

1957 Present : H. N. G. Fernando, J., and T. S. Fernando, J.

M. M. L. M. A. C. ALIM, Petitioner, and
A. L. P. H. ASIA UMMA, Respondent

S. C. Application 101—In the matter of an Application for Conditional Leave to appeal to the Privy Council in S. C. 10, D. C. Batticaloa 1,099

Privy Council—Application for conditional leave to appeal—Stamping of documents relating thereto—The Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rule 2—Stamp Ordinance (Cap. 189), s. 12 and Schedule A, Part II.

Where a petition for conditional leave to appeal to the Privy Council is accompanied, in the first instance, by an affidavit as to service of notice of it to the opposite party in compliance of the requirement of Rule 2 of Schedule 2 of the Appeals (Privy Council) Ordinance, the two documents must, under section 12 of the Stamp Ordinance read with Schedule A, Part II, be treated as separate and distinct for stamping purposes. Failure, therefore, to stamp the petition is a fatal irregularity, although the affidavit is properly stamped.

APPPLICATION for conditional leave to appeal to the Privy Council.

E. R. S. R. Coomaraswamy, with *M. S. M. Nazeem* and *T. G. Gunasekera*, for the petitioner.

V. K. Palasuntheram, for the respondent.

Cur. adv. vult.

September 16, 1957. H. N. G. FERNANDO, J.—

This application for conditional leave to appeal to the Privy Council against a judgment of this Court has been opposed by the respondent on the ground that the application for leave is not duly stamped.

On 25th February 1957 the Proctor for the petitioner filed with the Registrar the following documents :—

A. A motion (unstamped) signed by the Proctor “ I file petition and affidavit of the petitioner abovenamed and for reasons stated therein move that the Court be pleased to grant him conditional leave. ”

B. A document (also unstamped) purporting to be a petition signed by the Proctor and containing certain statements upon the basis of which the petitioner prays for conditional leave to appeal.

C. A third document (stamped)—numbered pages four and five—signed by the petitioner himself. This document takes the form usual for an affidavit, and in it the petitioner himself affirms to the identical matters averred by his Proctor in the document *B* mentioned above. This third document also concludes with a prayer for conditional leave to appeal.

D. The duplicate of a purported notice to the respondent of the intention to appeal having affixed thereto a postal receipt (stamped) in respect of a postal article received from the petitioner and addressed to the respondent.

E. A proxy (stamped) signed by the petitioner in favour of his Proctor.

The substantial point we have to decide is whether these documents have been duly stamped in accordance with the provisions of the Second Schedule to the Stamp Ordinance (Cap. 189) prescribing “ the duties on Law Proceedings ”. The first three items mentioned in the Schedule are respectively “ (1) Proxy (2) Affidavit (3) Application for conditional leave ”, and it would seem at first sight that the Statute requires each of the documents mentioned in the first three items to be separately stamped and that therefore in the present case the failure to stamp document *B*, which is the petition for leave to appeal, constituted a non-compliance with the provisions of the Stamp Ordinance.

It seems to me that in the circumstances of the present case the petitioner can only rely on two possible arguments, *firstly* that document *C*—the affidavit—is superfluous, and that therefore the requirement that an application for conditional leave should be stamped has been satisfied through the provision of stamps on document *C*; *secondly* that although document *C* takes the form of an affidavit, it also contains a prayer for leave to appeal and should accordingly be regarded as the application. It is necessary to refer to the Rules in the Schedule to the Privy Council Appeals Ordinance (Cap. 85) in order to consider these arguments. Rule 2 of the Schedule provides as follows :—

“ 2. Application to the court for leave to appeal shall be made by petition within thirty days from the date of the judgment to be appealed from, and the applicant shall, within fourteen days from the date of such judgment, give the opposite party notice of such intended application. ”

A prospective appellant is bound under this Rule to give notice to the opposite party of his intention to appeal, but there is no further express provision in the Rules concerning that matter, and in particular no provision requiring the appellant to satisfy the Court that notice has been duly given to the opposite party. It is argued therefore that although in the present case there is an affidavit of the petitioner affirming (in paragraph 3) that notice was given to the respondent, there was no necessity for such an affirmation because conditional leave could have been granted by the Court without it.

Although the Rules do not expressly so provide I have no doubt that a Judge who considers an application for leave to appeal has a right, if not also a duty, to satisfy himself that the petitioner has given notice under Rule 2 to the opposite party, and may in his discretion require for that purpose something more than an unsworn statement by the petitioner's Proctor. Even, therefore, though it may not be essential that the petition should in the first instance be accompanied by an affidavit as to service of notice, the Court may well require such an affidavit as a condition precedent to the granting of the application for leave.

It is not argued that it is unusual for a petition for leave to appeal to be accompanied by an affidavit: on the contrary there is little doubt that such is the ordinary practice. When, therefore, as in the present case, there is an affidavit separate from the petition, it must in my opinion be assumed that the deponent's object was to induce the Court to accept as established the several matters therein averred. The fact that document *D* and the postal receipt were also filed makes this assumption all the more valid. While it is unnecessary in this case to decide whether or not an affidavit as to service of notice is essential, it is at least clear that the present petitioner intended to establish by means of his affidavit that he had complied with Rule 2. One clear advantage, for instance, gained by filing an affidavit at the initial stage would be the saving of delay in the event of the Court requiring better proof of the notice than the Proctor's statement in the petition. The affidavit then has to be regarded as having been intentionally filed for a purpose ancillary to the purpose for which the petition—document *B*—was filed. In these circumstances section 12 of the Stamp Ordinance applies and the two documents must be treated as distinct for stamping purposes.

I would hold therefore that the petition—document *B*—required stamping and, following the recent decision in *Usoof v. Nadarajah Chelliar*¹, that the failure to stamp it prevents this Court from entertaining the petition.

The application for conditional leave to appeal to the Privy Council is refused with costs.

T. S. FERNANDO, J.—I agree.

Application refused.