

1932

Present: Garvin S.P.J. and Drieberg and Akbar JJ.

## MOHAMED SHERIFF v. MUTTU NATCHIA

170—D. C. (Inty.) Kalutara, 1,031.

*Privy Council—Application for conditional leave—Judicial settlement—Order on executor to give list of mortgage bonds and other debts—Reasons for non-recovery of debts—Final order—Ordinance No. 31 of 1909, rule 1 (a).*

In an application for judicial settlement by an executor the District Judge, after dealing with the case of one mortgage bond, ordered the executor to file a detailed list of the other bonds and debts of the estate, showing what steps he took and what amounts he recovered in each case and the reason for non-recovery. The Supreme Court affirmed the order.

*Held* (in an application for leave to appeal to the Privy Council), that the order had the effect of a final judgment and that the executor was entitled to have leave to appeal.

**A**PPPLICATION for conditional leave to appeal to the Privy Council from an order made in the course of an application for judicial settlement by an executor.

*Choksy*, for executor, appellant (with him *Canekeeratne* and *Jaya-wickrama*).—The judgment is final because it finally determines the executor's liability to pay the estate a certain sum. Any proceedings which may take place hereafter in the lower Court cannot reduce his liability to pay that certain sum.

Counsel cited *Kurukul v. Kurukul*<sup>1</sup> and *Ceylon Tea Plantation Co. v. Carry*<sup>2</sup>.

*H. V. Perera*, for respondents.—There is no finality in respect of the matter which the Court had to adjudicate upon, though there is a final ascertainment of liability for an item over Rs. 5,000. Till there is a judicial settlement of the whole account the matter submitted, viz., an account, is not finally settled. A decision in order to be final must cover the whole area of the subject matter in dispute. "Finally" means finally disposing of the whole proceeding, affecting the whole area of litigation between the parties.

An order which determines only part of a case is not a final order (*Baiy Nath Dass v. Sohan Bibi et al.*<sup>3</sup>).

Finality is reached when decree is entered (section 740, Civil Procedure Code).

Counsel cited 138 D. C. Jaffna, 5,870 (*S. C. M., March 19, 1931*). and 128 D. C. Jaffna, 5,408 (*S. C. M., May 29, 1931*).

*Choksy*, in reply.—Section 744, Civil Procedure Code, gives a right of appeal from every order made under Chapter LV.

If judgment is "final" within the meaning of the Privy Council rules, then there is a right of appeal to the Privy Council.

As to the test whether a judgment is final or interlocutory, *vide Bozon v. Attingham Urban District Council*<sup>4</sup>.

<sup>1</sup> 31 N.L.R. 165.<sup>2</sup> 12 N. L. R. 367.<sup>3</sup> 31 All. 545.<sup>4</sup> (1903) 1 K. B. 547.

A judgment in appeal which finally determines the principal matter in dispute, even though further hearing is necessary in the Court below before the action can be finally disposed of, is a final order appealable to the Privy Council (*Saijid Muzhar Hasseim v. Mussamat Bhoda Bibi* <sup>1</sup>)

April 22, 1932. GARVIN S.P.J.—

This application for conditional leave to appeal to the Privy Council was first listed before my brother Maartensz and myself. After hearing argument we decided, in view of the difficulty of the question and its importance to the parties concerned, that the matter should be considered by a larger Bench.

The applicant is one of the executors of the last will of S. M. L. Wappusa Marikar, deceased. He appealed to this Court from an order made by the District Judge in a proceeding for the judicial settlement of certain accounts filed by him upon the orders of the Court. It was not the final account of his administration. Several issues were framed and all these were fully answered by the learned District Judge with the exception of the 5th issue which was as follows:—

“Has the said executor fraudulently and negligently failed to recover mortgage bonds and other debts of the estate?” In the course of his order the learned District Judge considered and dealt with the case of one bond and then proceeded as follows:—

“As regards the other bonds and notes, &c., the executor is ordered to file a detailed list showing what steps he took and what amounts he recovered in each case and reason if any for non-recovery.” In appeal the judgment of the learned District Judge was affirmed subject to a slight variation in regard to his finding on issue 2 and in regard to the order for costs.

