1942 *Present :* **Howard C.J. and Hearne J.**

PALANIAPPA CHETTIAR *et al.* *v.* MERCANTILE BANK.

113*—D. C. (Inty.) Colombo, *49,541.

Appeal—Application for typewritten copies—Failure to comply with Rules—Application made to Secretary of District Court—Regularity—Matters not fundamental—Appeal does not abate—Civil Appellate Rules 2 (1) and 4 (1938).

Where an application for typewritten copies made by an appellant failed to comply with rule 2 (1) of the Civil Appellate Rules, 1933, inasmuch as (1) it was addressed to the Secretary of the District Court and not to the District Judge, (2) it did not state therein whether copies of the whole or portions only and, if so, what portions of the record were necessary for the decision of the appeal, (3) it did not state the value of the subject-matter and nature of the action or proceedings in which the appeal was preferred.

Held, with regard to the first ground, that an application made to the Secretary may be deemed an application to the District Judge.

Where the application was made the subject of a Journal entry it must be regarded as having been accepted by the District Judge, although the entry did not bear the initials of the Judge.

Held, further, that failure to comply with matters specified in grounds 2 and 3, which are not fundamental, does not amount to a substantial default, which would abate the appeal.

THIS was an application to revise an order of the District Judge of Colombo.

The plaintiffs filed a petition of appeal on September 8, 1941, against an order of the District Judge made the same day allowing the defendants to execute a decree of the Supreme Court dated May 10, 1938.

On November 28, 1941, on a motion made by the defendants the District Court declared that the appeal of the plaintiffs had abated owing to their failure to comply with the requirements of the Civil Appellate Rules in the application for typewritten copies.

H. V. Perera, K.C. (with him *S. Nadesan* and *Walter Jayawardene*), for the petitioners in the application and the appellants in the appeal.—The question is one of the interpretation of rule 4 (*a*) of the Civil Appellate Rules, 1938 (Vol. 3 of 1940 Supplementary Legislation, p. 6). The appeal cannot be said to have abated. The application for typewritten copies, under rule 2, was originally accepted by the District Judge. The respondents later took the objection that the application should have stated whether the whole or a portion only of the record was required for the decision of the appeal and that the value of the subject-matter of the action should have been stated. One has to distinguish the main, substantial act from the incidental requirements. The act of making the application and the act of stating certain things in that application are to be distinguished. The time within which and the form in which the application should be made are, no doubt, important and essential for the making of the application. The statement in such application

whether copies of the whole or portions only of the record are necessary is only an incidental matter and can be subsequently remedied. See the meaning of " default " in the judgment of Darling J. in *O'Connor and Ould v. Ralston*[1]. That dictum has been followed in *Murugappah Chettiar et al v. Ramanathan Chettiar*[2] and *Subramaniampillai v. Wickremasekere et al.*[3]

Another objection was taken in the District Court, that the application for typewritten copies was addressed to the Secretary of the District Court and not to the District Judge. For the purpose of the Civil Appellate Rules, the District Judge acts only as a ministerial officer and can, therefore, appoint an agent.

The Civil Appellate Rules were made to regulate the mode of prosecuting appeals. They cannot in any way take away the fundamental right of appeal provided by the substantive law. To provide for an abatement by a mere rule would be *ultra vires*.

In regard to the main appeal, there can be only one executable decree. Subsequent arrangements between the parties do not acquire the force of an executable decree. See the judgment of Soertsz J. in *Hunter et al. v. de Silva.*[4]

The decree sought to be executed should accompany and be annexed to the application for execution. In the present case no stamped copy of the decree of 1937 was so annexed. See *Wijesekere v. de Silva*[5].

N. Nadarajah (with him *E. B. Wickremanayake* and *H. A. Koattegoda*), for the 4th-16th defendants, respondents.—Rule 4 definitely penalizes a failure to make an application " in accordance with the requirements ". The only requirements are those mentioned in rule 2. The present rules, unlike those of 1913, do not provide for any relief. *Putwatta v. Nugawala*[6] and *Perera v. Sinno*[7], decided under the earlier rules, are helpful. For effect of the expression " shall be held to have abated ", see *Kangany v. Ramasamy Rajah*[8].

