

(28)

STATE OF ANTIGUA

IN CHAMBERS

APPEAL NO. 2 of 1977

BETWEEN: SYDNEY PRINCE Applicant/Appellant
and
KARL PHILLIPE DE JACQUES DE LA BASTIDE
SOOK MUNGAL SUPERSAD and
GEORGE CALVIN HAMILTON THOMAS Respondents

Before: The Honourable Mr. Justice Peterkin

Appearances: Dr. F. Ramsahoye for Applicant

T. Hosein and Attorney-General
for Respondents, S. Charles with
them.

1978; June 6 and 30

J U D G M E N T

PETERKIN, J.A.:

This is an application by Summons dated 24th May, 1978, to enlarge the time for giving security for costs and for taking out all appointments necessary for settling the Record under an order made on 8th March last granting conditional leave to the Applicant to appeal to Her Majesty in Council. The order granting conditional leave was obtained under Section 5 of The West Indies Associated States (Appeals to Privy Council) Order 1967, (No. 224 of 1967). Section 5 provides,

"5. Leave to appeal to Her Majesty in Council in pursuance of the provisions of any law relating to such appeals shall, in the first instance, be granted by the Court only-

(a) upon.....

- (a) upon condition of the appellant, within a period to be fixed by the Court but not exceeding ninety days from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the Court in a sum not exceeding £500 sterling for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee ordering the appellant to pay the costs of the appeal (as the case may be); and
- (b) upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the purposes of procuring the preparation of the record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose."

Acting under the Order in Council the Court fixed a period of six weeks, and the Applicant was required to deposit the sum of \$2,400 as security for costs within six weeks of the date of the order. The Applicant has not complied with the directions in the Order as the security for costs was not perfected within six weeks of the date of the order giving leave to appeal.

The present application to enlarge the time for giving security for costs is made under Section 6(b) of the Order in Council which gives to a single Judge of the Court power and jurisdiction,

"generally in respect of any appeal pending before Her Majesty in Council, to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require."

The Applicant prays that the Court will exercise its powers contained in the Order in Council to grant the relief sought in the Summons.

The facts giving rise to this application are contained in the affidavit in support of the Summons sworn to by

/Sydney.....

Sydney Preston Christian, the first five paragraphs of which read,

1. I am one of the counsel for the Appellant in this matter.
2. On 8th March, 1978 the Appellant obtained conditional leave to appeal to Her Majesty in Council against the judgment of this Court in this cause given on 6th January, 1978 and the terms of the Order are such as are contained in the order of this Honourable Court granting conditional leave to appeal.
3. Among the conditions in the said order, the Appellant was required to deposit the sum of \$2400.00 as the security for costs within six weeks of the date of the said Order.
4. The period of six weeks expired on 18th April, 1978 because of my inadvertence and not through any fault of the Appellant. The error arose because I mistakenly thought that 90 days was the period allowed for providing the security.
5. For several weeks I have attempted to have the Record settled in accordance with the Order, but I was not able to get a date convenient to the Deputy Registrar and the Solicitor for the Respondent before 4th May, 1978. It was on this date that my error was discovered, and as a result the record of appeal was not finally settled by the Deputy Registrar who observed that security has not yet been given."

Counsel for the Applicant has referred to the purpose of giving security. He stated that the error was that of the lawyer and was no fault of the client. Also, that the Respondents are in no way prejudiced by the error. He submitted that the justice of the case requires that the application be granted as the appeal is one of great importance.

The application is opposed on the ground that I have no jurisdiction to make the order sought.

Let me state at the outset that as to the merits, I am satisfied of the bona fides of the application. The question which falls to be decided is, whether in the circumstances given the Court has power or jurisdiction to enlarge or extend the time for entering into this security.

/In.....

