

APPELLATE CIVIL—FULL BENCH.

*Before Sir Lionel Leach, Chief Justice, Mr. Justice
Madhavan Nair and Mr. Justice Varadachariar.*

MATHUKUMALLI RAMAYYA AND THIRTY OTHERS
(PETITIONERS), PETITIONERS,

1938,
April 12.

v.

VUPPALAPATI LAKSHMAYYA (RESPONDENT),
RESPONDENT.*

*Code of Civil Procedure (Act V of 1908), O. XLV, r. 7—
Furnishing of security and making of deposit required by
—Extension of time for, beyond the periods mentioned in
the rule—Power of Court as to—Rule 9 of the Judicial
Committee Rules—Sec. 112 of the Code—Applicability and
effect of.*

Held by the Full Bench.—The Court has power under rule 9 of the Privy Council Rules to extend the period allowed for furnishing the security and the making of the deposit required by Order XLV, rule 7, of the Code of Civil Procedure beyond the periods mentioned therein, but the power should not be exercised without cogent reason.

The effect of the amendment of Order XLV, rule 7, of the Code is to limit the discretion of the Court in granting further time to a maximum period of sixty days beyond the ninety days which the applicant has of right and if that provision stood alone the Court would have no discretion to grant time beyond the further period of sixty days. But rule 9 of the Privy Council Rules leaves a discretion in the Court to extend the time and, by reason of section 112 of the Code, that rule must prevail over Order XLV, rule 7, of the Code.

Poornananthachi v. Gopalaswami Odayar(1) overruled.

PETITION praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to enlarge the time for making the

* Civil Miscellaneous Petition No. 1439 of 1938.

(1) (1932) I.L.R. 55 Mad. 835.

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deposit for security for costs in Privy Council Civil Miscellaneous Petition No. 89 of 1938 in Appeals Nos. 571 of 1931 and 260 of 1932 on the file of the High Court.

The petition originally came on for hearing before VARADACHARIAR and PANDRANG ROW JJ. when their Lordships made the following

ORDER OF REFERENCE TO A FULL BENCH:—

There is a conflict of decisions both in this Court and in the other High Courts as to the power of the Court to grant an extension of time beyond the period of six weeks provided for in Order XLV, rule 7, of the Code of Civil Procedure. In view of the observations in *Poornananthachi v. Gopalaswami Odayar*(1), we think it proper that this question should be decided by a Full Bench.

The petition came on for hearing in pursuance of the aforesaid order of reference before the Full Bench constituted as above.

ON THE REFERENCE :

K. Kameswara Rao for petitioners.—The Court has power to extend time even under the scheme of Order XLV of the Code of Civil Procedure, *i.e.*, even apart from the Judicial Committee Rules. [Reference was made to Order XLV, rule 7, of the Code of 1908 and to section 602, the corresponding provision in the Code of 1882.] Notwithstanding the change in the language made by the Code of 1908 the reasoning applicable to section 602 of the Code of 1882 still stands good. “Shall” in the new Code is merely directory and not mandatory.

[THE CHIEF JUSTICE.—You want to read the rule as—shall, unless the Court otherwise directs.]

The object of the amendment made by the new Code was to cut down the six months to a lesser period. The Court has even after the amendment a discretion.

[THE CHIEF JUSTICE.—What was the object of saying “not exceeding sixty days” if it was not to take away the discretion of the Court beyond the sixty days?]

