1961 *Present :* **Weerasooriya, J., and L. B. de Silva, J.**

PECHCHIMUTTU, Petitioner, *and* RASIAH, Respondent

S. C. 466—Application for relief under Section 756 (3) of the Civil Procedure Code in D. C. Kalmunai 216/L

Appeal—Order of abatement entered by District Court—Power of Supreme Court to grant relief—Supreme Court Appeals (Special Provisions) Act, No. 4 of 1960, ss. 2, 3 (1), 4 (1), 4 (2), 5—Civil Procedure Code, ss. 756 (1) (2) (3), 759—Civil Appellate Rules, Rule 4—Interpretation Ordinance (Cap. 2), s. 6 (3).

By Section 5 of the Supreme Court Appeals (Special Provisions) Act, No. 4 of 1960, which came into operation on the 14th October, 1960 :—

"The preceding provisions of this Act shall apply, in addition to appeals to the Supreme Court on or after the date of commencement of this Act, to appeals presented before the date of commencement of this Act but not finally disposed of by the Supreme Court".

Held, that the Section does not apply to an appeal which a Court of first instance had already declared to have abated by an order validly made under the law as it stood prior to the date on which the Act came into operation.

APPLICATION for relief under Section 756 (3) of the Civil Procedure Code.

S. Sharvananda, for defendant-petitioner.

C. Ranganathan, for plaintiff-respondent.

Cur. adv. vult.

July 6, 1961. WEERASOORIYA, J.—

The action in respect of which this application is made was instituted by the plaintiff-respondent against the defendant-petitioner for declaration of title to a certain allotment of land and for ejectment and damages. After trial the plaintiff obtained judgment as prayed for. The appeal that was filed by the defendant against the judgment was, on the 16th September, 1960, held by the District Judge to have abated under section 756 (2) of the Civil Procedure Code on the ground that the notice of tender of security, which is required to be given by an appellant under section 756 (1), had not been duly given in that it was addressed to, and served on, the plaintiff's proctor.

Section 756 (3) of the Civil Procedure Code provides for relief being granted to an appellant in respect of any mistake, omission or defect

in complying with the provisions of section 756, provided the respondent has not been materially prejudiced. It was held, however, by a Bench of five Judges in *de Silva v. Seenathumma* [1] that an appellant's failure to give to the respondent, in terms of section 756 (1), notice of tender of security for the latter's costs of appeal is not a matter in respect of which relief can be given under section 756 (3). In the recent case of *Ahamadulebbai v. Jubariummah* [2] a Bench of three Judges held that a notice of tender of security addressed to and served on the respondent's proctor is not a notice given to the respondent as required by section 756 (1). In view of these decisions Mr. Sharvananda who appeared for the defendant-petitioner did not press the application in so far as it relates to the obtaining of relief under section 756 (3).

Alternatively, relief is asked for in the application (as subsequently amended) under the Supreme Court Appeals (Special Provisions) Act, No. 4 of 1960, which came into operation on the 14th October, 1960, that is, after the appeal was held to have abated. In dealing with this part of the application the following provisions of the Act call for notice :

"2. Where, in respect of any appeal to the Supreme Court under the Civil Procedure Code, there is any error, omission or default in complying with the provisions of that Code or any other written law relating to such appeal, the Court of first instance shall, notwithstanding anything to the contrary in that Code or such other written law, transmit to the Supreme Court the petition of appeal together with all the papers and proceedings of the case relevant to the decree or order appealed against."

'4. (1) Subject to the provisions of sub-section (2), where an appeal referred to in section 2 . . . has been presented to the Court of first instance . . . within the time prescribed by any written law relating to such appeal, the Supreme Court shall not exercise the powers vested in such Court by any written law to reject or dismiss that appeal on the ground only of any error, omission or default on the part of the appellant in complying with the provisions of any written law relating to such appeal, unless material prejudice has been caused thereby to the respondent to such appeal.

(2) The Supreme Court shall, in the case of any appeal referred to in sub-section (1), which is not rejected or dismissed by such Court direct the appellant to comply with such directions as the Court may deem necessary for the purpose of rectifying, supplying or making good any error, omission or default so referred to within such time and upon such conditions as may be specified in such directions, and shall reject or dismiss that appeal if the appellant fails to comply with such directions."

[1] *(1940) 41 N. L. R. 241.*

[2] *(1960) 62 N. L. R. 474.*

" 5. The preceding provisions of this Act shall apply, in addition to appeals to the Supreme Court on or after the date of commencement of this Act, to appeals presented before the date of commencement of this Act but not finally disposed of by the Supreme Court."

The effect of sections 2 and 4 is that if an appeal has been filed within time, but any error, omission or default subsequently occurs in complying with the provisions of the Civil Procedure Code or other written law relating to such appeal the Supreme Court is required, without in the first instance exercising the powers vested in such Court by any written law to reject or dismiss the appeal on the ground only of such error, omission or default (except in a case where material prejudice has been caused thereby to the respondent) to give the appellant an opportunity, on such conditions as may be specified in any directions given in that behalf, of rectifying, supplying or making good such error, omission or default.

Under section 756 (2) of the Civil Procedure Code, where an appellant has failed to give security and to make the deposit as provided in section 756 (1) the appeal shall be held to have abated. Rule 4 of the Civil Appellate Rules, 1938, provides that an appeal shall be deemed to have abated where the appellant fails to make application for typewritten copies in accordance with the requirements of those rules, or to pay within the prescribed time any additional fees due in respect of such copies. In my judgment in *Fernando v. Samaranayake*[1] I expressed the opinion that although the abatement of an appeal is brought about by operation of law, the Court should enter a formal order of abatement, or the equivalent of it. Where an appeal which comes up before the Supreme Court is shown to have abated under section 756 (2) of the Civil Procedure Code or Rule 4 of the Civil Appellate Rules, 1938, the usual order that would be made is one rejecting or dismissing the appeal on the ground that it has abated. Power is also given to the Court under section 759 of the Civil Procedure Code to reject an appeal where the petition of appeal has not been drawn up in the manner prescribed in section 758.

