

FULL BENCH (CIVIL).

*Before Sir Ernest H. Goodman Roberts, Kt, Chief Justice, Mr. Justice Baguley,
and Mr. Justice Sharpe.*

1934

Mar. 20.

ISMAIL PIPERDI

v.

MOMIN BI BI AND OTHERS.*

Privy Council Appeal—Extension of time for furnishing security—High Court's power to annul, alter or add rules of procedure—High Court's power to extend time for furnishing security—Order in Council, Rule 9—Civil Procedure Code, s. 122 ; O. 45, r. 7 ; O. 52, r. 66.

The High Court has powers enabling it to make rules regulating its own procedure, and such rules may annul, alter or add to any or all of the rules in the 1st Schedule of the Civil Procedure Code.

The High Court has power under rule 9 of the Order in Council (Privy Council Rules) and under O. 52, r. 66 of the Civil Procedure Code for cogent reasons to extend the time for furnishing security beyond that which would be allowed by O. 45, r. 7 of the Code if it were read alone.

Mathukumalli v. Vuppalapati, I.L.R. [1938] Mad. 1007 ; *Nilkanth v. Shri Satchidanand*, I.L.R. 51 Bom. 430, followed.

Daw Byaw v. Maung Kyaw, C.M. Appl. 109 of 1930, H.C. Ran., referred to.

Bahadur Lal v. Judges of the High Court, I.L.R. 55 All. 432 ; *J. N. Surty v. T.S. Chettyar Firm*, I.L.R. 4 Ran. 265, 288, dissented from.

Foucar for the applicant. The time given by O. 45, r. 7 of the Civil Procedure Code to furnish security for the costs of the Privy Council appeal has expired, but under O. 52, r. 66 of this Court the applicant may be allowed further time if the justice of the case requires it. Similar powers are also conferred by Rule 9 of the Privy Council Rules, which in its terms is very similar to O. 52, r. 66, and the Court can act under either of the two provisions. The decision in *J. N. Surty v. T.S. Ghettyar Firm* (1) confined itself to the provisions of O. 45, r. 7 which had then recently been amended and did not refer to either of the above provisions.

* Civil Misc. Application No. 70 of 1938 arising out of Civil First Appeal No. 154 of 1937 of this Court.

(1) I.L.R. 4 Ran. 265.

There are cogent reasons in the present case why the applicant should be allowed further time. The affidavits filed show that the applicant has been acting diligently in the premises.

1939
 PIPERDI
 v.
 MOMIN
 BI BI.

Clark for the respondents. Once the certificate for leave to appeal is granted the Court becomes *functus officio*. There are no rules of procedure to operate thereafter. All that the High Court can do is to cancel the certificate for failure to furnish security in due time. The Privy Council has prerogative rights, and it has issued rules for the guidance of colonial Courts. If it had not been for rule 9 of the Privy Council Rules the High Court may have only to report to the Privy Council the fact that security had not been furnished. Rule 9 now enables the High Court to cancel the certificate in the circumstances.

[ROBERTS, C.J. Under s. 122 of the Code the High Court can make rules to regulate its own procedure till the record is actually sent to the Judicial Committee. O. 52, r. 66 is such a rule.]

Rules of the High Court govern its own procedure ; but once the certificate is granted the High Court has no further procedure of its own. Thereafter it acts as a delegate of the Privy Council in respect of any powers granted to it, and it may cancel the certificate or pass orders consequential thereon, but no more.

Before the amendment of O. 45, r. 7 in 1920 the Privy Council held that the High Court may extend time for giving security on cogent reasons being shown. *Burjore v. Bhagana* (1). But the object of the amendment was to expedite Privy Council appeals and the High Court has no power to extend time for more than 60 days. O. 45, r. 7 and O. 52, r. 66 should be read

(1) 11 I.A. 7, 9.

1939
 PIPERDI
 v.
 MOMIN
 BI BI.

consistently with this view. *Bahadur Lal v. Judges of the High Court at Allahabad* (1); *Hukum Chand v. Radha Kishen* (2); *Rajkumar Govind v. Narain Singh* (3). The decisions in *Mathukumalli Rammayya v. Vuppalapati Lakshmayya* (4); *Nilkanth Balwant v. Shri Satchidanand* (5) take a contrary view.

Foucar in reply. O. 45, r. 7 should be construed as being subordinate to Rule 9 in cases of conflict. The reasoning of Niamatullah J. in *Bahadur Lal's* case should be followed here. Rule 10 of the Privy Council Rules and the subsequent Rules show that the High Court is not necessarily *functus officio*. And the High Court has power to make Rules not inconsistent with the Privy Council Rules.