The provision in rule 7 is not mandatory but is only directory because no penalty is attached to failure to furnish security. The change is only in rule 7 of Order XLV. There is no change in the other provisions. "Not exceeding sixty days" is intended merely to fix one limit. Even if the Court has no power to extend time under Order XLV of the Code, it has power under rule 9 of the Judicial Committee Rules printed on page 53 of the Appellate Side Rules of this Court. As regards the words, "or make such further or other order in the premises, as in the opinion of the Court the justice of the case requires", in the concluding part of that rule, one view is that those words apply to orders consequential on the cancellation of the certificate for the admission of the appeal. The other view is that the Court may either cancel the certificate or make such other order as is consistent with the justice of the case. Therefore the Court may grant extension in a proper case. In cases of extension beyond the 150 days prescribed by rule 7 of Order XLV of the Code the Court may grant extension under rule 9 of the Judicial Committee Rules. Order XLV does not say what is to happen if security is not furnished within the 150 days. Rule 9 of the Judicial Committee Rules provides for such a case. It says the Court may cancel the certificate or make such other order, *i.e.*, order extending time. Section 112 of the Civil Procedure Code refers to presentation of appeals. Appeals to the Privy Council are presented in this Court. Therefore under the provisions of section 112 of the Code, rule 9 of the Judicial Committee Rules ought to prevail if there is held to be a conflict between that rule and rule 7 of Order XLV of the Code. Under rule 9 of the Judicial Committee Rules cancellation of the certificate is itself made discretionary. The clause beginning with "or" provides for the contingency arising on non-cancellation of the certificate and for an order being made, *i.e.*, an order alternative to cancellation. The nature of the order to be passed under that part of the rule is an order alternative to cancellation, *i.e.*, an order substituting some other security or extending the time for furnishing security. The view that the latter portion of rule 9 of the Judicial Committee Rules must be confined to extension within the time limited by Order XLV, rule 7, of the Code is not sound. No express provision is necessary for such a contingency because Order XLV, rule 7, itself vests a discretion in such a case. In several of the cases which hold that the

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[Reference was made to the following cases as being in support of, and against, the contention of the petitioners:— Civil Miscellaneous Petition No. 3644 of 1931 (REILLY and ANANTAKRISHNA AYYAR JJ.); Civil Miscellaneous Petition No. 4993 of 1931 (RAMESAM and MADHAVAN NAIR JJ.); *Poornanathachi v. Gopalaswami Odayar*(1); *Nagireddi v. Saki Reddi*(2); *Nilkanth Balwant v. Vidya Narsinha Bharati*(3); *Ram Dhan v. Prag Narain*(4); *Bahadur Lal v. Judges of the High Court at Allahabad*(5); *J. N. Surty (Receiver) v. T. S. Chettiyar Firm*(6); *Ma Sein v. Sit Pauing*(7); *Raj Kumar Govind Narain Singh v. Shamlal Singh*(8); *Kamala Kanta v. Bindhumukhi*(9); *In re Munna Lal v. Gajraj Singh*(10); and *Hukumchand Kashiwal v. Radha Kishen Moti Lal Chamaria, Messrs.*(11)].

M. Patanjali Sastri for *B. Somayya* for respondent.—There is no conflict between rule 9 of the Judicial Committee Rules and Order XLV, rule 7, of the Code. The two provisions should be read together and the result of reading them together is this: The applicant has an absolute right to a particular period. The amendment also vests in the Court a discretion to grant an extension in a certain case. Rule 9 of the Judicial Committee Rules provides for a state of things arising within the period within which the Court could grant an extension.

[VARADACHARIAS J.—Not necessarily so.]

The applicability of section 112 of the Code does not arise until it is held that there is a conflict between rule 9 and Order XLV, rule 7. The portion of rule 9 beginning with “or etc.”, assuming it refers to an alternative order, refers to the stage at which the question of the cancellation of the certificate comes in.

[VARADACHARIAS J.—Once you concede that the application of Order XLV, rule 7, of the Code will in any measure interfere

(1) (1932) I.L.R. 55 Mad. 335.

(2) (1922) 18 L.W. 29.

(3) (1927) I.L.R. 51 Bom. 430 (F.B.).

(4) (1921) I.L.R. 44 All. 216.

(5) (1933) I.L.R. 55 All. 432 (F.B.).

(6) (1926) I.L.R. 4 Ran. 265, 268.

(7) (1924) 94 I.C. 590.

(8) (1926) 39 C.W.N. 651.

(9) A.I.R. 1929 Pat. 431.

(10) A.I.R. 1935 Lah. 733.

(11) (1931) I.L.R. 7 Luck. 528 (P.C.).

with the scope of rule 9 of the Judicial Committee Rules, then section 112 of the Code says that rule 9 must prevail.]