The Secretary and the District Judge cannot change places. They perform separate functions. See *e.g.*, rule 2 (2) and rule 2 (1). The Secretary, therefore, has no *locus standi* in the present case.

The provision in rule 4 for abatement is not *ultra vires*. The Civil Appellate rules are framed under section 49 of the Courts Ordinance. This Court has already held that a District Judge need not forward an appeal where there is failure to comply with the Civil Appellate Rules—*214 D. C. Negombo, 11,463*[9].

The amendment of the decree by the Supreme Court, on the consent of the parties, supersedes the earlier decree of the District Court. *Meenatchy Atchy v. Palaniappa Chettiar*[10] is directly in point.

H. V. Perera, K.C., replied.

Cur. adv. vult.

[1] *(1920) 3 K. B. 451 at 456.*
[2] *(1937) 39 N. L. R. 231.*
[3] *(1941) 42 N. L. R. 573.*
[4] *(1939) 41 N. L. R. 110.*
[5] *(1934) 14 C. L. Rec. 105.*
[6] *(1913) 5 Bal. N. C. 34.*
[7] *(1915) 3 Bal. N. C. 40.*
[8] *(1918) 21 N. L. R. 106.*
[9] *S. C. Minutes of August 29, 1941.*
[10] *(1941) 42 N. L. R. 333.*

January 13, 1942. HOWARD C.J.—

The plaintiffs in this case on September 8, 1941, filed a petition of appeal against an order of the District Court of Colombo made the same day allowing the defendants to execute a decree of the Supreme Court dated May 10, 1938. On November 28, 1941, on a motion made by the defendants the District Court declared that the appeal of the plaintiffs had abated on account of their failure to comply with the requirements of the Civil Appellate Rules in the application for typewritten copies. The plaintiffs were further ordered to pay the costs of the inquiry. The plaintiffs have applied by way of revision for the setting aside of the order of November 28, 1941. This Court has considered both the application by way of revision from the order of November 28, 1941, and the appeal against the order of September 8, 1941, allowing execution.

A preliminary objection to the hearing of the application in revision was heard by this Court on December 9, 1941. Judgment was delivered on December 11, 1941, overruling this objection.

The declaration of the District Court holding that the appeal had abated was made on the ground that the application for typewritten copies made by the appellant's Proctor on September 12, 1941, failed to comply with section 2 (1) of the Civil Appellate Rules, 1938, inasmuch as (1) it was addressed to the Secretary of the District Court and not to the District Judge, (2) it did not state therein whether copies of the whole or portions only and, if so, of what portions of the record were necessary for the decision of the appeal, (3) it did not state the value of the subject-matter and nature of the action or proceedings in which the appeal was preferred. The District Judge held that as the application failed to comply with any of the requirements of section 2 (1), by section 4 of the Rules which was of a peremptory character the appeal must be deemed to have abated, and made declaration accordingly.

The question as to whether the District Judge was empowered to make such a declaration is academic inasmuch as it is now for this Court to decide whether in fact the appeal has abated. Sections 2 (1) and 4 of the rules are worded as follows :—

" 2. (1) The appellant shall apply in writing to the District Judge or the Commissioner of Requests, as the case may be, within the time limited by law for the completion of the security for costs of appeal, for typewritten copies of the record, stating in such application whether copies of the whole or portions only, if so, of what portions of the record, are necessary for the decision of the appeal. Every such application shall state the value of the subject-matter and the nature of the action or proceedings in which the appeal is preferred, and shall be accompanied by the fees prescribed in the schedule hereto.

Provided that where no time is fixed by law for the furnishing of security for costs of appeal, the appellant shall apply for typewritten copies within one month of the date of preferring his appeal. "

" 4. (*a*) Where the appellant fails to make application for typewritten copies in accordance with the requirements of these rules; or

(b) fails to pay the additional fees due under rule 2, sub-rule (4), within one month from the date of the order requiring him to do so, or, before the expiry of the time allowed by rule 2, sub-rule (7), whichever is later, the appeal shall be deemed to have abated."