ROBERTS, C.J.—This is an application by Ismail Ahmed Piperdi who has been granted a certificate of appeal to His Majesty in Council for further time in which to furnish security for the costs of his appeal. It is conceded that the time given by Order 45, Rule 7 expired six weeks from the date of the granting of the certificate namely on January 18th on which date the application was filed : but the applicant says that Order 52, Rule 66 operates in his favour and that the Court can extend the time in pursuance of the power given to us to make such other order in the premises as the justice of the case requires. Alternatively he says that the Court has such power by virtue of Rule 9 of the Order in Council notified in the Gazette of India on April 24, 1920, which is ordered to be observed by all Courts in India and which still applies to Burma by reason of the provisions of section 84 of the Government of Burma Act, 1935.

(1) I.L.R. 55 All. 432.

(2) I.L.R. 7 Luck. 528.

(3) 39 C.W.N. 651.

(4) [1938] Mad. 1007, 1117.

(5) I.L.R. 51 Bom. 430.

In *J. N. Surty v. T.S. Chettyar Firm* (1) a Bench of this Court considered that by reason of the provisions of Order 45, Rule 7 which came into operation on January 1, 1921, the period of six weeks from the date of the grant of the certificate cannot be extended by the exercise of any discretionary power. Neither Order 52, Rule 66 nor Rule 9 of the Privy Council Rules was referred to and the correctness of this decision has been doubted by Page C.J. delivering the judgment of a Bench in an unreported case, *Daw Byaw and seven others v. Maung Kyaw* (2).

In *Bahadur Lal v. Judges of the High Court* (3) it was held by a majority that the provisions of Rule 9 of the Privy Council Rules could not override the provisions of Order 45, Rule 7. The latter rule was held to be the expression of a particular intention by the Legislature and as an exception to the general intention contained in Rule 9. Niamatullah J. however considered that it did not follow that if the security were not furnished the Court was bound to cancel the certificate but might pass any order *ex debito justitiae*.

It appears that this view has the assent of the Bombay High Court in *Nilkanth Balwant Natu and others v. Shri Satchidanand Vidya Narsinha Bharati and others* (4) and also of the High Court of Madras in *Mathukumalli Rummayya and thirty others v. Vuppalapati Lakshmayya* (5).

It could not be denied that this Court has powers enabling it to make any rules regulating its own procedure, and that such rules may annul, alter or add to any or all of the rules in the 1st Schedule. The provisions of section 122 of the Code are clear on this point. However, it has been ingeniously contended

1939
 PIPERDI
 T.
 MOMIN
 BI BI.
 ROBERTS,
 C.J.

(1) (1926) I.L.R. 4 Ran. 265, 288.

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

(2) Civ. Mis. Appl. No. 109 of 1930, H.C. Ran. (4) (1927) I.L.R. 51 Bom. 430.

(5) I.L.R. [1938] Mad. 1007, 1017.

1939
 PIPERDI
 v.
 MOMIN
 BI BI.
 ROBERTS,
 C.J.

that Order 52, Rule 66, the provisions of which are substantially the same as those of Rule 9 of the Privy Council Rules, does not go so far as to do this and must be read consistently with Order 45, Rule 7 so that the discretion of the Court as regards time is limited. It is also urged that once the certificate has been granted the Court is *functus officio*; that it has no more procedure left to regulate as regards the appeal to His Majesty in Council; so that Order 52, Rule 66 does not regulate the procedure of this Court at all. Then it is said that the Order in Council from which Order 52, Rule 66 derives its source is a mere delegation of powers by the Judicial Committee. In this view the certificate may be cancelled and orders consequential upon the cancellation may be made, but no more may be done.

But the Court is not bound to cancel the certificate. This clearly appears from the terms of Rule 9 itself. If it does not do so the certificate remains in force and some order must be made having regard to the failure to furnish security. It cannot be supposed that the Court was to be left powerless to do anything except to cancel the certificate or in a proper case to refuse to cancel it. If there is a refusal to cancel the certificate some consequential order may well be necessary.

In *Mathukumalli Raimayya and thirty others v. Vuppalapati Lakshmayya* (1) Leach C.J. pointed out that by section 112 of the Code of Civil Procedure if there is any conflict between the Code and the Privy Council rules the latter must prevail. This case appears to me to be a further authority in support of the view that the High Court has power for cogent reasons to extend the time for furnishing security beyond that which would be allowed by Order 45 Rule 7 if it were read alone.

