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is still sufficient proof of the factum of adoption remaining."

And Dunkley J. added :

"It has been strenuously argued before us that there is no reason why adopted children should live in the house of their adoptive parents, but, of course, in the case of adoption of young children that would be the natural consequence of adoption. But in any case the acid test of an adoption is that the children should leave the family of their natural parents and join the family of their adoptive parents, and, consequently, it seems to me that in a case of a *keittima* adoption it is essential that the adoptive parents should, from the date of the adoption, make themselves responsible for the up-bringing of the children."

APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Sharpe.

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Dec. 23.

MAUNG SIN *v.* MAUNG BYAUNG AND OTHERS.*

Final order—Order remanding case for trial—Respondent's claim to property against applicant re-opened—Appeal to His Majesty in Council—Civil Procedure Code, s. 109 (a).

The 4th respondent sued the petitioner (brother of her deceased husband) for possession of the share of her husband or of him and her in certain properties and for mesne profits. The 1st, 2nd and 3rd respondents who were her children by the deceased husband were also defendants in the suit. The petitioner pleaded, *inter alia*, a certain arbitration award as a bar to her claim except to the extent of the benefits allowed to her by the award. The children were minors at the time of making the award, and in another suit filed by the 1st respondent it was set aside as against the 1st and 3rd respondents.

The trial Court in the first suit would not allow the children to prosecute their claims in respect of the properties except to the extent the mother was allowed, on the ground that they were not joined as plaintiffs in the suit, and the suit was not an administration suit. On appeal the Court said that the award was void *ab initio* against the first three respondents and that they had

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* Civil Misc. Application No. 61 of 1937 arising out of Civil First Appeal No. 25 of 1931 of this Court.

a right to have their claims investigated in the suit and remanded the case for such purpose. The petitioner applied for leave to appeal to His Majesty in Council.

Held, that the order of remand was a " final order " within s. 109 (*a*) of the Civil Procedure Code. The order finally disposed of the right of the respondents to prosecute their claim in the suit, and finally determined the question of the applicant's liability to them.

Abdul Rahman v. *D. K. Cassim & Sons*, I.L.R. 11 Ran. 58 (P.C.); *Rahimbhoy* v. *Turner*, 18 I.A. 6; *Ramchand* v. *Goverdhandas*, 47 I.A. 124; *Syed Mazhar Husein* v. *Bodha Bibi*, 22 I.A. 1; *U Nyo* v. *Ma Pwa Thin*, I.L.R. 10 Ran. 335, referred to.

Hay for the applicant.

Doctor for the respondents.

MYA BU, J.—This is an application for a certificate granting leave to appeal to His Majesty in Council against an order of remand made in Civil First Appeal No. 25 of 1931 of this Court. The order of remand was made under Order XLI, Rule 23, of the Civil Procedure Code.

The application is opposed on the ground that the order is not a final order within the meaning of section 109 (*a*) of the Civil Procedure Code.

The fact that the order in question is of the nature appealable under Order XLIII, Rule 1 (*u*), of the Civil Procedure Code, does not necessarily show that it is a final order within the meaning of section 109. In *Abdul Rahman* v. *D. K. Cassim & Sons* (1), their Lordships of the Privy Council, adopting the test formulated by Lord Cave in *Ramchand Manjimal* v. *Goverdhandas Vishindas Ratanchand* (2), namely, that an order is final if it finally disposes of the rights of the parties, held that an order passed by the Appellate Side of this Court under Order XLI, Rule 23, setting aside the dismissal of the suit by the Original Side and remanding it to the Original Side

(1) (1932) I.L.R. 11 Ran. 58. (2) (1920) 47 I.A. 124.

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for trial on the merits, was not a final order within section 109 (*a*) of the Code of Civil Procedure. Neither in *Abdul Rahman*'s case, nor in *Ramchand Manjimal*'s case, did the order under appeal to the Judicial Committee finally dispose of the rights of the parties, but left them to be determined by the Courts of original jurisdiction in the ordinary way. In fact, in neither case did the order dispose of any question affecting the substantive rights or liabilities of the parties in any way.

In *Rahimbhoy Hibibhoy* v. *Turner* (1), however, the Judicial Committee granted special leave to appeal from the decree directing the defendant to account, holding that such decree was final within the meaning of section 595 of the Code of Civil Procedure. In that case it was contended on behalf of the respondent that the decree would not be final till after the accounts directed had been taken. The suit was one in which the plaintiff alleged that the defendant was accountable to him upon several claims. The defendant put up certain legal defences and denied his accountability. The Court held that the legal defences put forward were valid as to some of the claims and as to others of the claims they were invalid, and, therefore, that the defendant must account, and consequently the decree directing accounts to be taken, which the defendant had been contending, ought not to be taken at all was passed. This case was described by Lord Hobhouse in *Syed Muzhar Husein* v *Bodha Bibi* (2), in the following words :

"the Defendant denied his liability to account to the Plaintiff. The High Court affirmed his liability and directed an account . . . . . But their Lordships held that the order establishing liability was one which could never be questioned again in the suit, and that it was the cardinal point of the suit."

