1941 *Present:* **Soertsz and Keuneman JJ.**

SELLASAMY *v.* KALIAMMA.

In re CONDITIONAL LEAVE TO APPEAL TO THE PRIVY COUNCIL, No. 272.

Privy Council—Conditional leave to appeal—Final order—The Appeals (Privy Council) Ordinance, No. 31 of 1909 (Cap. 85), Rule 1 (a).

Where, in the course of proceedings for the judicial settlement of an estate, an order was made that the subject-matter of a certain deed of gift should be brought into collation,—

***Held*, that the order had the effect of a final judgment within the meaning of Rule (1) (*a*) of the Rules in Schedule I. of the Appeals (Privy Council) Ordinance.**

THIS was an application for conditional leave to appeal to the Privy Council.

H. V. Perera, K.C. (with him *H. W. Thambiah*), for the petitioner.

N. Nadarajah (with him *C. Renganathan*), for the respondent, showed cause.—There is no right of appeal to the Privy Council from the present judgment. The judgment, although it concerns subject-matter which exceeds the value of Rs. 5,000, is not a final judgment. The petitioner cannot appeal to the Privy Council in this case until the final decree in the judicial settlement has been entered. There are two series of judgments of this Court, each series taking a different view of the meaning of the term "final judgment". See *Re Estate of Kiritisinghe Kuda Banda*[1]; *Dassanaike v. Dassanaike*[2]; *Lall v. Emmanuel*[3]; *Perera v. Mohamed Yoosoof*[4]; on the one hand, and *The Ceylon Tea Plantation Co., Ltd. v. Carry*[5]; *Balahamy v. Dinóhamy et al.*[6]; *Mohamed Sheriff v. Muttu Natchia*[7]; on the other. See also *Shubrook v. Tufnell*[8] and *Salaman v. Warner et. al.*[9].

H. V. Perera, K.C., in reply.—The expression "final judgment" in rule 1 of Ordinance No. 31 of 1909 (Cap. 85) has a very wide meaning and should be interpreted according to the context. The Civil Procedure Code ordinarily contemplates only one decision in a case between two parties. But take a case where there is a special proceeding in a testamentary case, *e.g.*, under section 736 of the Civil Procedure Code. The order determining the special proceeding should be regarded as final so far as the special proceeding is concerned. Appeal to the Privy Council would lie from it as long as it can be detached and is separable from the main testamentary case. The fact that two actions are rolled into one does not make them one single dispute. In the present application there is a final order of the Supreme Court on a subject-matter worth over Rs. 5,000. The order was merely incidental to and not a necessary step in the judicial settlement. Further, if the petitioner, in order to appeal to the Privy Council, has to

[1] *(1905) 2 Bal. Rep. 87.*
[2] *(1929) 30 N. L. R. 367.*
[3] *(1931) 33 N. L. R. 91.*
[4] *(1931) 32 N. L. R. 285.*
[5] *(1909) 12 N. L. R. 367.*
[6] *(1926) 27 N. L. R. 410.*
[7] *(1932) 33 N. L. R. 379.*
[8] *L. R. (1881–2) 9 Q. B. D. 621.*
[9] *L. R. (1891) 1 Q. B. D. 734.*

wait until the end of the judicial settlement proceedings, it may be too late, for it is conceivable that all the assets of the estate, including the subject-matter of this application, may be required for the payment of debts.

For meaning of "final judgment", see *McDonald v. Belcher et al.*[1]; *Saddanathkurukkal v. Vaithiampillai et al.*[2]; *The Ceylon Exports, Ltd. v. Abeyasundera et al.*[3].

Cur. adv. vult.

September 11, 1941. SOERTSZ J.—

This is an application for conditional leave to appeal to His Majesty the King in Council from a judgment of this Court holding that the subject-matter of a certain deed of gift is liable to be brought into collation as a gift made by a father to a son, within the meaning of section 35 of the Matrimonial rights and Inheritance Ordinance (Cap. 47, Legislative Enactments).

Counsel for the respondents, while conceding that the matter in dispute between the parties is above five thousand rupees in value, opposes the application on the ground that the appeal sought is not from a final judgment of this Court inasmuch as decree has not yet been entered in the matter of the judicial settlement in the course of which the judgment in question was entered by this Court.

The cases cited in the course of the argument upon this matter illustrate once more the difficulty and even the danger to which Garvin J. called attention in *Mohamed Sheriff v. Muttu Natchia*[4], that attend any attempt to lay down general rules or to frame a comprehensive formula for applications of this kind, and I propose to confine myself to the facts of this case, to the judgment of this Court thereon, and to the consequences therefrom to the present applicant.

The facts, to state them briefly, are these :—

The applicant's father gifted certain property to the appellant in the year 1937. At the time the gift was made,—to quote from the judgment of this Court—"a marriage between the donee and a bride whom the the donor greatly desired for the donee was imminent" and this Court held that in all the circumstances attending the execution of the deed of gift, the gift was one made "on the occasion of marriage", and was, therefore, liable to be brought into hotchpot as contended by the respondents to this application, in terms of section 35 of the Matrimonial Rights and Inheritance Ordinance. It results from that finding that the administration of the estate in question must now proceed on the footing that it includes a land above five thousand rupees in value which the applicant claims as his separate property.

Whatever the decree ultimately entered might be, it will be entered upon the footing that this property is part of the deceased man's estate. If the present applicant is dissatisfied with that final decree *in any way at all* and prefers an appeal to this Court he will not be able to re-agitate the question whether or not the land involved in the gift is liable to be administered as part of this estate, for he will be met with the plea of *res judicata*. If on

[1] *(1904) A. C. 429.*
[2] *(1933) 13 C. L. Rec. 76.*
[3] *(1933) 13 C. L. Rec. 80.*
[4] *33 N. L. R. 379.*

the other hand, the applicant has no *other* grievance in regard to the final decree entered on the judicial settlement, there will not be even a decent pretext for raising this question again.

There are other difficulties in which he may find himself involved if he waits till the final decree in the judicial settlement proceeding is entered, in order to make his application for leave to appeal. For instance, in the course of administration, it may happen that all the assets of the estate, including this land, which he claims as his own, are required for the payment of the debts of the estate, and by the time he comes to make his application, this property may be in the hands of some third party.

For these reasons I am of opinion that the judgment the applicant wishes to appeal from is within the scope of the words " final decree, order, sentence or decision ", for the word " judgment " in virtue of the interpretation given to it by section 2 of the Privy Council Appeals Ordinance, embraces all these forms of judicial pronouncement.

I would allow the application. The applicant is entitled to the costs of this argument.

KEUNEMAN J.—I agree.

Application allowed.