1921.

[FULL BENCH.]

Present: Bertram C.J. and Ennis and De Sampayo JJ.

PUNCHIRALA *v.* KIRI BANDA *et al.*

144—D. C. Kandy, 27,592.

Evidence Ordinance, 1895, s. 41—Declaration in judicial settlement in testamentary case that a person was adopted by the deceased for purposes of inheritance—Has declaration the effect of a judgment in rem.

In a judicial settlement in testamentary case No. 2,222 the question arose whether A had been duly adopted for purposes of inheritance, and the Court held that he was. In the present action brought by the administratrix *de bonis non*, the adoption of A was again challenged.

Held, that as the defendant (appellant) was not a party to the judicial settlement or a privy of any of the parties, he was not bound by the decision in the judicial settlement as to the status of A.

A declaration made incidentally by a Testamentary Court as to the legal character of the persons before them has not the effect of a judgment *in rem*.

[1] *(1894) A. C. 57.*

THIS case was referred to a Full Court by Ennis J. and Schneider A.J. The facts appear from the judgment.

M. W. H. de Silva (with him *Bartholomeusz* and *Fonseka*), for appellants.—The case of *Punchi Banda v. Yusubu Lebbe* [1] is on all fours with the present case. The expression "probate jurisdiction" in section 41 of the Evidence Ordinance must be strictly construed. An incidental decision on a question of adoption given by a District Court on an application for a judicial settlement in testamentary proceedings is not given in the exercise of its special probate jurisdiction, but in the exercise of its ordinary jurisdiction. The District Court might well have referred the parties between whom the question arose to a separate action, and would have done so if the question was too complicated to be investigated in the testamentary proceedings themselves. A decision on the question of adoption in such separate action would not be conclusive except as between the parties to the action. It would be extraordinary if a decision on the question given after a more or less summary investigation made in the course of testamentary proceedings is to be given a greater effect than a decision on the same question in a regular action. Sections 739 and 740 of the Civil Procedure Code state the effect of a judicial settlement and of a decree for payment and distribution. The findings of the Court on the various matters enumerated in those sections are binding only on the parties and their privies. The expression "legal character" in section 41 does not include the status of heir by adoption.

Counsel cited *Kanhya Loll v. Radha Chura* [2] and *Concha v. Concha*.[3]

H. V. Perera, for respondent.—The expression "probate jurisdiction" in section 41 has a wider meaning than that given to it in *Punchi Banda v. Yusubu Lebbe*.[1] It refers to the jurisdiction exercised by Courts of Probate which deal not merely with wills, but with cases of intestacy. This special jurisdiction is conferred on our District Courts by the Courts Ordinance. It cannot be said that the Court is *functus officio*, so far as that special jurisdiction is concerned, as soon as a grant of probate or of letters of administration is made. It is only by virtue of that special jurisdiction that the Court has power to take the proceedings that follow such grant of probate or letters, and the various orders made in the course of such proceedings are made in the exercise of the same jurisdiction. Thus, the order in question is an order of a competent Court made in the exercise of probate jurisdiction.

The expression "legal character" in section 41 is not confined to a legal character like that of an executor or administrator that is conferred by the Court, but extends to a legal character that the Court finds and declares a person to be entitled to; for instance,

[1] *(1908) 11 N. L. R. 294.* [2] *(1867) 7 W. R. 338.*
[3] *(1887) 11 A. C. 541.*

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where a Court finds that a person is the wife of another, it declares such person to be entitled to that legal character. So a declaration that a person is the heir of a deceased person by adoption is a declaration of a legal character. Thus, the requirements of section 41 are satisfied in the present case, and the decree in D. C. Kandy, 2,222, is conclusive proof of the fact of adoption. The case of *Kanhya Loll v. Radha Chura* [1] is clearly distinguishable, for though there was a decision on a question of adoption in that case, that decision was not given by a Court exercising any one of the special jurisdiction referred to in section 41.

Sections 739 and 740 of the Civil Procedure Code do not in any way restrict the operation of section 41 of the Evidence Ordinance, which is a later enactment.

The principle underlying judgments *in rem* is that the nature of the proceedings in which the judgment is given is such that all persons might be considered parties to it (*Yarakalamma v. Naramma* [2]). It was open to any one interested in the estate of the deceased to have come into the testamentary proceedings.

Cur. adv. vult.

