1960 *Present :* **Weerasooriya, J., and T. S. Fernando, J.**

FERNANDO, Petitioner, *and* SAMARANAYAKE, Respondent

S. C. 266—Application for conditional leave to appeal to the Privy Council in S. C. 523/D. C. Colombo 39558/M

Privy Council—Appeal to Supreme Court—Rejection on ground of abatement for failure to apply duly for typewritten copies—Right of appeal to Privy Council—"Final judgment"—Civil Appellate Rules, 1938, Rules 2 (1), 4 (a)—Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rules 1 (a), 3 (a)—Civil Procedure Code, s. 756 (3).

Where an appeal to the Supreme Court from a District Court judgment finally disposing of the rights of the parties is rejected on the ground that it has abated under Rule 4 (*a*) of the Civil Appellate Rules, 1938, by reason of the failure of the appellant to apply for typewritten copies, the order of the Supreme Court rejecting the appeal is a final judgment within the meaning of Rule 1 (*a*) of the Schedule to the Appeals (Privy Council) Ordinance.

The Civil Appellate Rules, 1938, contain no provision, corresponding to section 756 (3) of the Civil Procedure Code, for the granting of relief to an appellant whose appeal has abated under Rule 4 (*a*). But where a Court of first instance has declared that an appeal has abated under that Rule, the correct procedure for an appellant, who does not question the legality or propriety of the order, but seeks to obtain relief from the abatement of his appeal, is to make an application to the Supreme Court in revision. Where, however, he questions the legality or propriety of the order, his remedy is by way of appeal.

APPLICATION for conditional leave to appeal to the Privy Council.

H. V. Perera, Q.C., with *H. W. Jayewardene, Q.C.*, and *K. N. Choksy*, for defendant-appellant-petitioner.

E. B. Vannitamby, with *H. Ismail*, for plaintiff-respondent.

Cur. adv. vult.

November 23, 1960. WEERASOORIYA, J.—

This application for conditional leave to appeal to Her Majesty in Council was first argued before us on the 2nd September, 1960, when we allowed leave to appeal subject to the usual conditions. Before, however, the order allowing leave was signed by us, and with the concurrence of my brother, I had the matter listed for further argument. We are indebted to learned counsel for the assistance given us at the hearing which took place subsequently and at the conclusion of which we reserved judgment.

The position, shortly, is that the petitioner, who is the defendant, filed an appeal to this Court from the judgment and decree of the District Court of Colombo in D. C. Case No. 39558/M condemning him to pay a

sum of Rs. 75,000/- as damages and costs of suit to the plaintiff-respondent. When the appeal came up for hearing, counsel for the respondent took a preliminary objection to the appeal being entertained as the petitioner had failed to comply with the requirements of Rule 2 (1) of the Civil Appellate Rules, 1938. Under Rule 4 (*a*) of those Rules an appeal shall be deemed to have abated where the requirements of Rule 2 (1) have not been complied with. The preliminary objection was upheld and the appeal rejected by this Court, presumably on the ground that it had abated in terms of Rule 4 (*a*). It is from this order that the petitioner now seeks to appeal to Her Majesty in Council.

Two submissions were urged by counsel for the respondent against conditional leave to appeal being granted. One of them was that the order rejecting the appeal is not a " final judgment " within the meaning of that expression in Rule 1 (*a*) in the Schedule to The Appeals (Privy Council) Ordinance (Cap. 85). The other was that the order is not one made in a civil suit or action in the Supreme Court in terms of section 3 of the same Ordinance. In support of these submissions Mr. Vannitamby referred us to the case of *Palaniappa Chetty et al. v. Mercantile Bank et al.*[1] where, too, the appellant had failed to comply with the requirements of Rule 2 (1) of the Civil Appellate Rules, 1938. But the order declaring that the appeal had abated was made by the District Judge, before whom the matter was brought up by way of a motion. The correctness of the order does not appear to have been questioned by the appellant, but with a view to obtaining relief he filed an appeal from it and also an application in revision. Howard, C.J., (Hearne, J., agreeing) held that the order of the District Judge was a ministerial act from which no appeal lay, but that it was open to this Court to give relief in the exercise of its powers of revision.

