is that, where a person who was not the former owner of a company is found to be owning that company in the year of assessment, that person is to be assessed. That is not only a convenient course but seems to me to be a just one. Upon whom the burden is ultimately to fall is a matter of arrangement between the vendor company and the purchaser company. Taking this view, in my opinion, our answer to the question referred must be that the new company is the successor of the petitioners. Costs to the Commissioner Rs. 250.

RAMESAM J.—I agree.

CORNISH J.—I agree.

Attorneys for assessees : *King and Partridge.*

A.S.V.

APPELLATE CIVIL.

Before Sir Owen Beasley Kt., *Chief Justice, and Mr. Justice Curgenven.*

POORNANANTHACHI (PETITIONER IN CIVIL MISCELLANEOUS PETITION NO. 1494 OF 1931), PETITIONER,

1932, February 8.

v.

T. S. GOPALASWAMI ODAYAR, AND TWELVE OTHERS (RESPONDENTS IN CIVIL MISCELLANEOUS PETITION NO. 1494 OF 1931), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XLV, r. 7, as amended by Act XXVI of 1920, sec. 3—Time for furnishing security—Extension—Power of High Court—Judicial Committee Rules (1920), r. 9—Inability to raise funds—If a ground for extension.

The High Court has no power to extend the time for furnishing security beyond the time set out in Order XLV, rule 7, of the

* Civil Miscellaneous Petition No. 6139 of 1931.

POORNAN-ANTHACHI v. GOPALA-SWAMI ODAYAR.

Code of Civil Procedure and no different effect is produced by rule 9 of the Privy Council Rules.

Nilkanth Balwant v. *Vidya Narsinha Bharati*, (1927) I.L.R. 51 Bom. 430 (F.B.), dissented from.

PETITION under rule 9 of the new Judicial Committee Rules praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to extend the time by two months for furnishing security in the appeal sought, in Civil Miscellaneous Petition No. 1494 of 1931, to be preferred to His Majesty in Council against the decree of the High Court in Appeal No. 411 of 1925 preferred to the High Court against the decree of the Court of the Subordinate Judge of Kumbakonam in Original Suit No. 22 of 1924.

V. V. Srinivasa Ayyangar for *T. V. Ramanatha Ayyar* for petitioner.

K. S. Krishnaswami Ayyangar, *S. Panchanadha Mudaliyar* and *S. Ramanujam* for fifth respondent.

N. A. Krishna Ayyar for first respondent.

M. Ranganatha Sastri for second respondent.

K. V. Krishnaswami Ayyar and *T. R. Srinivasan* for sixth respondent.

S. V. Venugopala Achari for eighth respondent.

R. Gopalaswami Ayyangar and *K. S. Desikan* for ninth and eleventh respondents.

S. Venkatesa Ayyangar for tenth respondent.

The other respondents were unrepresented.

Cur. adv. vult.

ORDER.

BEASLEY C.J.

BEASLEY C.J.—This is an application for an extension of time by two months for furnishing security for costs. Leave to appeal to the Privy Council was granted on the 16th October 1931 and the petitioner was directed under Order XLV, rule 7, of the Code of Civil Procedure to furnish security for costs of the respondents within

six weeks from the date of the granting of the certificate. The last day for furnishing security was the 27th November 1931. By that date the petitioner had been unable to furnish the security and on the 30th November 1931 she presented this petition praying for an extension of time by two months.

