

OMAYACHI
v.
RAMA-
CHANDRA-
AIYAR.

can come in to prove against the insolvent's estate. We must therefore set aside the order of the Official Receiver and allow this appeal with costs.

The Official Receiver will pay the dividend to the appellant and also interest at 6 per cent for the period it has been withheld.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

1926,
March 18.

PARAMASWAMI AYYANGAR AND ANOTHER, PETITIONERS,

v.

ALAMELU NACHIYAR, RESPONDENT.*

Civil Procedure Code (Act V of 1908), ss. 109 and 110 and O. XLV, rr. 2, 3 and 8—Probate and Administration Act (V of 1881), s. 86—Application to the District Court for letters of administration with will annexed—Grant of—Appeal to the High Court—Order of High Court—Appeal to His Majesty in Council against order of High Court, whether competent—Letters Patent, clauses 39 and 44.

An appeal can be preferred to His Majesty in Council, under clause 39 of the Letters Patent, against an order of the High Court passed on an appeal under section 86 of the Probate and Administration Act, 1881, against an order of the District Court in proceedings under the said Act, if the case satisfies the provisions of sections 109 and 110 of the Civil Procedure Code.

Ramachandra Rao v. Ramachandra Rao, (1922) I.L.R., 45 Mad., 320 (P.C.), and *Secretary of State for India v. Chellikani Rama Rao*, (1916) I.L.R., 39 Mad., 617 (P.C.), relied on; *Rangoon Botatoung Co., Ltd. v. The Collector of Rangoon*, (1913) I.L.R., 40 Calc., 21 (P.C.), distinguished.

PETITION under sections 109, 119 and Order XLV, rules 2, 3 and 8 of the Civil Procedure Code, praying that the High Court may be pleased to grant a

* Civil Miscellaneous Petition No. 379 of 1926.

certificate enabling the petitioners to appeal to His Majesty in Council against the decision of the High Court in A.A.O. No. 437 of 1923 and A.A.O. No. 15 of 1924 preferred to the High Court against the decree of H. R. BARDSWELL, District Judge of Madura, in O.S. No. 14 of 1919.

PARAMA-
SWAMI
AYANGAR
v.
ALAMELU
NACHIHAR.

The material facts appear from the judgment.

S. Varadachari, N. S. Rangaswami Ayyangar and
P. V. Martandam Pillai for petitioners.

M. Patanjali Sastri for respondent.

JUDGMENT.

This is an application for the grant of leave to appeal to His Majesty in Council against the decree of the High Court in C.M.A. Nos. 437 of 1923 and 15 of 1924. A preliminary objection is taken by Mr. Patanjali Sastri for the respondent that no appeal lies to the Privy Council against the decree of the High Court in testamentary matters and it is incompetent for the High Court to grant leave to appeal to His Majesty in Council. The argument of Mr. Patanjali Sastri is that under the Probate and Administration Act, section 86, only one appeal is provided from an order of District Judge or District Delegate to the High Court and no further appeal is allowed by the Act, and that an appeal being a creature of statute there is no statute granting the right of appeal to the Privy Council in testamentary matters. Section 86 no doubt provides for an appeal to the High Court against an order made by a District Judge or a District Delegate. The question is, is the decree of the High Court in a testamentary matter appealable to His Majesty in Council, if the case is one which, if it were an ordinary civil case, would be appealable under section 109 of the Code of Civil Procedure. Reliance is placed

PARAMA-
SWAMI
AYYANGAR
v.
A. GAMBELU
NACHTYAE.

upon the well-known case in *Rangoon Botatoung Co., Ltd. v. The Collector of Rangoon*(1) for the contention that no appeal lies to the Privy Council. In that case it was held that no appeal lay to the Privy Council in land acquisition cases. Their Lordships observed :

“A special and limited appeal is given by the Land Acquisition Act from the award of ‘the Court’ to the High Court. No further right of appeal is given. Nor can any such right be implied.”

