

1935

Present : Akbar S.P.J. and Poyser J.

SILVA v. KING.

161—D. C. (Inty.) Colombo, 48,762.

Execution—Decree passed by the Supreme Court—Appeal to Privy Council—District Court has no power to execute decree—Powers of Supreme Court to grant execution subject to security—Privy Council (Appeals) Ordinance, No. 31 of 1907, Schedule 1, Rule 7.

A party is not entitled to obtain from the District Court execution of a decree passed in appeal and against which the Supreme Court has granted conditional leave to appeal to the Privy Council. In such a case the Supreme Court has power to direct that the judgment appealed from shall be carried into execution upon the condition that the decree-holder gives security for the due performance of the order of the Privy Council.

A PPEAL from an order of the District Judge of Colombo.

Choksy (with him H. N. G. Fernando), for plaintiff, appellant.

H. V. Perera (with him D. W. Fernando), for defendant, respondent.

July 24, 1935. AKBAR S.P.J.—

On April 5, 1933, decree was entered in favour of the plaintiff for a certain sum of money and costs and plaintiff applied for execution on the same day. On April 7, 1933, writ was issued returnable on April 15, 1933, but defendant filed a petition of appeal also on April 7, 1933, and on April 12, 1933, execution of this writ was stayed until the decision of the appeal. On March 28, 1934, the appeal was heard and dismissed but defendant on the same day gave notice of her intention to apply for conditional leave to appeal to the Privy Council to the plaintiff which notice was served on the plaintiff and his proctors. By application dated April 20, 1934, plaintiff applied for reissue of the writ *ex parte* on May 4, 1934, without disclosing the fact that he had been served on March 28, 1934, with notice of the defendant's intended application for conditional leave to appeal to the Privy Council, which motion was allowed on the same day, *i.e.*, May 4, 1934, and the writ was reissued on May 7, 1934. On May 18, 1934, defendant filed petition and affidavit and moved that execution of the writ be stayed. Notice was issued on the plaintiff for May 25, 1934. In the meantime on April 20, 1934 (*i.e.*, the same day on which application for reissue of writ by plaintiff was signed), the defendant filed her application for conditional leave to appeal to the Privy Council in the Registry of the Supreme Court and on April 25, 1934, leave was granted by the Supreme Court. So that it will be seen that when the Court allowed plaintiff's *ex parte* application for reissue of writ on May 4, 1934, the defendant had already been given conditional leave to appeal. This fact was not known to the District Judge when he reissued writ and when the defendant's motion for stay of execution was finally heard, the District Judge quite rightly in my opinion vacated his order allowing a reissue of the writ made on May 4, 1934. It is this order which has come up in appeal before us now. Under rule 7 of the rules in Schedule 1 of Ordinance No. 31 of 1909, regulating the procedure on appeals from the Supreme Court to the Privy Council the Supreme Court has the power when granting leave to appeal to the Privy Council to direct that the judgment appealed from (when it orders the appellant to pay money or perform a duty) shall be carried into execution upon the condition that the decree-holder gives security to the satisfaction of the Supreme Court for the due performance of the order of the Privy Council. And by rule 8 there is a proviso that nevertheless the appellant can in his turn get the execution stayed on his satisfying the Supreme Court that real and substantial injustice will be done to him if the writ were executed, and on his giving security to carry out the orders of the Privy Council. Although notice was served of the intended application for conditional leave on March 28, 1934, the plaintiff did not apply for any order under rule 7 to this Court, but his counsel argues that he has the right to apply for execution direct to the District Court. This he undoubtedly may do, so long as no proceedings are taken by the appellant to carry his appeal to the Privy Council. But here on the very day that the writ was reissued, *i.e.*, on May 4, 1934, the Supreme Court had already allowed conditional leave in a case in which defendant had the right to appeal to the Privy Council and of which application the plaintiff-appellant had notice but which

he had not disclosed to the District Court. When the District Court was informed of this fact for the first time by defendant when she applied for stay of execution, the Judge was quite right in my opinion in recalling the writ for section 224 and section 777 of the Civil Procedure Code can have no application to a decree which is subject to an appeal to the Privy Council in the sense that the Supreme Court had allowed conditional leave to appeal at that time. Mr. Choksy's argument comes to this. He could have applied to this Court for an order under rule 7, in which case his client would have to give security, but we are asked instead of this to send the case back to the District Judge in order that he may issue writ of execution without such security being given. It seems to me that there is a great deal of force in Mr. Perera's argument that when an appeal has been filed it prevents the Court which passed the decree from executing it pending such appeal, unless there is provision in an Ordinance by which such power is given expressly (see *Mohamed v. Annamalai Chettiar*'). As I have said the only statutory provision when leave to appeal to the Privy Council has been granted either conditionally or finally for execution of the decree is to be found in rules 7 and 8. Under rule 7 it is open to me to make such an order in this appeal (see *Abeyesekera v. Alahakoon*² and *Senathiraja v. Muthunayagam*³), and while dismissing the plaintiff's appeal with costs I make order that the judgment appealed from may be carried into execution upon the plaintiff giving security to the satisfaction of the Registrar in the sum of Rs. 15,000 for the due performance of such order as His Majesty in Council shall think fit to make thereon.

POYSER J.—I agree.

Appeal dismissed.

