1943 *Present :* **Soertsz S.P.J. and Hearne J.**

MUNICIPAL COUNCIL, COLOMBO, Appellant, *and*
LETCHIMAN CHETTIAR, Respondent.

APPLICATION FOR CONDITIONAL LEAVE TO APPEAL TO PRIVY COUNCIL IN 69 D. C. (INT.), COLOMBO, 3,092.

Privy Council—Conditional leave to appeal—Notice of application—Computation of period—Exclusion of vacation—Supreme Court—Vacations Ordinance, s. 8.

Where, on an application for leave to appeal to the Privy Council, the applicant gives notice of his intended application to the opposite party without the intervention of the Supreme Court, he is not entitled to have the days of a vacation excluded in the reckoning of the appointed period.

THIS was an application for conditional leave to appeal to the Privy Council.

H. V. Perera, K.C. (with him *N. Kumarasingham*), for the respondent.—Notice of the intended application was not given to the respondent within the time-limit of 14 days fixed by rule 2 of the schedule of the Privy Council Appeals Ordinance (Cap. 85). It was in fact served on us 21 days after the date of the judgment of the Supreme Court. The Supreme Court vacation cannot be excluded for the purpose of computing the time-limit. Section 8 of the Supreme Court Vacations Ordinance (Cap. 10) permits exclusion only in the case of an act to be done or proceeding to be taken in the Supreme Court. In the present instance notice was served on us by the applicant himself without the assistance of Court. Three ways of giving notice are contemplated by order 5 (Vol. I Subsidiary Legislation, p. 468), and inasmuch as the applicant chose to serve notice himself and not through Court, he cannot invoke the aid of the Vacations Ordinance, and computation of time will have to conform to section 8 of the Interpretation Ordinance (Cap. 2). See also *Tarrant et al v. Marikar*[1]. As regards the judgment in *Palaniappa Chetty v. Mercantile Bank of India et al.*[2], the statement that the vacation must be excluded in calculating the 14 days' notice is *obiter*.

There is no right of appeal to the Privy Council in the present case. This is not a civil suit or action such as is contemplated in section 3 of the Privy Council Appeals Ordinance. This is a case under the Land Acquisition Ordinance under which the District Court exercises a special jurisdiction. See *Soertsz v. Colombo Municipal Council*[3]; *R. M. A. R. A. R. R. M. v. The Commissioner of Income Tax*[4]; *Settlement Officer v. Vander Poorten et al.*[5]; *Kanagasunderam v. Podi Hamine*[6]; *Muttukrishna v. Hulugalle*[7].

E. B. Wikremanayake (with him *N. M. de Silva*) for the applicant.—The statement in *Palaniappa Chetty v. Mercantile Bank of India et al.* (*supra*) that in calculating whether the respondent is given 14 days' notice

[1] (*1934*) *2 C. L. W. 373.*
[2] (*1942*) *43 N. L. R. 352.*
[3] (*1930*) *32 N. L. R. 62.*
[4] (*1935*) *37 N. L. R. 447.*
[5] (*1942*) *43 N. L. R. 436.*
[6] (*1940*) *42 N. L. R. 97.*
[7] (*1942*) *43 N. L. R. 421.*

the days which fall within the period of a Supreme Court vacation must be excluded is not *obiter*. That ruling was given despite the fact that the judgment in *Hayley and Kenny v. Zainudeen*[1] was cited in the course of the argument in that case.

The meaning of the term "action" in section 3 of the Privy Council Appeals Ordinance must be decided by reference to section 6 of the Civil Procedure Code. The present case may be deemed to be an action. It cannot be said that under the Land Acquisition Ordinance there is appointed any special tribunal. That Ordinance recognises the existence of the District Court as a tribunal and makes use of its existence. The jurisdiction exercised by the District Court under the Land Acquisition Ordinance is derived from section 62 of the Courts Ordinance.

H. V. Perera, K.C., in reply.—The distinction between notice through Court and notice outside Court was not considered in *Palaniappa Chetty v. Mercantile Bank of India* (*supra*). The decision in *Hayley and Kenny v. Zainudeen* (*supra*) is of assistance in the present case.

There is no substance in the distinction drawn between a referernce to the District Court as such and the appointment of a special tribunal.

Cur. adv. vult.

March 8, 1943. SOERTSZ S.P.J.—

This is an application for conditional leave to appeal to His Majesty in Council from a judgment of this Court, fixing the amount of compensation due to be paid to the respondent, on account of the acquisition by the applicant, under the provisions of the Land Acquisition Ordinance, of a piece of land held by the respondent as trustee for a certain Hindu Temple.

The judgment of this Court was pronounced on December 17, 1942. The Christmas vacation of the Court, as fixed by the Supreme Court Vacations Ordinance, commenced on December 22, 1942, and terminated on January 12, 1943. Section 8 of the Vacations Ordinance provides that—

> "when by any Ordinance or rule regulating Civil Procedure or by any special order of the Court any limited time not exceeding one month is appointed or allowed for the doing of any act or the taking of any proceeding in the Supreme Court, no days included in any vacation shall be reckoned in the computation of such time unless the Court otherwise directs."

It appears to me that, on a proper interpretation, the operation of this section in regard to the exclusion of the days of a vacation, is conditioned—

(*a*) on the period appointed or allowed being a period *not exceeding* a month;

(*b*) on the act to be done or the proceeding to be taken, being an act to be done or a proceeding to be taken in the Supreme Court;

(*c*) on there being *no other direction* given by the Court.

