[FULL BENCH.]

1909.
November 17.

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

THE CEYLON TEA PLANTATION CO., LTD., *v.* CARRY.

D. C., Negombo, 7,224.

Decree ordering a party to account—Final order—No appeal lies to Privy Council—Value not ascertained—Courts Ordinance, s. 42.

A decree ordering a party to a suit to render an account (which decree finally decides the rights of the parties on the principal question at issue between them) is a final decree within the meaning of section 42 of the Courts Ordinance.

But an appeal to the Privy Council would not lie against such a decree, inasmuch as it is impossible to say till the account has been taken that the decree is for or in respect of a sum or matter at issue above the amount or value of Rs. 5,000.

PLAINTIFF brought this action to compel the defendant to render an account generally from the beginning of his employment under him. He alleged in the plaint that it would appear when the account was taken that the defendant owed him Rs. 30,000.

The defendant admitted his liability to account for the last three years of his employment only. The District Judge ordered the defendant to render an account as prayed for in the plaint; the Supreme Court in appeal affirmed the decree of the District Court.

The defendant applied for a certificate preparatory to an appeal to the Privy Council, that as regards amount or value and nature the case fulfils the requirements of section 42 of the Courts Ordinance.

The Supreme Court issued notice to the plaintiff to show cause why the certificate should not be granted.

Elliott, for the plaintiff, respondent.—The order is not a "final order." The order in this case was made under section 203, Civil Procedure Code. Form 41 of the schedule gives the form of a decree to be entered under sections 203 and 204; the decree must specify the date of further hearing. Section 204 expressly speaks of the decree as postponing the final determination of the action. There can be only one final decree in a case. The present order was purely interlocutory, as it merely postponed the date of trial. Counsel also referred to *Jackson v. Colombo Commercial Co.*,[1] *Periannan Chetty v. Rahappa Chetty*.[2] Sections 508 and 509 are general sections; section 204 is the particular section that applies to this case.

Even if the order in this case is a final order, the defendant has not shown that the order he is seeking to get rid of renders him liable to pay Rs. 5,000 to the plaintiff. The case must be looked at from the

[1] *(1892) 2 C. L. R. 127.*

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

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point of view of the person who wants to get rid of the judgment (*Allan v. Pratt*,[1] *Bandara v. Bandara*[2]). [WOOD RENTON J.—What is the effect of the words "or is otherwise a fit one"?] These words have been inadvertently taken over from the Indian Code (*Jackson v. Colombo Commercial Co.*[3]).

H. A. Jayewardene (with him *Wadsworth*), for the defendant, petitioner.—The order in this case has the effect of a final order (*Rahimbbhoy Habibbhoy v. Turner*,[4] *Saiyid Muzhar Hossein v. Mussamat Bodha Bibi*[5]). These judgments of the Privy Council over-rule the Ceylon judgments cited. [WOOD RENTON J.—The Privy Council did not consider the question of "value." The cases cited by you were applications for special leave to appeal, and the Privy Council might have granted leave even if the amount involved was only one rupee.] The Privy Council says that the Indian Courts were wrong in refusing a certificate, and does not grant the certificate as an indulgence. Counsel also referred to *Kahoranchihami v. Angohamy*.[6]

Elliott, in reply, cited *re Estate of Kuda Banda*.[7]

Cur. adv. vult.

November 17, 1909. HUTCHINSON C.J.—

This is an application for a hearing in review preparatory to appeal to the Privy Council, and for a certificate that as regards amount or value and nature the case fulfils the requirements of section 42 of the Courts Ordinance.

The decree of this Court against which the appellant wishes to appeal affirmed a decree of the District Court to the effect that the appellant was liable to render an account generally from the beginning of his employment with the plaintiff. He had admitted his liability to account for the last three years, but no more. The plaintiff alleged in the plaint that it would appear when the account was taken that the defendant owed him Rs. 30,000, but the decree is simply for an account.

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. But an appeal to the Privy Council will not lie unless, in the words of section 42, it is "for or in respect of a sum or matter at issue above the amount or value of Rs. 5,000, or shall involve directly or indirectly the title to property or to some civil right exceeding the value of Rs. 5,000"; and I do not think that it fulfils the requirement. 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.

[1] (*1888*) *13 A. C. 780.*
[2] (*1909*) *1 Cur. L. R. 52.*
[3] (*1892*) *2 C. L. R. 127.*
[4] (*1890*) *I. L. R. 15 Bom. 155.*
[5] (*1894*) *I. L. R. 17 All. 122.*
[6] (*1901*) *5 N. L. R. 193.*
[7] (*1905*) *2 Bal. 87.*

The authorities are discussed by my brothers Middleton J. and Wood Renton J. in their judgments. I agree with them that the application should be refused with costs.

MIDDLETON J.—

The only question really to be decided in this case is whether the order directing an account is in respect of a sum or matter at issue above the amount or value of Rs. 5,000—section 42 (2), Ordinance No. 1 of 1889. The ruling of the Privy Council in *Rahimbhoy Habibbhoy v. Turner*.[1] I think, makes it clear that the order in question must be deemed a final one.

