[IN THE COURT OF APPEAL OF CEYLON]

1972 *Present :* **Fernando, P., Sirimane, J., Samerawickrame, J., and Siva Supramaniam, J.**

M. A. M. ABDUL CADER, Applicant, *and* ASOKUMAR DAVID, Respondent

APPLICATION No. 20 OF 1972

S. C. 148 (F)/66—D. C. Puttalam, 6327

Court of Appeal—Judgment of Supreme Court delivered prior to January 19, 1972—Application for leave to appeal therefrom—Time limit for filing such application—Court of Appeal." Leave to Appeal Procedure " Rules, 1972, Rule 7—Court of Appeal Act, No. 44 of 1971, ss. 1, 2, 3, 11, 13 (1), 13 (3), 14, 18—Courts Ordinance (Cap. 6), Chapter V.

Rule 7 of the " Leave to Appeal Procedure " Rules, 1972, which came into operation on January 19, 1972, reads as follows :—

" Applications for leave to appeal in any civil or criminal matter shall be made within twenty-one days of the delivery of the judgment from which it is sought to appeal.

Provided, however, that until the coming into operation of these Rules, applications for leave to appeal shall be made within a reasonable time and with the least possible delay. "

Held, that in considering whether an application for leave to appeal from a judgment delivered by the Supreme Court on a date prior to January 19, 1972, was made with reasonable diligence and without undue delay, the time must be computed as from November 15, 1971, which was the date when the Court of Appeal came into being, and not as from March 8, 1972, which was the date when the minimum number of Judges necessary to constitute the Court of Appeal was appointed.

APPLICATION filed on March 22, 1972, for leave to appeal from a judgment of the Supreme Court delivered on May 30, 1971.

M. Tiruchelvam, Q.C., with *M. S. M. Nazeem* and *M. A. M. Baki*, for the applicant.

N. Satyendra, for the respondent.

Cur. adv. vult.

May 16, 1972. FERNANDO, P.—

The applicant by his application lodged in the Registry of the Court of Appeal on March 22, 1972, seeks leave to appeal to this Court from a judgment of the Supreme Court delivered on May 30, 1971. A preliminary objection to our entertaining this application was raised on behalf of the respondent, the ground of the objection being that the application was not filed within the time prescribed by the Rules made under the powers specified in Section 13 (1) of the Court of Appeal Act, No. 44 of

1971. That Section conferred a power on the President of the Court of Appeal to make, with the concurrence of the Minister of Justice, Rules of Court regulating generally the practice and procedure of the Court of Appeal including the time within which appeals to the Court are to be entertained. There is no dispute that the expression " appeals " in Section 13 (1) includes applications for leave to appeal.

Certain Rules made under the powers conferred by the aforesaid Section 13 (1) and styled the Court of Appeal "Leave to Appeal Procedure" Rules, 1972, have been published in Gazette Extraordinary No. 14,993/45 of January 19, 1972. By virtue of Section 13 (3) of the Act, these Rules came into operation on the date of publication, namely January 19, 1972. Rule 7 of these Rules specifies the time limit for presentation of applications for leave to appeal and is in the following terms :—

" 7. Applications for leave to appeal in any civil or criminal matter shall be made within twenty-one days of the delivery of the judgment from which it is sought to appeal.

Provided, however, that until the coming into operation of these Rules, applications for leave to appeal shall be made within a reasonable time and with the least possible delay. "

The Court of Appeal Act, No. 44 of 1971 came into operation (Section 1) on November 15, 1971—see Gazette Extraordinary No. 14,983/12 of November 12, 1971. On an assumption that the Court of Appeal came to be established only on that date, clearly the first part of Rule 7 which could only have prospective application could not have been complied with by the applicant as the judgment he is aggrieved by was delivered so long ago as May 30, 1971. Though there was no fixed time limit applicable to this matter, he had to be reasonably diligent in making his application ; it was not open to him to be dilatory or to be guilty of undue delay. The proviso to rule 7 is not intended to do more than to set out in express terms what even otherwise a party making an application was obliged to do. The purpose for which it was made was thus not to impose on 19th January 1972 an entirely new condition which an application made by a party earlier had not to satisfy. In terms it applies only to applications made on a date prior to the 19th January 1972 when the rules came into operation.

While therefore an application which falls within the proviso will be duly made, one that does not fall exactly and strictly within its terms will not necessarily be out of time. It will suffice that an application for leave to appeal from a judgment delivered before the coming into operation of the rules, whether made before or after 19th January 1972, is shown to our satisfaction to have been made with reasonable diligence and without undue delay.

