

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice N. J. Wadia.

1939
February 22

SHANKAR DYAMANGOUDA PATIL, MINOR BY HIS NEXT FRIEND GENETIVE FATHER NARSINHA MAHADEV UDAPI (APPELLANT—ORIGINAL PLAINTIFF), APPLICANT *v.* PUTTABAI BHRATAR GURUNATHGOUDA K. PATIL AND OTHERS (RESPONDENTS—ORIGINAL DEFENDANTS NOS. 1, 3 AND 4), OPONENTS.*

Civil Procedure Code (Act V of 1908), O. XLV, r. 7—Furnishing of security—Extension of time—Privy Council Rules, 1920, rule 9—Practice.

The discretion given to the Court by rule 9 of the Privy Council Rules is a general one, which does, if the justice of the case requires it, enable the Court to extend the time for lodging security to any extent; but in exercising that discretion regard should be had to the fact that under O. XLV, r. 7 of the Civil Procedure Code, 1908, the extension of time for giving security is strictly limited, and it would require a strong case to induce the Court to hold that justice requires an extension of time beyond the limit specified in that rule.

Nilkanth Balwant v. Vidya Narsinha Bharati,⁽¹⁾ followed.

Revanshidaya v. Gudnaya,⁽²⁾ referred to.

Poornananthachi v. Gopalaswami Odayar⁽³⁾ and *Bahadur Lal v. Judges of the High Court at Allahabad*,⁽⁴⁾ not followed.

The Court held that no case was made out for authorising the applicant to give substituted security, but in the special circumstances of the case the Court gave the applicant, under rule 9, an extension of 14 days to give the security in cash.

APPLICATION for substituted security.

On June 14, 1938, Shankar (applicant) filed against Puttabai and two others an application for leave to appeal to His Majesty's Privy Council against the decree of this Hon'ble Court dated January 19, 1938.

On December 14, 1938, the Court was pleased to grant a certificate, giving the applicant leave to appeal to His Majesty's Council.

*Civil Application No. 47 of 1939.

⁽¹⁾ (1927) 51 Bom. 430.

⁽²⁾ (1930) 33 Bom. L. R. 487.

⁽³⁾ (1932) 55 Mad. 835.

⁽⁴⁾ (1933) 55 All. 432.

On January 23, 1939, the applicant applied to the Court praying that he should be allowed to furnish substituted security, it being alleged that the applicant, who was a minor, was a pauper and that he had filed a suit and the appeal in *forma pauperis* and that if he was not so permitted to furnish the substituted security, he would not be able to proceed with his appeal.

The application was heard.

W. B. Pradhan and *S. R. Joshi*, for the applicant.

R. A. Jahagirdar, for opponents Nos. 1 and 3.

BEAUMONT C. J. This is an application to allow the applicant to give substituted security for the cash payment, which he was required to make in relation to an appeal to the Privy Council. The application raises a point of practice, which has led to a difference of opinion between this High Court and other High Courts.

Under O. XLV, r. 7, Civil Procedure Code, the applicant desiring to appeal to the Privy Council is required, 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, to furnish security in cash or in Government Securities. The decree in the present case was passed on January 19, 1938, and the certificate was issued on December 14, 1938. Therefore, it seems to me clear that under O. XLV, r. 7, no extension of time could be given beyond six weeks from December 14, 1938. But it is argued that an extension can be allowed under r. 9 of the Privy Council Rules, which came into force on the same day as the amendment to O. XLV, r. 7, which prescribed the period which I have referred to. Rule 9 is in these terms :

“ 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

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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."

Beaumont C. J.

Under s. 112 of the Civil Procedure Code the rules made by the Privy Council prevail in any conflict between them and the provisions of the Code, so that, if r. 9 of the Privy Council Rules conflicts in any way with O. XLV, r. 7, the provisions of r. 9 must prevail. The view which has been taken by a full bench of this Court in *Nilkanth Balwant v. Vidya Narsinha Bharati*⁽¹⁾ is that under r. 9 a general discretion is given to the Court to make such order as the justice of the case requires, and if the justice of the case requires the extension of time for giving security beyond that specified in O. XLV, r. 7, the Court has jurisdiction to make the order. That case has been followed by a division bench of this Court in *Revanshidaya v. Gudnaya*.⁽²⁾ However, the Madras High Court in *Poornanathachi v. Gopalaswami Odayar*⁽³⁾ and the Allahabad High Court in *Bahadur Lal v. Judges of the High Court at Allahabad*⁽⁴⁾ take a different view. They think that r. 9 of the Privy Council Rules does not empower the Courts to extend the time beyond the limit specified in O. XLV, r. 7.

The learned Government Pleader has suggested that the matter should be referred to a full bench of five Judges, but, as at present advised, I think the view taken by this Court in *Nilkanth Balwant v. Vidya Narsinha Bharati*⁽¹⁾ is the correct view. It seems to me that the discretion given to the Court by rule 9 of the Privy Council Rules is a general one, which does, if the justice of the case requires it, enable the Court to extend the time for lodging security to any extent; but in exercising that

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discretion we must have regard to the fact that under O. XLV, r. 7, the extension of time for giving security is strictly limited, and I think that it would require a strong case to induce the Court to hold that justice requires an extension of time beyond the limit specified in that rule.

In the present case apparently an order was made (rightly or wrongly) *ex parte* extending the time to February 25 next, that is to say for a period which still has three days to run, but it is obvious that if we are to accede to this application on the merits, a further extension will have to be allowed. The applicant, who is a minor, says that he is unable to provide the Rs. 4,000 in cash which is required of him. But he says that he can raise the money on the security of immoveable property worth at least Rs. 40,000. Obviously there would have to be an inquiry as to the value of the property which he proposes to substitute. But, whatever the value of that property may be, I can see no reason why this application should not have been made within the period limited by O. XLV, r. 7. The applicant has known his financial position ever since the decree was passed. If the property is really worth as much as he alleges, I should have thought he would have had no difficulty in raising the sum which he requires on the security of that property. In my opinion, on merits, no case is made out for authorising the applicant to give substituted security.

In the special circumstances of this case we grant under r. 9 an extension of fourteen days to give the security in cash. If it is not deposited, the application will be dismissed with costs. If it is deposited, costs will be costs in the appeal.

N. J. WADIA J. I agree.

Order accordingly.

Y. V. D.

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