1940 *Present :* **Howard C.J. and Soertsz J.**

WIJESINGHE HAMINE *v.* EKANAYAKE *et al.*

4—D. C. Matara, 11,374.

Privy Council—Application for conditional leave—Notice by post—Notice in letter addressed to another—Sufficiency of notice—Notice to all parties necessary—The Appellate Procedure (Privy Council) Order, 1921, r. 5.

Where notice of an application for conditional leave to appeal to the Privy Council was given by a letter containing the notice, sent through the post to the party to an address where the party was known to be staying, and where there was no denial of its receipt by the party,—

Held, that the notice was sufficient to comply with the requirements of rule 5 of the Appellate Procedure (Privy Council) Order, 1921.

Joseph v. Sockalingam Chetty (*32 N. L. R. 59*) followed.

Where notice to a party was enclosed in a letter addressed to another party to whom also notice had to be given,—

Held, that such notice was insufficient.

Fradd v. Fernando (*36 N. L. R. 132*) applied.

Held further, that notice must be given to all the parties in whose favour the judgment appealed against was given.

THIS was an application for conditional leave to appeal to the Privy Council.

H. V. Perera, K.C. (with him *N. E. Weerasooria, K.C.*, and *C. J. Ranatunge*), for the plaintiffs-respondents.—Under rule 5 of the Appellate Procedure (Privy Council) Order, 1921, service of notice has to be effected on the opposite party personally. Personal notice means the actual

handing over of a copy of the notice to the party required to be noticed—*Piyadasa v. Hewavitarane*[1], *Gooneratne v. The Bank of Chettinad*[2], *Fradd v. Fernando.*[3]

N. K. Choksy (with him *Miss Mehta* and *M. Ratnam*), for the petitioners, defendants-appellants.—A despatch of a copy of the notice by registered post is sufficient—*Joseph v. Sockalingam Chetty.*[4] There can be no doubt that the notice was duly served on the first plaintiff. There is no affidavit from her denying receipt of notice. As regards the second plaintiff, there was no need to serve any notice at all on him. He was joined merely as the husband of the first plaintiff, and is not a necessary party—*Gaintota Nona v. Manuel*[5]: The words "opposite party" in rule 2 of the schedule to Appeals (Privy Council) Ordinance, Cap. 85, contemplate a party who would be prejudicially affected by the appeal. The meaning of "necessary party" is considered in *Official Trustee of Bengal v. Benode Behari Ghose Mal*[6] *Ibrahim v. Beebee et al.*[7], *Fernando v. Fernando.*[8]

A definition of personal service as in section 59 of the Civil Procedure Code does not appear in Rule 5A of the Appellate Procedure (Privy Council) Order, 1921.

H. V. Perera, K.C., in reply.—*Joseph v. Sockalingam Chetty* (*supra*) may help the petitioners, but it does not carry them all the way. In that particular case, the circumstances were different from those in the present case.

If there are two respondents, both have to be given due notice. "Opposite party" would include the second respondent. The appellants are asking for a complete reversal of the Supreme Court decree where costs were awarded to both the plaintiffs. Further, it has been held that where a party has been made respondent, he should be given notice even though no relief is claimed against him—*Suppramaniam Chettiar v. Senanayake et al.*[9]

Cur. adv. vult.

February 22, 1940. HOWARD C.J.—

This is an application by the defendants for conditional leave to appeal to the Privy Council against a judgment of the Supreme Court dated November 28, 1939. Under rule 2 in the schedule to the Appeals (Privy Council) Ordinance the applicant for leave to appeal shall within fourteen days from the date of the judgment give the opposite party notice of the intended application. Rules 5 and 5A of the Appellate Procedure (Privy Council) Order, 1921, made under section 4 of the Ordinance, makes provision for the service of notices. Rule 5 provides that a party who is required to serve any notice may himself serve it or cause it to be served, or may apply by motion in Court before a single Judge for an order that it may be issued by and served through the Court. Rule 5A provides that if after reasonable exertion it is found that service cannot be duly effected upon a party personally or upon his proctor empowered to accept service thereof, it shall be competent for the Court which may consist of a single Judge, on being satisfied by evidence adduced before it

[1] *(1936) 40 N. L. R. 421.*
[2] *(1936) 38 N. L. R. 289.*
[3] *(1934) 36 N. L. R. 132.*
[4] *(1930) 32 N. L. R. 59.*
[5] *(1927) 8 C. L. Rec. 178.*
[6] *I. L. R. (1924) 51 Cal. 943.*
[7] *(1916) 19 N. L. R. 289.*
[8] *(1906) 9 N. L. R. 129.*
[9] *(1939) 16 C. L. W. 41.*

that reasonable exertion to effect service has been made and that service cannot be effected, to prescribe any other mode of service. In this case the defendants did not choose to effect service through the Court. On December 11, 1939, the last day but one for effecting service according to an affidavit made by the second defendant a notice was posted by express delivery to the first plaintiff addressed to her c/o Hayes Jayasundera, Light House street, Galle, her son-in-law, where according to such affidavit the first plaintiff was alleged at the time to be staying although it was not her permanent address. The notice contained an intimation of the defendants' intention to appeal to the Privy Council against the said judgment of the Supreme Court. The second defendant in her affidavit also states that in the same envelope she enclosed a copy of the said notice addressed to the second plaintiff as the husband of the first plaintiff as well as two copies of the petition filed in the application for conditional leave to appeal, that is to say, one copy for each of the plaintiffs.

