

1949

Present : Nagalingam and Windham JJ.

NAGALINGAM, Petitioner, and THANABALASINGHAM *et al.*,
Respondents

S. C. 537—APPLICATION FOR CONDITIONAL LEAVE TO APPEAL
TO THE PRIVY COUNCIL IN D. C. POINT PEDRO, 2,198

*Privy Council—Conditional leave to appeal—Due notice—Failure to give it—
Party not necessary—Clerical errors in notice—Requirements peremptory—
Privy Council Appeal Ordinance—Schedule—rule 2.*

Notice of an intended application for leave to appeal to the Privy Council must be given to a respondent even though no relief is claimed against him.

A notice giving a wrong date of the judgment in respect of which the application is made is not a compliance with the peremptory provision of rule 2 of the Schedule to the Appeals (Privy Council) Ordinance.

Wijesinghe Hamine v. Ekanayake (1940) 41 N. L. R. 415 followed.

APPPLICATION for conditional leave to appeal to the Privy Council.

C. Chellappah, for the petitioner.

H. W. Tambiah, with *S. Canagarayer*, for 2nd, 3rd and 4th respondents.

Cur. adv. vult.

February 3, 1949. WINDHAM J.—

This is an application for conditional leave to appeal to the Privy Council from a judgment of this Court upon two consolidated appeals, which were lodged by the present plaintiff-petitioner and by the second, third and fourth defendants-respondents, respectively, against a judgment for partition. More than one objection has been taken by the defendants-respondents, the main one being that the plaintiff failed to give the defendants due notice of their intended application for conditional leave to appeal as required by rule 2 of the Schedule to the Appeals (Privy Council) Ordinance (Cap. 85), which provides that "the applicant shall, within fourteen days of the date of such judgment, give the opposite party notice of such intended application".

The judgment from which conditional leave to appeal is sought was dated October 13, 1948, and it is not disputed that the plaintiff accordingly had until the end of October 27, in which to give the required notice. He proceeded to take the following action.

On October 26, he sent a telegram to the second defendant, which the latter admits having received on the same day, in the following terms:—"Please take notice for yourself and others that I am appealing to Privy Council in 2198 D. C. Point Pedro".

On the same day he sent a telegram to the firm of proctors who had in the original proceedings represented the second, third and fourth defendants, in the following terms:—"Please take notice that I am applying for conditional leave to appeal to Privy Council in 2198". The second, third and fourth defendants each deny that at that time the proctors to whom this telegram was sent were authorized to act or to receive such notices for them.

On the next day, October 27, the plaintiff sent a telegram to the fourth defendant in the following terms:—"Take notice that I the plaintiff intend to make an application to the Honourable the Supreme Court for leave to appeal to the Privy Council from the judgment and decree of the 11 (*sic*) day of October, 1948". The fourth defendant denies having received this telegram on October 27, or at all.

On October 27, the plaintiff sent an express letter to each of the three (second, third and fourth) defendants in the following terms:—"Take notice that I intend to make an application to the Honourable the Supreme Court for leave to appeal to the Privy Council from the judgment and decree of the Supreme Court dated the 11th (*sic*) day of October, 1948, in the above case". At the head of the letter the case number and reference was correctly cited. The second defendant admits receiving this

letter, but only on October 31 ; it was received at his residence on October 27, by a person who was not his agent for service, he himself being away from his residence from October 27 to 31. The third defendant received the letter on October 28. The fourth defendant denies receiving it at all.

Now on the above facts, even if we were to assume in favour of the plaintiff that the second, third and fourth defendants had each received, before the end of October 27, both the telegrams and the letters sent to them respectively, and that the proctors to whom the telegram was sent were acting for them at the time, there would still be a failure by the plaintiff, in more than one respect, to comply with the provisions of rule 2 of the Schedule to the Appeals (Privy Council) Ordinance.

In the first place, neither any telegrams nor a letter nor any other form of notice under rule 2 was ever sent to the first defendant-respondent, although he was a party to the appeal. It is true that this first defendant asked for no relief in the appeal and was not represented, and that there was no contest between him and the plaintiff. But nevertheless a proper compliance with rule 2 required notice to be served on him, since he was a respondent in the appeal. I would refer to *Wijesinghe Hamine v. Ekanayake*¹, where the judgment of Howard C.J. (Soertsz J. concurring) contained the following decision on the point :—“ 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 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.*² and *Suppramaniam Chettiar v. Senanayake and others*³. 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”. With this decision I respectfully concur, and I must accordingly hold that the failure of the plaintiff to notify the first defendant respondent was a fatal non-compliance with the requirements of rule 2 of the Schedule to the Appeals (Privy Council) Ordinance.

Secondly, the telegram sent to the fourth defendant in the present case, and the letter sent to all three contesting defendants, wrongly described the judgment in respect of which the application was to be made as being dated October 11, whereas in fact there was no judgment of that date, the correct date being October 13. No doubt this was a clerical error and would not have misled any of the defendants. But strict compliance with the requirements of the rules set out in the Schedule to the Appeals (Privy Council) Ordinance has always been demanded by this Court ; and it has been held more than once that the rules admit of no relaxation

¹ (1940) 41 N. L. R. 415.

² (1916) 19 N. L. R. 289.

³ (1939) 41 N. L. R. 271 ; 16 C. L. W. 41.

even in hard cases. In *Weerakoon Appuhamy v. Wijesinghe*¹, their requirements were held to be "peremptory and paramount"; and in *Tarrant and Co. v. Ibrahim Lebbe Marikkar*², Garvin S.P.J. said, in a case calling for the grant of indulgence,—"It does not appear to us that the terms of the rule vest in us any power to relax it in any case which may appear to us to be a case in which some indulgence might be accorded the applicant". In the light of these considerations I am unable to hold that the telegram to the fourth defendant, or the express letter sent to all three defendants, constituted valid notices under rule 2. And the failure to serve a valid notice on the fourth defendant was alone sufficient to vitiate the present application, in view of the decision in *Wijesinghe Hamine v. Ekanayake* to which I have already referred.

For these reasons I hold that the plaintiff has failed to comply with the requirements of rule 2 of the Schedule to the Appeals (Privy Council) Ordinance with regard to notifying the opposite party, and his application is accordingly dismissed with costs.

NAGALINGAM J.—I agree.

Application dismissed.