In that case the award was considered to be an award by an arbitrator and the Land Acquisition Act having provided for only one appeal it was held that no second appeal lay to the Privy Council. Their Lordships treated the decision of the Court on reference by the Collector to be an award by arbitrators. The question is whether to a civil case wherein the rights of parties are determined the Civil Procedure Code does not apply. The case in *Rangoon Botatoung Co., Ltd. v. The Collector of Rangoon*(1) has been explained by their Lordships of the Privy Council in *Ramachandra Rao v. Ramachandra Rao*(2). Lord BUCKMASTER in delivering the judgment of their Lordships observed at page 329 :

“The argument which succeeded in that case emphasizes the distinction between an award and a decree, and the judgment mentions this in terms by stating that the appellants, although admitted to the High Court, could not have the right to carry an award made under an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its original jurisdiction When once the award as to the amount has become final, all questions as to fixing of compensation are then at an end; the duty of the Collector in case of dispute as to relative rights of the persons together entitled to the money is to place the money under the control of the Court, and the parties then can proceed to litigate in the ordinary way to determine what their right and title to the property may be.”

PARANA-
SWAMI
AYYANGAR
v.
ALAMELU
NACHIYAR.

than to the Courts specifically set up by the statute for the determination of that value."

With reference to the case before them they observed :

"The merits of the present dispute are essentially different in character. The claim was the assertion of a legal right to possession of and property in land; and if the ordinary Courts of the country are seized of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation."

The order passed by this Court is a decree in a contested civil matter and under clause 39 of the Letters Patent an appeal lies to the Privy Council from any judgment, decree or order of the High Court made on appeal. Clause 44 empowers the Indian Legislature to alter or modify the Letters Patent. By the Civil Procedure Code an appeal to the Privy Council against an order or decree of the High Court is provided if it fulfils certain conditions. Sections 109 and 110 of the Civil Procedure Code lay down in what cases an appeal shall lie to the Privy Council. If a decree or a final order of the High Court satisfies the provisions of sections 109 and 110, it is difficult to see how an appeal is not competent to His Majesty in Council. The only authority in point is a decision of the Lower Burma Chief Court reported in *Po Kin v. Ma Sein Tin*(1). There, the learned Judges, following *Rangoon Botatoung Co., Ltd. v. The Collector of Rangoon*(2), held that no appeal lay against an order made under the Probate and Administration Act. Such an objection does not seem to have been taken in any other case, though in several cases against orders under the Probate and Administration Act appeals were presented to the Privy Council. It is urged by Mr. Patanjali Sastri that, though this objection is a novel one, yet it is one which, though not taken in other cases, he is entitled to take here.

(1) (1919) 51 I.C., 596.

(2) (1913) I.L.R., 40 Cal., 21 (F.C.).

If the contention of the respondent is to prevail, no appeal to the Privy Council could lie against the orders of the High Court in insolvency matters or orders under the Guardians and Wards Act. In the Provincial Insolvency Act an appeal is provided to the High Court but not an appeal to the Privy Council. It cannot be said that no appeal lies to His Majesty in Council against the order of the High Court made in insolvency proceedings provided sections 109 and 110 are satisfied. This point was specifically raised and decided in *Chatrapat Singh Dugar v. Kharag Singh Lachmiram*(1). In that case JENKINS, C.J., observed :

PARAMA-
SWAMI
ATTYANGAR
2.
ALAMELU
NACHIYAR.

“ It is urged that sections 46 and 47 of that Act (meaning the Provincial Insolvency Act), if anything, negative this right of appeal. But I do not so read the Insolvency Act. In my opinion, by that Act there was no intention to interfere with any right of appeal to the Privy Council that might otherwise exist, and this is a case which comes clearly within the provisions of the Letters Patent and of section 109 of the Code. The only question is whether this is a case which can properly be certified to be a fit one for appeal to His Majesty in Council.”

We have, therefore, no hesitation in holding that the objection of the respondent as to the competency of an appeal to the Privy Council is wholly untenable.

On the merits, we hold the case satisfies the provisions of sections 109 and 110. We therefore certify that this is a fit case for appeal to His Majesty in Council under section 109 (a), and we grant the leave prayed for.

K.R.