1949 *Present:* **Wijeyewardene C.J. and Gunasekara J.**

VANDER POORTEN, Applicant, *and* VANDER POORTEN *et al.*, Respondents

S. C. 172—APPLICATION FOR CONDITIONAL LEAVE TO APPEAL TO THE PRIVY COUNCIL IN S. C. 496, D. C. KANDY, 1,656/M.R.

Privy Council—Application for leave to appeal—Computation of amount in respect of which appeal lies as of right—Ground of appeal stated in notice to opposite party—Can it be altered subsequently?—Notice given by attorney of applicant—Is it valid?—Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rules 1 and 2—Appellate Procedure (Privy Council) Order, 1921, Rules 5, 6 and 19.

Plaintiffs, as beneficiaries under a last will, obtained judgment against the defendant for a sum of Rs. 1,000 as their share of a fund of Rs. 10,000. Defendant, however, sought to appeal to the Privy Council as of right on the ground that in view of the decree entered against him he was exposed to the risk of claims being made against him by the other beneficiaries trying to recover their shares of the Rs. 10,000.

Held, that the matter in dispute on the appeal did not involve a claim of the value of Rs. 5,000 and the defendant was not entitled to leave to appeal.

Obiter: An applicant for conditional leave to appeal to the Privy Council is not entitled to alter the ground on which he asks for leave to appeal after the lapse of fourteen days from the date of judgment.

Quaere, whether notice of application for leave to appeal given to the opposite party by a duly appointed attorney of the applicant is valid.

THIS was an application for conditional leave to appeal to the Privy Council from a judgment of the Supreme Court.

N. K. Choksy, K.C., with *M. P. Spencer*, for defendant applicant.

N. E. Weerasooria, K.C., with *G. T. Samarawickreme*, for defendants respondents.

Cur. adv. vult.

November 7, 1949. WIJEYEWARDENE C.J.—

This is an application filed by the defendant on April 9, 1949, under Rule 2 in the Schedule to the Appeals (Privy Council) Ordinance for leave to appeal to the Privy Council from a final judgment of this Court delivered on March 11, 1949. The application states :—

(i) " that the matter in dispute on the appeal amounts to or is of the value of Rs. 5,000 or upwards " ;

(ii) that the applicant " by notice dated March 24, 1949, duly intimated to the plaintiffs-respondents his intention to so appeal . . . . ".

The plaintiff objected to the application on the following grounds :—

(i) that the notice pleaded in the application was bad ;

(ii) that the matter in dispute was below Rs. 5,000.

1——J. N. A 94569-1,040 (1/50)

Before dealing with the objections, I shall give a brief statement of the facts of the case. The first and second plaintiffs who are minors were represented in this action by their mother, the third plaintiff, as next friend. The minors are beneficiaries in respect of 1/20th share, each, in the residuary estate of A. J. Vander Poorten who died leaving a last will which was proved in D. C. Kandy (Testy.) 50. Probate was granted to the defendant and two other executors. The plaintiffs asked for a decree in this action against the defendant personally directing him "to pay into Court in this action for the benefit of the estate of the said A. J. Vander Poorten a sum of Rs. 10,000" being the proceeds of a cheque misappropriated by him or, in the alternative, to pay to the first and second plaintiffs Rs. 1,000 being their 1/10th share of Rs. 10,000. In the course of the action, the plaintiffs restricted their claim to an order on the defendant to pay them Rs. 1,000. After trial the District Judge gave them judgment for Rs. 1,000. The defendant appealed against that judgment and the appeal was dismissed by the Supreme Court.

I proceed now to deal with the objections raised by the respondents' Counsel.

The notices referred to in the application were

(i) a telegram addressed to Mr. Kolugala, Proctor for the plaintiffs, by Mr. Stave, Proctor for the defendant. That telegram reads:—"As guardian-ad-litem of Antoine and Michael (minor plaintiffs) in District Court Kandy case No. 1656 take notice . . . . . ";

(ii) a similar telegram addressed to the third plaintiff by Mr. Stave;

(iii) "notices" sent to the plaintiffs and Mr. Kolugala, signed by Mr. Stave and by the defendant "by his Attorney" Mr. J. F. Martyn, authorised by a power of attorney to act for the defendant in respect of all matters connected with appeals to the Privy Council.

Mr. Kolugala's proxy empowering him to act under the Ordinance is dated May 19, 1949, and Mr. Stave's proxy is dated April 9, 1949.

