

1948

Present : Jayetileke and Windham, JJ.

SELVAGURU, Petitioner, and THYALPAGER *et al.*, Respondents.

S. C. 130—APPLICATION FOR APPROVAL OF SECURITY TENDERED *re*
 APPEAL TO PRIVY COUNCIL IN S. C. 602/78 (INTY.) D. C.,
 JAFFNA, No. 277.

Privy Council—Final leave to appeal—Deposit of security—Hypothecation of immovable property—Notice to other side—Application for approval—Appeals (Privy Council) Ordinance, Chapter 85—Rule 3 (a) of Schedule—Appellate Procedure (Privy Council) Order—Rule 7 (1).

Where conditional leave to appeal to the Privy Council is granted on the usual conditions the applicant need not deposit the security in cash. Where, however, the applicant seeks to give security by the hypothecation of immovable property, he must make his application to Court for the approval of such security within a month of the grant of conditional leave and such application must be with notice to the other side. Where no such notice has been given there is no sufficient compliance with Rule 7 (1) of the Appellate Procedure (Privy Council) Order. The Supreme Court has no power to extend the period of time unless an application for such extension is made within the month.

APPPLICATION for approval of security tendered regarding an appeal to the Privy Council.

H. W. Thambiah, with *H. Wanigatunga*, for the respondent.—The petitioner has been granted conditional leave to appeal to the Privy Council “on the usual conditions”. The order of the Supreme Court is that security of three thousand rupees be given by a deposit of money. [JAYETILEKE J.—Can the order of the Supreme Court “allowed on usual conditions” be interpreted to mean that cash security must be given?]

The order of the Supreme Court as it stands is that cash security should be given. The usual practice has been to give cash security. It is in the discretion of this Court to refuse any other kind of security. But under rule 7 (1) of the Appellate Procedure (Privy Council) order, 1921, made under section 4 (1) of the Appeals (Privy Council) Ordinance, No. 31 of 1909, Cap. 85, this court could have ordered other security. But under the same rule 7 (1) for this court to order other security there must be a special application made with notice to the other side for the approval of the security tendered.

The application for approval of security, the notice to the other side and the actual approval of the security by the Court must all be obtained within one month or within such extended time as has been obtained by application to Court made before the expiration of that period of one month from the date of the allowing of conditional leave to appeal. Rule 3 (1) of Schedule to the Appeals (Privy Council) Ordinance makes it perfectly clear that security must be complete within one month or, if extended, within the extended period of time.

In this case only an application for accepting the security was made within one month. No notice was given to us within one month, and security has not yet been approved by this Court. Further, there is not

even an application for extension within one month. Court has no power to grant any extension of time now as the month has expired, and the requirements of the main Ordinance (Chap. 85) and particularly of rule 3 (1) of Schedule to Chapter 85 are peremptory. See *Kadija Umma v. Mohamed Sulaiman*¹. Under rule 18 of Appellate Procedure (Privy Council) Order, 1921, extension of time may be granted for periods of time prescribed by that order, but rule 18 does not apply to periods prescribed by the main Ordinance (Chap. 85) or its Schedule.

Further, the security tendered is bad. One of the sureties is a woman. The *Senatus Consultum Velleianum* and *Lex authentica si qua mulier* still apply to persons subject to Thesawalamai. Though these benefits were abrogated by section 29 of Married Women's Property Ordinance that Ordinance itself does not apply to persons subject to Thesawalamai, under section 3 (2). Persons subject to Thesawalamai are governed by the Roman Dutch Law where there is an omission in the Thesawalamai. See *Puthakhamby v. Mailvakanam*². The benefit of the *Senatus Consultum* may be waived but the waiver must be clearly expressed—*Goonetilleke v. Abeyagoonesekera*³.