The petition is supported by the affidavit of the *kariasthan* of the petitioner. The two reasons for the granting of the petition set out in that affidavit are (1) the inability of the petitioner to furnish the security owing to her difficulty in getting the necessary funds and (2) because the petitioner is an old widow and for the two months previous to the presentation of the petition had been ill and confined to her bed. With regard to the former reason, it is stated that the sum awarded by the appellate Court to the petitioner for her maintenance, namely, Rs. 175 per mensem, is hardly sufficient for her maintenance and that the sum of Rs. 2,500 which she drew from the lower Court was utilized to pay off sundry creditors and that with the strictest economy she had only been able to save Rs. 1,500 and had not been able to raise the balance, Rs. 3,000, of the amount of the security ordered. It is also stated on her behalf that, after this petition was filed, her Advocate tendered to the Registrar the full amount of the security ordered but that, as the time for furnishing it had expired, the Registrar refused to receive it and that the money is now in the hands of her Advocate awaiting the disposal of the petition. The agent of the guardian of the minor fifth respondent has put in a counter-affidavit in which it is denied that the petitioner had been ill and confined to her bed for two months and the deponent states that he had occasion to meet her during the time when it is alleged she was ill and that she was in good health. It is also stated that

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the petitioner drew from the receiver in the lower Court, Rs. 10,919-11-0, under the order of that Court, dated the 11th November 1930, and that the allegation that she discharged debts is false. It is also pointed out that the judgment of the High Court in the appeal was delivered on the 1st May 1930, that the application for leave to appeal to the Privy Council was filed on the 2nd December 1930 and that leave to appeal was granted on the 16th October 1931. It is also stated that, when leave was applied for, it was claimed for the petitioner that, as the decree of this Court reversed the decree of the lower Court and the value of the appeal was more than Rs. 10,000, she was entitled to leave as of right. It is also alleged that the application for leave to appeal was really a move to obstruct the final decree proceedings of the lower Court and that the real object was to get a stay of the decree of this Court. No stay was obtained, however, and the partition and division of the property was proceeded with. In an affidavit, in reply to this counter-affidavit, sworn to by the petitioner she denies the allegation in the counter-affidavit that she was in good health and further states that the money received by her from the lower Court was in fact used for other necessary purposes, namely, payment of debts incurred for her maintenance for several years and the expenses of the litigation.

Taking the matters deposed to in these affidavits it seems to me clear that this petition must fail upon the merits and that no extension of time should be granted to the petitioner. With regard to the petitioner's alleged ill-health, she has made no attempt, and none has been made on her behalf, to substantiate this allegation. She merely contents herself with repeating it in her reply-affidavit. There is no certificate by her medical attendant, if she had one, and she does not even

state that she had. Nor is there any affidavit by any independent person in support of her allegation. With regard to her inability to raise the necessary funds, that is not a ground, in my view, for granting an extension of time particularly after such a long time has elapsed since the decree; and it has been held in a number of cases that this alleged reason is not sufficient to justify any extension of time for furnishing such security. In my view, therefore, on the facts, this petition must be dismissed.

Apart from the merits, the question whether the High Court has the power to extend the time for furnishing security beyond the time set out in Order XLV, rule 7, was very fully argued; and in view of some recent decisions of this High Court and one in Bombay which are in conflict with other decisions of this High Court and other High Courts, in my view, it is most desirable that any doubt that there may be should be finally removed and that this matter should receive the consideration of a Full Bench on the next occasion on which this question arises. In view of our rejection of this petition on the merits, I do not think it necessary to do what I at first thought should be done. Nevertheless, I feel bound to express the opinion that the decisions of this High Court taking the view that the High Court has the power to grant extensions of time are wrong, and that the decision of OLDFIELD and RAMESAM JJ., *Nagireddi* v. *Saki Reddi*(1), holding that the High Court has no power to extend the time is right. Turning to the decisions expressing the opposite view, we have the decision of RAMESAM and MADHAVAN NAIR JJ. in *Kilaru Ramakotiah* v. *Dharmabhotla Subramanyam and others* in Civil Miscellaneous Petition No. 4993 of 1931, following a decision of REILLY and

(1) (1922) 18 L.W. 29.

