

1955

Present : Nagalingam S.P.J. and Fernando A.J.

KANDY OMNIBUS CO., LTD., Petitioner, and SILVERLINE
BUS CO., LTD., *et al.*, Respondents

*S. C. 672—Application to vacate an order allowing conditional leave to
appeal to the Privy Council in S. C. Application No. 596 of 1952*

*Privy Council—Conditional leave to appeal—Grant in absence of respondent—Right
of Court to vacate it subsequently—Appeals (Privy Council) Ordinance (Cap. 85),
Schedule, Rule 22.*

Where an application for conditional leave to appeal to the Privy Council is allowed in the absence of the party respondent the Court has power to vacate its order subsequently if the party respondent shows that he had no notice or knowledge of the application and that though he exercised due diligence in attempting to obtain information with regard to any such application, he failed to obtain any.

APPPLICATION to vacate an order allowing conditional leave to appeal to the Privy Council.

H. V. Perera, Q.C., with E. R. S. R. Coomaraswamy and G. B. Kumarakulasinghe, for the petitioner.

H. W. Jayewardene, Q.C., with G. T. Samarawickreme and D. R. P. Goonetilleke, for the respondents.

Cur. adv. vult.

January 3, 1955. NAGALINGAM S.P.J.—

This is an application by the Kandy Omnibus Company Ltd., which will hereinafter be referred to as the petitioner, to vacate the order made by this Court on the 10th December, 1954, granting the respondents conditional leave to appeal to Her Majesty in Council.

The order sought to be taken in appeal to Her Majesty was made on the 12th November, and on the 15th November, 1954, the respondents gave notice to the petitioner of their intention to apply to this Court for conditional leave to appeal; on the 6th December they filed their application which came for hearing on the 10th of December and the application was allowed in the absence of the petitioner.

The gravamen of the complaint of the petitioner is that he had no notice of the application made for conditional leave, that he gained no knowledge of the application and that though he exercised due diligence in attempting to obtain information with regard to any such application, he failed to obtain any and that the order made in his absence should in those circumstances be set aside and that he should be heard before conditional leave is granted to the respondents.

That in fact the respondents gave no notice to the petitioner of their filing the application for conditional leave is admitted.

The Proctor for the petitioner has filed an affidavit in which he sets out that " he inspected the records at the Registry up to the 6th December, 1954, daily, in order to ascertain whether an application was filed in the Supreme Court Registry ". The other averments in the affidavit make it clear that the reference to the daily inspections up to the 6th of December relate to inspections alleged to have been made by him from and after the 30th November, 1954—the date when he received instructions to act on behalf of the petitioner in regard to the application for conditional leave.

The Proctor further states that on the 7th and 8th of December he was ill and therefore could not have attended the Registry for investigation, that the 9th of December was a Public Holiday and the Registry was closed but that when he did examine the records on the 10th, he says, he discovered for the first time that the application had not only been made but conditional leave had also been granted on that date.

These averments undoubtedly have been made with a view to support the allegation in the petition of the petitioner that the application for conditional leave was registered on the 8th of December and that the application was on that very day directed to be listed on the 10th December and that the ignorance on the part of the Proctor and officers of the petitioner company as regards the application made by the respondents for conditional leave was not due to any neglect or default on their part but due to the extreme swiftness with which the application was dealt with.

Mr. Jayawardene for the respondents, however, challenges these averments and points that in truth and in fact the application for conditional leave was registered at the Registry on the 6th December and not on the 8th as alleged by the petitioner, and that if a perusal of the entries in the Register had been made on the 6th, the entry relating to the filing of the application could not but have been observed.

In order to reinforce his submission, he sought permission of Court to cross-examine the Proctor for the petitioner on his affidavit. This we refused.

I think it is correct to state that applications of this nature are dealt with on the affidavits filed and ordinarily no cross-examination is permitted. The appellants, if they did want to challenge the affidavits filed on behalf of the petitioner, should at least have filed counter-affidavits themselves before making application for cross-examination.