In the case before us, conditions (*a*) and (c) are irrelevant. The one question is whether, in this instance, the acts to be done or the proceedings to be taken in conformity with rule 2 of the Schedule of rules annexed

[1] *(1923) 25 N. L. R. 312.*

to the Privy Council Appeals Ordinance were to be done or taken in the Supreme Court. In my opinion, it is beyond doubt that the phrase "in the Supreme Court" modifies both the "act to be done" and the "proceeding to be taken".

Rule 2 of the Schedule requires that—

"application to the Court for leave to appeal shall be made by petition within thirty days of 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."

These words are unambiguous and mean that *the application* for leave to appeal has to be by petition to the Supreme Court and, therefore is "an act to be done" or "a proceeding to be taken" in the Supreme Court. But *the giving of the notice of the intended application* need not be through the Court. This is made even clearer by order 5 of the orders made by the Judges of this Court. It provides that—

"a party who is required to serve any notice may himself serve it or cause it to be served, or may apply by motion in Court before a single Judge for an order that it may be issued and served through the Court."

It follows from rule 2 and order 5 read together that, so far as the application for leave to appeal is concerned, the days of the vacation must be excluded in the computation of the thirty-day period appointed or allowed but that, so far as the giving of the notice of the intended application is concerned, the exclusion of the days of the vacation in computing the period of fourteen days depends on whether or not occasion arises for the applicant to seek, the assistance of the Court for the purpose of issuing and serving that notice.

In this view of rule 2 of the Schedule, order 5 of the Judge's Orders, and section 8 of the Vacations Ordinance, the respondent concedes that the application for leave to appeal is within the appointed period, but he contends that in consequence of the course adopted by the applicant in this case, the notice of the intended application was served four days after the period appointed for that purpose had elapsed and that there was failure on the part of the applicant to comply with an imperative requirement of the law, and that his application must be rejected.

It is well established by rulings of this Court that compliance with rule 2 is imperative and that it is not competent for the Court to relax it. *Weerakoon Appuhamy v. Wijesinghe*[1], *and Tarrant & another v. Marikar*[2], In the latter case, the applicant having done everything in his power to give to the opposite party notice of the intended application himself, and having failed to do that, came into Court under order 5, and, by motion, sought and obtained an order for the notice to be issued and served on the opposite party by the Court. If the days of the vacation that intervened between the judgment and his coming into Court under order 5 were excluded his service of the notice of his intended application would have been within the fourteen days appointed, but it was held

[1] *30 N. L. R. 256.*

[2] *2 C. L. W. 373.*

that he had not complied with rule 2 inasmuch as,—the days of the vacation not having been excluded—he had failed to give notice within fourteen days. That ruling, in my view, inflicted an unwarranted hardship on the applicant in that case for, it seems to me, that when an applicant who having tried and failed to serve notice himself, comes into Court under order 5 seeking the assistance of the Court, he is doing an act or taking a proceeding *in the Supreme Court,* and is entitled to have the days of a vacation excluded in the reckoning of the appointed period. Be that as it may, the case now before us is very different. The applicant drew up the notice himself, and served it himself. He found no occasion for seeking the assistance of the Court under order 5. In these circumstances, I fail to see what logical or legal basis there could be for the claim made on his behalf, that the days of the Christmas vacation should be excluded. For the course he adopted the intervention of the Court was not, and did not become necessary " in the erroneous view he appears to have taken of the meaning of Section 8 of the Vacations Ordinance. "

It only remains to consider the ruling given in the case of *Palaniappa Chetty v. Mercantile Bank of India et al.*[1] on which the applicant's Counsel relied strongly. In that case, my Lord the Chief Justice and my brother Hearne J. held that—

> " in calculating whether the respondents have been given fourteen days' notice of the intended application the days which fall within the period of the Christmas vacation must be excluded. "

As this statement is unqualified, and as the facts upon which it is based, do not appear sufficiently in the judgment, I have examined the record and I find that the notices of the intended application were, eventually, issued and served on all the respondents by the Court on a motion made by the applicant to the Court under order 5. That ruling has no application, therefore, to the present case in which, as already observed, the applicant set out to give notice of the intended application *himself* and never came into Court for that purpose. In such a case, the exclusion of the days of the Courts' vacation is unwarranted.

It seems to me, for the reasons I have given, that we have no alternative but to sustain the objection taken that rule 2 of the Schedule of Rules has not been complied with, and to reject this application.

The respondent took a second objection to this application on the ground that the judgment from which the applicant desires to appeal to His Majesty in Council is not such " a final judgment " as is contemplated by the Privy Council Appeals Ordinance and the rules framed thereunder, inasmuch as—that is his contention—the District Court and this Court, in dealing with this case, were not exercising their ordinary jurisdiction but a special jurisdiction conferred on them by the Land Acquisition Ordinance and that, while a right of appeal is given from the judgment of the District Court to this Court, there is no right of appeal from the judgment of this Court. In support of this objection reliance is placed on *Soertsz v. Colombo Municipal Council*[2]; *R. M. A. R. A. R. R. M. v. The Commissioner of Income Tax*[3]; *Kanagasunderam v. Podi Hamine*[4];

[1] *43 N. L. R. 352.*
[2] *32 N. L. R. 62.*
[3] *37 N. L. R. 447.*
[4] *42 N. L. R. 97.*

Vanderpoorten v. Settlement Officer[1]; and *Muttukrishna v. Hulugalle*[2]. But, in view of our ruling on the first objection, it is unnecessary to rule on this second objection. The respondent is entitled to the costs incurred by him in opposing this application.

Application refused.