1935 *Present :* **Poyser and Koch JJ. and Soertsz A.J.**

ATTORNEY-GENERAL *v.* KARUNARATNE *et al.*

326—D. C. Galle, 32,345.

Appeal—Petition of Appeal—Failure to supply stamps for decree of Supreme Court—Fatal irregularity—Stamp Ordinance, No. 22 of 1909, schedule B, part 2.

Failure to deliver, together with the petition of appeal, stamps for the decree of the Supreme Court and the certificate in appeal is a fatal irregularity.

CASE referred to a Bench of three Judges by Garvin S.P.J. and Maartensz J. The question for determination was whether an appeal should be rejected on the ground that the stamps for the decree of the Supreme Court and the certificate in appeal were not delivered to the Secretary of the District Court together with the petition of appeal.

H. V. Perera (with him *A. L. Jayasuriya*), for defendants, appellants.—The case of *Bandara v. Baban Appu* [1] was first listed before a Bench of two Judges on November 8, 1892, and it stood out of the list on that day. It was relisted on November 16, 1892, when three Judges sat by accident. In 1892 there was no provision for a reference to a Full Court. Sections 41 and 52 of the Courts Ordinance were the only provisions then existing.

It is necessary that there should be a reference to a Full Court. It will not be presumed that the Judges sat on such a reference. There is nothing to show that a Full Court was specially convened to hear *Bandara v. Baban Appu* (*supra*). There are not three judgments in that case. (*Vide* differing views on this point in *21 N. L. R. 93* and *21 N. L. R. 170*).

[SOERTSZ J. referred to section 774 of the Civil Procedure Code.]

A "judgment" there refers to reasons, as distinguished from order or decree. After the Code, every Judge has to deliver a judgment. If three Judges merely happen to be present, it would not be regarded as a judgment of the Full Court, unless there was a reference to the Full Court. But where there has been a reference, a judgment of one Judge might be regarded as the judgment of all.

All the Judges must not only be present, but must participate in the proceedings (*Jane Nona v. Leo* [2]).

See In re Wappu Marikkar [3], where Wood Renton J. referred to a case and distinguished it from a Full Bench case, because one of the Judges did not seem to have taken any part in it.

The Courts Ordinance gives a right of appeal. It is a serious matter for an appeal to be dismissed without hearing. The petition of appeal is a document that must be stamped, but the certificate in appeal is a document that is executed by the Secretary of the Court.

"Together with" in the Stamp Ordinance does not mean "at the same time as", but it means "in addition to". We have to consider the purpose of the Stamp Ordinance. It is a revenue enactment, and not one

[1] *Matara cases. 203.* [2] *25 N. L. R. 245.* [3] *14 N. L. R. 225.*

made for the benefit of the party respondent to the appeal. Where the stamp has been provided in time, a party should not be deprived of the right of appeal.

The word "shall" in the Stamp Ordinance is only directory, not imperative. It has often been interpreted as directory. One must therefore have regard to the purpose of the enactment. If stamp is not delivered at the same time as the petition of appeal, then party takes the risk of the stamp not being available at the time it is required.

Counsel cited *Bosanquet v. Woodford* [1].

The Court should take a practical view of the case.

J. E. M. Obeyesekere, Acting D. S.-G. (with him *Basnayaka, C.C.*), for plaintiff, respondent.—At the date *Bandara v. Baban Appu* (*supra*) was decided, the Supreme Court consisted of the Chief Justice and two Puisne Judges. The Supreme Court Minutes show that when this case was decided all three Judges were present. It is therefore in fact a decision of the Full Court. It must be presumed that all three Judges, who were present, took part in the decision. This decision is therefore binding and cannot be overruled even by another Full Court. As regards the binding effect of a decision of the Full Court, see *Jane Nona v. Leo* [2].

Apart from *Bandara v. Baban Appu* (*supra*), there are other cases in which the same view was taken of the effect of this proviso. See *Cornalis v. Ukku* [3], *Sathasivan v. Cadiravel Chetty* [4], and *Ramalingam Pillai v. Wimalaratne* [5]. In *Grindell v. Brendon* [6], the words 'together with' were interpreted to mean 'at the same time as'.

If the question were treated as *res integra*, the decision would turn upon whether this provision is absolute or directory only. This is a provision as regards the time at which a certain act should be done, and it was held in the case of *Barker v. Palmer* [7] that provisions with respect to time are always obligatory. Counsel also referred to *Howard et al. v. Bodington* [8] and *Vaux v. Williams* [9].

September 4, 1935. POYSER J.—

The question for determination is the correct interpretation of the following proviso in part 2 of schedule B of the Stamp Ordinance, No. 22 of 1909:—

"Provided also, that in appeals to the Supreme Court the appellant shall deliver to the Secretary of the District Court or clerk of the Court of Requests, together with his petition of appeal, the proper stamp for the decree or order of the Supreme Court and certificate in appeal which may be required for such appeal."