I may say at once that the Register maintained at the Registry was consulted and it revealed that in fact the application for conditional leave had been registered on the 6th of December and the Deputy Registrar stated that the applications are tendered to him personally and that when he receives the applications he directly enters them in the Register. In view of these facts there can be little doubt that the statement of the petitioner that the application for conditional leave was registered on the 8th is incorrect in point of fact, but *non constat* that the affidavit of the Proctor that he inspected the Register on the 6th and the implied suggestion underlying that statement that he found no entry in the records of the Registry is itself incorrect. The time factor has to be taken into account before one can venture to express an opinion that the averment in the Proctor's affidavit is untrue. The facts are quite consistent with no entry having been made at the time the Proctor inspected the Registers on the 6th and the entry being made on that very day, after his inspection. That Proctor's statement therefore could not be characterised as being culpable, but that is not to say that the allegation in the petition that the application for conditional leave was registered on the 8th is incorrect. If, of course, one considers the allegation as being merely an inference from the facts set out in the affidavits, then no dishonesty need be imputed.

That an applicant for conditional leave is not bound to give notice to the respondent of the day on which the application would be made has been laid down by this Court in the case of *Pathmanathan v. Imperial Bank of India*¹. Counsel were agreed that there is no provision either in the Appeals (Privy Councils) Ordinance (Cap. 85), or in the Rules framed thereunder requiring that even notice of the filing of the application should be given to the respondent. But, however, the practice followed hitherto has been as set out by me in the case of *De Silva v. Hirdarmani Ltd.*²:

“ the application for leave (conditional) is not disposed of excepting in the presence of or at least after proof that notice of the application has been given to the respondent and in practice the application itself is never disposed of in fact within 30 days of the date on which the judgment appealed from was delivered and there is always sufficient time for the respondent to get ready to show cause against the application after receipt of notice or the gaining of knowledge of the filing of the application ”

In the present case the application for conditional leave was in fact disposed of before the expiry of thirty days from the date when the judgment appealed from was delivered.

¹ (1937) 39 N. L. R. 103,

² (1953) 55 N. L. R. 73.

I do not think that a party or his Proctor is expected to search the Register at the Registry every hour, or even every day. That will be an intolerable situation to place a party or his Proctor in. Ordinarily, I think at least thirty days from the date of judgment appealed against should be permitted to lapse before the application for conditional leave is listed for disposal. If such a course be adopted a Proctor who may not receive any information earlier would, by examining the Registry on the thirty-first day, be in a position to ascertain once for all and finally, whether an application has been made to Court in pursuance of the notice of intention to appeal.

In this case there is the affidavit sworn to by the Proctor for the petitioner which shows that he had as far as possible made every effort to acquaint himself of any application being made to Court, and, if, in the circumstances he has set out in his affidavit, he had failed to gain knowledge of the application, it cannot be said that his ignorance was due to any gross carelessness or culpable negligence on his part.

The question then arises whether, if there has been neither gross carelessness, nor culpable negligence on the part of the Proctor, and neither the petitioner company nor any of its officers had knowledge of the application for conditional leave made to the Court, in consequence whereof the petitioner company failed to enter appearance when the application for conditional leave came to be considered, this Court has the necessary powers vested in it to vacate an order granting conditional leave in the absence of the petitioner. It is not denied by Mr. Jayawardene that the petitioner had the right to be heard before conditional leave was granted. If so, I do not think that the powers of this Court are so restricted as to prevent it from doing justice as between the parties and making such order as may be necessary to reach that objective.

I would therefore vacate the order of this Court dated the 10th December, 1954, granting conditional leave to the respondents to appeal to Her Majesty in Council and direct that that application should be re-listed for argument.

The respondents will be entitled to the costs of this application as well as the costs incurred by them in regard to the application made by them on the 10th of December.

Before I part with this record, I desire to draw attention to an aspect which has passed through my mind on a consideration of the provisions of the Appeals (Privy Council) Ordinance. It seems to me that the Legislature did not intend to give the respondent to an appeal the right to be heard at the consideration of the application for conditional leave, but only at the stage when final leave is applied for,—vide Rule 22 of the Rules appended to the Ordinance; however, as there has been a *curius curiae* of long standing to hear the respondent to the appeal on the

consideration of the application for conditional leave and as Mr. Jaywardene has conceded that the respondent to an appeal has a right to be heard at that stage, I do not intend to pursue the matter further, especially as I have not had the benefit of any argument on the point.

FERNANDO A.J.—I agree.

Application allowed.

