

1938

*Present : Hearne J. and Wijeyewardene A.J.*BALASUBRAMANIAN PILLAI *v.* VALLIAPA CHETTIAR.APPLICATION FOR CONDITIONAL LEAVE TO APPEAL TO  
THE PRIVY COUNCIL.

286—D. C. Colombo, 4,520.

*Privy Council—Application for conditional leave—Notice of intended application. When it should be given—Appeal (Privy Council) Ordinance, rule 2, schedule. 1.*

Where an application for conditional leave is made under rule 2, schedule I of Appeal (Privy Council) Ordinance, No. 31 of 1909, it is not imperative that the respondent should receive notice of the intended application before it is filed.

THIS was an application for conditional leave to appeal to the Privy Council.

*H. V. Perera, K.C. (with him S. Subramaniam), for the petitioner.*

*E. F. N. Gratiaen (with him J. A. T. Perera), for the respondent.*

*Cur. adv. vult.*

August 31, 1938. HEARNE J.—

This is an application for conditional leave to appeal to the Privy Council.

Judgment was entered by this Court on May 27, 1938, in S. C. 286 (F) D. C. Colombo, 4,520; the judgment was a final judgment and the matter in dispute on appeal is over Rs. 5,000 in value.

Two communications which, it is claimed, gave the opposite party notice of the applicant's intention to apply to this Court for conditional leave were sent to the respondent.

The first notice (A) was sent by registered express delivery post on May 30, 1938, and was delivered to the respondent on the same day. It is, in my opinion, doubtful that this notice can be construed as a notice of intention to apply to this Court for conditional leave, but I do not decide the question as, in the view I take of the second notice, it is unnecessary.

The second notice (D) which admittedly was a notice of intention to apply to this Court for conditional leave was posted on June 8, 1938, and addressed to the respondent at his address at 295, Galle road, Colpetty. The respondent left Colombo on June 9, at 4 A.M., and received D on June 10, on his return. The notice was presumably delivered by post at his house on June 9. On the evening of June 8 the applicant filed his application for conditional leave.

The notice D was admittedly posted and received by the respondent within 14 days from the date of the judgment appealed from, but it is argued that as the respondent did not receive the notice before the applicant filed his application, the provisions of Rule 2 of Schedule I. of the relevant Ordinance have not been complied with (Vol. 4, p. 422).

The Rule is as follows :—“ Application to the Court for leave to appeal shall be made by petition within thirty days from the date of the judgment to be appealed from, and the applicant shall, within fourteen days from the date of such judgment, give the opposite party notice of such intended application ”.

In *Wijeyesekere v. Corea*<sup>1</sup>, Driberg J. said, “ The form of notice adopted in practice includes an intimation of the day on which the petitioner will move in the Supreme Court, and this is absolutely necessary in order that the respondent may be present or arrange for his representation on the day stated or any other day to which the hearing is adjourned ”.

Poyser S.P.J. and Koch J. dissented from this view in *Pathmanathan v. Imperial Bank of India*<sup>2</sup>. “ Apart from the fact ” Poyser J. said “ that the rule does not specifically state that the day shall be named upon which the application will be made, in practice it would be impracticable to name any such day. The day on which the application will be heard would be decided by the Registrar in accordance with the usual practice. Further in my experience the practice in this court has been for the applicant to apply in the first place “ *ex parte* ” for a notice of his application to be served on the respondent and that would appear to be the most convenient practice ”.

It would appear from this passage in Poyser J's judgment which I respectfully adopt that the object of the notice required to be given by the applicant to the respondent is in practice not to give him an opportunity of appearing when mere notice to the opposite party is in the first place asked for in Court. He will have the opportunity of raising whatever objections he has when he is before the Court after notice has

<sup>1</sup> (1931) 33 N. L. R. 349.

<sup>2</sup> (1927) 39 N. L. R. 103.

been served on him. It is I think merely to apprise him within a reasonable time of the fact that the litigation is not at an end, and that the unsuccessful party has the intention of applying to the Court for leave to take the subject-matter in dispute between the parties to the Privy Council.

Apart from this I would not, in the absence of express language to that effect, construe Rule 2 to mean that there must be an interval of time between the effectuation of service of the notice of intention to apply for leave and the filing of an application in that behalf.

In the circumstances of this case, as application for leave to appeal was made within 30 days and notice of intention to apply to the Court for leave was posted to and received by the respondent within 14 days, I am of the opinion that the applicant has complied with the provisions of Rule 2.

Leave to appeal will therefore be granted subject to the usual conditions.

WIJEYWARDENE A.J.—

In this case the plaintiff has made an application for conditional leave to appeal to the Privy Council from a judgment of this Court delivered on May 27, 1938.

On June 8, 1938, the plaintiff's Proctor sent by post a letter to the defendant intimating to him the plaintiff's intention to appeal to the Privy Council and forwarded with the letter a copy of the application which the plaintiff intended to file in this Court.

On the same day, after posting the letter to the defendant, the plaintiff's Proctor filed the application in the Supreme Court Registry. The defendant received the letter and the copy of the application on June 10, 1938.

The defendant's Counsel objects to this Court entertaining the application on the ground that the notice of the application was received by the defendant after the application was, in fact, filed in the Registry. He argues that the provisions of Rule 2 in Schedule I. to the Appeals (Privy Council) Ordinance require that the party noticed should receive notice of an intended application and not of an application already filed in Court.

The rule in question reads:—Application to Court for leave to appeal shall be made by petition within thirty days from the date of the judgment to be appealed from, and the applicant shall, within fourteen days from the date of such judgment, give the opposite party notice of such intended application.

It is argued that the Rule speaks of notice of an intended application being given and not of such notice being issued and that therefore, at the time the notice is received by the opposite party, the applicant should merely have an intention of making an application, and should not have carried such intention into effect by making the application.

In my opinion this contention of the defendant's counsel fails to give full effect to the words "*the applicant should give notice*". The giving of a notice must necessarily involve the sending of a notice which ultimately reaches the party to be noticed. The action involved in giving notice must be considered with reference to the applicant who

gives the notice and not with reference to the opposite party who receives such notice. It appears to me therefore that the material point of time before which the application shall not be made is when the *applicant* gives notice or in other words when the applicant sends notice. An applicant who sends a notice and then files his application before the notice reaches the opposite party is an applicant who gives notice of his intended application for at the time he sent the notice he had not made the application but had only formed the intention of making such an application.

The plaintiff has, in my opinion, complied with the requirements of Rule 2 and leave to appeal will be therefore granted to him, subject to the usual conditions. The applicant is entitled to the costs of this application.

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