

1957

Present: Weerasooriya, J., and Sansoni, J.

UṢOOF *et al.*, Petitioners, and NADARAJAH
CHETTIAR *et al.*, Respondents

*S.C. Application 183—Conditional Leave to appeal
to the Privy Council in S.C. 189/D.C. Colombo, 24, 958*

Privy Council—Application for conditional leave to appeal—Must be properly stamped—“Final judgment”—Stamp Ordinance (Cap. 189), s. 35—The Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rules 1 (a) and 2.

An application for conditional leave to appeal to the Privy Council which is insufficiently stamped will be rejected even if it is filed in time and the deficiency in stamp duty is subsequently made good by the applicant but after the expiry of the period of thirty days prescribed in Rule 2 of the Schedule to the Appeals (Privy Council) Ordinance.

A judgment of the Supreme Court dismissing an appeal from an order of a District Court refusing to set aside a sale of property seized in execution of a decree is a “final judgment” within the meaning of Rule 1 (a) of the Schedule.

APPPLICATION for conditional leave to appeal to the Privy Council.

Sir Lalita Rajapakse, Q.C., with *M. Markhani*, for the petitioners.

C. Thiagalingam, Q.C., with *T. Parathalingam*, for the respondents.

Cur. adv. vult.

March 22, 1957. WEERASOORIYA, J.—

Two objections were taken by learned counsel for the respondents against this application being granted. One of them was that the judgment sought to be appealed from is not a “final judgment” within the meaning of Rule 1 (a) of the rules contained in the Schedule to The Appeals (Privy Council) Ordinance (Cap. 85).

The petitioners seek to appeal from the judgment of this Court dismissing an appeal from the order of the District Court refusing to set aside a sale of a land called Alawwa Estate belonging to the petitioners. The sale took place in execution of a decree which had been entered against them in the case.

The objection raised seems to be covered by the decision in *Subramaniam Chetty v. Soysa*¹ where this Court had reversed in appeal an order of the District Court disallowing an application made by an execution creditor to set aside (on the ground of material irregularity) a sale of certain property seized in execution of a writ in his favour. The matter subsequently came up again in the form of an application for leave to appeal to the Privy Council from the judgment of this Court, and the question arose whether that judgment was a final judgment. The majority of a bench of three Judges held it was. This decision is binding on us. The objection must, therefore, be overruled.

¹ (1923) 25 N. L. R. 344.

The other objection relates to a question of stamp duty. It is common ground that the application for conditional leave was insufficiently stamped when it was filed. The deficiency in stamp duty was subsequently made good by the applicants but after the expiry of the period of thirty days provided in Rule 2 of the Schedule referred to for the making of the application, although the application itself was filed in time. In these circumstances it is contended for the respondents that the application for leave to appeal must be rejected. This matter too appears to be covered by previous authority. It was held by a bench of two Judges in *British Ceylon Corporation Ltd. v. The United Shipping Board*¹ that where a petition of appeal to this Court from the District Court was insufficiently stamped the appeal should be rejected. The judgment in that case followed certain earlier decisions referred to therein, one of which is *Hurst v. Attorney General*², also a decision of two Judges, where Ennis J., in delivering the judgment of the Court dismissing an appeal on the ground that the petition of appeal was not correctly stamped, stated: "I would add that section 36 (now section 35) of the Stamp Ordinance prohibits the Court from acting upon the instrument, and there is no proviso or any provision in the Stamp Ordinance allowing the defect to be cured other than possibly section 43". These decisions were followed by another bench of two Judges in *James v. Karunaratne*³.

Section 35 of the Stamp Ordinance (Cap. 189) provides as follows: "No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered, or authenticated by any such person or by any public officer, unless such instrument is duly stamped". I respectfully agree with the observations of Ennis, J., in *Hurst v. Attorney General* (*supra*) that the effect of the latter part of this provision is to preclude a Court from acting on a petition of appeal unless it is properly stamped. These observations are equally applicable to the petition for leave to appeal in the present case.

Paragraph (a) of the proviso to section 35 contains provision for an instrument (other than one chargeable with a duty of six cents only or a bill of exchange or promissory note) being admitted in evidence on payment of the duty with which it is chargeable or, in the case of an instrument insufficiently stamped, of the amount required to make up the duty. Learned counsel for the petitioners did not contend that this provision covered the case but he urged that the objection under consideration should be overruled on the ground that no prejudice has been caused to the respondents, and he referred us to certain observations of Lord Goddard in delivering the judgment of the Judicial Committee of the Privy Council in *Bilindi et al. v. Wellawa Attadassi Thero*⁴ that "it would be an unfortunate and probably unintended result of the Stamp Ordinance if a litigant should be debarred from an appeal on a ground (of the insufficiency of the stamp) which is from a practical

¹ (1934) 35 N. L. R. 225.² (1935) 37 N. L. R. 154.³ (1917) 4 C. W. R. 265.⁴ (1915) 47 N. L. R. 7.

point of view capable of easy remedy without injustice to anyone". It is clear, however, from what precedes those observations that he did not intend to give expression to a finding or an opinion on the question whether the appeal should be rejected or not on such a ground. Moreover, it does not appear that his attention had been drawn to section 35 of the Stamp Ordinance (Cap. 189).

The application for leave to appeal is rejected with costs.

SANSONI, J.—I agree.

Application rejected.