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Rule 9 must be read with Order XLV, rule 7, and as referring to the same topic.

[VARADACHARIAR J.—If taking rule 9 alone the Court could grant an extension in a particular case and Order XLV, rule 7, is against its granting an extension in such a case, Order XLV, rule 7, does conflict with rule 9.]

Rule 9 does not apply to extension of time for granting security.

[VARADACHARIAR J.—What other default does the rule refer to?]

Default in making the application referred to in rule 9.

[VARADACHARIAR J.—The Code provides for such an application.]

The Judicial Committee Rules and Order XLV, rule 7, of the Code must be read together as forming part of the same scheme. [Rule 10 of the Judicial Committee Rules was referred to.]

[VARADACHARIAR J.—The Judicial Committee Rules refer to two stages—one, the stage before the admission of the appeal which is done by the High Court and the other the post-admission stage when everything takes place before the Privy Council.]

There seems to be no such clear-cut division; but if it is to be held that there is such a clear-cut division, section 112 of the Code cannot apply to the rules relating to the pre-admission stage.

[VARADACHARIAR J.—But section 112 of the Code refers to presentation of appeals which is done in this Court.]

“Or” in rule 9 of the Judicial Committee Rules does not necessarily provide for an alternative order. The whole of that rule including the last clause really deals with the stage when the appellant has finally failed to give security, i.e., after all possibilities of getting extension have been exhausted. If, therefore, the power of the Court to grant extension in such a case is sought, it must be *dehors* rule 9, under whatever provision it may be. Rule 9 does not provide for what is to happen if the certificate is not cancelled. [Reference was made to the maxim, *Generalia specialibus non derogant*.]

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Rule 9 of the Judicial Committee Rules is the general provision and Order XLV, Rule 7, of the Code is the special provision.

Cur. adv. vult.

OPINION.

LEACH C.J.

LEACH C.J.—The question which has been referred is whether in an appeal to His Majesty in Council the Court has power to extend the time for furnishing the security and making the deposit required by Order XLV, rule 7, of the Code of Civil Procedure beyond the periods mentioned therein. The rule provides that where the certificate permitting the appeal is granted the applicant shall furnish the security and make the deposit within ninety days or such further period not exceeding sixty days, as the Court may upon cause shown allow from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date. The words “within ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow” were substituted for the words “within six months” by Act XXVI of 1920. The amendment was made in order to expedite appeals to the Privy Council by restricting the Court’s discretion to extend the time. Up to then it had been the uniform practice in the Courts in India to grant extensions of time and it would appear that the impression had been created that they had been too lenient when dealing with such applications. The rule as it stood before the amendment was regarded by the Privy Council itself as being

merely directory although it had intimated that it should not be departed from without cogent reasons ; *Burjore and Bhawani Pershad v. Mussumat Bhagana*(1).

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Since the amendment there has been a conflict of judicial opinion on the question whether the amended rule has the effect which the Legislature intended it to have. The conflict has arisen by reason of the provisions of rule 9 of the rules framed by the Privy Council and section 112 of the Code of Civil Procedure. Rule 9 reads 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 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.”

Section 112 (1) (b) of the Code of Civil Procedure states that nothing in the Code shall be deemed

“ to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee ”.

Stated broadly the conflict is this : Some Judges have regarded the amendment of Order XLV, rule 7, of the Code of Civil Procedure as constituting an overriding statutory prohibition of extension beyond sixty days after the initial period of ninety days, while other Judges have considered that rule 9 of the Privy Council Rules governs

(1) (1883) L.R. 11 I.A. 7.

RAMAYYA the situation by reason of section 112 of the Code
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 LEACH C.J. discretion.