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ANANTAKRISHNA AYYAR JJ., in *Ramakrishna Ayyar* v. *Parameswara Ayyar* in Civil Miscellaneous Petition No. 3644 of 1931, an unreported case, which followed the decision in *Nilkanth Balwant* v. *Vidya Narsinha Bharati*(1), in which they held that the High Court has power to grant extensions of time, and accordingly extended the time for furnishing security for costs. In the latter case two previous applications for extension of time appear to have been made but were rejected, but on the third occasion the attention of the Court was drawn to the decision of the Bombay High Court, and it was followed, and an extension of time given. *Nilkanth Balwant* v. *Vidya Narsinha Bharati*(1) is a decision of a Full Bench and was in consequence of a difference of opinion between SHAH J. and FAWCETT J.; SHAH J. was of the opinion that the High Court had such power and FAWCETT J. took the contrary view. The Full Bench consisting of MARTEN C.J. and CRUMP and PATKAR JJ. adopted the view of the former. In the opinion of MARTEN C.J. the High Court has the power to extend the time because there is no express penalty provided by Order XLV, rule 7, for failure to furnish the security and it is therefore in contrast with Order XLV, rules 10 and 11. He is further of the opinion that rule 9 of the Privy Council Rules is in conflict with Order XLV, rule 7, because upon a construction of it the High Court has power to extend the time. Rule 9 is as follows:—

"Where an appellant, having obtained a certificate for the admission of an appeal, fails to furnish the security or make the deposit required (or apply with due diligence to the Court for an order admitting the appeal) the Court may, on its own motion or on an application in that behalf made by the respondent, cancel the certificate for the admission of the appeal, and

(1) (1927) I.L.R. 51 Bom. 430 (F.B.).

may give such directions as to the costs of the appeal, and the security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises, as in the opinion of the Court the justice of the case requires."

With all respect to the opinion of MARTEN C.J. I do not think rule 9 of the Privy Council Rules is in conflict with Order XLV, rule 7, because the latter rule does provide for a further extended period not exceeding sixty days upon cause being shown to the Court. Suppose, therefore, the ninety days from the date of the decree have passed without security being furnished; rule 9 of the Privy Council Rules, it seems to me, gives nothing more than the right to cancel the certificate or, if it can be read as giving the Court any power to extend the time, then, if good cause is shown, to extend the time for furnishing the security, provided the extended time does not exceed sixty days. In any event, if, as it appears to me, Order XLV, rule 7, does not entitle the High Court to extend the time beyond that which is provided in the rule, I do not imagine that it was intended in rule 9 of the Privy Council Rules which were to take effect from the same date as the amended rule 7 of Order XLV to have any different effect. Rule 7 of Order XLV was amended in order to put an end to the great delay in appeals to the Privy Council reaching the Privy Council. Under the old rule, the appellant had six months in which to furnish the security from the date of the decree or six weeks from the date of the grant of the certificate, whichever was the later date. In order to expedite the hearing of Privy Council appeals and to remove one serious cause of delay, the six months' period was cut down to ninety days and rule 7 was amended by substituting the following words

"ninety days or such further period, not exceeding sixty days, as the Court may, upon cause shown, allow."

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In my view, it was not intended by this amendment that the High Court should, for reasons appearing cogent, further extend that period of sixty days, having regard to the fact that in the rule it is thus expressed, "not exceeding sixty days". It is quite true that under the old rule it was held that the High Court had power to extend the period. But in view of the very definite alteration of the rule, I cannot bring myself to suppose that the High Court has any power to grant further extensions. When the case in *Nilkanth Balwant* v. *Vidya Narsinha Bharati*(1) went to the Privy Council the appeal was decided in favour of the appellant. Their Lordships do not make any reference in the judgment of the Board to the extension of time granted for furnishing security by the Bombay High Court; nor was the power of the Bombay High Court to do so questioned in the argument. The fact that no exception was taken by the Privy Council to the extension of time has been taken by REILLY and ANANTAKRISHNA AYYAR JJ. as significant, but, with all respect, the Privy Council never considered the point and it may well be that the point was never taken by the respondent because the Privy Council itself has power to extend the time, however limited the power of the Indian High Courts may be. And it may well be that, all the heavy costs of that appeal having been incurred, it was thought that the Privy Council would excuse the delay even if the Bombay High Court had no power to extend the time.