It was conceded by the appellants that their application for typewritten copies failed to comply with the Rule 2 (1) as specified in (1), (2), and (3) above mentioned. The application was made the subject of a Journal entry on September 12, 1941. It is true that this entry does not bear the initials of the District Judge. On the other hand, I am of opinion that for the purposes of this provision of the rules an application made to the Secretary may be deemed an application to the District Judge. Moreover, it must be regarded as having been accepted by the District Judge inasmuch as the Journal is his record of the proceedings.

With regard to the matters specified in (2) and (3), Mr Perera on behalf of the applicants contended that a distinction must be drawn between the act which they were required by the rule to perform and acts incidental thereto. In this connection we were referred to section 4 of the Business Names Ordinance and the judgment of Darling J., in *O'Connor and Ould v. Ralston*[1]. In this case the question for consideration was whether the plaintiffs by describing themselves as accountants, which was a misdescription of their business, made "default" in furnishing a statement of particulars within the meaning of section 8 (1) of the Registration of Business Names Act, 1916. This provision is worded similarly to section 4 (1) of the Ceylon Ordinance. Darling J., though not basing his decision on this point, expressed the opinion that the word "default" in the subsection means not furnishing any particulars at all and does not mean furnishing insufficient particulars. This dictum of Darling J. was cited in the judgment of Hearne J. in the case of *Murugappah Chettiar v. Ramanathan Chettiar*[2] where it was held that on a return under section 4 of the Registration of Business Names Ordinance an erroneous statement with regard to the residence of a partner would not alone amount to a default within the meaning of section 9 of the Ordinance. In *Subramaniampillai v. Wickremasekere*[3], where a firm in registering its business under the Business Names Ordinance failed to furnish the names of each of its individual partners, it was held that there had been an omission to give particulars, in regard to a material, and fundamental matter. There was, therefore, a substantial failure to comply with the requirements of the Ordinance as to amount to a default within the meaning of section 9. In *Putwatte v. Nugawela* reported in 5 Balasingham's Notes of Cases, p. 34, Wood-Renton A.C.J., referred to the Proctor's duty to give directions to the Registrar as to what should be included in the brief. It is an authority for the proposition that if in the performance of that duty material portions of the brief remain uncopied the appellant runs the risk of the appeal being dismissed. It is not an authority for the proposition that in such circumstances the appeal cannot be heard or has lapsed. In *Perera v. Sinno*[4] the same Judge held that in the absence of special circumstances, the appeal must be dismissed

[1] *(1920) 3 K. B. at p. 456.*
[2] *(1937) 39 N. L. R. 231.*
[3] *(1941) 42 N. L. R. 573.*
[4] *3 Balasingham's Notes of Cases, p. 40*

when under the Civil Appellate Rules, 1913, no application for typewritten copies was made within the term prescribed. *Kangany v. Ramasamy Rajah*[1] was a case decided under section 756 of the Civil Procedure Code. In my opinion the last three cases do not touch the point at issue. What we have to decide is whether the failure to comply with the matters specified in (2) and (3) above are fundamental. In my opinion they are not and hence there has not been a substantial default. The application in revision is, in these circumstances, allowed and the order of November 28, 1941, set aside. The applicants are allowed their costs in the District Court on the hearing of the motion for the declaration, and in this Court on December 9, 1941.

The appellant's appeal against the District Judge's order of September 8, 1941, allowing the defendants to execute the decree of the Supreme Court dated May 10, 1938, is based on the ground that there was no decree made by the Supreme Court on that date and that the only decree of which execution could be ordered was that of May 18, 1937. The history of this case is as follows: On December 6, 1935, a mortgage decree was entered in the District Court in favour of the respondents. This decree was affirmed by the Supreme Court on May 18, 1937. Application was then made by the appellants for leave to appeal to the Privy Council. At the same time the respondents applied for execution of the mortgage decree. On December 16, 1937, by consent the parties entered into an agreement with regard to the execution of the mortgage decree of May 18, 1937. The terms of this settlement included the dismissal of the respective applications for leave to appeal to the Privy Council and for execution of the decree of May 18, 1937. On May 10, 1938, the case was mentioned in a Court constituted by Maartensz and Koch JJ., and judgment was as follows:—

" Maartensz J.—

(1) Of consent application for leave to appeal to the Privy Council is refused with costs.