(1) I.L.R. [1938] Mad. 1007.

In the present case I think there are cogent reasons for permitting the security which has already been paid into the office of the legal advisers of the applicant to be furnished forthwith. We are told that the applicant is only nineteen years of age and he therefore needed advice as to how best to prosecute the appeal he desired to make. He says he was helped by his uncle to make arrangements for furnishing the necessary security and it was arranged with one Abdul Aziz (whom he describes as his grandfather but who, it is now stated, was his great uncle) to raise a loan upon security of the deposit of title deeds of the latter's immovable properties. The lender wished to come to Rangoon and deposit the money personally in Court so as to assure himself that the reason given for the advance was genuine. Accordingly he was to visit Rangoon on January 17 there was on that date a disturbed state of affairs in many parts of Burma including Rangoon and the lender failed to arrive. On January 18 applicant filed an affidavit asking for time and on January 20 Abdul Aziz died. The money was deposited with the applicant's advocates on February 10 and on the February 11 he filed a further affidavit setting out the circumstances. In our opinion it is desirable that the security furnished should be paid into Court and that the appeal should proceed forthwith.

BAGULEY, J.—I agree.

SHARPE, J.—Subject to the question as to whether we have power to extend beyond the 18th January last the time fixed by this Court's order of the 7th December 1938 for giving security for costs and making a deposit for printing copies of the records in this appeal to His Majesty in Council, I agree that there are in this case reasons for granting a short extension of time,

1939
 PIPERDI
 v.
 MOMIN
 Bi Bi.
 ROBERTS,
 C.J.

1939

PIPERDI

v.
MOMIN
BI BI.

SHARPE, J

which reasons may to my mind be not improperly described as cogent ones. The question of our power to grant such an extension is not, however, entirely free from difficulty.

I desire to base my answer to that question entirely upon Rule 9 of the Order in Council dated the 17th April 1920. To base my answer to that question on Rule 66 of Order LII of the Code of Civil Procedure, which is an Order added to that Code by this High Court under the provisions of section 122 of that Code, would involve further careful consideration on my part as to whether this High Court had power to make such a rule under that section, for, as at present advised, I feel considerable doubt as to whether this Court had such power. It is, however, unnecessary, in my judgment for me to pursue that line of inquiry, for the material words of Rule 9 of the Order in Council are identical with those of Rule 66 of Order LII: I therefore confine myself to a consideration of Rule 9 of the Order in Council. The question which we have to decide is precisely the same as that which was before a Full Bench of the Madras High Court last year, in the case of *Mathukumalli Rammayya v. Vuppalaapati Lakshmayya* (1); the Madras High Court has not, seemingly, added to the Code of Civil Procedure any rules corresponding to our Order LII. In that Madras case Leach C.J. said, at page 1017 :

"The question is reduced to this: Does Rule 9 of the Privy Council Rules give a discretion to the Court to extend the time?"

I myself at one time thought that the proper construction of Rule 9 of the Order in Council required 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" should be read with the words

(1) I.L.R. [1938] Mad. 1007.

“ 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,” a construction which was urged before, but ultimately rejected by the Madras High Court. Despite the not inconsiderable body of judicial opinion which has accepted the above construction I have come to the conclusion that the view which I at first took is not the correct one. To my mind the word “ may ”, when it first appears in Rule 9, between the word “ Court ” and the words “ on its own motion,” is the key to the construction of the whole Rule ; had there been the word “ shall ” there instead of “ may,” I think that there would be considerable difficulty in not giving Rule 9 the construction which was rejected by the Madras High Court and urged before us by Mr. Clark. But, as it is “ may ” and not “ shall,” the decision of the Madras High Court was, if I may respectfully say so, a correct one, and we must now give a similar decision.

As my Lord the Chief Justice has pointed out in his judgment, this view has had the assent of the Bombay High Court for about twelve years, and, as he pointed out during the course of the argument before us, it is more likely than not that, were that an erroneous view to take, there would by now be a reported decision of their Lordships of the Privy Council expressing disapproval of the view taken by the Bombay High Court.

For these reasons I agree that we should in the present case extend, in the way suggested by my Lord the Chief Justice, the time already fixed for giving security and making the necessary deposit in connection with the appeal to His Majesty in Council.

1939

PIPERDI
?.
MOMIN
BT Bl.

SHARPE, J.