

1930

*Present : Garvin A.C.J. and
Jayewardene A.J.*

JOSEPH v. SOCKALINGAM CHETTY.

270—D. C. Colombo, 15,313.

Privy Council—Application for conditional leave—Substituted service—Notice by registered post—Ordinance No. 31 of 1909, schedule I., rule 2.

Where an applicant for leave to appeal to the Privy Council was allowed by the Supreme Court to effect substituted service on the respondent and the applicant, in complying with the order, further transmitted by registered post a copy of the notice addressed to the respondent who was resident in India,—

Held, that there had been a sufficient compliance with the requirements of rule 2 of schedule I., Appeals (Privy Council) Ordinance, No. 31 of 1909.

APPPLICATION for conditional leave to appeal to the Privy Council.

June 9, 1930. GARVIN A.C.J.—

This is an application for conditional leave to appeal to the King in Council, from a judgment of this Court dated March 10, 1930. The application is opposed on the ground that there is no proof that the applicant gave the opposite party notice of his intended application within 14 days as provided for by rule 2 of the schedule I to Ordinance No. 31 of 1909. That rule imposes upon an applicant for conditional leave the obligation to give notice of his intended application to the opposite party within the period of 14 days. The respondent to the application is the defendant in the action. He was represented right through these proceedings by an attorney, Saminathan Chetty, and I gather from the statements of counsel made during the hearing that Sockalingam Chetty has not been in Ceylon during the whole of these proceedings. The applicant, who appears in person, made on March 21 an application to this Court under the provisions of rule 5 (a) for substituted service stating the various steps he had taken

to give notice to the defendant, the circumstance of the absence of the defendant in India and the refusal of his proctor to accept notice on his behalf and that he had thereupon taken steps to transmit formal notice of his application to the defendant by post. Upon this application order was made allowing substituted service to be effected by affixing a copy of the petition and notice of this application at the defendant's place of business. A further order was made directing that an attempt should be made to cause notice to be served upon the defendant through the district munsiff in India. In compliance with the practice here the plaintiff handed in at the registry duly stamped copies of the notice and application, but in consequence of a delay, for which he does not appear to be responsible, substituted service was not effected till March 28, which was a few days after the period of 14 days prescribed by rule 2. There is no information still before us as to whether the attempt to serve the notice on the defendant through the district munsiff has been successful or not. Now, it is clear to my mind that the applicant has done all that he says he did. On March 11, the day after the judgment, he personally informed the defendant's attorney, Sāminathan Chetty, verbally of his intention to apply to this Court for conditional leave. He also gave the proctor for the defendant notice of that intention, but the proctor refused to accept notice, stating that his proxy did not authorize him to act for Sockalingam Chetty after the termination of the matter of the appeal to the Supreme Court. On March 21 the applicant posted three letters, each containing copies of his application, and giving notice of his application: one to the proctor, one to Sockalingam Chetty, and one to Sāminathan Chetty. The letter to Sockalingam Chetty, that is, the defendant, was addressed to Kallal, which the applicant has sworn is the defendant's residence in India to his own personal

knowledge. He also submitted a receipt from the post office acknowledging that these letters had been handed in for transmission. He also posted a letter to one Sinnasamy, whom he says is the local agent for Sockalingam Chetty. It is difficult to imagine what else the applicant could have done under the circumstances. This is not the only case in which parties have been placed in a position of great disadvantage in the matter of service of notices by reason of our proximity to the continent of India. It is contended, however, by the applicant that he has sufficiently satisfied the requirements of rule 2 by the notice contained in the letter which it is proved he had handed in at the post office for transmission to Sockalingam Chetty in India. The respondent has been aware of this application for a considerable time, and he must certainly have been aware of every material fact relating to it by April 4, when this matter was partly argued before this Court and then adjourned. All the materials before us were available then and yet no counter-affidavit has been filed denying any of the allegations made in the two affidavits filed of record by the applicant. The provisions of the Evidence Act, section 114, entitle us to presume that the common course of business has been followed. Here is proof that a letter containing a notice had been handed into the post office for transmission. Despite the fact that some two months have since elapsed, there is no denial before us by the defendant, to whom that letter was addressed of its receipt. It seems to me that in these circumstances we are entitled to presume that a letter which we are satisfied was properly directed and is proved to have been handed to the postal authorities for transmission reached its destination in due course and that it was received by the person to whom it was addressed. If we presume, and I think we are entitled to do so, that the defendant had notice of this application and must have received

that notice within the time prescribed by rule 2 the objection fails. The applicant is entitled to conditional leave upon the usual conditions.

JAYWARDENE A.J.—I agree.

Application allowed.
