

1968 Present : H. N. G. Fernando, C.J., and Sirimane, J.

C. SANDANAM, Petitioner, and M. I. JAMALDEEN, Respondent

S. C. 93/67—*Application for conditional leave to appeal to the Privy Council in S. C. 215/63—D. C. Kandy. 6642*

*Privy Council—Application for conditional leave to appeal—Deficiency in stamping—Curable defect—Appeals (Privy Council) Ordinance (Cap. 100), Schedule, Rule 2—Stamp Ordinance, ss. 7 (2), 14, 41—Civil Procedure Code, ss. 46 (2) (b), 755.*

A deficiency arising from a bona fide error in the stamping of an application for conditional leave to appeal to the Privy Council in a civil case is not a fatal defect. The deficiency may be supplied upon an order of the Court.

*Usoof v. Nadarajah Chettiar* (58 N. L. R. 436) not followed.

**A**PPPLICATION for conditional leave to appeal to the Privy Council.

*H. W. Jayewardene, Q.C.*, with *N. R. M. Daluwatte*, for the Plaintiff-Petitioner-Appellant.

*C. Ranganathan, Q.C.*, with *M. T. M. Sivurdeen* and *M. S. Azeez*, for the Defendant-Respondent.

*Cur. adv. vult.*

September 19, 1968. H. N. G. FERNANDO, C.J.—

This is an application for leave to appeal to the Privy Council from a judgment of this Court in a civil action. The action was one for the conveyance to the plaintiff of the interests allotted to the defendants in a former partition action. For reasons which it is not necessary to discuss here, the value of the subject-matter involved in the proposed appeal is higher than the amount at which the action was valued at the time of its institution. The only objection of substance which has been taken by the respondents to the present application has been that the application for leave to appeal was insufficiently stamped. The appellant does not now contest the fact of insufficient stamping, but it is perfectly clear that this arose because of a bona fide error as to the amount of the stamp duty properly payable.

The respondents have quite correctly relied on the decision of this Court in *Usoof v. Nadarajah Chettiar*,<sup>1</sup> rejecting an application for conditional leave in a case where the application was insufficiently stamped, and where the deficiency was not supplied within the period of 30 days specified in Rule 2 of the Schedule to the Appeals (Privy Council) Ordinance (Cap. 100). Although that decision has been

<sup>1</sup> (1957) 58 N. L. R. 436.

subsequently followed, I regret that I have to disagree with it because in my opinion that decision was reached without consideration of relevant matters which have come to light during the argument of the instant case.

A very early case [regarding] the question of stamping in appeal proceedings was that of *Cornalie v. Ukkuwa*<sup>1</sup>. In that case, a petition of appeal to the Supreme Court from the judgment and decree of a lower civil Court had been duly stamped, but there had been a failure to supply the stamps required to be furnished for the judgment of the Supreme Court in appeal and for the certificate in appeal. The Court in that case observed that the omission to furnish stamps for the judgment in appeal and for the certificate in appeal would cause injustice to the respondent by his being kept out of his judgment. The decision gave effect to a specific statutory requirement as to the time of the delivery of the proper stamps which must accompany a petition of appeal to the Supreme Court. The requirement that such stamps be furnished *together with the petition of appeal* is now specified in the Schedule to the Stamp Ordinance (Vol. VIII at p. 755).

In *Salgado v. Peiris*<sup>2</sup>, a petition of appeal to the Supreme Court bore no stamp at all, and the appeal was rejected on that ground, the Court holding that it had never been the practice to allow a petition of appeal to be stamped subsequent to the date of its presentation. This was a decision of the Full Bench, and it must therefore be regarded as settled law that *a petition of appeal to the Supreme Court will be rejected if it is not sufficiently stamped on the day of its presentation*. Similarly, the 1867 decision was followed by a Full Bench in *Bandara v. Babun Appu*<sup>3</sup>, and accordingly *a petition of appeal to the Supreme Court must be rejected if the proper stamps for the judgment and certificate in appeal are not furnished at the time of the presentation of the petition*.

The legal ground for the decision in *Salgado v. Peiris* was subsequently explained by Macdonell C. J. in *British Ceylon Corporation v. The United Shipping Board*<sup>4</sup>. He referred to s. 755 of the Civil Procedure Code, which specifies the two modes of preferring an appeal to the Supreme Court, *either that a petition of appeal is drawn by an Advocate or Proctor, or that a party states his grounds of appeal to the Secretary or Clerk of the original Court, which grounds are taken down by that officer in the form of a petition of appeal*. But this second mode is only available to a party upon his producing the proper stamp for the petition of appeal. Macdonell C.J., pointed out that since s. 755 requires a party to produce the proper stamp if he wishes to prefer his appeal by this second mode, the section implicitly requires that a petition of appeal drafted by an Advocate or Proctor must be properly stamped at the time of presentation. The same point was made, though not so clearly, by Grenier J. when he referred to s. 755 in his judgment in *Salgado v. Peiris*.

