

1958                      *Present* : Gunasekara, J., and Sansoni, J.

THE VENERABLE BADDEGAMA PIYARATANA NAYAKA  
THERO, Petitioner, *and* THE VENERABLE VAGISVARACHARIYA  
MORONTUDUWE SRI NANESWARA DHAMMANANDA THERO  
*et al.*, Respondents

*S. C. 93—Application under Rule 7 of the Rules in the Schedule to the  
Appeals (Privy Council) Ordinance in respect of 26 D. C. Colombo,  
2882/L*

*Privy Council—Execution pending appeal thereto—Decree “to pay money or perform  
a duty”—Does it include an order of ejectment from immovable property?—  
Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rules 7, 8, 9.*

In an action where the subject matter consisted of certain immovable property, the judgment declared the plaintiff to be entitled to the possession of that property as the trustee of a charitable trust and ordered the defendant to be ejected therefrom.

*Held*, that it was open to the Court, when granting to the defendant leave to appeal to the Privy Council, to direct in terms of Rule 7 of the Schedule to the Appeals (Privy Council) Ordinance that the judgment should be carried into execution. In such a case, it could not be contended that the judgment was not one that required the appellant "to pay money or perform a duty". Rules 7 and 8 of the Schedule should be read in conjunction with Rule 9.

*Held further*, that the Court had power to make an order in terms of Rule 7 even after it had already granted leave to appeal.

**A**PPPLICATION under Rule 7 of the Schedule to the Appeals (Privy Council) Ordinance.

*E. B. Wikramanayake, Q.C.*, with *H. A. Koattegoda*, for the plaintiff-petitioner.

*H. W. Jayewardene, Q.C.*, with *P. Ranasinghe*, for the 1st defendant-respondent.

*H. A. Koattegoda*, for the 3rd, 5th, 7th, 8th-10th, 12th, 13th, 17th 18th and 20th-22nd defendants-respondent.

*Cur. adv. vult.*

May 30, 1958. GUNASEKARA, J.—

At the close of the hearing of this application we refused it with costs and said that we would give our reasons later.

The 1st respondent had been granted final leave to appeal from a judgment of this court, dismissing an appeal by him from a judgment of the District Court of Colombo in an action brought against him by the petitioner, and the petitioner by his application sought an order under rule 7 of the Rules in the Schedule to the Appeals (Privy Council) Ordinance (Cap. 85) directing that the judgment should be carried into execution.

Rule 7 is in these terms :

"Where the judgment appealed from requires the appellant to pay money or perform a duty, the Court shall have power, when granting leave to appeal, to direct that the said judgment shall be carried into execution if the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such order as His Majesty in Council shall think fit to make thereon."

Rule 8 contains a proviso "that if the appellant shall establish to the satisfaction of the Court that real and substantial justice requires that, pending such appeal, execution should be stayed, the Court may order the

execution of such judgment to be stayed if the appellant shall give sufficient security for the due performance of such order as His Majesty in Council shall think fit to make thereon." Mr. Jayawardene, who appeared for the 1st respondent, took a preliminary objection to the application on two grounds: first, that the judgment is not one that requires the appellant to pay money or perform a duty and, secondly, that the court has no power to make an order in terms of rule 7 after it has granted leave to appeal.

The case is one in which the subject of litigation consists of certain immovable property, and the judgment declares the petitioner to be entitled to the possession of that property as the trustee of a charitable trust and orders the 1st respondent to be ejected therefrom. A consideration of the provisions of rule 9 makes it clear that rules 7 and 8 apply to such a judgment: for rule 9 provides for the amount of the security that must be demanded from a party for the performance of the judgment to be pronounced upon the appeal in any case where the subject of litigation consists of immovable property and the judgment appealed from relates to the occupation of such property. Therefore there is no substance in the first ground on which the preliminary objection was based.

The validity of second ground depends on the effect to be given to the expression "when granting leave to appeal". Mr. Jayawardene's contention is that the power given to the court to decide that the judgment shall be carried into execution is one that can be exercised only at the time when it grants the leave and not afterwards. But what is indicated by the words in question appears to be the time when the court gets the power and not the time when it may be exercised: the phrase "when granting leave to appeal" must be read as qualifying "shall have" and not "to direct".

For these reasons we decided that the preliminary objection must be overruled.

The petitioner and the 1st respondent are both of them eminent Buddhist monks. The former claimed a right to have possession of the property upon the footing that he was the duly appointed principal of a Buddhist teaching institution known as the Vidayodaya Pirivena and that the property formed a part of the premises on which the Pirivena stood. The 1st respondent alleged that it belonged to a Buddhist temple known as the Maligakanda temple and that he was the viharadhipati of that temple and was in that capacity entitled to have possession of it. The action was instituted on the 26th July 1943, and the 1st respondent has been in occupation of the property from a time long prior to that day. Upon the material that was placed before us we were not satisfied that there was sufficient ground for causing him to be ejected from this property before the decision of his appeal to Her Majesty in Council.

SANSONI, J.—I agree.

*Application refused.*