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Present: Weerasooriya, J., and Sansoni, J.

REV. M. BUDDHARAKKITA THERA, Petitioner, and
WIJEWARDENE *et al.*, Respondents

*S. C. 459—Application under Rule 18 of the Appellate Procedure
(Privy Council) Order, 1921*

WIJEWARDENE *et al.*, Petitioners, and
REV. M. BUDDHARAKKITA THERA,
Respondent

*S. C. 460—Application under Rule 25 of the Schedule to Appeals
(Privy Council) Ordinance*

D. C. Colombo, 7,338/J.

Privy Council—Grant of final leave to appeal—Negligence of Proctor in taking necessary steps thereafter—Application for extension of time—Dismissal of appeal for non-prosecution—Appellate Procedure (Privy Council) Order, 1921, Rules 10, 13—Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rule 25.

After the plaintiff in this case had obtained final leave to appeal to the Privy Council from the judgment of the Supreme Court, the last date, under Rule 10 of the Appellate Procedure (Privy Council) Order, 1921, for serving on the defendants a list of all the documents necessary for the due hearing of the appeal was September 7, 1957, but the list was not posted to the defendants until September 11, 1957. The delay was due to a high degree of negligence on the part of the plaintiff's Proctor.

Held, that "good cause" was not made out within the meaning of Rule 18 of the Appellate Procedure (Privy Council) Order, 1921, for an extension of the time prescribed under Rule 10. The circumstances that the case was an important one and that the delay caused no prejudice to the defendants did not constitute "good cause".

Held further, that under Rule 25 of the rules in the Schedule to the Appeals (Privy Council) Ordinance the defendants were entitled to have the appeal dismissed for non-prosecution.

APPPLICATIONS under Rule 18 of the Appellate Procedure (Privy Council) Order, 1921, and under Rule 25 of the Schedule to Appeals (Privy Council) Ordinance.

D. N. Pritt, Q.C., with *E. B. Wikramanayake, Q.C.*, *G. T. Samerawickreme* and *Prins Gunasekera*, for the plaintiff, applicant in Application 459 and respondent in Application 460.

H. V. Perera, Q.C., with *E. F. N. Gratiaen, Q.C.*, and *W. D. Gunasekera*, for the defendants, respondents in Application 459 and applicants in Application 460.

Cur. adv. vult.

February 19, 1957. WEERASOORIYA, J.—

The plaintiff in this case obtained final leave on the 28th August, 1957, to appeal to Her Majesty in Council from the judgment and decree of this Court. One of the steps to be taken thereafter by the plaintiff in terms

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of Rule 10 of the Appellate Procedure (Privy Council) Order, 1921 (hereinafter referred to as "the Order") was to serve on the defendants within ten days a list of all the documents which he considered necessary for the due hearing of the appeal. Although the last date for taking this step was the 7th September, 1957, it is common ground that the list was not posted to the defendants until the 11th September, 1957, and received by them on the following day under protest.

Arising from the plaintiff's non-compliance with Rule 10 these two applications have been made by the plaintiff and defendants respectively. The plaintiff's application is under Rule 18 of the Order for an extension of the time allowed under Rule 10. The defendants on the other hand apply under Rule 25 of the rules in the Schedule to the Appeals (Privy Council) Ordinance (Cap. 85) for a declaration that the appeal stands dismissed for non-prosecution. Rule 25 provides for such a declaration being made where an appellant having obtained final leave to appeal fails to show due diligence in taking all necessary steps for the purpose of procuring the despatch of the record to England.

Although the affidavits filed in support of the plaintiff's application for an extension of time are not clear on the point, Mr. Senaweera his proctor who gave evidence before us has explained how the delay in furnishing the defendants with the list specified in Rule 10 was occasioned. According to Mr. Senaweera he fell ill on the 6th September, 1957, and for that reason he was unable to attend his office at Hulftsdorp from the 7th to the 10th September. On the 7th September the plaintiff met him at his residence and informed him that a list of documents had to be furnished to the other side on that very day and instructed him to take the necessary steps. Mr. Senaweera does not appear even then to have become alive to the provisions of Rule 10, but he states that he typed out a notice to the defendants and signed it and sent it by his servant boy to his clerk at Hulftsdorp with an oral message that it should be despatched by express post on the same day. He refers to one notice having been typed, signed and sent by him, and how this single document could possibly have served as a notice to the three defendants (who lived at three different addresses) has not been explained. Mr. Senaweera, satisfied, no doubt, that he had performed his good deed for the day, appears to have rested thereafter. He remained in that state of quiescence until the 11th September when he attended office, and on discovering that the notices had not yet gone took action to have them despatched on that day, but disingenuously dating them as on the 7th September, 1957. He does not appear to have been sufficiently mindful of his client's interests even to the extent of questioning his clerk about the despatch of the notice sent to him on the 7th September when the clerk saw him at his residence on the 9th September in connection with some other business. Why the clerk should have failed to carry out his instructions if he did in fact receive the requisite notices on the 7th September has not been explained.

