

Council in *Ahmed Musaji Saleji v. Hashim Ebrahim Saleji* (1).

The result is Appeal No. 340 and its memorandum of objections are dismissed with costs. Appeal No. 204 is modified as indicated above. The memorandum of objections is dismissed with costs. In Appeal No. 204 the parties will give and take proportionate costs. In the lower Court also, the parties will give and take proportionate costs.

JACKSON, J.—I agree.

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—
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K.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Odgers.

SHUNMUGA SUNDARA MUDALIAR AND 2 OTHERS,
PETITIONERS *

1928,
December 11

v.

RATNAVELU MUDALIAR AND 4 OTHERS,
RESPONDENTS.

Civil Procedure Code (V of 1908), ss. 109 and 110—Appeal and Memorandum of Objections before High Court—Common ground of disposal of both—Valuation of appeal to Privy Council.

In a suit for a general account against a trustee which charged him also with specific items of malversation, the Court of first instance trying the items on the merits, decreed only some of them. On an appeal and a memorandum of objections, the High Court dismissed the whole suit on a new ground common to both, viz., the non-liability of the defendant to account, on account of his prior accounting and handing over of account books.

(1) (1915) I.L.R., 42 Cal., 914.

* Civil Miscellaneous Petition No. 2776 of 1928.

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In a petition for leave to appeal to the Privy Council on the subject-matter of both the appeal and the memorandum of objections, whose aggregate value was above Rs. 10,000, but the separate values less than 10,000.

Held, granting the petition, that as the subject-matter of both, as newly determined by the High Court was the same (viz., liability or otherwise to account), the decree of the High Court cannot be construed as two decrees, one in respect of each, but was a single decree on a single subject-matter, which did not "affirm" the decree of the first court within the meaning of section 110 of the Civil Procedure Code.

Held, further that in a suit for a general account, each of the items of malversation was not a distinct subject-matter.

Ramanathan Chetty v. Subramanian Chetty, (1926) 51 M.L.J., 295, distinguished.

Petition under sections 109 and 110, Civil Procedure Code (V of 1908), praying for the grant of a certificate to enable the petitioners to appeal to the Privy Council against the decree of the High Court in Appeal Suit No. 218 of 1925 preferred against the decree of the Court of the Subordinate Judge of Chingleput in Original Suit No. 5 of 1922.

The facts are given in the judgment.

N. S. Srinivasa Ayyar for petitioner.—In this case the suit was for a general account; the High Court did not affirm the decree of the trial Court, and the value of the suit and of the appeal to the Privy Council is above Rupees ten thousand, each. The appeal and the memorandum of objections must be taken together; for the latter is in law dependent on the former; *Alagappu Chettiar v. Chockalingam Chettiar*(1), *Murugappa Chettiar v. Ponnusami Pillai*(2). Moreover the ground of High Court's decision in this case both on the appeal and on the memorandum was the same, viz., liability to account. Hence the value of both alone should be taken for the purpose of appeal to the Privy Council even if one of them is confirmed. In the light of the above decisions *Ramanathan Chetty v. Subramanian Chetty*(3) should be reconsidered. Anyhow it is distinguishable from the present case. I rely on C.M.P. No. 126

(1) (1918) I.L.R., 41 Mad., 904 (F.B.). (2) (1921) I.L.R., 44 Mad., 828.
(3) (1926) 51 M.L.J., 295.

of 1926; See also *Ghulam Abbas v. Govind Rao* (1) and *Annapurna Bai v. Rup Row*(2).

T. M. Krishnaswami Ayyar (with *M. S. Venkatarama Ayyar*) for respondents.

An appeal and a memorandum of objections are two distinct matters and the value of both cannot be joined for valuing the appeal to the Privy Council; see Order XLI, rule 22, Civil Procedure Code. At any rate, in respect of the subject-matter of the memorandum of objections, the decree must be taken to be an affirming decree. When that is left out, the value of the appeal to the High Court alone is less than Rs. 10,000; see C.M.P. No. 785 of 1928 which has decided this point in my favour after noticing *Annapurna Bai v. Rup Row* (2). This last case decides that particular heads of claim, such as the eight items of malversation in this case, must be considered as separate claims; see *Ramanathan Chetty v. Subramanian Chetty*(3), *Vikrama Deo Garu v. Maharaja of Jeypore*(4), *Narendra Lal Das Choudhury v. Gopendra Lal Das Choudhury*(5).

N. S. Srinivasa Ayyar in reply. The plaintiff's claim was only for a general account and he only instanced eight cases of malversation; this cannot change the nature of the suit.

JUDGMENT.