Apart from the fact that the telegram to Mr. Kolugala was addressed to him "as guardian-ad-litem of Antoine and Michael" Mr. Kolugala was not, at the time he received the telegram and "notice", a Proctor of the plaintiffs "empowered to accept service thereof" [see Rule 5A of the Appellate Procedure (Privy Council) Order, 1921]. Mr. Stave himself had no authority to act for the defendant and send the telegrams and "notices" as his proxy was dated April 9, 1949. There remains for consideration the validity of the "notice" signed by the defendant "by his Attorney". It is contended by the plaintiff that that notice too is bad, as a notice could be signed only by a party or by a Proctor for a party empowered to act under the Ordinance. This contention is based on Rule 6 of the Order which states, "A party to an application under the Ordinance. . . . shall, unless he appears in

person, file in the Registry a document in writing appointing a Proctor of the Supreme Court to act for him in connection therewith . . . . ". It is, however, not difficult to take the view that Rule 6 applies only to what has to be done in Court and not to a notice of " an intended application " referred to in Rule 2 in Schedule 1 to the Ordinance and not given with the assistance of the Court. Such a view of the law has the merit of not placing unnecessary technical difficulties in the way of a party wishing to appeal to His Majesty in Council. If that view is correct, the party required to serve notice may do so by a writing signed by him " by his Attorney ", as that is permissible under the common law and there is nothing in Rule 5 to show that the right under the common law has been taken away. A certain difficulty is however created by a decision of this Court. In *Annamalay Chetty v. Thornhill*[1], a Bench of two Judges held against the validity of an application for conditional leave to appeal which was made by a Proctor appointed by a duly authorised Attorney of a party. When the same question came up subsequently before another Bench of two Judges, it was referred to a Divisional Bench, as it was felt that the earlier decision needed reconsideration. The Divisional Bench overruled the earlier case. There are, however, passages in the judgment of the Divisional Bench (*Muttucarupen Chettiar v. Mohamed Salim*[2]) which seem to suggest that a notice given by a duly appointed Attorney is bad. I do not think it necessary to refer this question to a Divisional Bench, as we could give our decision on the regularity of the present application without reaching a decision as to the sufficiency of the notice.

In considering the second objection of the plaintiffs, it should be remembered that the right of appeal given to parties in a civil action is subject to certain limitations. They could appeal

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

B. " As of right, from any final judgment of the Court, 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 " ; or

C. " 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 general or public importance or otherwise ought to be submitted to His Majesty in Council for decision " (see Scheduled Rule 1).

Now the decree against which an appeal is sought to be taken orders the defendant to pay a sum of Rs. 1,000 and costs. The applicant, therefore, cannot appeal as of right under A above. Counsel for the applicant did not seek to come under C above. He argued, however,

[1] *(1935) 36 N. L. R. 413.* [2] *(1939) 40 N. L. R. 145.*

that he had a right of appeal under B above. That contention was based on the ground that in view of the decision in the present case the defendant was exposed to the risk of claims being made against him by other beneficiaries in the estate of A. J. Vander Poorten trying to recover their shares of the sum of Rs. 10,000 mentioned above. Those shares, it may be stated, would amount to only Rs. 4,500, as the defendant himself is entitled to 9/20th of the residuary estate. The judgment in this case would not operate as *res judicata* in favour of the other beneficiaries. Moreover, it is quite possible that the defendant may have various defences against those beneficiaries which were not available to him in the present action. There is also no evidence that any of the other beneficiaries have sued the defendant or even threatened to sue him. I am, therefore, unable to hold that the applicant is entitled as of right to appeal as stated in B above (vide *Gooneratne v. The Bishop of Colombo*[1]). On this ground, at least, the application for leave to appeal must fail.

I wish, however, to refer to a matter that was argued at some length before us. In his application to the Court the applicant claimed a right of appeal on the ground that the matter in dispute was of the value of Rs. 5,000. Could he at the argument before this Court long after the lapse of the specified period of thirty days claim that he had a right of appeal as stated in B above? Now Scheduled Rule 2 requires an application for conditional leave to appeal to be made within thirty days of the judgment of this Court and notice of the intended application to be given to the opposite party within fourteen days of that judgment. The main, if not sole, object of giving notice is to enable the opposite party to be prepared to show, if possible, that the plaintiff is not entitled to appeal. The opposite party should, therefore, know in time whether the applicant claims a right to appeal and in that case, on what grounds, or whether he pleads that the Court should exercise its discretion in his favour and permit him to appeal. It appears to me that the very object of requiring a party to give notice within a specified time will be defeated if the applicant is allowed to alter the ground on which he asks for leave to appeal after the lapse of fourteen days from the date of judgment. This view of mine derives some support from an examination of the Appellate Procedure (Privy Council) Order, 1921. Those Rules were made by the Supreme Court under section 4 of the Appeals (Privy Council) Ordinance which empowered the Supreme Court to "make rules for regulating the form and manner of proceeding". Now Rule 19 of the Order enacts that "the form contained in Schedule 2 to the Order may be used or others to the like effect". The "form of petition for conditional leave to appeal" given in Schedule 2 shows clearly that the applicant is expected to state specifically whether the application is made on the ground A, B or C above.

The application is refused with costs.

GUNASEKARA J.—I agree.

Application refused.

[1] *(1931) 33 N. L. R. 63.*