

Held, that Rule 21 vests a discretion in the court as to whether or not it will rescind the leave already granted.

APPPLICATION for final leave to appeal to the Privy Council.

H. W. Jayewardene, Q.C., with *S. S. Basnayake* and *Ravindra Tennakoon*, for the plaintiff-petitioners.

C. Ranganathan, Q.C., with *N. S. A. Goonetilleke, Rohini Breckenridge* and *K. Kanagaratnam*, for the substituted defendant-respondent.

Cur. adv. vult.

October 17, 1970. DE KRETZER, J.—

The facts are as follows :—

Conditional leave to appeal to Her Majesty the Queen in Council was granted to the Plaintiff-Petitioners on the 17th day of March upon the condition that within one month from the said date they would furnish security by the deposit of Rs. 3,000 in cash for the due prosecution of the appeal and the payment of such costs as may become payable. The Plaintiff-Petitioners complied with this condition on the first day of April, 1968. Thereafter they made their application for final leave on the 10th of April, 1968. The Respondents on the 30th of July, 1968, have filed their objections to the granting of final leave to the Petitioners on the ground that the Petitioners failed to apply for an order granting final leave within one week from the date of their having complied with the conditions imposed on them by the order granting conditional leave to appeal. The Respondents pray that the court be pleased to rescind the order granting conditional leave to appeal and to declare the appeal to stand dismissed for non-prosecution. The relevant rule is No. 21 of the Rules which are found in the schedule to the Privy Council Appeals Ordinance, Cap. 100, Vol. IV of the Legislative Enactments, and the relevant portion of the rule reads as follows :—

“Where an appellant, having obtained an order granting him conditional leave to appeal, and having complied with the conditions imposed on him by such order, fails thereafter to apply, *within one week from the date of having so complied*, to the court for an order granting him final leave to appeal, the court *may*, on an application in that behalf made by the Respondent or of its own motion rescind the order granting conditional leave to appeal and declare the appeal to stand dismissed for non-prosecution notwithstanding the appellant’s compliance with the conditions imposed by such order”

I find it impossible to agree with the submission made by Mr. Ranganathan that the rule vests no discretion in the court for I see no reason whatsoever to think that when the legislature used the words, “The court *may* rescind the order granting conditional leave to appeal” the

legislature intended that “ may ” should be read in the context of this rule as if it were “ shall ”. I am fortified in my opinion that Rule 21 vests a discretion in the court as to whether or not it will rescind the leave already granted when I find that in the case of *Hall v. The Pelmadulla Valley Tea and Rubber Company*¹ Garvin J. with whom Dalton J. agreed said as follows :—

“ Counsel for the Respondent urges that the application for conditional leave to appeal should be rescinded upon the ground that more than one week has lapsed since the date when the applicant complied with the conditions. It has to be noted, in the first place, that *Rule 21 vests a discretion in the court as to whether or not it will rescind the leave already granted.* ”

I now pass on to consider the next point made by Mr. Ranganathan, namely, that assuming that Rule 21 vests a discretion in the court the facts and circumstances in the instant case are not such as would justify the court exercising its discretion in favour of the Plaintiff-Petitioners.

The Proctor for the Plaintiff-Petitioners, Mr. V. Murugesu, has filed his affidavit which gives the reason why the papers were not filed in time. The relevant paragraphs of his affidavit read :—

(5) The application for final leave was tendered by me to this court and filed on the 10th day of April, 1968.

(6) Due to pressure of work I was unable to file the papers in Your Lordships' court earlier than the 10th of April, 1968.

It appears to me that the fact that there was compliance with the conditions on which conditional leave was obtained long before the time limit imposed by court for such compliance was over—in fact, I find the application for final leave was also within that period of time—and the fact that there has been long delay on the part of the Respondent in moving in the matter, are matters that outweigh the fact that the excuse given by Petitioner's Proctor establishes negligence which must be deemed to be Plaintiff's negligence. There is also the fact that no prejudice has been shown to have been caused to the Respondent. This appears to me to be a case in which the exercising of discretion in favour of the Plaintiff-Petitioners is justified.

The objections of the Respondent are dismissed with costs and the application for final leave granted.

SAMERAWICKRAME, J.—I agree.

Application allowed.

¹ (1927) 29 N. L. R. 41.