PHILLIPS, J.—The petitioners brought a suit against PHILLIPS, J. the respondents asking for an account in respect of their trusteeship of the plaint temple. Although they asked for a general account in the plaint, eight specific charges of malversation were alleged and these charges formed the subject-matter of the trial in the first Court. Without taking a general account, the Subordinate Judge examined the evidence relating to the eight charges and held that two charges were proved and that the other six failed. The judgment is not altogether satisfactory, for it is quite possible that, if a general account had been taken, some sums of money might have

(1) (1925) 91 I.C., 200 (Nag.)

(2) (1924) I.L.R., 51 Calc., 969 (P.C.).

(3) (1925) 51 M.L.J., 295.

(4) (1916) 1 M.W.N., 122.

(5) (1927) 81 C.W.N., 572; 45 C.L.J., 426.

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been found to be due to the respondents which could have been set off against the two claims allowed. The respondents filed an appeal in respect of these two claims and the appeal was allowed in this Court. The petitioners filed a memorandum of cross-objections relating to the other six items, and that was dismissed in toto. The ground for dismissing the claim of the petitioners in toto, both in appeal and in the memorandum of objections, was that the petitioners had no right to claim a general account, as accounts had already been furnished and the petitioners themselves had suppressed the accounts and thereby prevented any further account being taken. The petitioners now wish to appeal to the Privy Council in respect of the whole of the subject-matter of the original suit.

It is contended for the respondents that the decree of this Court which was drawn up in respect both of the appeal and of the memorandum of objections is in effect an affirming decree and that no substantial question of law arises. So far as the appeal is concerned, the decree of this Court can in no circumstances be deemed to be an affirming decree for it disallowed a sum of Rs. 7,000 which had been allowed by the trial Judge. The contention for the respondents is that the appeal and the memorandum of objections must be treated as separate appeals, and that, so far as the decree in respect of the memorandum of objections is concerned, no appeal would lie to the Privy Council as the judgment of the lower Court was affirmed, and that, so far as the decree in the appeal itself is concerned, the value of the subject-matter is less than Rs. 10,000 and therefore no appeal would lie. The petitioners contend that the memorandum of objections must be deemed to be so intimately connected with the appeal itself as to constitute one appeal and that therefore the total value of

the subject-matter is over Rs. 10,000 and the decree of this Court is a reversing decree. I am not prepared to hold that in all cases the memorandum of objections must be deemed to be dependent upon the appeal itself. The alteration in law effected by Order XLI, Rule 22 (4), clearly indicates that the memorandum of objections may, in certain cases, be treated as a separate cross-appeal. The decision in *Alagappa Chettiar v. Chockalingam Chettiar*(1), does not affect the point, for, that only dealt with the question of limitation. The further decision in *Murugappa Chettiar v. Ponnusami Pillai*(2), which purported to follow *Alagappa Chettiar v. Chockalingam Chettiar*(1), does not apply here; but, with all respect, it seems to me difficult to hold that the abatement of an appeal on the death of the appellant and its subsequent dismissal does not amount to a dismissal for default of prosecution within the meaning of Rule 22, clause 4. What has to be considered in a question of this sort is whether the appeal and the memorandum of objections must be treated as forming two independent proceedings relating to distinct sets of facts, and it is now contended for the respondents that each of the eight charges of malversation formed a separate subject-matter and that inasmuch as this Court affirmed the decree of the lower Court in respect of six charges, it must be deemed to be an affirming decree and that therefore in respect of these six charges no appeal would lie to the Privy Council. It is, however, difficult to say that all these eight charges are separate and distinct subject-matters, for they were all based on the alleged breach of trust by the respondents, and, in fact, the six charges were dismissed by the trial Court not on the ground taken by this Court, namely, that the petitioners

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had no right to demand an account, but on the merits of the evidence which was held not to prove the charges. In these circumstances, *Ramanathan Chetty v. Subramanian Chetty*(1), decided by this Bench can be distinguished, for, there the memorandum of cross-objections related to a matter entirely distinct from the subject-matter of the appeal, nor do I think that *Raja Sree Nath Roy Bahadur v. The Secretary of State for India in Council*(2), and *Narendra Lal Das Choudhury v. Gopendra Lal Das Choudhury*(3), apply. It is unnecessary to refer to the other cases cited, for, the question that has to be decided is, whether the decree of this Court in the appeal and memorandum of objections really consists of two separate decrees in respect of separate subject-matters or whether it is really one decree dealing with one subject-matter only. In the former case, it may well be that in respect either of the appeal or of the memorandum of objections, no appeal would lie to the Privy Council, whereas, in the latter case, if the subject-matter of the suit in the first Court and the value of the appeal to the Privy Council is over Rs. 10,000 an appeal would lie to the Privy Council. Here, so far as the value of the subject-matter of the suit and the appeal is concerned, the provisions of section 110, Civil Procedure Code, are complied with and it is not possible to split the decree into two parts and hold that one part is an affirming decree and that the other part is a reversing decree, and that because the latter is below Rs. 10,000 in value, no appeal would lie. In these circumstances, I would hold that the petitioners have a right to appeal.