It was submitted on behalf of the applicant for leave that the effect of the judgment of this Court in appeal is to place the applicant under a liability to the estate in respect of sums of money considerably in excess of Rs. 5,000 and that he is therefore entitled to appeal to the Privy Council. It is not denied that the order of this Court has finally determined the liability of the executor to the estate in respect of sums of money greatly in excess of Rs. 5,000. There is no question, therefore, that the matter in dispute is in excess of the pecuniary limit set to the right of appeal to the Privy Council. It was urged, however, that the judgment of the Court was not final within the meaning of rule 1 (a) of the rules in schedule 1 of Ordinance No. 31 of 1909 regulating the procedure on appeals to His Majesty in Council.

No decree has been entered judicially settling this account. The order of the District Judge directing the executor to account further in respect of other bonds, notes, &c., rendered it impossible to do so until this material had been furnished to the Court and considered by it. Further, the order of the Supreme Court in appeal bearing on the finding of the District Court on issue 2 itself involves a further hearing. If, therefore, the expression “final judgment” in rule 1 (a) means a judgment which finally and completely determines the action or proceeding, this is not a final judgment.

The term "judgment" is defined in section 2 of the Ordinance as follows:—"Judgment includes a decree, order, sentence, or decision." This of itself is an indication that a judgment of this Court may be final within the meaning of rule 1 (a) even though it does not completely dispose of the suit or proceeding.

Now, there is ample authority for the proposition that a judgment of this Court may be a final judgment within the meaning of rule 1 (a) notwithstanding that before the action or proceeding is completely disposed of some further inquiry may be necessary, such, for instance, as the taking of an account or the computation of the amount payable by one party to the other upon the basis of their respective right or rights as determined by the judgment of this Court.

What then is a final judgment within the meaning of rule 1 (a). The very full and able arguments which have been addressed to us in the course of this case have served to emphasize the great difficulty and perhaps the unwisdom of endeavouring to give to the expression "final judgment" any clear-cut or scientifically accurate definition. One of the factors which contributes very largely to the practical difficulty with which we are frequently confronted is the circumstance that, under our Code of procedure, every order made by a District Court is appealable to this Court, except where the context indicates that a particular order is an exception to that rule. There is provision in our Code which enables the Court in cases where issues both of law and fact arise in the same action to dispose of the issues of law, postponing the settlement of the issues of fact until after the issues of law have been determined. Further, our Code contemplates the joinder in one proceeding of several causes of action, so that in effect the Court is trying in one proceeding not merely one action but a number of actions as between the same parties. As a result, appeals are frequently taken to this Court from orders of the District Court and the decisions given thereon in appeal often affect matters which in value exceed Rs. 5,000. Such decisions though they are binding upon the parties often necessitate the return of the case to the Court below for further proceedings and do not therefore completely dispose of the action or proceeding, though they might, had the decision been in favour of the other party, have had that effect. Cases frequently arise in which the decision of the Court on the question whether or not a certain form of words in a will or deed creates a *fidei commissum* may in one view finally dispose of the action; in the opposite view it may involve a further trial as to the prescriptive or other rights of the parties before the action can be finally determined. Notwithstanding that the decision of the Court of appeal on the question of the existence or non-existence of a *fidei commissum* may be of vital importance to the parties not only in respect of the property which is the subject of the action but in respect of other allotments of land as well, it has sometimes been found impossible to treat the decision as a final judgment of this Court within the meaning of rule (1) (a).