November 18, 1921. BERTRAM C.J.—

This case has been referred to the Full Court with a view to further elucidation of section 41 of the Evidence Ordinance. The material facts are as follows :—Some time back the estate of one Dingiri Appuhamy was administered in D. C. Kandy, 2,222. In a judicial settlement in that case the question arose whether one Appuhamy had been duly adopted by Dingiri Appuhamy for purposes of inheritance. The District Judge inquired into the matter, and in his judgment declared that he had been so duly adopted, and that decision was upheld by the Supreme Court. In the present action, which is brought by the administratrix *de bonis non* of the deceased Appuhamy, the adoption of Appuhamy has again been challenged, and it is sought to put this question in issue again. The plaintiff pleads that the decision of the Kandy District Court as to the status of Appuhamy, being a final judgment of a competent Court in the exercise of probate jurisdiction, declaring Appuhamy to be entitled to a "legal character," is conclusive proof that the legal character in question, that is to say, the status of an adopted son, accrued to Appuhamy at the date of the judgment. The learned District Judge without going into the other facts of the case has allowed that contention. On appeal to this Court, it was pointed out that the learned Judge had ignored the decision in *Punchi Banda v. Yusubu Lebbe* [3] which, apparently, had not been brought to his notice. In that case Wendt J., with whom Grenier J. concurred, held that section 41 did not extend to

[1] *(1867) 7 W. R. 338.* [3] *(1864) 2 Mad. H. C. Rep. 276.*
[2] *(1908) 11 N. L. R. 294.*

incidental decisions given by a District Court in a testamentary action as to the legal status of any person concerned, but that the phrase "probate jurisdiction" was limited to that power of the Court by which it grants or refuses probate of a testamentary paper, or, perhaps, also letters of administration. As in this case a Court exercising testamentary jurisdiction has in effect declared appellant to be entitled to what may reasonably be regarded as a "legal character," and as Wendt J. did not explain for what reasons he considered that the phrase "probate jurisdiction" should receive the limited interpretation suggested, the case has been referred for a fuller consideration of the matter.

From a consideration of the history of the section there can be no doubt that, like the Ordinance as a whole, it was intended to embody in statutory form the general principles of the English law of evidence, and that this particular section was intended to give effect to those principles in so far as they relate to the difficult subject of "judgments *in rem*." I do not think it necessary for the purpose of this judgment to discuss that subject at length. It will be found expounded in the *locus classicus* on the subject, namely, in the note of Mr. William Smith (as enlarged by subsequent editors) to the Duchess of Kingston's case in *Smith's Leading Cases (vol. II.), 11th ed., pp. 800, et seq.*, and also in *Taylor on Evidence, paragraphs 1674-1681*. The history of the section in India may be seen in the judgment of Holloway J. in *Yarakalamma v. Naramma*[1] and of Peacock C.J. in *Kanhya Loll v. Radha Chura*.[2] The former of these judgments, that of Holloway J., is of particular value, and is worth detailed study as a masterpiece of legal exposition. The conclusion which Holloway J. came to was that the phrase "judgment *in rem*" was simply a peculiar name (which it requires a historical disquisition to explain) which had come to be attached to certain peculiar classes of judgments, the singularity of which is that they take effect, not merely *inter partes*, but as against all the world. The difficulty of embracing all these judgments in any single formula is indicated by the fact that Taylor in his work on *Evidence* has been reduced to enumerating them alphabetically in a lengthy footnote. The compilers of the Evidence Ordinance appear to have addressed themselves to the difficulty in another way. They have enumerated the Courts which are qualified to deliver these judgments, and they have attempted to describe these judgments by reference to their intention and to their effect.

The special Courts which are declared to be entitled to pronounce these judgments are Probate, Matrimonial, Admiralty, and Insolvency Courts. I may say, incidentally, that there seems to me no doubt that our District Courts in the exercise of what is called their testamentary jurisdiction are, like the English Courts

[1] *(1864) 2 Mad. H. C. Rep. 276.* [2] *(1867) 7 W. R. 338.*

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of Probate, for this purpose to be considered as exercising probate jurisdiction where they are dealing with cases of intestacy. The judgments of these Courts which have this special character are distinguished by reference to the results which they affect to declare. These results are four :—

(*a*) The conferment of a " legal character " ;
(*b*) The declaration of title to a " legal character " ;
(*c*) The taking away of a " legal character " ;
(*d*) The declaration of a title to a specific property.