In *Nilkanth Babwant v. Vidya Narsinha Bharati*(1) a Full Bench of the Bombay High Court expressed itself strongly in favour of the view that rule 9 has left the Court a discretion in the matter. The question was referred to a Full Bench as SHAH J. and FAWCETT J. had disagreed, SHAH J. being of the opinion that the Court had still power to extend the time for cogent reasons while FAWCETT J. considered that the amendment of Order XLV, rule 7, in 1920 restricted any extension beyond sixty days after the ninety days had expired. The Full Bench consisted of MARTEN C. J. and CRUMP and PATKAR JJ., and they were unanimous in adopting the opinion of SHAH J. After pointing out that there was no express penalty provided by Order XLV, rule 7, for failure to furnish the security and to make the required deposit, MARTEN C.J. observed that as there was an inconsistency between Order XLV, rule 7, and rule 9 of the Privy Council Rules, the Privy Council rule must prevail by virtue of the provisions of section 112. On this basis the Court granted an extension beyond the additional period of sixty days. The appeal was in due course heard by the Privy Council and the judgment of their Lordships is reported as *Nilkanth Babwant v. Vidya Narsinh*(2). The judgment, however, makes no reference to the action of the Bombay High Court in extending the time.

(1) (1927) I.L.R. 51 Bom. 430 (F.B). (2) (1930) I.L.R. 54 Bom. 495 (P.C.)

Nilkanth Balwant v. Vidya Narsinha Bharati(1) was considered by BEASLEY C.J. and CURGENVEN J. in *Poornananthachi v. Gopala-swami Odayar*(2), but they found themselves unable to share the opinion of the Bombay High Court. BEASLEY C.J. considered that rule 9 of the Privy Council Rules gave nothing more than the right to cancel the certificate, but if it could be read as giving the Court power to extend the time, the extension could not exceed the sixty days provided by Order XLV, rule 7. The learned CHIEF JUSTICE did not imagine that rule 9 was to have a different effect from Order XLV, rule 7, as rule 9 and the amendment to Order XLV, rule 7, came into effect on the same date (1st January 1921). CURGENVEN J. delivered a separate judgment to the same effect. In *Nagireddi v. Saki Reddi*(3) OLDFIELD and RAMESAM JJ. also held that the Court had no power to extend the time beyond the sixty days, but this decision was before the decision in *Nilkanth Balwant v. Vidya Narsinha Bharati*(1) and RAMESAM J. later changed his opinion. In *Ramakrishna Ayyar v. Parameswara Ayyar* (Civil Miscellaneous Petition No. 3644 of 1931) REILLY and ANANTAKRISHNA AYYAR JJ. followed *Nilkanth Balwant v. Vidya Narsinha Bharati*(1) and their decision was accepted by RAMESAM J. sitting with MADHAVAN NAIR J. in *Kilaru Ramakotiah v. Dharmabotla Subramanyam* (Civil Miscellaneous Petition No. 4993 of 1931).

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The only decision of the Calcutta High Court to which we have been referred is that of *Raj*

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

(2) (1932) I.L.R. 55 Mad. 835.

(3) (1922) 18 L.W. 29.

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Kumar Govind Narain Singh v. Shamlal Singh(1) where RANKIN O.J. and GHOSE J. expressed the opinion that rule 9 of the Privy Council Rules did not empower the High Court to grant an extension beyond the sixty days. The Bombay decision is not referred to in the judgment and presumably was not considered. The Allahabad High Court has also decided that there is no power of extension beyond the sixty days: *Ram Dhan v. Prag Narain*(2) and *Bahadur Lal v. Judges of the High Court at Allahabad*(3). The latter case was decided by a Full Bench consisting of MUKERJI A.C.J. and KING and NIAMAT-ULLAH J.J. MUKERJI A.C.J. and KING J. were of the opinion that there was no discretion left in the Court after the expiration of the sixty days, while NIAMAT-ULLAH J. held that there was. KING J. considered that rule 9 could be read as applying to a failure to comply with an order falling within the maximum period allowed by Order XLV, rule 7, and MUKERJI A.C.J. agreed with him. NIAMAT-ULLAH J. did not consider that Order XLV, rule 7, necessarily implied that the Court had no power to grant an extension for more than sixty days, but assuming that it did conflict with rule 9, he agreed with the opinion of the Bombay High Court that the latter rule prevailed. The Patna and the Lahore High Courts have also held that there is no power to extend the time beyond the sixty days: *Kamala Kanta v. Bindhumukhi*(4) and *In re Munna Lal v. Gajraj Singh*(5). The Lahore High Court considers

(1) (1926) 39 C.W.N. 651.