In many of the cases falling within the classes above noticed the decision in appeal may and often does conclusively determine the rights and liabilities of parties in respect of a matter over Rs. 5,000 in value, and from that decision there is no appeal at any time to the Privy Council

since the order of this Court is not a "final judgment" and there is no procedure which enables the matter to be carried to the Privy Council even when the whole proceeding has been brought to a conclusion after further trial or inquiry. This Court has no original civil jurisdiction so that in a large proportion of its judgments in appeal its order, while it determines the appeal, does not determine the action or proceeding.

An order of this Court in appeal which completely disposes of the action or proceeding would, of course, clearly be a "final judgment" and would be appealable to the Privy Council if the matter is of the value of Rs. 5,000 or over. Similarly an order, which finally determines the rights of the parties though it does not completely dispose of the action in that it necessitates further proceedings upon the basis of the rights as determined by the judgment in appeal, may be a final judgment. It has even been held that a judgment in appeal which finally determines the principal matter in dispute between the parties even though it involves further hearing in the Court below before the action can be completely disposed of is a final order and appealable to the Privy Council (*vide Saiyid Muzhar Hasseim v. Mussamat Bodha Bibi*<sup>1</sup>).

Thus orders, other than those which completely dispose of the action or proceeding in which it is made, may be final judgments within the meaning of rule 1 (a). It must depend upon the circumstances of each case whether the judgment in appeal can be said to have carried the action to a stage at which it can fairly be said that a measure of finality has been reached in regard to the matter or matters at issue which justify it being treated as a final judgment within the meaning of the rules regulating appeals to the Privy Council. Differences of opinion will sometimes arise as to whether a particular judgment is a final judgment. This is inevitable in the present state of our law but there remains the remedy of an application direct to the Privy Council for leave to appeal in any case in which the matter is thought to be of sufficient importance to justify such a step.

The order under consideration was not made in a regular action but in the course of a special procedure for the judicial settlement of the accounts of executors and administrators prescribed in Chapter LV. of the Civil Procedure Code. It would be most inconvenient and would unduly protract the settlement of such accounts if every time a Court gives a decision upon or in regard to any entry in such an account there should be an appeal to this Court and from this Court to the Privy Council if it should happen that the item so allowed or disallowed amounts to Rs. 5,000 or more. The Code does not contemplate such interim orders or the piecemeal determination of the several items of the account submitted for judicial settlement. Section 744 permits an appeal from every order or decree made under the provisions of this chapter to this Court. The orders contemplated are those which the Court is permitted by the provisions of the chapter to make, for example, under sections 726, 727, 735, &c. The decree is this decree judicially settling the account. If at the termination of the inquiry when the Judge proceeds to consider its decision he thinks that a matter needs further elucidation or that further information is necessary in regard to any

<sup>1</sup> 17 All. 112.

matter or thing before the account can be settled he should set the matter down for the purpose and then make his order dealing once and for all with the whole of the account.

Although in the case before us no decree for judicial settlement was entered it is evident that the District Judge intended that his order should completely dispose of this account subject to the reservation of certain matters for consideration when the final account was filed. The parties themselves appear to have taken the same view for no objection was taken to the appeal to this Court. It is also evident that all the most important of the matters at issue have been dealt with, that the orders already made have definitely placed upon the executor a liability to the estate in respect of sums considerably in excess of Rs. 5,000, that that liability will not be affected by the further proceedings necessitated by the orders of this Court and of the Court below, and that the suspension of such further proceedings which relate only to a few subsidiary matters will not delay the final settlement of the accounts of this estate appreciably longer than if a decree for judicial settlement had been entered.

In these circumstances the order of the Court below which has been treated as a decree for judicial settlement subject to the reservation of certain matters to be dealt with at the settlement of the final account should I think continue to be treated as such and the order in appeal notwithstanding that it made a slight variation of the order of the Court below may fairly be regarded as a final judgment and as such appealable to the Privy Council. The application is allowed.

DRIEBERG J.—I agree.

AKBAR J.—I agree.

*Leave granted.*