Enough has been said, I think, to show that Mr. Senaweera was lacking in candour in the evidence he gave and even on that evidence he has

displayed a high degree of negligence in regard to the sending of the notices. His negligence must, of course, be deemed to be the plaintiff's negligence.

Under Rule 18 of the Order, the Court may for good cause extend the time allowed by the Order for doing any act notwithstanding that the time has expired. If the plaintiff can rely only on the circumstances which resulted in the delay as deposed to by Mr. Senaweera, it would be impossible to say that good cause has been shown for granting an extension of time. It was held in *Samel Appuhamy v. Peter Appuhamy*¹, which also was a case of a failure to comply with Rule 10, that "good cause" was not made out as the applicant had not shown that throughout he had exercised due diligence in prosecuting his appeal and that the failure to comply with the rules was occasioned by some circumstance beyond his control or of his legal advisers. We were invited by Mr. Pritt who appeared for the plaintiff to treat this ruling as nothing more than an expression of opinion amounting to an *obiter dictum*, but it seems to me, on the contrary, that it represents the *ratio decidendi* of the case.

Even if in an appropriate case it is possible to take into account certain extraneous circumstances as constituting a good cause for an extension of time notwithstanding that the applicant has been guilty of negligence in not taking within the prescribed time a necessary step towards the prosecution of his appeal, the only circumstances relied on in the present case are that it is an important one and that the failure has caused no prejudice to the defendants. While it may be assumed that the case is an important one to the parties, and even if no prejudice is shown to have been caused to the defendants by the failure, I am unable to take the view that these circumstances, separately or cumulatively, constitute a good cause.

Mr. Pritt also contended that the provisions of Rule 10 are directory and not mandatory, inasmuch as there is nothing in the rule or in any other rule under the same Order to indicate that non-compliance with Rule 10 is fatal to the appellant proceeding further with his appeal. But apart from no authority having been cited to us for the view that a law which imposes a time limit for the doing of an act is to be construed as otherwise than mandatory; it seems to me that Rule 25 of the rules in the Schedule to The Appeals (Privy Council) Ordinance under which the defendants have made their application, provides the sanction for the due compliance by an appellant of Rule 10 of the Order. Rule 25 implies that it is for the appellant to show due diligence in taking all necessary steps for the purpose of procuring the despatch of the record to England under pain of having his appeal dismissed for non-prosecution. It cannot be doubted, I think, that the steps required to be taken under Rule 10 are necessary steps, and it was so conceded by Mr. Pritt. The very fact that special provision is made in the Order for an extension of time being specially obtained for doing an act notwithstanding that the time specified has expired is, to my mind, a further indication that Rule 10 is a mandatory provision.

¹ (1951) 52 N. L. R. 496.

I hold, therefore, that no good cause under Rule 18 of the Order having been shown, the extension of time applied for by the plaintiff cannot be granted, and it is refused. But Mr. Pritt contended that even if that application is refused it does not necessarily follow that the application of the defendants must be granted. In his submission a declaration under Rule 25 in the Schedule to The Appeals (Privy Council) Ordinance can be made only for non-prosecution of the appeal, and a single omission resulting in a short delay cannot have the effect of rendering the plaintiff guilty of non-prosecution of his appeal. I am unable to agree. Where in consequence of our refusal to extend the time allowed under Rule 10 of the Order, the further prosecution of the appeal by the plaintiff is necessarily brought to a standstill I do not see that we can do otherwise than grant a declaration under Rule 25 that the appeal stands dismissed for non-prosecution (without express Order of Her Majesty in Council) and I declare accordingly.

The defendants will be entitled to the costs of their application under Rule 25 which are fixed at Rs. 525. They will also be entitled to the costs (as taxed by the Registrar) already incurred by them in connection with the plaintiff's appeal to Her Majesty in Council. I make no order as regards costs in the application of the plaintiff under Rule 18.

SANSONI, J.—I agree.

Application No. 459 dismissed.

Application No. 460 allowed.

