

1951

*Present: Gratiaen J. and de Silva J.*

SAMEL APPUHAMY, Applicant, and PETER APPUHAMY,  
Respondent

*S. C. 160—Application to declare the appeal to the Privy Council in  
D. C. Avissawella, No. 3,046 (S. C. 359), to stand dismissed for  
non-prosecution*

*Privy Council—Dismissal of Appeal for non-prosecution—Time limit for compliance  
with Rules—Extension of it "for good cause"—Duty to exercise due diligence  
—Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rules 23 and  
25—Appellate Procedure (Privy Council) Order, 1921, Rules 10 and 18.*

When the time allowed by the Rules contained in the Appellate Procedure (Privy Council) Order, 1921, for doing any act necessary for prosecuting an appeal to the Privy Councils has already expired, the Supreme Court will not grant an extension of time for the doing of that act unless the applicant can show that he has throughout exercised due diligence in prosecuting his appeal, and that his failure to comply with the Rules was occasioned by some circumstance beyond the control of himself and his legal advisers.

<sup>1</sup> (1917) 20 N. L. R. 65.

<sup>2</sup> (1924) 25 N. L. R. 481.

<sup>3</sup> (1924) 25 N. L. R. 481.

<sup>4</sup> (1868) L. R. 3 H. L. 330.

THIS was an application for a declaration that a certain appeal to the Privy Council should stand dismissed for non-prosecution. Application was also made by the respondent for an extension of time within which to comply with the necessary requirements.

*H. V. Perera, K.C.*, with *A. L. Jayasuriya*, for the plaintiff applicant.

*N. E. Weerasooria, K.C.*, with *W. D. Goonesekera*, for the 5th defendant respondent.

*Cur. adv. vult.*

June 11, 1951. GRATIAEN J.—

On October 13, 1950, a Bench of two Judges of this Court refused an application of the 5th defendant to interfere, either by way of revision or *restitutio in integrum*, with an order made against him in favour of the plaintiff in *D. C. Avissawella, No. 3,046*. On November 13, 1950, he obtained conditional leave to appeal to the Privy Council against the judgment of this Court. The usual conditions having been complied with, final leave to appeal to the Privy Council was granted to the 5th defendant on January 18, 1951.

It now became necessary for the 5th defendant, in terms of Rule 23 in the Schedule to the Appeals (Privy Council) Ordinance, to take active steps to prosecute his appeal in accordance with the Rules which regulate the practice and procedure in appeals to His Majesty in Council. These latter Rules, which have been in force since July 29, 1921, are specially designed to ensure that, having obtained leave to appeal, an applicant should proceed expeditiously to have the record printed and transmitted to the Privy Council so that his appeal may be disposed of in that tribunal without delay. Vide *The Appellate Procedure (Privy Council) Order, 1921*, published in *Volume 1 of the Subsidiary Legislation of Ceylon at page 464*. Failure to show "due diligence in taking all necessary steps for the purpose of procuring the dispatch of the record to England" exposes a dilatory appellant to the risk of a declaration of this Court that his appeal shall stand dismissed for non-prosecution. *Rule 25 in the Schedule to the Appeals (Privy Council) Ordinance*.

It is not in dispute that the 5th defendant having obtained final leave to appeal on January 18, 1951, failed to comply with the requirements of *Rule 10 of the Appellate Procedure (Privy Council) Order, 1921*. Under this rule, he should within 10 days of January 18, have served on the plaintiff (who was the respondent to his appeal) a list of all the documents which he required to be included in the printed record for the hearing of his appeal; had this been done, the plaintiff should within 5 days after receipt of such list, have returned it to the petitioner together with a list of such additional documents, if any, as he desired to be added to the record; it was then the 5th defendant's duty within further 3 days to lodge the complete list of documents, relied on by both parties, with the Registrar of this Court. The 5th defendant and his proctor should, therefore, have fully realised that the maximum period allowed for compliance with the requirements of *Rule 10*, was 18 days. In point of fact,

