1958 *Present :* **H. N. G. Fernando, J., and T. S. Fernando, J.**

NAZEER AHAMED, Petitioner, *and* BANK OF CEYLON *et al.*, Respondents

S. C. 479—Application for Conditional Leave to appeal to the Privy Council in S. C. 93 (Inty.) and 481 D. C. Colombo, 3361/MB

Privy Council—Decree relating to immovable property—Execution pending appeal—Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rules 7, 8, 9—Civil Procedure Code, ss. 217, 325, 327.

The word " duty " in Rule 7 of the Schedule to the Appeals (Privy Council) Ordinance means an act the performance of which is enjoined by a decree under any of the Heads A to E in section 217 of the Civil Procedure Code.

Accordingly, execution of a decree to yield up possession of immovable property may be allowed under Rule 7 during the pendency of an appeal to the Privy Council. Rule 9 would not be a bar in such a case.

Execution will be allowed under Rule 7 unless "real and substantial justice requires that execution should be stayed". The burden of establishing this exception is upon the appellant.

APPLICATION for conditional leave to appeal to the Privy Council.

Sir Lalita Rajapakse, Q.C., with *E. R. S. R. Coomaraswamy, D. C. W. Wickremasekera* and *H. Ismail* for the 2nd respondent-petitioner.

H. W. Jayewardene, Q.C., with *C. G. Weeramantry* and *C. P. Fernando*, for the plaintiff-respondent.

M. Markhani, with *R. D. B. Jayasekera*, for the 1st defendant-respondent.

Cur. adv. vult.

December 19, 1958. H. N. G. FERNANDO, J.—

After hearing arguments, we allowed the application made by the 2nd respondent-appellant for conditional leave to appeal to Her Majesty in Council against the judgment of this Court delivered on 21st November 1958, and we also made order allowing the application of the plaintiff-respondent to the main appeal for execution of that judgment. We now set out our reasons for the latter order. We allowed no costs for the reason that each party was successful in his application.

The plaintiff had on 27th July 1953 obtained a decree in a hypothecary action instituted against one A. E. M. Usoof who was at that stage the only defendant. The mortgaged premises were sold in 1955 in execution of the decree and were purchased by the plaintiff. The Fiscal, who had been ordered to deliver possession of the premises, reported to the Court that one Nazeer Ahamed claimed to be in possession of the premises under a lease from the defendant. The plaintiff thereupon made an application to the District Court under Section 325 of the Civil Procedure Code in the usual terms, but the Court, instead of acting under that section or under Section 327A, caused the petition of the plaintiff to be numbered as a plaint and investigated Nazeer Ahamed's claim under Section 327. In this way, Nazeer Ahamed came to be styled the 2nd defendant, and he filed answer refusing to vacate the premises on the ground that he was the lessee thereof, under a deed dated 15th January 1955, for a period of five years from 1st August 1954. The only issue framed at that investigation was whether he could be ejected in those proceedings. Apart from certain admissions on the part of the 2nd defendant, no evidence was led in the District Court. Two questions of law were raised upon the issue just mentioned: (1) whether the 2nd defendant was bound by the hypothecary decree, and (2) whether he was liable to be ejected having regard to the provisions of the Rent

Restriction Act. On the first question the learned District Judge held that the 2nd defendant was bound by the decree, on the ground that the *lis pendens* of the hypothecary action had been registered, and the hypothecary decree entered, before the execution of the lease to the 2nd defendant. On the second question the Judge held against the 2nd defendant on the ground that there was no proof that the premises were subject to the Rent Restriction Act. On appeal to this Court, the judgment and decree were affirmed, and the application I am now considering is for the execution of the judgment of this Court pending appeal to Her Majesty in Council.

I have first to consider the argument that Rules 7 and 8 of the Rules in the Schedule to the Privy Council Appeals Ordinance (Cap. 85) do not apply to a judgment relating to the occupation of immovable property, and that a recent decision of this Court to the contrary effect *The Venerable Baddegama Piyaratana Nayaka Thero v. The Venerable Vagisvarachariya Morontuduwe Sri Naneswara Dhammananda Thero et al.*,[1] should not be followed. It was argued with much insistence, firstly that Rule 9 is the only Rule which applies in relation to such a judgment, and secondly that the terms of Rule 7 do not cover such a judgment inasmuch as it does not require the appellant to perform a duty.

Rule 9 confers no power on this Court to allow or to stay execution of a judgment against which an appeal is being preferred. It pre-supposes that execution is either being allowed or stayed, and provides, for one class of case (where the judgment will not involve a change in the actual occupation of property) that no security shall be required from either party, and for the opposite class of case a criterion for determining the maximum of security. What power then does Rule 9 assume to be in existence, if it is not the power conferred by Rules 7 and 8 respectively to allow or to stay execution on terms ? Counsel's answer is that the power which Rule 9 assumes the Court to enjoy is an inherent or implied power. That would mean that the Rules, for some reason which is quite obscure, have conferred an express power in relation to some judgments only, and have relied on inherent or implied power for the purposes of the wide and common class of judgments relating to immovable property.