S. J. V. Chelvanayagam, K.C., with *C. Shanmuganayagam*, for the petitioner, appellant.—What is required by rule 3 (1) of the Schedule to the Appeals (Privy Council) Ordinance is that good and sufficient security be given within one month from the grant of conditional leave to appeal. This Court has no power to order only cash security. The appellant has the right to give other security so long as the Court approves it. The other side must be noticed and the approval of the Court obtained. It is not contemplated that the notice to the other side or the approval of Court should be obtained within one month. Such a view would be very impracticable. It may not be possible either to give notice or get the approval of Court within a month despite all reasonable diligence on the part of the appellant. All that is required by Rule 3 (1) is that the security should be tendered within one month. If the security is approved the appeal proceeds; if it is not approved by Court, the appeal cannot be proceeded with. *Kadija Umma v. Mohamed Sulaiman* (*supra*) has no application because no security at all was given in that case. Security may be other than cash. See *de Silva v. de Silva*⁴. Security in this case is good and sufficient. *Senatus Consultum Velleianum* and *Lex authentica si qua mulier* never applied to persons subject to Thesawalamai.

Cur. adv. vult.

May 14, 1948. WINDHAM J.—

The petitioner applies for final leave to appeal to the Privy Council; and for approval of the security tendered by him to the Court on February 28, 1948, in pursuance, or purported pursuance, of the order of the Court dated January 30, 1948, granting conditional leave to appeal "on the usual conditions". The respondents have raised preliminary objections to the application, the main objection being that the applicant has failed within one month of the application for provisional leave to appeal (*i.e.*, within one month of January 30, 1948), to enter into good

¹ (1939) 40 N.L.R. 265 at 272.

² (1897) 3 N.L.R. 42.

³ (1914) 17 N.L.R. 368.

⁴ (1927) 28 N.L.R. 350.

and sufficient security to the satisfaction of the Court, as required by rule 3 (a) of the Schedule to the Appeals. (Privy Council) Ordinance (Cap. 85).

On January 30, 1948, the applicant applied for and obtained conditional leave to appeal to the Privy Council from a judgment of this Court dated December 10, 1947. Leave to appeal was granted "on the usual conditions". The applicant did not follow the usual course of depositing with the Registrar Rs. 3,000 in cash; but upon February 28, 1948, he mortgaged and hypothecated to the Registrar of the Supreme Court certain immovable property by a security bond of that date, at the same time filing a motion in the Supreme Court tendering this security and moving "that it be accepted". He thereupon sent a telegram and registered letter to the respondents informing them of what he had done.

The first point argued for the respondents is that the only course open to the applicant which would comply with this Court's order of January 30, granting conditional leave to appeal "on the usual conditions", was for him to have deposited Rs. 3,000 security in cash. I do not agree with this contention. The relevant provisions of the law are the following: Rule 3 (a) provides as follows:—

"3. Leave to appeal under rule 1 shall only be granted by the Court in the first instance—

(a) upon the condition of the appellant within a period of one month, from the date of the hearing of the application for leave to appeal, unless the court shall, on the ground of the absence of the appellant from the Island or for some other special cause, on application made to it, before the expiration of such period have granted an extension thereof, entering into good and sufficient security, to the satisfaction of the court, in a sum not exceeding three thousand rupees for the due prosecution of the appeal,"

Rule 7 (1) of the Appellate Procedure (Privy Council) Order, 1921 provides that the security to be given under the above rule 3 (a) of the Schedule "shall be by deposit of a sum of Rs. 3,000 with the Registrar and hypothecation thereof by bond or by such other security as the Court shall, on application made after notice to the other side, approve".

