1938 *Present :* **De Kretser J.**

MOHAMED BHAI *v.* DIYAIVA *et al.*

179—C. R. Kandy, 21,757.

*Courts of Requests—Leave to appeal on the facts—Application granted after time by the Supreme Court—*Per Incuriam*—Appeal rejected.*

In a Court of Requests' case application to the Supreme Court for leave to appeal on the facts must be filed within seven days of the Commissioner's refusal. Sundays are not excluded in reckoning the period.

Where an application was made out of time and leave granted *per incuriam*, the Supreme Court is not precluded from rejecting the appeal.

APPEAL from a judgment of the Court of Requests, Kandy.

N. Nadarajah, for plaintiff, appellant.

H. A. Wijeymanne, for second defendant, respondent.

Cur. adv. vult.

June 27, 1938. DE KRETSER J.—

Judgment in this case was delivered on June 30, 1937. An application for leave to appeal was refused on the same day.

On July 8 an application to this Court for leave to appeal was filed. The journal entry describes it as a petition of appeal against the Commissioner's refusal of leave to appeal.

This Court allowed the application. The appeal came on for hearing in due course.

Counsel for respondent then took the objection that the appeal was not in order as leave to appeal had been granted without jurisdiction inasmuch as the application had not been filed within seven days of the Commissioner's refusal. He relied upon section 7 of the Interpretation Ordinance for the computation of the period of time and according to that section Sundays are not excluded in the reckoning.

Appellant's Counsel conceded that the application was out of time and he contended that this Court having granted leave to appeal could not now reject the appeal and that the period had possibly been reckoned in accordance with a prevailing practice and that this ought not to be disturbed. He cited *Boyagoda v. Mendis*[1].

With regard to the first objection, it is in my opinion not entitled to succeed. The first order was obtained *ex parte* and the respondent had then no opportunity of objecting. This Court has repeatedly held that an application to set aside an *ex parte* order should be made to the Court making the order and that such a Court had power to set aside such an order.

The cases apply to orders made by Courts of first instance but I do not see why the principle they embody should not be extended to orders made by this Court.

There is another way of looking at the matter. The appellant had no right of appeal except in terms of Ordinance No. 12 of 1895 and this Court had jurisdiction to grant leave to appeal only when the case fell within the provisions of that Ordinance. This Court ought therefore to have power to vacate an order made without jurisdiction and cannot extend the right of one party at the expense of the other. There can be no doubt that this Court would not have granted leave had it known that the application was out of time, and that its order was made *per incuriam*.

The objection to the constitution of the appeal is in my opinion sound. There remains the question to whether a *cursus curiae* exists to the contrary and whether such *cursus* should be allowed to affect the question.

[1] *30 N. L. R. 321.*

By letter dated May 26, 1938, the Registrar addressed the different Courts in the Island, and 26 out of the 33 had replied by June 20. The delay in giving judgment was due to these replies being awaited. No replies were received from Galle, Matara, Kalutara, Panadure, Nuwara Eliya, Mannar, and Mullaittivu, and I do not propose to wait for them. Badulla reported that no application for leave to appeal had ever been made in that Court, and Kandy, Ratnapura and Point Pedro include Sundays and follow the Interpretation Ordinance.

There is therefore no uniformity in the prevailing practice nor any evidence as to the length of time during which the existing practice has prevailed. The circumstances in this case are quite different from those in *Boyagoda v. Mendis (supra)*.

This case comes from Kandy and in that Court the practice is to include Sundays. The application to this Court for leave to appeal was therefore out of time.

The erroneous practice in some Courts is due either to confusion of such an application with regular appeals or to the mistaken notion that it is in itself an appeal.

Originally an appeal lay from every final order of a Court of Requests but in 1895 appeals in actions for debt, damage or demand were prohibited except on leave allowed. Having before it the provisions with regard to the computation of time in filing regular appeals the Legislature made no similar provision regarding applications for leave to appeal and there may have been good reason for its not doing so.

Section 13 of Ordinance No. 12 of 1895 did not specify within what time applications should be made to the Commissioner for leave to appeal but it allowed an appeal with such leave, and clearly the appeal so allowed had to be filed within seven days of the judgment, in terms of section 756 of the Code. This point was decided in *Arnolis v. Lewishamy* [1] and *Goonewardene v. Orr* [2]. By implication therefore an application to the Commissioner would have to be made within the appealable period. Now, such an application might be made even on the last day of the appealable period and the unsuccessful applicant was given a further period of time within which to apply to this Court for leave to appeal. The decree therefore remained liable to be suspended for this period and it is scarcely likely that the Legislature, which contemplated curtailment of the right of appeal, intended to extend the period of seven days beyond its natural limit.

Whatever may have been its intention, that intention can be gathered only from the provisions in the Ordinance and there is no power in this Court to extend the period.

The objection is upheld and the appeal dismissed with costs.

Appeal dismissed.

[1] *2 N. L. R. 222.*

[2] *2 A. C. R. 35.*