The decision in *Carthelis Appuhamy v. Siriwardena* [2] is of no assistance, for what was there held was, not that there is inherent or implied power to execute a judgment, but rather that a judgment declaring a status is incapable of being executed until the stage of a final determination (after appeal) has been reached. That decision, at the best, only establishes that there may be some judgments which this Court cannot enforce while an appeal is pending. It does not support the theory that Rule 9 assumes some inherent or implied power to exist.

I myself have no hesitation in taking the view that the effect of the judgment in this case is to require the appellant *to perform a duty*. Those words in Rule 7 have to be considered in the context of the provisions in Section 217 of the Civil Procedure Code which define the different objects of decrees. A decree made under any of the Heads A to E in that section

[1] *(1958) 60 N. L. R. 61.* [2] *(1951) 53 N. L. R. 433.*

requires a person to do some act; and it is only Head A that refers to the payment of money. If therefore, the expression " perform a duty " in Rule 7 is construed narrowly, as not referring to a decree under Head C, then equally the rule will not cover decrees falling under Head B, D or E, and the expression might even become meaningless. This absurdity is avoided if " duty " is taken to mean an act the performance of which is enjoined by a decree. Where proceedings under Section 327 of the Code terminate by a decree against an unsuccessful claimant, the decree enjoins him to perform the act specified in Head B of Section 217, namely to yield up possession of immovable property and thus requires him to perform a duty within the meaning of Rule 7. I have therefore to consider the present application on the basis that Rules 7 and 8 lay down the principles to be followed upon an application for execution pending appeal of a decree under any of the Heads A to E in Section 217.

The principle appears to be that execution will be allowed unless " real and substantial justice requires that execution should be stayed ". The burden of establishing this exception is upon the appellant, and that burden is not in my opinion discharged by merely pointing to the hardship and inconvenience which *any* appellant must suffer if he has to surrender immovable property under decree which is liable to be set aside in appeal. If that was intended to be a sufficient ground for refusing execution, one would expect to find express provision making stay of execution the general rule in land actions.

Counsel has relied on the English case of *Wilson v. Church* [1] in support of the principle that " when a party appellant is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory ". No authority was cited to us to show that this principle has been applied in the case of appeals from this Court to Her Majesty in Council, nor is it easy to reconcile such a principle with the apparently different criterion underlying Rules 7 and 8. But Cotton L. J. observed in the same judgment that " if there had been any case made by the plaintiff that this appeal was not *bona fide*, that it was for some indirect purpose and not for the purpose of trying whether the judgment of this Court was right, the case would have stood in a different position ". There is much to be said against the *bona fides* of the present appeal. If the appellant did enter into occupation of the premises under his lease, he did so in such circumstances that he must have known at least of the possibility of his being ousted in execution of a decree which had priority over his lease. The entry of the decree which he now appeals against, even if it be ultimately reversed, was a possibility which should have been anticipated at the time of the execution of the lease.

In my opinion, his appeal is not *bona fide* in so far as it raises the question whether the Rent Restriction Act over-rides the provisions of Section 16 of the Mortgage Act. The plea was taken in the appellant's answer filed in the District Court in April 1956, but he omitted to lead evidence to establish that the premises were subject to rent control.

[1] *(1879) 12 Ch. 454.*

Even if, as counsel now suggests, the Privy Council were to hold that this omission is not fatal, the omission to lead evidence which this Court had earlier held to be necessary in cases under the Rent Restriction Act shows that the plea was not taken in good faith, and even leads to the suspicion that the annual value of the premises does not fall within the prescribed limit. Moreover, one cannot disregard the observations of Sansoni, J. in the main judgment under appeal as to the suspicion arising from the fact that the appellant is the son-in-law of the principal debtor.

The appellant's other ground of appeal will be that he is entitled to continue in possession under his lease. Only seven months now remain out of a five-year term. I do not think it can be seriously urged that an ultimate judgment in his favour will have been rendered nugatory by the appellant being now compelled to surrender possession when only a one-eighth part of his term has yet to run. If, on the other hand, a stay of execution is now granted pending the final determination of the appeal, the result might well be that the appellant remains in possession for a considerable period beyond the term of his lease. " Real and substantial justice " does not require that we assist the appellant to achieve such a result.

I would add for the purposes of record that we ordered the plaintiff to deposit Rs. 10,500 with the Registrar of this Court as security.

T. S. FERNANDO, J.—I agree.

Applications allowed.