

1958

*Present : Sansoni, J., and T. S. Fernando, J.*

L. G. KANAGARATNAM and others, Applicants, and S. A. SUPPIAH,  
Respondent

*S. C. 290—Application under Rule 25 of the Rules in the Schedule to the Appeals (Privy Council) Ordinance (Cap 85) for dismissal, on the ground of non-prosecution, of the appeal to the Privy Council against judgment of the Supreme Court in S. C. 262/D. C. Nuwara Eliya 3,181*

*Privy Council—Grant of final leave to appeal—Failure of appellant to serve list of documents within 10 days—Active prosecution of the appeal notwithstanding the omission—Application by respondents for dismissal of appeal for non-prosecution—Effect of delay—Appellate Procedure (Privy Council) Order, 1921, Rules 10, 11, 18—Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rule 25.*

Despite his failure to comply with the requirements of Rule 10 of the Appellate Procedure (Privy Council) Order, 1921, after he had obtained final leave to appeal to the Privy Council, the appellant incurred substantial expenses in getting the copies of the record printed. He had, further, been allowed by the Supreme Court itself an extension of time for the delivery of the prints to the Registrar.

*Held*, that the appeal should not be dismissed for non-prosecution under Rule 25 of the Schedule to the Appeals (Privy Council) Ordinance.

*Held further*, that the fact that the respondents waited nearly eleven months after final leave was granted before moving the Supreme Court under Rule 25 to have the appeal dismissed for non-prosecution was an additional ground for refusing the application.

**A**PPPLICATION to have an appeal to the Privy Council dismissed on the ground of non-prosecution.

*H. W. Jayewardene, Q.C.*, with *D. R. P. Goonetilleke* and *L. C. de S. Seneviratne*, for the Defendants-Respondents-Applicants.

*S. J. V. Chelvanayakam, Q.C.*, with *T. K. Curtis.*, for the Plaintiff-Appellant (respondent to the application).

*Cur. adv. vult.*

November 26, 1958. T. S. FERNANDO, J.—

Appeal No. 262 of 1955 preferred to this Court against a judgment of the District Court of Nuwara Eliya in Case No. 3,181 was decided on 28th June 1957. The party unsuccessful in the Supreme Court, viz., the plaintiff, obtained from this Court on 28th August 1957 final leave to appeal to Her Majesty in Council.

On 23rd July 1958, this application No. 290 was made to this Court by the 1st to 7th substituted-defendants (who are some of the respondents to the appeal to the Privy Council) under Rule 25 of the Rules contained in the Schedule to the Appeals (Privy Council) Ordinance (Cap. 85) for a declaration that the appeal stands dismissed for non-prosecution. The reason advanced in support of the application is that the appellant has failed to comply with the requirements of Rule 10 of the Appellate Procedure (Privy Council) Order, 1921, which requires the appellant, within ten days after obtaining final leave to appeal, to serve on the respondent a list of all such documents as he considers necessary for the due hearing of the appeal. The appellant admits the failure to comply with Rule 10. If nothing further had taken place after the failure of the appellant to comply with Rule 10, there would in my opinion have been no difficulty in declaring this appeal dismissed for non-prosecution.

The appellant however submits without any contradiction by the respondents that the printing of the record which is being printed in Ceylon is well under way. No material has been placed before us by either side to show in what circumstances the Registrar came to certify the record for printing without having before him the list referred to in Rule 10 of the Appellate Order, but a sum of Rs. 1,253.25 has undoubtedly been paid by the appellant for a certified copy of the record necessary before printing can be undertaken. The appellant has further submitted that he has already incurred liability to the printers in a sum of Rs. 4,500 and that part of the printing is already completed in the sense that the proof copies of one half of the record have been sent in August and September 1958 to the Registrar for correction of errors.

It would also appear that the appellant had on 19th March 1958 made an application to this Court under Rule 18 of the Appellate Order for extension by six months of the time allowed by Rule 11 to deliver the prints, and this application has been granted. The question of the failure on the part of the appellant to comply with Rule 10 should properly have been raised by the respondents at the time of this earlier application, but respondents' counsel states that his clients had no notice of that application. On inquiry made from the Registry we find that that application which bears No. 102 of 1958 has been made and granted *ex parte*. I may observe in this connection that it is desirable that applications for extension of time be considered only after notice to parties who may be affected.

Our attention has been invited to the decision of this Court in *Samel Appuhamy v. Peter Appuhamy*<sup>1</sup> where Gratiaen J. stated that this Court should not grant an extension of time for the doing of any act necessary for prosecuting an appeal to the Privy Council unless the applicant can show that he has throughout exercised due diligence in prosecuting his appeal, and that his failure to comply with the Rules was occasioned by some circumstance beyond the control of himself and his legal advisers. Respondents' counsel argues that failure to comply with the requirements of Rule 10 shows a failure to exercise due diligence. Appellant's counsel, on the other hand, has submitted that in deciding whether the appellant

<sup>1</sup> (1951) 52 N. L. R. 496.

has failed to show due diligence the entire progress of the appeal must be taken into account. In *Buddharakkita Thera v. Wijewardene*<sup>1</sup> this Court did declare an appeal dismissed for non-prosecution where on account of the negligence of the appellant's proctor the list of documents referred to in Rule 10 was received by the respondent five days after the date specified in the Rule. The facts of that case were, however, not complicated (a) by the appellant actually incurring, as in this case, substantial expenses in the process of getting the copies of the record printed and (b) by the grant by this Court itself of an extension of time for the delivery of the prints to the Registrar. In the case before us the presumption of non-prosecution which may fairly be drawn from the failure to comply with Rule 10 is rebutted by the indication of active prosecution of the appeal evidenced by the expenditure of the substantial sums referred to above. In these circumstances I am of opinion that the admitted failure to furnish the list of documents specified in Rule 10 should not be a ground for the exercise by us of the discretion vested in us by Rule 25 to declare the appeal dismissed for non-prosecution. In refusing to exercise our discretion in favour of the respondents we take into account also the circumstance that the respondents themselves waited nearly eleven months after final leave was granted before moving this Court under Rule 25. They must have known not long after the grant of final leave that the appellant had omitted to take a necessary step. If they had themselves exercised ordinary diligence they could have acquainted themselves with the progress of the appeal. The respondent in *Buddharakkita Thera v. Wijewardene*, it must be noted, moved promptly in the matter of invoking the Court's discretion under Rule 25. If the present respondents had been equally prompt the reasons for which we now distinguish that case from this would probably not have been available. The uncontradicted affidavits presented by the appellant show that the printing had been entrusted to the printers so long ago as 6th January 1958. For these reasons the application of the respondents is refused. There will, however, be no order for costs.

The appellant himself has on 19th September 1958 moved under Rule 18 of the Appellate Order for an extension of time till the end of November 1958 for the delivery of the prints to the Registrar. In support of this motion an affidavit has been submitted by the printers that the printing has been delayed, first by a strike at their printing works lasting two months and thereafter by the non-return by the Registrar of the proof copies after correction of errors. We therefore grant the prayer in the appellant's motion; but as it has been admitted before us that even at this late stage the list contemplated in Rule 10 has not been furnished, we make the grant conditional on the appellant complying with the requirements of Rule 10 within seven days after today. If further time is required by the appellant to comply with Rule 11 he must make to this Court a fresh application therefor with notice to the respondents.

SANSONI, J.—I agree.

*Application for dismissal refused.*

<sup>1</sup> (1958) 59 N. L. R. 409.