Ram Dhan v. *Prag Narain*(2), *Joti Prasad* v. *Harkesh Singh*(3), *J. N. Surty (Receiver)* v. *T. S. Chettyar Firm*(4), *Ramani Ranjan* v. *Durga Dutt*(5) and *Kamala Kanta*

(1) (1927) I.L.R. 51 Bom. 430 (F.B.). (2) (1921) I.L.R. 44 All. 216.
(3) (1928) 26 A.L.J. 433. (4) (1926) I.L.R. 4 Rang. 265, 288.
(5) A.I.R. 1927 Pat. 330.

v. *Bindhumukhi*(1) were referred to and it has been held in all these cases that the High Court has no discretion under Order XLV, rule 7, to extend the period for furnishing security beyond that laid down in the rule. It is quite true that in none of those cases was the effect of rule 9 of the Privy Council Rules considered; but as already stated, in my view, rule 9 does not have the effect given to it in *Nilkanth Balwant* v. *Vidya Narsinha Bharati*(2). I think further that rule 9 obviously has reference to the procedure in Order XLV, rule 7, and this is also clear from rule 10 which is as follows:—

"An applicant whose appeal has been admitted shall prosecute his appeal in accordance with the rules for the time being regulating the general practice and procedure in appeals to His Majesty in Council."

In my opinion, rule 9 of the Privy Council Rules and Order XLV, rule 7, are parts of the same scheme. Quite apart, therefore, from the merits of this case, in my opinion, this petition for an extension of time should be rejected, because the High Court has no power to extend the time beyond that specified in Order XLV, rule 7. This petition must be dismissed with costs of the respondents, one set, and the certificate, dated 16th October 1931, granted in Civil Miscellaneous Petition No. 1494 of 1931, cancelled.

CURGENVEN J.—The question whether this Court has unlimited discretion to extend the time for furnishing security in appeals to the Privy Council resolves itself into the two questions: (1) what is the meaning of Order XLV, rule 7, Civil Procedure Code, read by itself, and (2) if by itself it would limit the discretion to grant time, is it overridden by rule 9 of the new Judicial Committee Rules? The former of these questions has received an almost uniform answer at the

(1) A.I.R. 1929 Pat. 431. (2) (1927) I.L.R. 51 Bom. 430 (F.B.).

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hands of those Benches which have considered it. The Allahabad High Court in *Ram Dhan* v. *Prag Narain*(1) has drawn attention to the very careful drafting of the amended Order XLV, rule 7, and has concluded that the real meaning and intended effect is to curtail and limit the discretion of the Court to granting an extension up to the sixty days which the rule lays down as the maximum extension permissible. In particular the learned Judges reject an argument which has since been resorted to before us, that, whereas a limit is set to any extension allowed of the period of ninety days from decree, no such limit is set to the period of six weeks from the grant of certificate. It is sought to take advantage of the absence of any such limit in order to attach to the latter period some such addition as "or such further period as the Court may upon cause shown allow", so that while the Court cannot indefinitely extend the time reckoned from the decree, it can always extend it reckoned from the certificate. Such a construction must, I think, clearly be held untenable in cases where the six weeks from certificate expires before the ninety *plus* sixty days from decree; because it is not reasonable that extension should be made to the period which first expires. But whatever the circumstances, I think that it is difficult to escape from the view taken in the Allahabad case under citation, that to grant an extension beyond the period of six weeks would be to defeat the object and intention of the amendment. This case was followed in *Joti Prasad* v. *Harkesh Singh*(2). Two other High Courts, those of Rangoon and Patna, have taken the same view, the main argument being that the claim to unfettered discretion can only be justified at the cost of disregarding

(1) (1921) I.L.R. 44 All. 216. (2) (1928) 26 A.L.J. 433.