(2) (1921) I.L.R. 44 All. 216.

(3) (1933) I.L.R. 55 All. 432 (F.B.).

(4) A.I.R. 1929 Pat. 431.

(5) A.I.R. 1935 Lah. 733.

that the words "make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires" are intended to cover merely incidental orders necessitated by the cancellation of the certificate.

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I have already pointed out that in amending Order XLV, rule 7, the Legislature intended to limit the discretion of the Court in granting further time to a maximum period of sixty days beyond the ninety days which the applicant has of right—there would be no reason for the amendment otherwise—and I am of the opinion that the words of the amendment effect their object so far as the Code is concerned. Therefore, if Order XLV, rule 7, stood alone, I should have no hesitation in holding that the Court had no discretion to grant time beyond the further period of sixty days. But, if there is conflict between the Code and the Privy Council Rules, the Rules must prevail. Section 112 of the Code says so in very plain language. Consequently the question is reduced to this: Does rule 9 of the Privy Council Rules give a discretion to the Court to extend the time? If it does, nothing in Order XLV, rule 7, can take away that discretion. In my opinion rule 9 does leave a discretion in the Court, and therefore must prevail over Order XLV, rule 7. I read rule 9 in this way: On failure by the applicant for leave to appeal to the Privy Council to furnish the security or make the deposit the Court has two courses open to it. It may cancel the certificate and pass consequential orders or it may instead of cancelling the certificate make such "other" order as it considers requisite. If it does not cancel the

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certificate the only other order it can pass is to extend the time for furnishing security or making the deposit, or doing both, as the case may be. The furnishing of security and the making of the deposit are conditions which must be complied with before the appeal can be lodged in the Privy Council. It must be cancellation or extension.

We have been asked to hold that the words "make such further or other order in the premises, as, in the opinion of the Court, the justice of the case requires" are to be read with the words "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", but, with respect to the judicial opinion which has supported this construction, I consider its acceptance would mean violating the plain meaning of the rule.

It is very desirable to guard against delay in the prosecution of appeals to the Privy Council and it is unfortunate that there should be this conflict between Order XLV, rule 7, and rule 9 of the Privy Council Rules, but at the same time I do not think that it is of much practical importance. With the amendment of Order XLV, rule 7, before it, the Court is not likely to grant more than sixty days beyond the initial ninety days, unless the circumstances are very exceptional.

For the reasons indicated I would answer the reference in this way. The Court has power under rule 9 of the Privy Council Rules to extend the period allowed for furnishing the security and the making of the deposit required by Order XLV,

rule 7, beyond the periods mentioned therein, but the power should not be exercised without cogent reason.

MADHAVAN NAIR J.—I agree.

VARADACHARIAR J.—I agree.

A.S.V.

APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Madhavan Nair.*

CHOCKALINGAM CHETTIAR (SIXTH DEFENDANT),
APPELLANT,

1938,
March 29.

v.

MUTHUKARUPPAN CHETTIAR AND SEVEN OTHERS
(PLAINTIFF AND DEFENDANTS 1 TO 5 AND 7 AND 8),
RESPONDENTS.*

Hindu law—Joint family—Manager of—Contract of partnership by, with strangers—If, and when, other members of the joint family also become partners—Partition—Consent decree not effecting immediate severance of status but only embodying arrangement to be carried into effect if and when a partition subsequently takes place—Subsequent contract implying the continuance of joint status—Effect of.

In a suit for partition among the members of a joint Hindu family, a consent decree was passed which declared, *inter alia*, that certain members were entitled to a half share and certain other members were entitled to the other half. In a subsequent suit a question arose as to the status of the family after the consent decree. It was found: (i) that the partition decree was not intended to alter the joint family status, but was merely regarded as embodying arrangements to be carried into effect, if and when a partition did in fact take place,