(2) Application for the appointment of a Receiver is refused without costs.

(3) Application for execution of the decree made to this Court pending the appeal to the Privy Council is refused without costs.

(4) Appeal No. 47 filed by the plaintiffs-appellants is dismissed without costs.

(5) Decree of the District Court as affirmed by this Court is to be varied in terms of the consent motions dated December 16, 1937, and April 29, 1938.

Draft decree to be submitted to Counsel before it is signed by the Registrar.

(Sgd.) L. M. Maartensz,
Puisne Justice.

I agree

(Sgd.) F. H. B. Koch,
Puisne Justice.

[1] (1918) 21 N. L. R. 106.

Decree in terms of this judgment was entered on the same day. On December 19, 1939, application was made by the defendants for execution against the plaintiffs of the decree of December 16, 1935, and varied of consent of parties as per decree of the Supreme Court dated May 10, 1938. On September 8, 1941, this application was allowed with costs.

It is contended by Counsel for the appellants that the only decree of the Court that is executable is that of May 18, 1937. It is suggested also that Maartensz and Koch JJ. had no power to vary the decree of May 18, 1937, and that, if they did so, such order was not executable. We are unable to accept this contention. The order of the Supreme Court made on May 10, 1938, purports to be a decree of the Court and has in subsequent proceedings been treated as such. Thus in proceedings before Soertsz and Hearne JJ., on August 22, 1940, this order was treated as a decree of the Supreme Court. Again on February 13, 1941, in proceedings before Hearne and Wijeyewardene JJ., the order of May 10, 1938, was assumed to have varied the previous decree. Moreover to the judgment of Maartensz J., there is appended a note to the effect that the draft decree is to be submitted to Counsel before it is signed by the Registrar. In these circumstances it is impossible to contend that the order made on May 10, 1938, is not a decree. Its validity is not, in my opinion, open to question. In this connection I am of opinion that the cases of *Wijesekere v. de Silva*[1] and *Hunter v. de Silva*[2] have no relevance. In the former case it was held that an application for the execution of a decree should not be allowed until the formal decree had been entered in the case and the Court is satisfied that the applicant had obtained a copy of the decree. In the present case formal decree had been entered. In *Hunter v. de Silva (supra)* where after decree was entered in an action the defendants entered into an agreement with the plaintiffs to pay a rate of interest higher than that given by the decree, and where the plaintiffs applied to have the decree altered and the adjustment certified under section 349 of the Civil Procedure Code, it was held that the decree could not be altered to give effect to the agreement; the agreement may go beyond the terms of the decree but the Court will recognize and certify only so much of the agreement as adjusts the decree in whole or in part. In that case the agreement was not made a decree of the Court. There was no substitution of a new decree for the original decree as in this case. On the other hand, the case of *Meenatchy Atchy v. Palaniappa Chettiar*[3] is very much in point. In this case a decree entered in January, 1926, was adjusted by means of a consent motion filed to the effect that "the date of the decree in this case should be reckoned as from this date". It was held (1) that the agreement incorporated in the order substituted a new decree for the original decree and that the date given in the agreement must be regarded as the date of the decree for the purpose of section 337 (1) of the Civil Procedure Code, and (2) that the agreement may be regarded as "a subsequent order directing the payment of money to be made at a "specified date" within the meaning of section 337 (1) (b) of the Civil Procedure Code. Keuneman J., in his judgment in this case stated that, to establish his point, the respondent

[1] *14 C. L. Rec. 105.*

[2] *(1939) 41 N. L. R. 110.*

[3] *42 N. L. R. 333.*

must show that the original decree was actually superseded by the new arrangement and that it was not merely an intermediate arrangement for the payment of the original decree. In this case also the respondents have succeeded in establishing a similar state of things.

The point was also taken that as a reference was made to the original decree, the latter should have been attached to the application for execution. This point is without substance. In my opinion the original decree was superseded by that of May 10, 1938. This decree was executable.

The appeal in my opinion fails and must be dismissed with costs.

HEARNE J.—I agree.

Application allowed.
Appeal dismissed.