These two rules, 3 (a) and 7 (1), though embodied in separate pieces of legislation, are to be read as supplementary each to the other, since section 3 of the Appeals (Privy Council) Ordinance (Cap. 85) provides that the rights of parties seeking to appeal to the Privy Council shall be subject to and regulated by (a) the rules set out in the Schedule (which include rule 3 (a) above) and (b) such general rules of court as may be made by the Judges of the Supreme Court in exercise of their powers under section 4 of the Ordinance (which include rule 7 (1) above). And the joint effect of these two rules, as I see it, is that a party seeking leave to appeal to the Privy Council has a right, upon conditional leave being granted, either to deposit Rs. 3,000 in cash as provided for in the first part of rule 7 (1), or, should he prefer to adopt the alternative and less usual procedure, to furnish such other security as the court shall, on application made after notice to the other side, approved. The applicant was

rightly given this choice in the decree to which the Court's order of February 28 was reduced by the Registrar. That this alternative course is open to an applicant was confirmed in *de Silva v. de Silva*¹.

But, whichever alternative course is adopted, the requirements of rule 3 (a) of the Schedule still have to be satisfied, namely, that the applicant must, within a period of one month from the date of application for conditional leave to appeal, enter into this security to the satisfaction of the court, unless before the expiration of that month he shall have applied for and obtained an extension of time. Now in the present case it is undisputed that, before the expiry of one month from January 30, the applicant neither applied for nor obtained an extension of time under rule 3 (a) or at all. What the applicant contends, however, is that in tendering his security and making his application upon February 28, (*i.e.*, within the month) he had done all that rule 3 (a) required to be done within the month. But I do not think this contention can succeed. True, I do not think that, upon a proper and reasonable construction of rule 3 (a), an applicant is required to obtain the approval of the Court to his security within the month, as has been argued for the respondents. For the hearing of his application, or the Court's decision upon it (if reserved) might be delayed until after the expiry of the month, through no fault of his, and even a decision upon an application for extension of the time under section 3 (a) itself might be similarly delayed. But I do hold the combined effect of rules 3 (a) and 7 (1) to be that, if an applicant chooses to tender some "other security" under rule 7 (1), as the present applicant did, then his "application made after notice to the other side" for approval of such security, which rule 7 (1) requires, must be so made within the month prescribed in rule 3 (1), unless application for extension of that month is made under section 3 (1) before the expiry of that month. That is to say, the application for approval must, within the month, have been made *after* notice to the other side. This the applicant failed to do. It was only on March 15 that he belatedly gave to the respondents the notice required by section 7 (1). Nor, as I have said, did he within the month apply under section 3 (1) to extend the time so as to enable him, within the extended time, to remedy his omission by giving notice to the other side and then renewing his application for approval.

Now had rule 7 (1) been the only rule infringed by this failure to apply for approval after notifying the respondents within the month, then the position might perhaps have been remedied by this Court in exercise of its powers of extension of time under rule 18 of the Appellate Procedure (Privy Council) Order, 1921, since rule 7 (1) is one of those Rules. But rule 18 applies only to periods of time prescribed in those Rules, and not to periods prescribed in the Rules set out in the Schedule to the Appeals (Privy Council) Ordinance, in which rule 3 (a) appears. This Court would therefore have no power under rule 18 to extend the month's time limit prescribed under rule 3 (a). The only way to extend that month would have been upon an application lodged within the month under rule 3 (a) itself, which, as I have said, was not made. For the rules set out in the Schedule contain no other power to extend the time

¹ (1927) 28 N.L.R. 350.

limit prescribed in rule 3 (a) beyond the power contained in rule 3 (a) itself. That this Court has no other power to extend this month's time limit was confirmed by a full bench in *Kadija Umma v. Mohamed Sulaiman*¹ where it was held at page 273 that "the period of time fixed, has now expired and no application for extension of time was made or allowed before that period expired. If we give relief now it will be in contravention of rule 3 (a) and I am of opinion that we have no power to do so".

On these grounds I hold that the condition prescribed in rule 3 (a), read in conjunction with rule 7 (1), was not fulfilled by the applicant, and that this preliminary objection must accordingly succeed; it therefore becomes unnecessary to consider whether the security tendered was satisfactory.

The application is dismissed with costs.

JAYETLEKE J.—I agree.

Application dismissed.