The matter first came before Garvin S.P.J. and Maartensz J.; it was referred by them to a Full Court. The following passages in the judgment of Garvin S.P.J. set out the material facts and the reasons for such reference:—

"This case has been set down by the Registrar for directions as to whether the appeal be listed for hearing in due course. The petition of

[1] *5 Q. B. 310, or 114 Eng. Rep. 1266.*
[2] *(1923) 25 N. L. R. 241.*
[3] *(1867) Ramanathan's Reports 278.*
[4] *(1919) 21 N. L. R. 93.*
[5] *(1934) 36 N. L. R. 52.*
[6] *(1859) 28 L. J. C. P. 333.*
[7] *(1881) 8 Q. B. D. 9.*
[8] *(1877) 2 P. D. 203.*
[9] *4 B. & A. 525.*

appeal in the case was filed on August 13, 1934. On the 14th the Proctor for the appellant tendered to the Secretary of the District Court stamps for the certificate in appeal, the decree of the Supreme Court in appeal and the notice of appeal. They were accepted by the Secretary; the other steps necessary to perfect the appeal were taken and the record was forwarded to this Court with the Secretary's certificate to which the necessary stamps had been affixed. Some uncertainty appears to have arisen in view of the conflicting judgments of this Court upon the point as to whether or not the appeal should be rejected upon the ground that the stamps for the decree of the Supreme Court and the certificate in appeal were not delivered to the Secretary of the District Court '*together with*' the petition of appeal . . . ."

"The question, it is hardly necessary to say, is one of very great importance and we think that the whole matter should be placed before a Full Court for fuller consideration and determination."

The following are the authorities above referred to. (*Bandara v. Baban Appu and others*[1].) In that case the petition of appeal was filed on July 25, 1892, but the stamps for the decree of the Supreme Court and the certificate in appeal were not furnished till the 26th. It was held that the stamps for the certificate in appeal and for the Supreme Court judgment must be supplied along with the petition of appeal; the appeal was consequently rejected.

This decision, according to the report, purported to be a decision of only Burnside C.J., but as it will subsequently appear, the report is erroneous in this respect and it was in fact a decision of the Full Bench.

In a latter case, *Sathasivan v. Cadiravel Chetty*[2], this decision was treated as a judgment of the Full Bench, but in the case of *Nonai v. Appuhamy*[3], a case decided about two months later, Ennis A.C.J. did not consider *Bandara v. Baban Appu* (*supra*) was a Full Bench decision and held that the words of the proviso did not make it imperative that the appeal should be rejected if stamps are not tendered at the same time as the petition of appeal.

The only other authority it is necessary to refer to is the case of *Ramalingam Pillai v. Wimalaratne*[4]. In that case Macdonell C.J. and Dalton J. considered they were bound by *Bandara v. Baban Appu* (*supra*), as it was a Full Bench decision.

The first point therefore to be considered is whether *Bandara v. Baban Appu* (*supra*), was in fact a Full Bench decision or only, as Ennis A.C.J. appears to consider, a two-Judge decision, for if it was the former we are bound to follow it.

For the purpose of coming to a decision on this point we examined not only the Supreme Court minutes but also the record. From the minutes it appears that the case first came before two Judges on November 8, 1892, and was adjourned for the convenience of Counsel.

[1] 1 *Matara cases* 203.
[2] 21 *N. L. R.* 93.
[3] 21 *N. L. R.* 170.
[4] 36 *N. L. R.* 52.

On November 16, 1892, the case came up again before Burnside C.J., Lawrie J., and Withers A.P.J., a Full Bench as the Supreme Court was then constituted. The minutes read as follows:—

> "Appeal rejected with costs because stamps for the Supreme Court judgment were not supplied in time."

The decree also sets out that the appeal came on for hearing and deliberation on November 16, 1892, before Burnside C.J., Lawrie J., and Withers J. and decreed and ordered that the appeal filed in the action be rejected with costs, stamps for the Supreme Court judgment and certificate in appeal not having been supplied at the same time.

There is therefore not the slightest doubt that Ennis A.C.J. was mistaken and this decision was, as Macdonell C.J. held a Full Bench decision.

It does not appear from the record or minutes which Judge gave judgment. Possibly only Burnside C.J. did which might account for the report in *1 Matara cases.* But even if Burnside C.J. only gave judgment the decision is still a Full Bench one and it appears to have been the practice at that time, in some cases at any rate, for the judgment of the Full Bench to be given by only one Judge. (See *Perera v. Amaris Appu* [1].)

As therefore the case of *Bandara v. Baban Appu* (*supra*) is binding on us, this appeal must be rejected with costs.

I would however add that, if such case was not binding on us, I would, for the reasons stated by Macdonell C.J. in *Ramalingam Pillai v. Wimalaratne* (*supra*), have rejected the appeal.

KOCH J.—I agree.

SOERTSZ A.J.—I agree.

Appeal rejected.