<sup>1</sup> (1867) *Ram. 278*.

<sup>2</sup> (1909) 12 *N. L. R. 379*.

<sup>3</sup> (1892) *Matara Cases 203*.

<sup>4</sup> (1934) 36 *N. L. R. 225*.

It will be seen therefore that there are express statutory provisions which prescribe the time for due stamping of petitions of appeal to the Supreme Court, and the time for the furnishing of the proper stamps to accompany such petitions.

It is useful now to consider the case of a plaint which is unstamped, or insufficiently stamped. S. 36 of the Civil Procedure Code (Subsection 2 (h)) requires the Court to reject a plaint if it is "written on paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamps within a time to be fixed by the Court, fails to do so". This means that the Court is bound to afford to the plaintiff an opportunity to supply the deficiency in stamping. There is the high authority of Pereira J. for the proposition that if the Court does accept a plaint which is insufficiently stamped, the insufficiency will not be a ground on which the opposing party can ask for a dismissal of the plaintiff's action. I cite from the judgment in *Jayawickrema v. Amarasuriya*<sup>1</sup> :—

"So that when, in the case of a plaint under section 46 of the Code and in the case of an answer under section 77, the Judge does not reject the pleading, but accepts it, the presumption is that he has adjudicated in favour of the party who has tendered the document the question of the sufficiency of the stamp thereon, and I doubt that the adjudication in such a case can be interfered with by anybody. In the case, however, of a plaint or answer being accepted *per incuriam*, that is to say, as the result of an inadvertent omission on the part of the Court to consider the question of the sufficiency of the stamp thereon, it may be that before any step in the regular course of procedure is taken by the opposite party the Court may return the pleading to be properly stamped; but this question need not be considered on this appeal, because we have no information from the District Judge that the plaint in this case was accepted by him *per incuriam*, and no order returning the plaint was, in fact, made before the filing of the answer. When a Judge, having considered the question of the sufficiency of stamp duty, has accepted a plaint or answer, or has accepted it having inadvertently omitted to consider the question, the remedy, if indeed any exists, can only be by means of such action as the Attorney-General, as representing the Crown, to which all stamp duties are a debt, may be deemed to be entitled to take. It will be embarrassing to both the parties to any action and lead to disastrous results, if for instance, at a very late stage of the action a pleading can be thrown out for default of either party to make good any deficiency in stamp duty. Anyway, the sufficiency of the stamp on a plaint cannot be called in question as a matter of defence in an answer, any more than the fact that the plaint has not been 'distinctly written on good and suitable paper', as required by section 40 of the Code."

<sup>1</sup> (1914) 17 N. L. R. 174.

Pereira J. pointed out that the only provision of law in force relating to stamps on plaints appears to be s. 46, and his conclusion clearly was that a plaint cannot be rejected on the ground of insufficient stamping except in the manner and at the stage specified in that section. I find myself in respectful agreement with the principle here enunciated that the right of a party to maintain a proceeding cannot be denied to the party on the ground of insufficient stamping of a document, unless the law provides for such a denial. That principle was not violated in the decisions regarding the stamping of petitions of appeal to the Supreme Court because statutory provisions explicitly or implicitly regulate the time of due stamping.

The matter of the stamping of applications for leave to appeal to the Privy Council was considered in the case of *Usoof v. Nadarajah Chettiar* (supra). Weerasooriya J., in holding that a deficiency in the stamping of such an application cannot be supplied after the presentation of the application, appears to have thought that the decisions regarding petitions of appeal to the Supreme Court must apply also in the case of such applications. With respect, the judgment did not take account of the existence of provisions of law which are applicable to appeals to this Court, and which justify the rejection of such appeals on the ground of deficiencies in stamps. Neither that judgment, nor the later one in the case of *Thenuwara v. Thenuwara*<sup>1</sup>, gave consideration to the question whether there is any statutory provision, applicable to appeals to the Privy Council which resembles the statutory provisions (in s. 755 of the Code and in the schedule to the Stamp Ordinance) relating to stamping in cases of appeals to the Supreme Court. That being so, it is open to me to consider afresh the point whether a deficiency in the stamping of an application for leave to appeal to the Privy Council is curable.

There is in fact no special statutory provision concerning the time of stamping of such an application.

I need only consider, therefore, the general provisions of the Stamp Ordinance. Section 14 provides that "all instruments chargeable with duty and executed by any person in Ceylon shall be stamped before or at the time of execution", and s. 41 provides that "no instrument chargeable with duty shall be acted upon, registered or authenticated" by any public officer "unless such instrument is duly stamped". These provisions apply to all applications (e. g. for summons, for writ of Execution, for service of interrogatories) made in Court proceedings. If then any such application to a Court is in fact stamped, but insufficiently stamped, I much doubt whether a breach of s. 14 is thereby established; if stamps, though of insufficient value, are affixed at the time when such an application is signed by a Proctor it cannot be said that the instrument was not stamped at that time. Section 14 does not provide, (as does s. 7 (2) in a different context), that an insufficiently stamped instrument is deemed to be unstamped.