(1) (1890) 18 I.A. 6. (2) (1894) 22 I.A. 1.

Upon a review of these authorities I am of the opinion that, as pointed out in *U Nyo* v. *Ma Pwa Thin and others* (1), whether an order is a final order or not within section 109 (*a*) of the Civil Procedure Code depends upon the effect of the order as made; if it finally disposes of the rights of the parties, the order is final; and where the appellate Court has finally determined that the plaintiff has a good and subsisting cause of action, and all that remains is to work out subsidiary questions consequent upon the final determination of the defendant's liability, the order is in substance and effect a final order though the *quantum* of the rights or liability remains to be ascertained.

Applying these principles to the present case, in my opinion, the applicant should be granted the leave that he prays for.

The suit was instituted by the sole plaintiff, Ma Shwe Yu, the fourth respondent. The petitioner and his deceased sister, together with the first, second and third respondents, children of Ma Shwe Yu by Ko Po Cho, deceased brother of the petitioner, were defendants. Ma Shwe Yu sued for possession of the share of her deceased husband, or of him and her, in certain properties, and for mesne profits and accounts, etc. The petitioner and his deceased sister, Ma Nga Ma, pleaded *inter alia* that a certain arbitration award barred Ma Shwe Yu's claim except to the extent of the benefits which Ma Shwe Yu could have derived thereunder. At the time of the making of the award, the first, second and third respondents were minors, and certain persons acted as their guardians in the arbitration proceedings. After the petitioner and his deceased sister had filed their written-statements the first respondent filed a suit for a declaration that the award was not binding on him, and for an order setting aside the award. Later on, all

(1) (1932) I.L.R. 10 Ran. 335.

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the other respondents, who were originally cited among the defendants, were transposed as plaintiffs. The result of that suit was a decree setting aside the award in favour of Maung Byaung and Maung Aung, the first and third respondents. The suit, at the instance of the second and fourth respondents, was held to have been barred by limitation. The first, second and third respondents have, however, remained throughout the proceedings in the present suit as defendants. They arrayed themselves along with their mother only in the appeal, in which the order sought to be appealed against was passed. The trial Court did not allow them to prosecute their claims in respect of the properties in the suit except to the extent that their mother, the fourth respondent, was allowed to do so, for the reasons that the award was not set aside so far as the second and fourth respondents were concerned, and that the first three respondents were not plaintiffs in the suit putting forward their claims, and that the suit, not being an administration suit, was one in which they had no right of making any claim to any share in the properties independently of the fourth respondent. By the order passed in appeal it was decided that none of the first three respondents was bound by the award, that the award was void *ab initio* as against all three of them, and that in the nature of the proceedings in the suit they had a right to have their claims investigated in the suit. In the result, the final decree passed by the trial Court was set aside and the case was remanded to the trial Court for the purpose of enabling the first, second and third respondents to prosecute their claims and of having a proper final decree drawn up after necessary enquiries have been made.

In my opinion, the order of the appellate Court finally disposes of the rights of the first, second and third respondents to prosecute their claims in the suit, and

finally determines the question of the applicant's liability to them. The decisions upon these points can never be disputed again except by way of the proposed appeal.

For these reasons, I hold that the order is a final order within the meaning of section 109 (*a*) of the Civil Procedure Code.

Inasmuch as the conditions requisite under section 110 are indisputably present in this case, the certificate prayed for will issue. The first three respondents must pay the applicant's cost of this application advocate's fee three gold mohurs.

SHARPE, J.—Seeing that this case has been going on for over a quarter of century and has, I am told, been before His Majesty in Council three times already, it is a matter of regret to me to have to hold that the order made in Civil First Appeal No. 25 of 1931 of this Cour acting in its appellate jurisdiction, was a "final order" within the meaning of clause (*a*) of section 109 of the Code of Civil Procedure. But for the reasons appearing in the judgment which my learned Brother has just delivered, I agree that this is a case in which there is a right of appeal to His Majesty in Council, and we must grant the appropriate certificate.

This apparently unending litigation must, if the parties are so minded, continue its deplorable course. We were told at the Bar that certain offers of settlement had recently been put forward ; I hope most earnestly that there is yet time for the parties to see the wisdom of agreeing amongst themselves even at this late stage.

I agree with the order proposed by my learned Brother in regard to the costs of this application.