

1927.

Present: Dalton and Lyall Grant JJ.

DE SILVA *v.* DE SILVA.

98—D. C. (Inty.) Galle, 5,440.

Privy Council—Conditional leave to appeal—Security—Mortgage of immovable property.

In an appeal to the Privy Council the appellant is entitled to give security for the respondent's costs by the mortgage and hypothecation of immovable property.

The requirements, which the applicant must comply with before such security can be accepted, indicated.

APPPLICATION by appellant, who had obtained conditional leave to appeal to the Privy Council, to give security for respondent's costs by the mortgage and hypothecation of an undivided half share of an allotment of land stated to be of over the value of Rs. 3,000.

J. S. Jayawardene, for appellant.

H. V. Perera (with *Vethavanam*), for respondent.

January 31, 1927. DALTON J.—

This is an application by the appellant, who has obtained conditional leave to appeal to the Privy Council, to this Court to approve of the appellant giving security for the respondent's costs by the mortgage and hypothecation of an undivided half share of an allotment of land, which half share is stated to be of the value of over Rs. 3,000 and to be free of encumbrance.

The application was opposed by the respondent. We thereupon referred the application to the Registrar for report as to the sufficiency or otherwise of the security proposed, and also as to the

practice of the Court in such case and to say whether as a rule money is deposited or property hypothecated.

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*De Silva v.
De Silva*

The Registrar now reports that the almost invariable practice has been to call upon the appellant to deposit the required security in cash, and that within the last ten years there has been only one departure from this practice, so far as he has been able to ascertain. In that one case (190-191, D. C. Jaffna, 9,671) a similar application to the one now before us was made to the Court, which thereupon referred the matter to the District Court to satisfy itself as to the valuation of the property tendered as security. Upon the District Judge reporting that the security was sufficient this Court directed that the hypothecation of the lands for the security of Rs. 3,000 be accepted. No mention is made of any reason why the usual practice was not followed.

The respondent resists the application principally upon the ground that the form of security offered is objectionable, and that if a mortgage is accepted as proposed, he may have considerable difficulty in realizing his security, should he become entitled to do so. He also lays stress on the practice that has obtained for so long, and asks that that practice be not departed from in the absence of any good and sufficient reason being put forward by the appellant.

The duty imposed upon this Court, under rule 3 of the schedule to Ordinance No. 31 of 1909, in the case of appeals to His Majesty in Council, is to direct good and sufficient security to its satisfaction in the sum fixed, for the due prosecution of the appeal and for the payment of all such costs as may become payable to the respondent. There are, however, further rules framed under the provisions of section 5 of the Ordinance to which no reference was made by Counsel in the course of the argument. I personally must admit that their existence has not been brought to my notice before. They are contained in "the Appellate Procedure (Privy Council) Order, 1921," published in the *Gazette* of July 29, 1921. By rule 7 of the Order it is provided that the security to be given by the appellant under rule 3 (a) of the schedule to the Ordinance shall be by deposit of a sum of Rs. 3,000 with the Registrar and by hypothecation thereof by bond, or by such other security as the Court shall, on application made after notice to the other side, approve. This no doubt explains the practice referred to by the Registrar in his report, but in effect it is only a little more definite in one respect than rule 3 (a) of the schedule, and of course is not wider than that rule. There is then no general rule laid down as to how security is to be furnished. No doubt, however, a deposit of money, as provided by rule 7 of the Order, is generally the most easy and convenient method for both sides, and the method which has in practice been generally adopted. But this Court obviously cannot say, in face of the rules cited, that that method is the only one for giving security.

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DALTON J. The words used in rule 3 of the schedule are repeated in rule 7 of the schedule. The latter rule deals with the carrying into execution of a judgment appealed from on security being given for restitution. De Silva v. De Silva That security has likewise to be "good and sufficient security, to the satisfaction of the Court." In dealing with an application made under that rule, I find Wood Renton C.J. and de Sampayo J. in *Abeyesekera v. Alahakoon*¹ allowed the judgment-creditors to execute his judgment on his giving security by way of a mortgage of immovable property of the full value of the judgment-debt either by themselves or by a surety on their behalf. It is to be noted, however, that the Order of 1921 contains in the case of security to be given under rule 7 of the schedule no rule similar to rule 7 (1) of the Order applying to the security to be given under rule 3 of the schedule. In view, however, of the clear provisions of the rules of the schedule as to security, I do not think that is a matter of very great importance.

This method of furnishing security, it is to be noted, is also provided in the case of appeals governed by Part VIII. of the Civil Procedure Ordinance, as set out in sections 756 and 757 of the Code. It might be noted also that it is the only method of giving security recognized in the past in the case of appeals from some colonies to the Privy Council, e.g., Victoria, for which reference may be had to the Order in Council of June 9, 1860, which was revoked in 1911 (*Melbourne Tramway & Omnibus Co., Ltd. v. Mayor of Fitzroy*²), and Canada, for which reference may be had to the Canada Act, 34 Geo. III. c. 2 s. 35 (*Grant Powell and Others v. Washburn*³).

In the face of these authorities it is impossible to uphold the respondent's objection to the form of the security offered, and I can find nothing in rule 3 of the schedule or in rule 7 of the Order which prevents the Court from approving the giving of security in the way proposed. Applicant, however, must comply with some further requirements before the security tendered can be accepted. This application will be referred to the lower Court to satisfy itself as to the valuation of the property tendered as security. The surety must file an affidavit to the effect that he is seized and possessed of the property he tenders as security and lodge a certificate of freedom from encumbrances. If the Court below is then satisfied with the sufficiency of the security, it should so report to this Court within fourteen days of the receipt of the reference. The usual steps for the due execution of the bond by appellant and surety before a notary public, and its due and proper registration must follow, before it be accepted.

Subject to these conditions, the application will be allowed.

LYALL GRANT J.—I agree.

Application allowed.

¹ 19 N. L. R. 413.

² (1901) A. C. 153.

³ 2 Moore 198.