In respect of an appeal to the Supreme Court under the Civil Procedure Code, I think that the reference in section 4 (1) of Act No. 4 of 1960 to the powers vested in the Courts " by any written law to reject or dismiss " that appeal should be construed as a reference to the powers of the Supreme Court under the provisions of sections 756 (2) and 759 of the Civil Procedure Code and Rule 4 of the Civil Appellate Rules, 1938, relating to the abatement of an appeal. No other written law vesting in the Supreme Court power to reject or dismiss such an appeal on the ground mentioned in section 4 (1) was brought to our notice. In so far as the provisions referred to are to be regarded as imperative, they would appear to have been impliedly repealed by sections 2 and 4 of Act No. 4 of 1960. If this view is correct—and no argument to the

[1] *(1960) 62 N. L. R. 397.*

contrary was addressed to us by counsel on either side—the question that arises is, to what extent, if any, the order of abatement of the 16th September, 1960, which it is conceded, was rightly made under section 756 (2) of the Civil Procedure Code, is affected by sections 2 and 4 of Act No. 4 of 1960, read with section 5 thereof.

Section 6 (3) of the Interpretation Ordinance (Cap. 2), in so far as is material to the question under consideration, is in the following terms :

> " Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected—
>
> (*a*) the past operation of anything duly done or suffered under the repealed written law ;
>
> (*b*) . . .
>
> (*c*) any action, proceeding or thing pending or incompleted when the repealing written law comes into operation, but every such action, proceeding or thing may be carried on and completed as if there had been no such repeal ".

That sections 2 and 4 of Act No. 4 of 1960 apply to appeals filed on or after the date on which the Act came into operation is, of course, undeniable. By virtue of section 6 (3) (*c*) of the Interpretation Ordinance, sections 2 and 4 of Act No. 4 of 1960 would not apply to appeals which were pending at such date unless there is express provision making them applicable. Section 5 of Act No. 4 of 1960 provides, however, that sections 2 and 4 shall apply as well to appeals presented before that date but " not finally disposed of by the Supreme Court ". In my opinion, the expression " not finally disposed of by the Supreme Court " refers to appeals which were pending at the date when Act No. 4 of 1960 came into operation, and not to appeals which had already been disposed of as a result of a previous valid order of abatement. In other words, section 5 is an express provision making sections 2 and 4 applicable to pending appeals, whereas, in the absence of it, all such appeals would, in terms of section 6 (3) (*c*) of the Interpretation Ordinance be carried on and completed as if there had been no repeal of the existing law by sections 2 and 4 of Act No. 4 of 1960.

Mr. Sharvananda contended, however, that in construing the expression " not finally disposed of by the Supreme Court " emphasis should be laid on the words " by the Supreme Court ", and that since in the present case the order abating the appeal was made by the District Court, the appeal is one which has not yet been finally disposed of by the Supreme Court and, therefore, section 5 applies to it. He was constrained to concede that on such a literal construction, a Court of first instance would be obliged, in terms of section 2, read with section 5, of Act No. 4 of 1960, to transmit to the Supreme Court the record of every case in which an appeal which was filed was declared to have abated, however remote the

point of time at which such declaration had been made; and similar action would have to be taken by the "appropriate authority" referred to in section 3 (1). On the same construction, where a Court of first instance, acting in purported compliance with section 2 read with section 5, transmits to the Supreme Court the record of a case in which an order of abatement has already been validly entered by the Court of first instance, the question that arises is, what action may be taken by the Supreme Court in regard to such appeal. The powers of the Supreme Court in such a case are limited to the powers conferred on it by section 4. Section 4 confers no express power on the Supreme Court to set aside an order of abatement of an appeal which has been validly made by a Court of first instance. No such additional power is expressly conferred by section 5 and unless such a power is to be implied, it would seem that the transmission of the record to the Supreme Court in such a case is a futile proceeding.

I do not think, however, that such an implied power can be admitted in view of the provisions of section 6 (3) of the Interpretation Ordinance. Paragraph (*a*) of section 6 (3) specifically refers to "the past operation of anything duly done or suffered under the repealed written law". As pointed out by Gratiaen, J., in *Akilandanayaki v. Sothinagaratnam*[1], section 6 (3) "is an adaptation of section 38 of the Interpretation Act, 1889, of England except that our legislature has designedly introduced (by substituting the words 'in the absence of any express provision to the contrary' for the words 'unless a contrary intention appears' of the English model) an even stronger presumption against *ex post facto* legislation."

A statute is not to be construed so as to have a greater retrospective operation than its language renders necessary—*per* Lindley, L.J., in *Lauri v. Renad*[2]. Even in construing a section which is to a certain extent retrospective, this maxim ought to be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain—Maxwell on Interpretation of Statutes (10th edition) 214.

I hold that section 5 of Act No. 4 of 1960 does not apply to an appeal which a Court of first instance had already declared to have abated by an order validly made under the law as it stood prior to the date on which the Act came into operation.

The application is dismissed with costs.

L. B. DE SILVA, J.—I agree.

Application dismissed.

[1] *(1952) 53 N. L. R. 385.*

[2] *(1892) 3 Ch. 402 at 421.*