<sup>1</sup> (1960) 62 N. L. R. 501.

Section 41 of the Stamp Ordinance precludes a Court from acting upon an insufficiently stamped application. But must the Secretary of the Court necessarily reject such an application when it is filed? Section 7 provides that a stamp must be cancelled at the time when it is affixed on an instrument, and if the deficiency in stamping cannot be supplied by affixing additional stamps, the consequence will be that the value of the original stamps is lost to the party and fortuitously gained by the State. Taxing Statutes cannot in my opinion be interpreted in a manner so unfavourable to the tax-payer. The Secretary of the Court is an officer referred to in s. 41, and he is constituted an agent of the revenue authorities for the purpose of the collection of the proper stamp duties. He must not *act upon* an insufficiently stamped application. But s. 41 does not declare that such an application is valueless and must be rejected as such. Would not the proper course be for the Secretary instead to call upon the party to supply the deficiency in stamps, and if the deficiency is in fact supplied, would not the Court thereafter *act upon* the application? I am satisfied, on the authority of *Jayewickrema v. Amara-sooriya*, that this course should be adopted, for there would otherwise ensue "disastrous results" of the nature contemplated by Pereira J. or a miscarriage of justice as contemplated by Lord Goddard in the judgment of the Privy Council in *Karunapejjalage Bilindi v. Wellawa Attadassi Thero*<sup>1</sup>.

It is useful to consider what the Legislature intended by the provision in s. 41 that an instrument, particularly an application in a civil proceeding, should not be *acted upon*. In one sense, the petition for leave to appeal in this case was in fact acted upon several weeks ago, when the Registrar accepted it and when it was considered by this Court which issued notice thereof to the respondents. Such a situation closely resembles that which Pereira J. envisaged in the judgment already cited: "when . . . . the Judge does not reject the pleading, but accepts it, the presumption is that he has adjudicated in favour of the party who has tendered the document the question of the sufficiency of the stamp thereon, and I doubt whether the adjudication in such a case can be interfered with by anybody". I do not need, however, to go so far as to hold that this Court has no power to call upon the petitioner in this case now to supply the deficiency in stamps, although the judgment of Pereira J. does support even that conclusion.

Alternatively, if the petition in this case has not thus far been *acted upon*, then the point of time at which the Court will *act upon* the petition for leave is the time when the Court grants the leave. If this be so, s. 41 prevents the Court from granting the leave upon a petition insufficiently stamped. But if the Court now orders the

<sup>1</sup> (1945) 47 N. L. R. 7.

deficiency to be supplied, and it is supplied, then the Court can thereafter duly act upon a sufficiently stamped petition and grant the leave accordingly.

I must point out also that this Court, in entertaining applications for leave to appeal to the Privy Council, is in substance acting as a delegate of the Privy Council. That being so, I think it proper to heed the observations made by Lord Goddard in the case of *Karunapejjalage Bilindi v. Wellawa Attadassi Thero* (supra) :—

“ . . . . . their Lordships do not propose to express any opinion as to whether it is open to the Supreme Court, once the petition has been accepted by the Court of first instance, to take or give effect to an objection as to the sufficiency of the stamp, nor as to whether by the combined effect of ss. 756 and 839 it may not be possible for a *bona fide* mistake as to the stamp required to be remedied and thus perhaps avoid a miscarriage of justice. They say no more than that both points appear susceptible of considerable argument and that it would be an unfortunate and probably unintended result of the Stamp Ordinance if a litigant should be debarred from an appeal on a ground which is from a practical point of view capable of easy remedy without injustice to anyone.”

These observations, though made with reference to insufficient stamping of petitions of appeal to the Supreme Court, are a strong indication of the attitude which their Lordships would wish this Court to adopt in the case of proposed appeals to the Judicial Committee. They lead me to the opinion that the somewhat technical objection taken in this case should not stand in the way of a conclusion which will further the ends of justice.

I hold for these reasons that the considerations which require or justify the rejection, on the ground of insufficient stamping, of a petition of appeal to the Supreme Court, do not apply in the case of applications for leave to appeal to the Privy Council. This for the reason that there is not, in the latter case, any special provision of law which expressly or by implication prevents a deficiency in the stamping of applications for such leave from being supplied upon an order of the Court. I direct the present petitioner to supply the deficiency in stamps before 1st October 1968, and make order that the application for conditional leave be allowed if the deficiency is duly supplied.

I make no order for costs.

SIRIMANE, J.—I agree.

*Application allowed conditionally.*