Mr. Tiruchelvam sought an escape for the applicant from the operation of the time limit indicated in Rule 7 by contending that, as the Court of Appeal was not constituted (Section 3) until March 8, 1972, in the sense

that the minimum number of Judges necessary to constitute the Court was appointed only on that date, there was no Court in existence to which the applicant could have applied for leave to appeal or in which he could have lodged his application. To use his own words, " there must be judges before there can be a Court ". We think that an examination of Chapter V of the Courts Ordinance which provides for the establishment of District Courts, Courts of Requests and Magistrates' Courts and appointment of judges thereto is sufficient by way of a general answer to Mr. Tiruchelvam's contention, without an enumeration of other similar provisions which are readily available. After an examination of his argument we were unable to agree with his contention that there was no distinction between the establishment of the Court and its constitution. It is clear that when Section 2 of the Act enacted that " there shall be a Court of Appeal . . . ", the Court, which is undoubtedly a creature of statute, was established in the sense that it came into existence on the day the statute itself came into operation. The President of the Court of Appeal was appointed on November 20, 1971, and there are no words in the Act to warrant a conclusion that the President could not himself have been appointed except at the same time as at least two other Judges of this Court received appointment. Then Section 11 of the Act provides for a Registrar and other officers of the Court, and Section 13 enables the President to make Rules of Court. We are unable to accede to the argument necessarily implied in the contention raised by Mr. Tiruchelvam that neither the President nor the Registrar and the other officers could have been appointed until the Court was constituted within the meaning of Section 3.

Mr. Satyendra submitted that the Act contemplates three classes of powers of the Court—administrative, legislative and judicial. He pointed out that certain administrative functions of the Court have to be performed by the Registrar and the other officers, that the President has been vested with certain legislative powers and that the judicial power lies in the Court constituted in terms of Section 3. He emphasised the distinction between the Court as an institution and the holders of office therein, viz., the judges. This submission is undoubtedly sound, and it is only for the hearing and determining of appeals and applications for leave to appeal, or, in other words, for the exercise of the judicial power of Court, that the minimum number of judges specified in Section 3 becomes necessary. We therefore hold that the Court was established or came into being on November 15, 1971, and it follows that an application for leave to appeal or an appeal could have been lodged at any time on or after that date. A constitution of the Court was not necessary to enable an intending applicant for leave or an appellant to file his application or appeal, as the case may be, in the already established Court because the filing of documents of that kind is a unilateral act by the applicant or appellant. Such lodging could have been effected by presenting the documents to the Registrar who had himself received appointment as from the date of operation of the Act and there was an established Registry of the Court on that date.

The affidavit filed by the applicant indicates that he had after May 30, 1971, taken certain steps under the Appeals (Privy Council) Ordinance to obtain from the Supreme Court leave to appeal to the Privy Council. Those steps had not been completed by the date the Court of Appeal Act came into operation.

Section 14 of the Court of Appeal Act repealed the Appeals (Privy Council) Ordinance as from November 15, 1971. It is indisputable that litigants were generally aware, at any rate by about the middle of 1971, of the proposal to abolish the jurisdiction of the Privy Council and to substitute therefor a Court of Appeal in Ceylon. As we hold (1) against Mr. Tiruchelvam's contention which was that it was not possible to invoke the judicial power of the Court of Appeal until the minimum number of judges received appointment and (2) that an application for leave to appeal was competent as from November 15, 1971, what we have now to consider upon this application is whether there has been on the part of the applicant reasonable diligence and no undue delay in making the application. Before the date of the operation of Rule 7 the applicant had a period of two months and three days during which he could have lodged his application. He actually did so only on March 22, 1972, i.e. more than four months afterwards. Whereas the time limit after the Rules came into operation has been fixed as within 21 days (and no one has contended that this itself is an unreasonable limit), whether the case of this applicant is one to which the proviso to Rule 7 applies or is one which falls outside Rule 7 altogether, a delay of over four months is in our opinion an unreasonable delay. Mr. Tiruchelvam did not appear to us to submit that a procedural bar on the basis of dilatory tactics on the part of an applicant was intrinsically unfair or unreasonable. Therefore, when one remembers that the submission for the applicant is that he was waiting for the establishment of the Court (even to the extent of not being anxious to pursue his application for leave to appeal to the Privy Council), we are left with the situation that no valid reason has been put forward to excuse the delay in invoking the jurisdiction of the Court except the unsuccessful argument that that jurisdiction could not have been invoked until March 8, 1972.

It may be mentioned here that Section 18 of the Court of Appeal Act abolished the right of appeal to Her Majesty in Council. The date that abolition took effect was the date the Court of Appeal Act itself came into operation. We have the satisfaction therefore of observing that the view which we have upheld that the Court of Appeal itself was established on the same date is not only not in conflict with but actually furthers the achievement of the principal objects for which Act No. 44 of 1971 purported to provide, viz., the establishment of a Court of Appeal at the same time as the abolition of appeals to Her Majesty in Council.

We uphold the respondent's preliminary objection. In this situation we do not feel it necessary to examine another objection raised for the respondent and on which both Counsel addressed us, namely, that the

question involved in the proposed appeal is not one of general or public importance. We would refuse leave to appeal and award to the respondent his costs of the application.

Application refused.