

1960 *Present :* **K. D. de Silva, J., and T. S. Fernando, J.**

A. S. ABDUL CADER, Petitioner, and I. L. M. SHERIFF,
Respondent

*S.C. 543—Application for Conditional leave to appeal to the Privy Council in
S. C. 539 of 1957/D. C. Gampaha 797/4947*

*Privy Council—Application for conditional leave to appeal—Notice to opposite party—
Meaning of “ opposite party ”—Invalidity of notice given by a Proctor without
due authority—Proof of notice sent by ordinary post—Appeals (Privy Council)
Ordinance (Cap. 85), Schedule, Rule 2.*

By Rule 2 of the Rules in the Schedule to the Appeals (Privy Council)
Ordinance :—

“ 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 judg-
ment, give the opposite party notice of such intended application.”

Held, that where the petitioner is a defendant in a partition action, any co-defendant who will be prejudicially affected by the success of the proposed appeal is an "opposite party" within the meaning of Rule 2 and must therefore be given notice of the intended application for leave to appeal.

Sobitha Unnanse v. Piyaratna Unnanse (60 N. L. R. 189), doubted.

Held further, (i) that a notice of intended application given by a Proctor when the proxy does not empower him to act for his client for the purpose of taking steps to appeal to the Privy Council and where there is no other authority from his client is an invalid notice.

(ii) that where a notice of intended application is sent by ordinary post the best proof of such despatch is by the production of a receipt from the Post Office.

APPPLICATION for conditional leave to appeal to the Privy Council.

M. T. M. Sivardeen, for the 19th defendant-appellant, petitioner.

E. B. Wikramanayake, Q.C., with *M. Markhani*, for the plaintiff-respondent and the 2nd, 3rd (3a), 11th and 12th defendants-respondents.

Cur. adv. vult.

October 21, 1960. T. S. FERNANDO, J.—

This application by the 19th defendant for conditional leave to appeal to Her Majesty in Council is opposed by the plaintiff and the 2nd, 3(a)rd, 11th and 12th defendants on the grounds specified below :—

(1) On behalf of the plaintiff it is urged that notice of the intended application required by Rule 2 of the Rules in the Schedule to the Appeals (Privy Council) Ordinance (Cap. 85) to be given within fourteen days of the judgment appealed from has been given by a proctor who had not at the time of doing so any authority from the 19th defendant to give such notice ;

and (2) on behalf of the 2nd, 3(a)rd, 11th and 12th defendants it is urged that there has been a total failure to give them notice of the intended application.

In support of the first objection, the plaintiff has tendered the notice served on him by registered post together with the envelope in which this notice was enclosed. These show that the notice has been given by proctor J. F. Jayatilake who describes himself therein as proctor for the 19th defendant-appellant. An examination of the only proxy granted by the 19th defendant to Mr. Jayatilake does not show that any authority was granted thereby to the latter to act for the former in respect of or in connection with an appeal to Her Majesty in Council from an order of the Supreme Court. Mr. Sivardeen does not contend that the proxy in question grants the required authority, but relies on an averment of his client in an affidavit presented to this Court nearly a year after the

date of the judgment sought to be appealed against that proctor Jayatilake had his client's oral authority to send the notice of intended application. It is significant that this averment is not supported by an affidavit of proctor Jayatilake himself stating that he had such oral authority. In the case of *Kandaswamy v. Kandavanam*¹, it has been held that a notice of intended application given by a proctor where the proxy did not empower him to act for his client for the purpose of taking steps to appeal to the Privy Council and where there was no other authority from his client was an invalid notice. I am of opinion that the notice upon which the plaintiff bases his objection is of no avail to the petitioner.

Mr. Sivardeen, however, relies on an averment contained in the petitioner's affidavit dated 12th September 1960 according to which the petitioner himself posted to the plaintiff by registered post a notice of intended application "identical in terms of the notice" sent by proctor Jayatilake. While the receipt of such a notice is not specifically denied by the plaintiff, inasmuch as such a notice must have been signed not by the petitioner but by proctor Jayatilake, I fail to see what difference there can be between that notice and the one posted by proctor Jayatilake. In these circumstances the first objection has to be upheld.

In regard to the second objection, it is contended by the petitioner that notice of intended application was sent by ordinary post to the defendants who have raised this objection, and that none of the postal packets containing the notices was returned to the petitioner undelivered. I fail to see why the notices to these defendants should have been sent by ordinary post when the notices to the other parties were sent by registered post. No receipt of any kind from a post office relating to the posting of notices by ordinary post is relied on by the petitioner although it is possible to obtain from a post office, on payment of a small fee, a receipt even in respect of letters or packets sent by ordinary post. The receipt of the notices has been specifically denied by the objecting defendants, and I am unable to say that the petitioner has proved that notice was given to these defendants. I may add that even in respect of the notices alleged to have been sent to these defendants, the position for the petitioner is that the notices sent were signed by proctor Jayatilake who, as I have pointed out above, has not been proved to have had any authority from the petitioner to send such notice.