the words "not exceeding sixty days", which we must suppose were deliberately introduced by the amendment of 1920. An opinion to the same effect was expressed by OLDFIELD and RAMESAM JJ. in *Nagireddi* v. *Saki Reddi*(1). The first dissentient judgment was delivered by SHAH J. in *Nilkanth Balwant* v. *Vidya Narsinha Bharati*(2) in referring the question to a Full Bench. The learned Judge notices the argument that

> "when the Legislature fixed the possible period of extension, the necessary implication is that the further powers of the Court for extending the time were taken away",

a consideration which, as he says, much influenced the Judges who decided *Ram Dhan* v. *Prag Narain*(3). But he goes on to express the view that, although in exercising its powers the Court will have regard to the object of the Legislature, yet

> "it (the amendment) cannot be accepted as a ground for negativing the powers of the Court, which are as necessary in the broad interests of justice as it is necessary to avoid and reduce delays in the interests of justice."

The only meaning which I can attach to this language is, not that there is any doubt as to the intention of the Legislature in introducing the words "such further period not exceeding sixty days", but that, because the Court may think that strict compliance with them may occasion hardship, it is at liberty to regard them merely as a general direction to avoid excessive delays.

> "The provisions of this rule",

the learned Judge says,

> "are as directory after the amendment of the rule by Act XXVI of 1920 as they were before the Act was passed."

He finds further support for his position in the terms of rule 9 of the new Judicial Committee Rules,

(1) (1922) 18 L.W. 29. (2) (1927) I.L.R. 51 Bom. 430 (F.B.).
(3) (1921) I.L.R. 44 All. 216.

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a point to which I will refer presently. FAWCETT J., the learned Judge who joined in making the reference, took the view that the intention of the Legislature was plain, and that the Courts ought to observe the limits now laid down. I respectfully concur in the line of reasoning followed in his judgment. The decision of the Full Bench expressed by MARTEN C.J. leaves open the question of the effect of the present Order XLV, rule 7, read by itself. It is based upon a supposed conflict between that rule and rule 9 of the Privy Council Rules; the latter rule, it is said, read by itself, would allow the Court unlimited discretion to extend time; and the provisions of section 112 of the Code of Civil Procedure are invoked for liberty to proceed under rule 9 unconditioned by Order XLV, rule 7.

This is the subject of the second question which I have framed above. Rule 9 says that the Court may cancel the certificate if the appellant fails to furnish the security and the use of the word 'may', it is urged, shows that, instead of cancelling it upon such failure, the Court may extend without limit the time fixed for compliance. I am unable to see how, even upon this construction, any conflict is thereby created between the two rules, unless it be conflict that the one rule, read by itself, might leave the Court free to do something which the other rule in unmistakable terms forbids. I doubt very much whether section 112, Civil Procedure Code, ought to be used in order to abrogate a rule having the force of law on the ground that it sets bounds to a discretion which the Privy Council Rules leave undefined. Rule 10 of those rules requires an appellant to prosecute his appeal in accordance with the rules regulating the general practice and procedure in Privy Council appeals, among which I suppose are comprised the rules under the Civil Procedure Code.

That the amendment to rule 7 was not made without advertence to the terms of the new Judicial Committee Rules seems clear from the fact that the amendment and the Rules came into force on one and the same day ; so that, without saying with FAWCETT J. that the amendment was made at the instance of the Privy Council, it seems specially incumbent upon the Courts to reconcile the two, rather than to enlarge their own powers by seeking to establish a conflict between them. In Civil Miscellaneous Petition No. 3644 of 1931 REILLY and ANANTAKRISHNA AYYAR JJ. have recently followed the Bombay Full Bench Case, but I doubt, with respect, whether the added reason given, that that case went before the Privy Council which must, from the silence of the report, be taken to have adopted the view of the Full Bench, is based upon a justifiable inference. Nor perhaps is it quite correct to say that rule 9 "gives a power", which cannot therefore be restricted by anything in Order XLV of the Code.

I agree accordingly with my Lord that we have no power to extend the time in the present case. I agree too that even if we had the power it would not be a fit case for its exercise.

G.R