heirs, and sending the case back for the judicial settlement of accounts, did not become a final judgment until the settlement of account, and entry of decree which would enable the value of the rights of which the applicant had been deprived by the judgment of the Court to be definitely ascertained. Here, I may remark, that the question whether a person is an heir of an estate under administration is not one that can be decided in the course of a judicial settlement of accounts. Such a question does not come within the scope of chapter LV., which lays down the procedure for "the accounting and settlement" of estates. It ought to be finally decided before the settlement of accounts is entered upon. For if the Court decides, as the District Judge had done in this case, that an applicant is not one of the heirs of the deceased, he would have no voice in the settlement of the estate accounts.

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The judgment I have referred to is a judgment of a Bench of three Judges, one of the Judges (Grenier A.J.) dissenting. As a judgment of a Bench of three Judges it would be binding on us, but there is another judgment of this court, *Ceylon Tea Plantations Co., Ltd. v. Carry* (*supra*) also of a Bench of three Judges in which the Court took a different view of the term " final judgment " as used in the statutory provisions regulating appeals to the Privy Council. There this Court followed certain decisions of the Privy Council dealing with the construction of the sections of the Indian Civil Procedure Code, which contains provisions similar to those enacted locally. We are bound to follow the later decision as it adopts the law as laid down by the Privy Council. It was conceded that the definition of the term " final judgment " as adopted in the earlier case must be regarded as over-ruled by the later judgment. The later judgment takes a view which, if I may say so, respectfully commends itself to me. It was an action for an accounting and the Court had held that the defendant was liable to account for the full period of his employment and not for a period of three years as contended by him, and Hutchinson C.J. in his judgment on the application for leave to appeal to the Privy Council said :—

> " I agree that this was a ' final decree ' in as much as it finally decides the rights of the parties on the principal question at issue between them, and the working out of the decree is merely a matter of account."

This is a practical and common sense view of what a final judgment is, and applying it to the case before us the judgment that the first respondent was married to the deceased according to the customs of the country, and that her children are his legitimate children " finally decides the rights of the parties on the principal question at issue between them," and is accordingly a " final judgment." No doubt the judgment does not finally determine the suit and is interlocutory in form, but it is final in its effects upon the rights of the parties : *Macfarlane v. Leclaire.*[1]

As regards the value of the petitioners' interests affected by this " final judgment," it is contended that in a testamentary case the value of a party's interest cannot be ascertained until the judicial settlement of accounts. Mr. Perera contends that the judgment of the Full Bench in *In re the Estate of Kiritisinghe Kuda Banda* (*supra*) binds us on this point, although overruled on the other point. It appears to me that the decision of the court on this point was unnecessary and must be treated as *obiter*, for once the Court held that the judgment was not a final one, the value of the interest involved became immaterial. It cannot be supposed that the Court intended to hold that in every testamentary case the value of the interest involved cannot be determined until the decree in the

[1] *(1862) 15 Moo. P. C. C. 181.*

judicial settlement. For we know that both in Ceylon and in India appeals have been taken to the Privy Council in testamentary actions long before the judicial settlement stage was reached, and in all such cases the value of the estate as given in the testamentary case is taken as the basis for valuing the interests involved : *Karunaratne v. Ferdinandus*,[1] *Perera v. Perera*,[2] *Esoof Hasshim Dooply v. Fatima Bibi*.[3] These are no doubt cases in which wills or rights under wills were in question. But that can make no difference for property bequeathed by will is as much liable for the payment of debts as any other property. It seems to me to be impossible to contend that where a person claims under or impeaches a will which deals with property worth a million rupees, and a decision is given against him which affects his title to property worth over the appealable limit according to the inventory or schedule, he should have to wait till the final settlement of the estate property and accounts before he can appeal to the Privy Council. If there are debts of the estate which are likely to reduce its value or the value of the interest of the aggrieved party below the appealable limit, it would be different. What Grenier A.J. said in the case under discussion may be aptly repeated here. He said :—

> " Admittedly the estate is worth more than double that amount, and if the petitioner succeeds in his claim the whole estate will go to him. But it is argued that, as a result of the judicial settlement of the estate, the assets may be reduced to a sum less than Rs. 5,000. I do not think that any speculation should be allowed in a matter of this kind. There is no suggestion that the deceased died heavily indebted, and at the present moment the nett estate may fairly be valued at a sum considerably exceeding Rs. 5,000. It is in the highest degree improbable that some creditor who has been asleep for several years past will suddenly wake up and make a claim against the estate. In matters of this kind I think we must proceed upon reasonable *data*, and not deprive a person of his right of appeal simply because something may happen at some indefinite future time, which may deprive him of this right. That something was not even adumbrated by any evidentiary material placed before us, and it must therefore be regarded as belonging to the region of speculation, and dismissed from serious consideration."

In the present case the estate has been valued at over Rs. 21,000 by an official valuator. There are no debts due from the estate in the inventory, and it was not suggested that there were any debts

[1] *(1902) 2 Bal. 3.*

[2] *(1901) A. C. 354. ; 5 Thamb 54.*

[3] *(1896) 24 Cal. 30.*

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of the intestate to be paid out of the estate, although learned Counsel hinted that there might be debts which have not yet been disclosed, although the intestate died several years ago. The existence of such debts cannot be seriously considered. By the judgment against which the petitioners desire to appeal to the Privy Council, their claim to property worth much more than Rs. 5,000 is directly involved, and, I think, they are entitled to the leave they ask for. They are also entitled to the costs of this application. They will give security in a sum of Rs, 3,000 in the usual way.

Application allowed.