Faced with the difficulty of establishing the giving of notice to the objecting defendants, Mr. Sivardeen, relying on the authority of *Sobitha Unnanse v. Piyaratna Unnanse*² has contended that Rule 2 referred to above does not require that notice of intended application be given to these defendants. In the case relied upon, Basnayake C.J., (Pulle J. agreeing) has held that in an application for conditional leave to appeal to the Privy Council, the words "opposite party" in Rule 2 mean the party on the side opposite to the applicant, and that therefore when the

¹ (1956) 58 N. L. R. 413.

² (1957) 60 N. L. R. 189.

applicant is a defendant he must give notice of his application to the plaintiff, but need not give such notice to a co-defendant although he is at issue with the co-defendant. The report does not disclose the nature of the action filed by the plaintiff in *Sobitha Unnanse v. Piyaratna Unnanse* (*supra*). I find great difficulty in applying that decision to the case before us, the more so as it appears to be contrary to earlier decisions of this Court on the same question.

Before referring to these earlier decisions, it is necessary to state that the application before us relates to a partition action in which the District Judge had at the trial excluded from the partition certain lots (lots D, E, F and H) claimed by the 19th defendant. On appeal to the Supreme Court, the order relating to the exclusion of these lots was reversed and they were brought in as part of the corpus to be partitioned with the result that, by the judgment sought to be appealed against, the 2nd, 3(a)rd, 11th and 12th defendants were allotted shares in the entire land. It is clear that, if the 19th defendant is successful before Her Majesty in Council in obtaining exclusion of any one of the lots D, E, F and H, the interests the objecting defendants have obtained by the judgment of the Supreme Court will be prejudicially affected.

In *Wijesinghe Hamine v. Ekanayake*¹, Howard, C.J., (Soertsz, J. agreeing) interpreting the expression "opposite party" in Rule 2 of the Rules in the Schedule stated that the expression implies all the parties in whose favour the judgment appealed from was given. This decision was followed in *Nagalingam v. Thanabalasingham*² which went so far as to hold that notice of an intended application for leave to appeal to the Privy Council must be given to a respondent even though no relief is claimed against him. In the appeal to which the application before us relates, as I have indicated above, the petitioner is seeking to obtain an order which will prejudicially affect, *inter alia*, the defendants who have raised this second objection. No doubt the person making the application and those now objecting to it are all defendants, but I do not find it possible to agree that that circumstance has the effect of preventing the objecting defendants being the "opposite party" to the 19th defendant, the petitioner. I have already stated that the nature of the action in the case of *Sobitha Unnanse v. Piyaratna Unnanse* (*supra*) cannot be gathered from the judgment, but the case out of which the application before us arises is a partition action in which in one sense every party is both a plaintiff and a defendant. That circumstance apart, having regard to the object or purpose of giving notice of intended application to the opposite party which is merely to apprise him within a reasonable time of the fact that the litigation is not at an end—see *Balasubramaniam Pillai v. Valliappa Chettiar*³—the expression "opposite party" must mean the party or parties who would be prejudicially affected by the success of the proposed appeal and would, therefore, naturally be opposed to the granting of the remedy or relief sought for by the proposed appellant. The meaning attached to this expression in *Sobitha Unnanse v.*

¹ (1940) 41 N. L. R. 415 at 418.

² (1949) 50 N. L. R. 396.

³ (1938) 40 N. L. R. 90, 12 C. L. W. 59.

Piyaratna Unnanse (supra) is capable of leading in certain cases to a situation whereby notice of intended application is required to be given to a party who is neither affected by nor interested in the grant of the relief prayed for by the applicant while such notice need not be given to a party who may be prejudicially affected. I do not consider that we should interpret this expression in a manner which could lead to the result indicated above. It does not appear from the report that the cases I have cited here were brought to the notice of the learned Judges who decided the application in *Sobitha Unnanse v. Piyaratna Unnanse (supra)*, and, with great respect, I find myself unable to apply that decision to the application before us. I would respectfully follow the reasoning that commended itself to the Court in *Wijesinghe Hamine v. Ekanayake (supra)* and, inasmuch as I have held that the applicant has failed to prove that notice of intended application was given to the 2nd, 3(a)rd, 11th and 12th defendants who are parties who would be prejudicially affected by the success of the proposed appeal, this application for conditional leave must be refused with costs.

DE SILVA, J.—I agree.

Application refused.
