

1964 Present: Abeyesundere, J., and Sri Skanda Rajah, J.

C. M. PERERA, Petitioner, and PAUL PERERA, Respondent

S. C. 55/64—Application for re-listing of appeal in S. C. 179/D. C. Colombo, 51944

Appeal—Abatement—Civil Appellate Rules, 1938, Rule 4.

Where an appellant is required by the Registrar of the Supreme Court to pay an additional fee due from him under the Civil Appellate Rules, 1938, and to deposit that fee in the Kachcheri and send the receipt in proof of payment, it is the duty of the appellant to inform Court after he makes the payment due from him.

APPPLICATION to re-list an appeal.

H. W. Jayewardene, Q.C., with N. R. M. Daluwatte, for the Petitioner-Appellant.

E. B. Wikramanayake, Q.C., with K. Sivagurunathan, for the Respondent.

May 19, 1964. ABEYESUNDERE, J.—

In this case the appellant's Proctor was required by the Registrar of the Supreme Court, by letter dated 21.10.63, to pay the additional fee of Rs. 16 due from him under the Civil Appellate Rules, 1938, and to deposit that fee in the Colombo Kachcheri and send the receipt in proof of payment. The additional fee was deposited in the Colombo Kachcheri on 31.10.63, but the receipt issued by the Kachcheri was not sent to the Registrar.

On 13.2.64 the appeal was listed for an order of this Court and the following order was made by His Lordship the Chief Justice:—"The appeal is declared to have abated for failure to comply with the Civil Appellate Rules." The appellant now moves for the reinstatement of the appeal on the ground that, at the time the declaration of abatement was made by this Court, the additional fee due from him had already been paid to the Colombo Kachcheri.

Mr. H. W. Jayewardene, Q.C., who appears for the appellant, contends that under Rule 4 of the Civil Appellate Rules, 1938, the appeal "shall be deemed to have been abated" only when the additional fee due from the appellant is not paid within one month from the date of the order requiring him to make the payment and that abatement is deemed to occur by operation of law and not as a result of an order of this Court. He also submits that the declaration of abatement made by this Court was *per incuriam* in view of the fact that this Court was not aware that the additional fee due from the appellant had already been paid to the Colombo Kachcheri.

Mr. E. B. Wikramanayake, Q.C., who appears for the respondent on being questioned by Court states that no prejudice is caused to the respondent. It was the duty of the appellant to have informed Court on 12.2.64, or earlier, that the payment due from him had already been made. However, as no prejudice is caused to the respondent, I think it fit to treat the declaration of abatement made by this Court on 13.2.64 as one made *per incuriam*. I therefore vacate that declaration of abatement and direct this appeal to be restored to the list of appeals to be heard by this Court.

The respondent is entitled to the costs of the proceedings on the appellant's application. I fix the costs at Rs. 157.50.

SRI SKANDA RAJAH, J.—I agree.

Order of abatement vacated.