It was contended by Counsel for the plaintiffs that service in the manner described in the affidavit of the second defendant was not in accordance with the rules to which I have referred, that service of the notice had not been properly made in the case of either of the plaintiffs and, with regard to the second plaintiff, not even an attempt at service had been made. The question as to whether the mode of service adopted in the case of the second plaintiff is an adequate compliance with the rules must be considered in the light of two decisions which have been cited in this case. In *Fradd v. Fernando* [1] the interpretation of rules 5 and 5A read in conjunction with rule 2 in the schedule to the Ordinance was considered by a Supreme Court Bench constituted by Macdonell C.J. and Dalton J. The Court held that service upon a "party personally" meant the party who is to be made a respondent, him or herself, and that it does not include an attorney under a power of attorney. In an Election Petition, *Piyadasa v. Hewavitarne* [2] it was held that service on a person not duly appointed as the agent of the respondent did not constitute service of notice on the respondent. Applying these two cases and giving the phraseology employed in rules 5 and 5A its ordinary meaning, I think it is clear that adequate service of the notice on the second plaintiff has not been effected.

The question as to whether the mode of service adopted in the case of the first plaintiff is adequate is not so easy to answer. The cases of *Fradd v. Fernando* [1] and *Piyadasa v. Hewavitarne* [2] were decided on the ground that the service had been effected not on the party himself, but on a different person alleged to be the agent of such party. Neither case dealt with what actual steps were necessary when an attempt was made to serve the party himself. There is no doubt in this case that a letter containing the notice addressed to the party at an address where she was known to be staying was an attempt to serve such party. That party has not adopted the course of denying by affidavit, as she might have done, that she received the letter or that she was staying at that address. But are the requirements of the law with regard to service thus satisfied? The case of *Gooneratne v. Bank of Chettinad* [3] would seem to indicate that they

[1] *36 N. L. R. 132.* [2] *40 N. L. R. 421.*

[3] *16 C. L. R. 13.*

are not. In that case it was alleged by affidavit that the proctor for the respondent posted by registered post to an insolvent under the Insolvency Ordinance a letter, a copy of which was filed with the affidavit, and that a reply had been received from another proctor referring to this letter which had been addressed to the appellant and sending a cheque for Rs. 100 on account, and that the cheque had been returned. The Court heid that this did not amount to personal service and referred to a dictum of Parke B. in the English case of *Goggs v. Huntintower* [1] in which the latter said as follows :—

> "In consequence of those decisions the Judges have come to the conclusion that, in future, there shall be no equivalent for personal service."

Accepting this dictum Mr. Justice Akbar held that personal service means an actual service on the person affected, by a duly constituted agent who hands the document into the hands of the person so affected. If this is the law, it is obvious that the service in this case effected on the first plaintiff falls short of what is required. In the case of *Joseph v. Sockalingam Chetty* [2] which was not referred to in the report of *Gooneratne v. Bank of Chettinad* (*supra*) a different view of the law was taken by the Supreme Court. That case, like the present one, was before the Court with reference to the adequacy of service of a notice on an application for leave to appeal to the Privy Council under rule 2 of Schedule, Appeals (Privy Council) Ordinance. There was proof that a letter containing a notice had been handed into the post office for transmission. Also, as in this case, there was no denial of its receipt by the respondent. The Court constituted by Garvin A.C.J. and Jayewardene J., held that in those circumstances they are entitled to presume that a letter which they were satisfied was properly directed and is proved to have been handed to the postal authorities for transmission reached its destination in due course and that it was received by the person to whom it was addressed. They, therefore, held that there had been a sufficient compliance with the requirements of rule 2 of the Ordinance. I find it a matter of some difficulty to distinguish the facts of *Joseph v. Sockalingam Chetty* (*supra*) from those of the present case and being an authority on the rules governing leave to appeal to the Privy Council I am of opinion that it must be followed. In these circumstances service on the first plaintiff was good.

This finding with regard to service of the notice on the first plaintiff does not dispose of the case. The judgment of the Supreme Court from which leave to appeal is requested was in favour of both plaintiffs. The notice served or attempted to be served was addressed to both plaintiffs. Rule 2 of the Schedule to the Ordinance provides that the applicant shall, within fourteen days from the date of such judgment, give the "opposite party" notice of such intended application. Inasmuch as only the first plaintiff has been given notice it is obvious that compliance has not been made with the provisions of the rule. Counsel for the applicant has contended that as the second plaintiff has not executed the deed, he is not a necessary party to the appeal. I do not consider there is any substance in this contention. "Opposite party" must imply all the

[1] *12 M. & W. 503.*

[2] *32 N. L. R. 59.*

parties in whose favour the judgment appealed against was given. In this connection I would refer to the judgment of the Full Bench in *Ibrahim v. Beebee et al.*[1] and *Suppramaniam Chettiar v. Senanayake and others*[2]. In the latter case de Kretser J. held that even when parties against whom no relief is claimed are made respondents to an appeal notice of security should be given to them. For these reasons I am of opinion that notice has not been served on the opposite party. The application must, therefore, be dismissed with costs.

SOERTSZ J.—I agree.

Application dismissed.