In the first place, it is contended that we cannot derive any assistance from a decision as to value founded on sections 595 and 596 of the Indian Civil Code, as the wording of section 596 makes the criterion the amount or value of the subject-matter of the suit.

In *Macfarlane v. Leclaire*[2] the Privy Council laid down that in determining the question of the value of the subject-matter in dispute upon which the right of appeal depended, the proper course was to look at the judgment as to the extent that it affected the interest of the party prejudiced by it and seeking to relieve himself from it by appeal. In that case the value to the defendant of the adverse judgment was greater than the value laid by the plaintiff in his claim. Here the order may or may not in its arithmetical result affect the interest of the defendant up to an amount of Rs. 5,000. The amount or value of the matter at issue is Rs. 30,000 as claimed in the plaint, but the order is made in respect of no actual sum or matter which can be estimated in value, and looking at the authorities I have quoted, in my opinion the words " at issue " must be taken to refer to the matter at issue in the order itself and not as laid in the plaint.

In *Allan v. Pratt*[3] the Privy Council held that the measure of value for determining a defendant's right of appeal is the amount which the plaintiff has recovered, and in *Mohideen Hadjiar v. Pitchey*[4] the measure of value for determining an appellant's right of appeal was held to be the amount for which the defendant has successfully resisted the decree.

In *Allan v. Pratt*,[3] Lord Selborne, delivering the judgment of the Privy Council, said that case was the converse of *Macfarlane v. Leclaire*, *ubi supra*, and that the injury to the " defendant if he is wrongly adjudged to pay damages is measured by the amount of damages which he is adjudged to pay. That is not in the least enhanced to him by the fact that some greater sum had been claimed on the other side."

[1] *(1880) I. L. R. 15 Bom. 155.*
[2] *(1862) 15 Moore P. C. 181.*
[3] *(1888) 13 A. C. 780.*
[4] *(1893) A. C. 193.*

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In *Mussumat Amuna Khatoor v. Radhabenod Misser*[1] it was held that in estimating the appealable value restricted by the order in Council of April 1, 1838, for regulating appeals from the Supreme and Sudder Dewanny Courts in the East Indies to Rs. 10,000 as the amount in dispute, regard should be had to the whole matter involved in the suit, and not to the value of a fractional part of the property sought to be recovered.

In the present case the order against which the defendant appeals is incapable of estimation in value, and I think it lies on the party seeking to obtain the order now sought for to show that it affects his interest up to the appealable value. If the defendant now obtains leave to appeal, it may subsequently in a trial of the action result in an order against him considerably less in value than Rs. 5,000, but he will have had his appeal to the Privy Council, at great expense, it may be, to both parties.

If, on the other hand, the taking of the account result in the award of a sum up to or exceeding Rs. 5,000, he will then have his undoubted right to appeal, and can then raise, in addition, the question of the propriety of the order for an account he is now seeking to bring before the Privy Council.

In my opinion, looking at the cases I have quoted, and I can find no others which appear to touch on the matter in question, the appellant is not entitled to an order for leave to appeal under section 781 of the Civil Procedure Code, and leave, in my opinion, ought not to be granted.

If this order be wrong, the appellant can apply to the Privy Council for special leave to appeal; but if leave were granted, it seems to me doubtful, if the decision of this Court in granting leave were reversed, whether special leave would be granted by the Privy Council (*Allan v. Pratt*,[2] *ubi supra*).

I would dismiss the petition with costs.

WOOD RENTON J.—

By the decision of the Supreme Court in appeal in this case the appellant has been ordered to account to the respondent for a longer period of time than that for which he was prepared to give an account. In my opinion that is a "final judgment" within the meaning of section 42 of the Courts Ordinance and section 779 of the Civil Procedure Code. On that point the Indian cases cited by Mr. Hector Jayewardene are, I think, conclusive (*Rahimbhoy Habibbhoy v. Turner*[3] and *Saiyid Muzhaṛ Hossein v. Mussamat Bodha Bibi*[4]).

[1] (*1859*) *12 Moore P. C. 470.*
[2] (*1888*) *13 A. C. 780.*
[3] (*1890*) *I. L. R. 15 Bom. 155.*
[4] (*1894*) *I. L. R. 17 All. 122.*