These four special results are embodied in four separate paragraphs numbered 1–4 in section 41 ; and there can be no question that, with reference to the four special Courts enumerated at the beginning of the section, these four paragraphs must be interpreted on the principle *reddendo singula singulis*. That is to say, paragraph 1, which refers to the conferment of a legal character, must be held to relate to the legal characters conferred by certain orders of Probate and Insolvency Courts. These are the only Courts which confer legal characters by their decrees ; and the legal characters, which are to say the least primarily in view, must be the characters of administrator, bankrupt, and trustee (or assignee) in bankruptcy (or insolvency). The decrees of Matrimonial or Admiralty Courts do not confer any legal character. Paragraph 2, which relates to declarations that a person is entitled to a legal character, is clearly, at least primarily, intended to have reference to the declarations of a Probate Court that a particular person is entitled to the legal character of executor. An executor cannot discharge his functions until the Court has declared him entitled to that capacity. Paragraph 3, which relates to the taking away of a legal character which a person already possesses, can only have reference to the decrees of Matrimonial Court. Decrees of dissolution of marriage in divorce suits put an end to the relationship of husband and wife, and *ipso facto* take away from the parties to the suit the legal character of husband and wife which they have hitherto borne. Paragraph 4, which relates to declarations to persons entitled to any specific property, can only have reference to Admiralty Courts.

The only paragraphs with which we are concerned in this case are paragraphs 1 and 2. That the " judgments, orders, or decrees " in question are, at least, primarily grants of probate or letters of administration can be proved historically. The conclusive effect of grants of probate or letters of administration has been discussed in a long series of cases which will be found summarized in book VI., chapter of *Williams on Executors and Administrators*. Perhaps the leading modern case on the subject is the decision of the House of Lords in *Concha v. Concha*.[1] These grants, which in the one case in effect declare the executor to be entitled to one particular capacity

[1] *(1887) 11 A. C. 541.*

and in the other case confers a particular capacity upon the administrator, are conclusive against all the world as to the existence of that capacity until they are set aside. There can be no question, therefore, that, having regard to the history of the subject, these are the two judgments which the two paragraphs I have referred to were intended, at least primarily, to comprise.

But the question we have to determine is this: Is this the whole scope of the paragraphs? Testamentary Courts, in the course of the exercise of their jurisdiction, are often incidentally called upon to make declarations as to the "legal character" of persons before them. In this case the Kandy District Court has declared Appuhamy to be entitled to the status of an adopted son. Why should this not be considered as equivalent to a declaration conferring a "legal character" within the meaning of the section? The words "legal character" are clearly wide enough to include the status of husband and wife. What is there to distinguish the status of husband or wife from the status of an adopted son? There is no apparent distinction, but if there were such a distinction this would not settle the matter. Suppose, in the course of the exercise of his testamentary jurisdiction, a District Judge had occasion incidentally to consider the validity of a marriage, and supposing that as a result of his consideration he declares that one of the parties to the case was entitled to the status of a wife. Here a Testamentary Court, in the exercise of its jurisdiction, has declared a person to be entitled to a "legal character." Why should this declaration not be considered as coming within the terms of the section?

To that question Wendt J. has in effect replied that the phrase "in the exercise of its probate jurisdiction" must be given a very restricted significance. "It must be limited to that power of the Court by which it grants or refuses probate of a testamentary paper," or perhaps of letters of administration. With regard to incidental orders and declarations made subsequently, these are to be treated as coming "at a later stage when the Court has already granted probate or letters, and is *functus officio*, so far as that special jurisdiction is concerned."

I confess that I am hardly satisfied with the explanation. No doubt in the mind of the draughtsman, paragraphs 1 and 2, so far as they relate to testamentary proceedings, were intended to comprise only the grants of probate or letters of administration. But what we have to discover is something in the words of the section itself which limits the words "judgment or order or decree" to proceedings of this nature. Mr. H. V. Perera was quite right in insisting that it was not enough to discover the history of the enactment and intention of the draughtsman. We must examine the words he has used, and see whether he has effectuated his intentions.

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Now, where a draughtsman has essayed to codify a branch of the law in a condensed and succinct formula, he is entitled to ask that every phrase and every word which he has used should receive their true effect. The key to the problem now under consideration, as my brother Ennis suggested in the course of the argument, is to be found in the words "not as against the specific person, but absolutely." These words clearly cannot apply to an ordinary incidental declaration made *inter partes*. It must be the intention of the Court, when it makes the declaration in question, to make it universally as affecting all the world. I do not mean to say that any casual or unauthorized intention on the part of any Court to make a declaration with this peculiar effect would give that effect to that declaration, but what is intended to a declaration made by the Court, in accordance with the established principles governing its procedure and jurisdiction, and intended, in pursuance of those principles, to have this specific effect. If this be the meaning of the words, clearly they do not include incidental declarations and orders as to the status of persons concerned in the testamentary proceedings made either in connection with the grant of probate or letters of administration or in subsequent stages after such a grant.

As the appellant was not a party to the judicial settlement or a privy of any of the parties, he is not bound by the previous determination of the Court as to the status of Appuhamy.

In my opinion the appeal must, therefore, be allowed, with costs, and the case remitted to the District Judge for an inquiry into the facts.

ENNIS J.—I agree.

DE SAMPAYO J.—I agree.

Appeal allowed.