

1918.

Present: Bertram C.J. and De Sampayo J.

KANGAMY v. RAMASAMY RAJAH

165—D. C. Ratnapura, 2,960.

Civil Procedure Code, s. 756—Notice of tendering security given to respondent after security was tendered and perfected—Objection fatal—District Court may refuse to forward appeal if conditions of s. 756 are not complied with—Costs.

It is competent to a District Court to make an order that an appeal has abated if the conditions of section 756 have not been complied with, and to refrain from forwarding the record to the Supreme Court.

It is desirable, if it is in the power of the respondent to raise the point in the District Court, that he should do so there. If he prefers to wait until the case comes to the Supreme Court before taking the point, he runs the risk of losing his costs.

THE facts appear from the judgment.

Bawa, K.C. (with him *R. L. Pereira*), for the appellant.

A. St. V. Jayawardene (with him *Weeraratne*), for the respondent.

November 12, 1918. BERTRAM C.J.—

An objection is taken in this case to the appeal, on the ground that security was not perfected in the manner prescribed by section 756 of the Civil Procedure Code. It is said that the deposit was not given, as in that section provided, inasmuch as the section prescribes as a preliminary to the tendering of the security that notice should be given to the respondent. This must mean an effective notice, whereas in the present case the only notice that was served upon the respondent reached him a day after the date on which security was tendered and perfected. This is no doubt a highly technical

objection, but we are bound by the express words of the section. The final paragraph of section 756 has in practice been treated as making all the provisions at the beginning of section 756 imperative, and as preventing the Court from regarding them as directory only. The objection, therefore, must receive effect.

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Mr. Bawa, however, has raised a new point. It is suggested that it would not be just that the respondent in this case should be allowed the costs of the appeal, inasmuch as it was open to him to have taken this point at an early period, and thus to have saved the costs which have been incurred in the preparation for the argument of the appeal. The final paragraph of section 756 says that if a petitioner has failed to give the security and to make the deposit as in this section provided, then the petition shall be held to have abated, and it further says the further proceedings in that section provided shall not be necessary. Thus, it appears to be open to the Court, before it issues notice of appeal, or before it forwards the record to the Supreme Court, to ascertain whether the security has been given in the manner in that section provided. If it appears to the Court that the conditions of the section have not been complied with, it is not bound to forward the papers to the Supreme Court. A defect in the preliminary proceedings would be brought to the notice of the respondent as soon as he receives the notice of appeal. If he has had no notice, or if the security has been inadequately perfected, he must be aware of this defect at that time. It is open to him to move the District Court for an order that the petition of appeal shall be held to have abated, and it is competent to the District Court to make such an order, and to refrain from forwarding the record to the Supreme Court. Any order so made by the District Court is presumably subject to appeal, or, at any rate, to revision. If this course is adopted, technical points, which are sometimes obviously right, can be taken in the District Court, not for the first time, where parties have come fully prepared to argue the appeal, and where the point is sometimes only discovered for the first time after briefs have been delivered to counsel. In saying this, I do not mean to suggest that this point cannot be taken before this Court on the appeal. I think it clearly can, but I think it is desirable, if it is in the power of the party to raise the point in the District Court, that he should do so there, and that, if he prefers to wait until the case comes to the Supreme Court before taking the point, he should then run the risk of losing his costs. The point in this case, as I say, is extremely technical. It does not appear that there is any real substance in the objection, and though it must be allowed, I think it must be allowed without costs.

The appeal is dismissed.

DE SAMPAYO J.—I agree.

Appeal dismissed.