In the Australian case of Pearson v Russell, 15 V.L.R. 89, cited by Counsel for Respondents, an application was made to a single Judge under a local statute, (Sec. 34 of 15 Vict., No.10), to enlarge the time for entering into security. The Section fixed a period of three months from the date of the order but gave to the Court the power to enlarge the time for entering into such security. The Appellant did not comply with the directions in the Section as the securities for costs were not perfected within three months of the date of the order giving leave to appeal. After three months had elapsed the Appellant made an application to a single Judge, sitting as a Court, for an order to extend the time, and the Judge made the order sought. He was reversed by the unanimous decision of three Judges (Williams, Holroyd and Kerferd, J.J.). Williams J who read the first judgment stated in part,

"Under the Statute cited, however, for some reason the appellant is given a chance of obtaining further time within which to perfect his security and it is provided that if he does not perfect it within three months then, unless the time is extended, he shall be taken to have waived the benefit of any order in his behalf. But there is a certain period of time fixed, and that is three months. The time being three months, when the three months is past there is no time to extend. If a power is given to extend the time then the application to extend it must be made before the original prescribed period of time which it is sought to extend has elapsed. It is only when the application is made before the time has expired that the Court has jurisdiction. In the Judicature Act, indeed, special powers and special jurisdiction are given to extend the time for doing an act or taking a proceeding, even although the time for doing such an act may have expired. The object of these provisions is expressly to give a Court or judge power to do what otherwise they would be unable to do. Where words plainly imply that a Court or judge has such jurisdiction then it is given, but not otherwise. An enlargement of time can then only be made before the original time has expired."

In the instant case the period of six weeks fixed by the Court expired on 18th April. Not until 4th May was it discovered that the Applicant had not complied with the order granting conditional leave and that the directions as to security.....

security for costs had not been perfected. The Order in Council delegates to the Court the power to fix the time within which security for costs is to be perfected, and stipulates an outside limit of ninety days. Counsel for the Respondents has argued that when the time is fixed by the Court (in this case six weeks) it is as if written into the section. In short, it is as if the section had said six weeks. I agree. In my view once the six weeks period fixed by the Court has expired, and the directions as to security for costs have not been complied with, the order granting conditional leave is spent, and there is no power or jurisdiction in the Court to enlarge the time as sought. The Court would then in effect be making a new order. I would adopt the words of Kerferd, J in agreeing with Williams, J in the case mentioned for the purposes of this case. He said this,

"If we were to allow this order to stand we do not enlarge the time at all, for the order is gone, as it was not enlarged within the three months. We have no power to make a new order."

But there is another aspect which calls for mention. It must be borne in mind that the present application falls under the Order in Council, (No.224 of 1967), and not under the provisions of any local statute, and that it must accordingly be governed entirely by the rules laid down in the Order. In Bentwich on Privy Council Practice, 2nd Edition, the learned author states at page 139,

"The colonial Court, or other Court before which the cause is heard, and from which the appeal is sought, has no power to give leave to appeal to the Sovereign unless first authorised by some enactment, such as an Order in Council. So where an appeal could not be admitted by the colonial Court unless the securities were perfected within

/the.....

the time specified by the charter (viz., three months from the date of the petition for leave to appeal), the Court had no discretion in the matter, and it was held that if it granted permission to appeal on the securities being perfected at a later date, the permission was invalid; and it could not acquire validity from any waiver or implied consent on the part of the respondent. The Court below is generally absolutely bound by the rules of the Order in Council or other instrument which governs the admission of the appeal, and, unless specially authorised, is unable to extend any of the periods mentioned therein."

In short, the power to extend time must be specifically conferred. In my opinion Section 6(b) is a general provision only, and does not confer power to extend time. In dealing with this aspect of the matter, Williams, J said in Pearson v Russell referred to above,

"It is perfectly clear that this enlargement of time could not be granted under the Orders in Council, and this is so even if the application were made before the three months had expired, as in them there is no clause giving jurisdiction to the Judge to enlarge the time."

And again,

"So that under the Orders in Council, unless the appellant performs the act of obtaining and perfecting security within three months, he is precluded from obtaining further time in which to do so."

The Orders in Council referred to by the Judge fixed the time for perfecting security as three months. In the instant case, the Court in furtherance of the power to fix the time delegated by the Order in Council fixed it as six weeks.

For the reasons stated I would reluctantly conclude that this Court has no jurisdiction to grant the application sought.

It would appear that the only course now open to the Applicant is one of direct approach to the Judicial Committee. In the words of the learned author of Halsbury's Laws of

/England,.....

England, 4th Edition, Vol. 10 at paragraph 830,

"The Judicial Committee has power to excuse the parties, for sufficient cause, from compliance with the requirements of the rules, and may give such directions as to practice and procedure as it considers just and expedient."

In the result, the application is refused, and the Summons dismissed with costs to the Respondents to be taxed.

(N.A. Peterkin)
JUSTICE OF APPEAL