It is perhaps unfortunate that in this particular case, this litigation which is undoubtedly prejudicial to the

(1) (1926) 51 M.L.J., 295.

(2) (1901) 8 C.W.N., 294.

(3) (1927) 31 C.W.N., 572; 45 C.L.J., 425.

interests of the suit temple should have been instigated by a factious feeling prevailing between two parties. This, however, cannot affect the right of appeal of the parties. The petitioners have been prejudiced by the judgment of this Court and therefore they must be allowed to appeal to the Privy Council.

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I certify that the provisions of sections 109 and 110 of the Civil Procedure Code have been complied with in this case and grant leave to the petitioners to appeal.

ODGERS, J.—This is an application for leave to appeal to the Privy Council from a judgment of PHILLIPS, J., and myself. The suit was brought by certain persons interested in the temple of Sri Karuneswaraswami, Saidapet, against the defendants, for a general account of their management of the shrine and for a decree that defendants 1 to 4 be directed to pay Rs. 14,458 or such other sum as may be found due on such account being taken. The learned Judge decided the case on the eight points of particulars of claim lodged with the plaint and decided as to points A and B that the first defendant was liable to account but that as to the other items he was not liable. It was held by us that the first defendant could not be held liable to a general account and accordingly he was not even liable on the two items found by the Subordinate Judge. Now, the first question is, is this a decree of affirmance? The Subordinate Judge, as stated, did not find on the broad question of liability to general account at all which was the main ground for our decision here.

As regards the particulars there is no doubt that it was not a decree of affirmance and I think therefore that it cannot be said that our decree was in affirmance of the decree of the lower Court.

Then the question is whether the appeal is worth Rs. 10,000. The total amount claimed is about

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Rs. 14,500. I think there is no doubt that this is the amount in question on appeal to the Privy Council. The question is complicated by a memorandum of objections in which the respondents took objection to the finding of the Subordinate Judge with regard to the six other particulars of claim.

It is contended that all the eight items of particulars are independent and that therefore the value of the subject-matter must be under Rs. 10,000. I do not think that these items can be considered as being separate. They are really particulars of the claim for a general account, i.e., they are incidents of the alleged misuse of trust moneys, so that they really all depend on a finding as to whether the first defendant was liable to a general account or not. I therefore agree with my learned brother that they are not independent items.

The question is further as to whether the Court's order below as to the six items can be separated from the appeal as to the two allowed by the Subordinate Judge. Of course, if the memorandum of objections relates to an entirely different matter as in *Ramanathan Chetty v. Subramanian Chetty*(1), it may be that the memorandum of objections must be considered as a separate cross-appeal quite distinct from the main appeal. In any case, the petitioner is to have the benefit of any doubt that may arise, *Vikrama Deo Garu v. Maharaja of Jeypore*(2), though there is no doubt that, if an appeal is dismissed as being out of time, the memorandum of objections cannot be heard as it is dependent to that extent on the appeal. *Alagappa Chettiar v. Chockalingam Chettiar*(3). But as I have held that all these items are not independent items but really hang together

(1) (1926) 51 M.L.J., 295.

(2) (1916) 1 M.W.N., 122.

(3) (1918) I.L.R., 41 Mad., 904 (F.B.).

and are collectively dependent on and form particulars of the claim for a general account, I think this objection must be overruled. I therefore agree that this is a fit case for appeal to the Privy Council and that the certificate may issue.

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N.B.

APPELLATE CRIMINAL.

*Before Mr. Justice Waller and Mr. Justice
Krishnan Pandalai.*

PANCHANATHAM PILLAI, PRISONER.*

1929,
January 16.

General Clauses Act (X of 1897)—“Magistrate”—Definition of—If confined to Magistrates exercising jurisdiction under Criminal Procedure Code—Intention of legislature—Confession to a Juge d’instruction—If admissible under sec. 26 of Indian Evidence Act.

Under section 26 of the Indian Evidence Act, British Indian Courts are not precluded from taking into consideration confessions made by prisoners in police custody to Magistrates in England or in a foreign country, the definition of “Magistrate” in the General Clauses Act not being confined to Magistrates exercising jurisdiction under the Code of Criminal Procedure.

A confession made by a prisoner in police custody to a *Juge d’instruction* in French India, if otherwise proper, is admissible in evidence. *Queen-Empress v. Nagla Kala*, (1896) I.L.R., 22 Bom., 235, referred to.

TRIAL referred by the Court of Session of the East Tanjore Division at Negapatam for confirmation of the sentence of death passed upon the said prisoner in case No. 19 of the Calendar for 1928.

* Referred Trial No. 124 of 1928.