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In the case of *Jackson v. Colombo Commercial Co.*[1]—an action for the infringement of a patent—the Supreme Court held that a judgment finding that the plaintiff's patent had been infringed and granting an injunction, but directing an inquiry as to damages, which had not yet been assessed, was not a final judgment within the meaning of the sections which I have cited above. The case of *Jackson v. Colombo Commercial Co.*[1] was a decision of two Judges only. With the greatest respect, I am unable to follow it. As a mere matter of authority, I think it must be taken to have been impliedly over-ruled by the Indian cases above mentioned, which are decisions of the Privy Council; and as a matter of interpretation I do not see how a judgment, which determined the main point at issue in the case—the question of infringement—and left only the quantum of damages to be fixed, can be held not to have possessed the characteristic of finality as between the parties to the action. It is necessary, however, under section 42, rule 2, of the Courts Ordinance, and section 781 of the Civil Procedure Code, that a judgment from which it is desired to appeal to the Privy Council should not merely be final but should be for or in respect of a sum or matter at issue above the amount or value of Rs. 5,000, or should involve, directly or indirectly, the title to property or to some civil right exceeding the value of Rs. 5,000. It was held by the Privy Council in the case of *Allan v. Pratt*[2] that the measure of value for determining the defendant's right of appeal is the amount which the plaintiff has recovered, and that where this falls short of the appealable amount, the Court cannot give leave to appeal (see also *Macfarlane v. Leclaire*[3] and *Mohideen Hadjiar v. Pitchey*[4]). In the present case it cannot be said that the applicant has had judgment given against him for a sum above the amount or value of Rs. 5,000. Till the account ordered by the judgment of the Supreme Court has been taken, it is impossible to say whether his liability to account will amount to or exceed that sum. Mr. Hector Jayewardene argued that if we construe the provisions of sections 42 of the Courts Ordinance and 781 of the Civil Procedure Code in this sense, we shall be over-ruling, in effect, the decisions of the Privy Council in *Rahimbhoy Habibbhoy v. Turner*[5] and *Saiyid Muzhar Hossein v. Mussamat Bodha Bibi.*[6] In both of those cases, however, the Indian High Court had refused leave to appeal on the ground that the order objected to was not a final order within the meaning of section 595 of the Civil Procedure Code, from which an appeal would lie as of right. They were brought before the Privy Council on petition for special leave to appeal. In the case of *Rahimbhoy Habibbhoy v. Turner*[5] the question of appealable value was not discussed at all, and it was, of course, open to the Privy Council to

[1] *(1892) 2 C. L. R. 127.*
[2] *(1888) 13 A. C. 780.*
[3] *(1862) 15 Moore P. C. 181.*
[4] *(1893) A. C. 193.*
[5] *(1890) I. L. R. 15 Bom. 155.*
[6] *(1894) I. L. R. 17 All. 122.*

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grant special leave to appeal, irrespective of that question altogether. In the case of *Saiyid Muzhar Hossein v. Mussamat Bodha Bibi*[1] special leave was also granted, and Lord Hobhouse, who delivered the judgment of the Judicial Committee, stated incidentally that the value of the property affected by the decree made in two cognate suits was such as would have allowed the High Court to grant leave to appeal in the ordinary course. I do not think that either of those decisions is in any way in conflict with the case of *Allan v. Pratt*,[2] or would justify us in holding that, whenever a final order has been made in an action for an account which has not yet been taken, the question of appealable value is to be determined by reference to the value which a plaintiff-respondent has put upon the subject-matter of the suit. Mr. Jayewardene laid hold of a paragraph in the respondent's plaint, in which he, for revenue purposes, estimated the appellant's liability at Rs. 30,000. The prayer of the plaint, however, contains no reference to that or to any other sum, and merely asks that the appellant should be compelled to account. On the strength of these facts, Mr. Elliott contended that, even if the appellant was entitled to have recourse to the respondent's pleadings for the purpose of finding an appealable value, the sum of Rs. 30,000 could not fairly be taken as a measure of that value. Whether that is so or not, we are, in my opinion, bound to apply the principle laid down by the Privy Council in *Allan v. Pratt*,[2] and, in the case of a defendant's appeal, to seek for the measure of appealable value in the terms of the judgment of which he desires to get rid.

At the first argument of the appeal before His Lordship the Chief Justice and myself, the appellant's counsel abandoned his claim in reconvention, the amount of which exceeded the appealable limit; and at the re-argument of the case before three Judges no attempt was made by Mr. Hector Jayewardene to re-open that question.

In the course of the argument I called Mr. Elliott's attention to the clause in section 781 of the Civil Procedure Code, which apparently empowers the Court to grant the certificate with which that section deals, if the case "is otherwise a fit one for appeal to His Majesty in Council." It was suggested by the Supreme Court in the case of *Jackson v. Colombo Commercial Co.*[3] that these words had probably crept into the Code through inadvertency, and not through any deliberate intention to confer on the Supreme Court an unlimited discretion to allow such appeals. It is unnecessary, however, to consider that point now, for Mr. Jayewardene did not seek to bring his case within the clause in question, and we have before us no materials on which we could say that it is applicable to the present case.

[1] *(1894) I. L. R. 17 All. 122.* [2] *(1888) 13 A. C. 780.*
[3] *(1892) 2 C. L. R. 127.*

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In my opinion the judgment from which it is now desired to appeal to the Privy Council, while it is final in character, does not satisfy the statutory requirements as to appealable value, and can only be brought before the Privy Council by the special leave of that tribunal itself. I should, perhaps, add that it was not argued that the case could be brought within the meaning of the clause in rule 2 of section 42 of the Courts Ordinance as to title to property or to some civil right.

I would dismiss the application with costs.

Application dismissed.