1962 *Present :* **Basnayake, C.J., H. N. G. Fernando, J., and Sinnetamby, J.**

RUBEN PEIRIS, Petitioner, *and* DASSENAIKE, Respondent

S. C. 255—Application for Conditional Leave to appeal to Privy Council in S. C. 57/D. C. Colombo, 12380/S

Privy Council—Appeal to Supreme Court—Rejection on ground of abatement—Incapacity of appellant to apply for conditional leave to appeal to Privy Council—Civil Appellate Rules, 1938, Rules 2 (1), 4 (2)—Appeals (Privy Council) Ordinance, ss. 2, 3, Schedule, Rule 1—Supreme Court Appeals (Special Provision) Act No. 4 of 1950.

Where an appeal to the Supreme Court, which was lodged before the Supreme Court Appeals (Special Provision) Act No. 4 of 1960 was enacted, was rejected on the ground that it had abated by operation of Rule 4 (2) of the Civil Appellate Rules, 1938—

Held, that the appellant was not entitled to make an application to the Supreme Court for conditional leave to appeal to the Privy Council.

APPLICATION for conditional leave to appeal to the Privy Council.

H. V. Perera, Q.C., with *S. Sharvananda*, for Petitioner-Appellant.

E. B. Wikramanayake, Q.C., with *H. A. Koattegoda, G. T. Samerawickreme* and *R. Bandaranayake*, for Plaintiff-Respondent.

Cur. adv. vult.

March 16, 1962. BASNAYAKE, C.J.—

The question that arises for decision on this application for leave to appeal to the Privy Council is whether such an application lies in the instant case.

The petitioner sought to appeal to this Court from the judgment of the District Court; but he failed to comply with the requirements of Rule 2 (1) of the Civil Appellate Rules 1938, and on objection taken by counsel the appeal was rejected on 17th May 1960 as it was deemed to have abated by operation of Rule 4 of those Rules. The Appeals (Privy Council) Ordinance provides for an appeal to the Privy Council against judgments and orders of the Supreme Court (s.3). The expression "judgment" is used in the Ordinance in the sense of "a decree, order, sentence or decision" (s.2). An appeal lies—

> "(*a*) as of right, from any final judgment of the Court, where the matter in dispute on the appeal amounts to or is of the value of five thousand rupees or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the value of five thousand rupees or upwards; and
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> (*b*) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision." (Rule 1—Schedule).

In the instant case there was no appeal before this Court as it had abated by operation of law. The effect of abatement in legal procedure is thus stated in Sweet's Law Dictionary—

> "In procedure, abatement is where an action is put an end to and destroyed by the death of one of the parties, or some other event which makes it impossible to continue the action."

Bouvier's Law Dictionary in setting out the distinction between abatement in Chancery Practice and in law states—

> "It differs from abatement at law in this; that in the latter, the action is entirely dead and cannot be revived; but in the former the right to proceed is merely suspended, and may be revived by a supplemental bill in the nature of a bill of revivor."

What we have here is an abatement at law.

Although it is an appeal and not an action in the Court of first instance the consequence of abatement is the same whether it be an appeal or an action and the appeal if ever it was in existence came to an end on abatement. As this appeal was lodged long before the Supreme Court Appeals (Special Provision) Act No. 4 of 1960, the record of the case should not have been forwarded by the District Court to this Court because the consequence of the abatement of the appeal by operation of Rule 4 (2) was that it ceased to be an appeal. When this Court made order rejecting the appeal it gave formal expression to the fact that there was no appeal before it and the order it made was not a judgment or order in the case. The petitioner cannot for that reason be in a better position than he would have been if the District Judge did not forward the appeal on the ground that it had abated or if the Registrar had not listed it as it was not an appeal that should properly be included in the list of appeals for hearing.

I am of opinion that the petitioner is not entitled to the leave he seeks. His application is accordingly refused with costs.

H. N. G. FERNANDO, J.—I agree.

SINNETAMBY, J.—

I agree with My Lord the Chief Justice that this application should be refused. The petitioner-appellant had intervened in an action between the plaintiff-respondent and the defendant-respondent in the course of execution proceedings. The defendant-respondent had transferred a certain property to the petitioner-appellant which, at that time, was alleged to have been under seizure upon a writ issued by the plaintiff-respondent. The property was subsequently sold under the writ and purchased by the plaintiff-respondent. The petitioner appellant moved to set aside the sale and the District Judge refused his application. Against that refusal he filed a petition of appeal but failed to comply with the requirements of Rule 2 (1) of the Civil Appellate Rules 1938. Under Rule 4, the failure of the appellant to comply with the provisions of Rule 2 (1) abates the appeal. It has been held by this Court that the abatement in such a situation takes place by operation of law and that the formal order of abatement which the District Judge makes in pursuance thereof is merely a ministerial act, *Palaniappa Chettiar et al. v. Mercantile Bank*[1]. Irrespective, therefore, of whether a formal order is made or not, in law, the appeal has abated. In this particular case, no formal order appears to have been made by the District Judge; but when the appeal came up before this Court, it was rejected. In *Fernando v. Samaranayake*[2] a similar situation arose and Weerasooriya, J. who delivered the judgment of the Court stated that there should be a formal order of abatement before an appeal can be regarded as having abated. With this view, I find myself unable to agree. Rule 4 itself states that on failure to comply with the requirements of Rule 2 the appeal is deemed to have abated and, in my view, no further steps can

[1] *(1941) 43 N. L. R. 127.* [2] *(1960) 62 N. L. R. 397.*

be thereafter taken. It is for that reason that the Supreme Court, in such a case, does not " dismiss " an appeal but only " rejects " it. The word " dismiss " is, I venture to think, used in the case of valid appeals which are pending and the word " reject " in cases where in strict law there is no valid appeal before the Court. In these circumstances, therefore, it seems to me that the rejection of an appeal is not a final order or a judgment affecting the appeal against which an application can be made for leave to appeal to the Privy Council. Once an appeal is deemed to have abated, I agree with My Lord the Chief Justice that the entire case comes to an end and no further steps can be taken until the action is revived by a successful application to have the abatement set aside.

Application refused.