no list of the documents relied on by the 5th defendant was furnished to the plaintiff's proctor until March 9, 1951—i.e., one month and 12 days after the limit of 10 days fixed by the Rule had been passed. The plaintiff's proctor replied within 5 days of receipt of this letter, protesting that this notice was out of time but furnishing, without prejudice to his client's rights, a list of further documents relied on by the plaintiff. The 5th defendant's proctor, on hearing from the plaintiff's proctor, has taken no further steps to furnish the Registrar with a complete list of the documents relied on by both parties to the intended appeal.

The 5th defendant has now applied under *Rule 18* of the Appellate Procedure (Privy Council) Order, 1921, for an extension of time within which to comply with the requirements of *Rule 10*. This application, which is now before us, is dated May 26, 1951, which is more than 3½ months after the final date fixed by law for compliance with the Rule. No doubt *Rule 18* permits an extension of time to be granted after the date of compliance with the requirements of the Rule, but this privilege can only be granted to a party "*for good cause*". It is therefore necessary to examine the explanation offered by the 5th defendant's proctor, in an affidavit dated May 26, 1951, for his client's delay in complying with the requirements of *Rule 10*.

I regret to say that I can find nothing in this affidavit which can be accepted as a satisfactory explanation of the 5th defendant's default. The 5th defendant was, or should have been aware, *as early as November 13, 1950*, on which date conditional leave to appeal to the Privy Council was obtained, that he would be required within 10 days of the granting of final leave to furnish the plaintiff with a list of the documents necessary for the printing of the record. It follows therefore that he was fore-warned for a period of over 3 months of the necessity to proceed with a due sense of urgency if he desired to avail himself of the right to take his appeal before a higher tribunal. The only explanation which he now offers is that his proctor was "unable to have access to the record of the case" because that record had on October 21, 1950, been returned by the Registrar to the District Court of Avissawella. There is no substance whatsoever in this excuse and the affidavit is significantly silent as to what endeavours were in fact made to obtain access to the record. Had his proctor applied to the District Judge for permission to examine the record in the lower Court, I do not doubt that permission would have been readily and quite properly granted. But no such application was in fact made; nor was the Registrar even requested to arrange for the record to be sent up from Avissawella to the Registry to suit the proctor's convenience. Indeed, it is open to argument whether an examination of the record was *essential* to due compliance with the provisions of the Rule. The intended appeal to the Privy Council related solely to the correctness of the decision of this Court on October 13, 1950, in proceedings *initiated not in the District Court but in this Court*. All the papers and documents relevant to the application were admittedly available to the 5th defendant in the Registry. Finally, the 5th defendant having realised—as I assume he did—that the time for compliance with *Rule 10* had now expired, took no steps to apply for an extension of time until long after the plaintiff had filed his application dated March 21, to have the appeal dismissed for want of prosecution.

When the time allowed by the Rules contained in the Appellate Procedure (Privy Council) Order, 1921, for doing any act necessary for prosecuting an appeal to the Privy Council has already expired, this Court should not in my opinion grant an extension of time for the doing of that act *unless the applicant can show that he has throughout exercised due diligence in prosecuting his appeal, and that his failure to comply with the Rules was occasioned by some circumstance beyond the control of himself and his legal advisers.* It is in this sense that I interpret the words "for good cause" in Rule 18.

For the reasons which I have given I would refuse the 5th defendant's application for an extension of time and I would allow the plaintiff's application for a declaration that the 5th defendant's appeal shall stand dismissed for non-prosecution. The 5th defendant will pay to the plaintiff the costs of both applications. The privilege of preferring appeals to His Majesty in Council carries with it an obligation to exercise a sense of vigilance in complying with the very simple Rules which regulate the procedure for perfecting such appeals.

DE SILVA J.—I agree.

*Application for dismissal allowed.*

*Application for extension of time refused.*

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