Under section 756 (1) of the Civil Procedure Code, when an appeal is filed, various steps have to be taken by the appellant in regard to, *inter alia*, giving security for the respondent's costs of appeal and depositing a sufficient sum of money to cover the expenses of serving notice of appeal on him. Section 756 (2) provides that where the appellant has failed to give the security and to make the deposit, the appeal shall be held to have abated. In *Zahira Umma v. Abeysinghe et al.*[2] the procedure to be followed by an appellant whose appeal is declared in the Court of first instance to have abated under section 756 (2) was considered by a Divisional Bench of this Court, and it was held that the remedy is an application for relief under section 756 (3), and not by way of appeal. From the judgment of Abrahams, C.J., in that case it would appear that this ruling was intended to be applicable only where the legality or propriety of the order is not questioned. Where, however, such a question is raised, it was held in *Alima Natchiar v. Marikar et al.*[3] that the proper course is to file an appeal. See, also, *Mapalagamaethige Carlina v. Mary Nona Silva*[4].

[1] *(1941) 43 N. L. R. 127.*
[2] *(1937) 39 N. L. R. 84.*
[3] *(1945) 47 N. L. R. 81.*
[4] *(1945) 47 N. L. R. 16.*

The Civil Appellate Rules, 1938, contain no provision, corresponding to section 756 (3) of the Civil Procedure Code, for the granting of relief to an appellant whose appeal has abated under Rule 4 (*a*). But where a Court of first instance has declared that an appeal has abated under that Rule, the correct procedure for an appellant, who does not question the legality or propriety of the order, but seeks to obtain relief from the abatement of his appeal, is to make an application in revision, as held in *Palaniappa Chetty et al. v. Mercantile Bank et al.* (*supra*). Where, however, he questions the legality or propriety of the order, his remedy would appear to be by way of appeal—see *Alima Natchiar v. Marikar et al.* (*supra*), which dealt with the abatement of an appeal under section 756 (2) of the Civil Procedure Code, but the *ratio decidendi* of which, I think, applies to an abatement under Rule 4 (*a*) as well.

Mr. Vannitamby did not take up the position that, whichever of these two remedies an appellant might adopt as the appropriate one, the resulting appeal or application in revision would not be a civil suit or action in the Supreme Court in terms of section 3 of The Appeals (Privy Council) Ordinance. But he contended, firstly, that in respect of the substantive appeal which is declared to have abated by order of the Court of first instance, there would be no civil suit or action pending in this Court until such order is set aside; and, secondly, that the appeal filed in the present case against the judgment and decree of the District Court had abated by operation of law before the order rejecting it was made by this Court and, therefore, there was no civil suit or action pending when that order was made. I need not consider the first of these contentions as no order of abatement was made by the District Court in this case. As for the other contention, while it is correct to say that the abatement of an appeal under Rule 4 (*a*) of the Civil Appellate Rules, 1938, is brought about by operation of law, I think that there should be a formal order or declaration of abatement, or the equivalent of it, either by the Court of first instance, or by the appellate Court, before the appeal can be regarded as having abated. It is the order or declaration which gives effect to the relevant law governing the abatement of the appeal. Therefore, in my opinion, the appeal against the judgment and decree of the District Court was still pending when the order rejecting it was made by this Court.

On the question whether the order rejecting the appeal is a " judgment " within the meaning of Rule 1 (*a*) in the Schedule to The Appeals (Privy Council) Ordinance, Mr. Vannitamby, relying on *Palaniappa Chetty et al. v. Mercantile Bank et al.* (*supra*), contended that it was only a ministerial act. In that case, however, the order of abatement was made by the District Court. In the present case the order rejecting the appeal was made by this Court in the exercise of its appellate jurisdiction, and when the appeal came up for hearing in the ordinary course. I am unable to regard such an order as other than a judicial act. I am also of the view that the order was a " final " judgment within the meaning of Rule 1 (*a*). There can be no question that the judgment and decree of the District Court finally disposed of the rights of the parties (subject,

however, to appeal) and so did the order of this Court rejecting the appeal—see *Settlement Officer v. Vander Poorten et al.*[1] and *Usoof v. The National Bank of India Ltd.*[2].

Leave to appeal to Her Majesty in Council is, therefore, granted under Rule 3 (*a*) in the Schedule to The Appeals (Privy Council) Ordinance subject to the usual conditions. The period of one month referred to in that Rule will be computed from the date of this judgment.

The respondent will pay to the plaintiff-appellant the costs of this application.

T. S. FERNANDO, J.—I agree.

Application allowed.