

1956 Present : H. N. G. Fernando, J., and Sinnetaimby, J.

B. J. F. MENDIS, Petitioner, and B. J. M. C. FERNANDO
et al., Respondents

S. C. Application 133.

S. C. 181—D. C. Panadura, 1,834

IN THE MATTER OF AN APPLICATION IN TERMS OF RULE 25 OF THE
SCHEDULE TO THE APPEALS (PRIVY COUNCIL) ORDINANCE (CAP. 85)

Privy Council—Grant of final leave to appeal—Delay of appellant thereafter to take necessary steps—Dismissal of appeal for non-prosecution—Appeals (Privy Council) Ordinance (Cap. 85). Schedule, Rule 25—Appellate Procedure (Privy Council) Order, 1921, paragraphs 11 and 18.

A party seeking to appeal to the Privy Council from a judgment of the Supreme Court was granted on November 11, 1955, final leave to appeal. He elected to print the record in Ceylon. On May 4, 1956, he was informed by the Registrar of the Supreme Court that the record was ready for printing, and he was requested to nominate a printer to whom the record was to be entrusted for printing. He failed to respond to this request until August 20, 1956, and the work of printing was not commenced by the printers until about November 1, 1956.

The appellant established no good cause either for his failure to nominate a printer within a reasonable time after he was called on to do so by the Registrar or for his delay in having the work of printing taken in hand. It was only after his delay was brought to his notice by the present application made on October 24, 1956, under Rule 25 of the Schedule to the Appeals (Privy Council) Ordinance that he applied for relief and extension of time under paragraph 18 of the Appellate Procedure (Privy Council) Order, 1921.

Held, that the appellant clearly failed to show due diligence for the purpose of procuring the despatch of the record to England and that his appeal should, under Rule 25 of the Schedule to the Appeals (Privy Council) Ordinance, be dismissed for non-prosecution.

APPPLICATION in terms of Rule 25 of the Schedule to the Appeals (Privy Council) Ordinance.

E. G. Wikramanayake, Q.C., with *T. B. Dissanayake*, for the plaintiff-petitioner.

Walter Jayawardene, with *Neville Wijeratne*, for the defendants-respondent.

Cur. adv. vult.

November 23, 1956. H. N. G. FERNANDO, J.—

This is an application under Rule 25 of the Privy Council Appeals Ordinance Ch : 85 N. L. E. to declare that the respondent's appeal to the Privy Council in *S. C. 181/L-53, D. C. Panadura 1834*, stands dismissed for non-prosecution. The ground upon which this Court may

make such a declaration is that the appellant in the appeal had failed "to show due diligence in taking all necessary steps for the purpose of securing despatch of the record to England".

Final leave to appeal was given by this Court on 11th November 1955; the appellant elected to print the record in Ceylon and accordingly under paragraph 11 of the Appellate Procedure (Privy Council) Order 1921 it was his duty to deliver the prints to the Registrar for examination and certification at the latest on or about 11th January 1956. It is unnecessary to consider whether the failure to comply with this obligation established a want of due diligence on the part of the appellant because his want of due diligence is conclusively established by other circumstances.

On the 4th of May 1956, the appellant was definitely informed by the Registrar of this Court that the record was ready for printing, and he was requested to nominate a printer to whom the record was to be entrusted for printing. Despite several letters inviting his attention he failed to respond to this request until 20th August 1956 and no explanation has been offered for this failure. In his letter of 20th May 1956 the appellant stated that "he had made arrangements with *Ceylon Daily News*, Lake House, Colombo, to print the record, and the Registrar forthwith transmitted the record to *Ceylon Daily News*. Correspondence between *Ceylon Daily News* and the Registrar shows that on 1st November 1956 the printers informed the Registrar that the work of printing "has now been taken in hand". The most that is thus established in the appellant's favour is that the work of printing was commenced at or about 1st November, and there is no explanation to show why the work was not commenced earlier. Counsel for the appellant now submits that the appellant's statements in August 1956 that he had "made arrangements for printing" must be taken to mean that he had paid *Ceylon Daily News* the cost of printing and that therefore the reason for delay must be taken to be that the printers were unable to take the work in hand before November 1956. We do not agree with this submission. The expression "made arrangements" might equally well refer to a mere undertaking on the part of *Ceylon Daily News* to print the record and does not fairly constitute evidence that payment had been made in advance. Hence it is equally possible that the delay in commencing the work of printing was due to the fact that the printers waited until payment was actually made. In the absence therefore of positive evidence to show that the delay in the commencing of the printing was not due to the fault of the appellant, counsel's explanation for the delay is not an acceptable one. At the date of the present application to this Court, therefore, the position was that the printing had not been taken in hand and the appellant has not satisfied us that the delay was due to any cause beyond his control.

In the result the appellant has established no good cause either for his failure to nominate a printer within a reasonable time after he was called on to do so by the Registrar, nor has he established that by October 24th 1956, which was the date of the present application, he had taken the steps within his power to secure that the work of printing would be done expeditiously.

Paragraph 18 of the Order enables this Court to extend the time allowed for doing any act, but the appellant did not think fit to seek any such relief and thus to make sure that the delay in printing the record would not prejudice his appeal. He only made the application for such relief after his delay had been brought to his notice by means of the present application.

We are of opinion that the appellant clearly failed to show due diligence for the purpose of procuring the despatch of the record and that the present application must therefore succeed. We would therefore grant the declaration prayed for in the petition and direct that the costs incurred by the petitioner in consequence of the appellant's filing an appeal to the Privy Council be taxed by the Registrar and be paid to the petitioner out of the sum Rs. 3,000 deposited as security for costs. We direct also that the appellant do pay to the petitioner the taxed costs of this application and that the decree of this court in appeal be transmitted to the District Court for execution.

SINNETAMBY, J.—I agree.

Application allowed.

