

1951

*Present: Dias S.P.J. and Gunasekara J.*

**CARTHELIS APPUHAMY, Petitioner, and SIRIWARDENA,  
Respondent**

*Application for conditional leave to appeal to the Privy Council in  
S. C. 100—D. C. (Inty.) Colombo, 10,277*

*Privy Council—Appeal from Supreme Court decree—Execution of such decree pending the appeal—Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rules 7 and 8—Applicability to decree declaring a right or status—Civil Procedure Code, s. 217.*

In a testamentary action a contest arose between A and B as to whether a will was genuine or a forgery. Pending the final decision of the case, A was appointed administrator *pendente lite*. Subsequently, the District Court and, on appeal, the Supreme Court pronounced the will to be genuine and declared that B, the executor, was entitled to have the will admitted to probate. Thereupon, A appealed to the Privy Council. Pending the appeal to the Privy Council, B filed papers in the Supreme Court praying that A be removed from the office of administrator *pendente lite* and that B be granted probate or, in the alternative, be appointed administrator *pendente lite*. B sought to support his application under Rules 7 and 8 of the Schedule to the Appeals (Privy Council) Ordinance.

*Held*, that Rules 7 and 8 of the Schedule to the Appeals (Privy Council) Ordinance have no application to a case where the decree, without affording any substantial relief or remedy, declares a right or status. Such a decree falls under head G of section 217 of the Civil Procedure Code and no procedure is provided for its execution.

*Held further*, that Rule 7 applies only where the decree under appeal "requires the appellant to pay money or perform a duty".

**A**PPPLICATION for conditional leave to appeal to the Privy Council.

*E. B. Wikramanayake, K.C.*, with *J. W. Subasinghe*, for the respondent appellant.

*H. W. Tambiah*, for the petitioner respondent.

July 30, 1951. DIAS S.P.J.—

Of consent the application for leave to appeal to the Privy Council is allowed.

This is a testamentary action in which a contest arose as to whether a will was genuine or a forgery. The learned District Judge pronounced it to be genuine and in appeal this Court affirmed that finding. The respondent appellant is now appealing to the Privy Council.

It appears that pending the final decision of this case the respondent appellant was appointed administrator *pendente lite*. The petitioner respondent has filed papers in this Court asking for a declaration that the respondent appellant has ceased to be an administrator *pendente lite*, or in the alternative that this Court should remove him from the

said office and the petitioner respondent be granted probate, or in the alternative be appointed administrator *pendente lite*. It is also prayed that the respondent appellant be ordered to hand over the movable and immovable properties of the estate to the petitioner respondent. It is to be noted, however, that neither the law nor the authority under which this large relief is claimed from the Supreme Court has been set out in the motion paper.

Mr. H. W. Tambiah for the respondent petitioner has endeavoured to support this application under Rules 7 and 8 of the Privy Council Appeal Rules (Legislative Enactments, Volume 2, page 423) which read:—

“ 7. Where the judgment appealed from requires the appellant to pay money or perform a duty, the Court shall have power, when granting leave to appeal, to direct that the said judgment shall be carried into execution if the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such order as His Majesty in Council shall think fit to make thereon.

8. Provided, nevertheless, that if the appellant shall establish to the satisfaction of the Court that real and substantial justice requires that, pending such appeal, execution should be stayed, the Court may order the execution of such judgment to be stayed if the appellant shall give sufficient security for the due performance of such order as His Majesty in Council shall think fit to make thereon.”

I am of opinion that these rules have no application to a case of this kind.

What is the decree which has been appealed against? It is a decree declaring that a certain document is a genuine last will. How is that decree to be executed? The kinds of decrees which a Court of original jurisdiction can lawfully enter in this Island are enumerated in s. 217 of the Civil Procedure Code. A decree which declares a will to be genuine does not fall within any of the heads A to F in s. 217. Such a decree falls under head G of s. 217 which provides: “ Or it (the Court) may, without affording any substantive relief or remedy, declare a right or status ”. While procedural rules have been laid down for the execution of decrees under heads A to F, there is no procedure provided for the execution of decrees falling under head G. The language of s. 217 also makes it clear “ that in the case of decrees which declare a right or status the Court may without affording any substantive relief or remedy, make that declaration ”. A decree declaring a status would be one, for example, where A seeks a declaration from the Court that she is the lawfully married wife of B. If the Court gives A such a decree there is no means by which that decree can be executed. A decree declaring a right would be one as in this case—where the Court has declared that the applicant for probate has the right to have the testator’s will admitted to probate, and so far as I can see there is no method by which that decree can be executed except by admitting the will to probate. Until the Privy Council finally decides this case, it cannot be said that

the executor's right to probate has been established. Therefore, under the Civil Procedure Code, this decree is incapable of execution. Furthermore, the language of Rule 7 of the Privy Council Appeal Rules makes it clear that that rule only applies where the decree under appeal "requires the appellant to pay money or perform a duty". Therefore there may be decrees which are capable of execution in the lower Court but incapable of execution under Rule 7. In the present case the decree of the District Court does not require the payment of money or the performance of a duty.

The application is dismissed with costs.

GUNASEKARA J.—I agree.

*Application allowed.*  
*Cross-application dismissed.*

