1937 *Present :* **Abrahams C.J., Maartensz and Soertsz JJ.**

ZAHIRA UMMA *v.* ABEYSINGHE *et al.*

411—D. C. Colombo, 302.

Appeal—Order of abatement—Application for relief—When relief should not be granted—Civil Procedure Code, s. 756.

Where an appeal has abated under section 756 of the Civil Procedure Code and relief is sought against the order of abatement, the proper procedure is by way of an application for relief to the Supreme Court.

Application for relief under the section should not be granted in the following cases :—(*a*) Where there has been a non-compliance with the terms of the section without an excuse irrespective of the question whether material prejudice has been caused or not. (*b*) Where the non-compliance with an essential term is trivial but material prejudice has been caused.

CASE referred to a Bench of three Judges by Koch and Moseley JJ. on the point whether an appeal lies from an order of abatement of an appeal entered under section 756 of the Civil Procedure Code.

C. T. Olegasegaram, for petitioner.

Chelvanayagam (with him *Wickremanayake* and *Muttucumaru*), for respondents.

Cur. adv. vult.

May 5, 1937. ABRAHAMS C.J.—

This case was referred to us by a Bench of two Judges on the question as to whether an application for relief under section 756 of the Civil Procedure Code should be pursued by way of appeal and Mr. Justice

Koch stated in his reference that there can be little doubt that an appeal can be preferred to this Court from such an order, that is to say, that a petition of appeal was held by the District Judge to have abated. It would seem, however, that on the facts of the case the learned District Judge had no option but to hold that the appeal had abated and the application of the petitioner for relief was framed as if it were an application in revision. In our opinion an order of abatement is not appealable where the District Judge had no option because an appeal must protest against some error of law or fact made in the order in respect of which relief is sought. Probably Mr. Justice Koch thought that in view of the way in which the petition was drawn up the petitioner was in point of fact questioning the legality or propriety of the order which had been made. The petitioner has drawn up the petition in the form in which she did out of ignorance as to what the proper procedure really was. The provision appended by way of amendment to section 756 clearly indicates that where relief is sought against an order of abatement the proper procedure is by way of an ordinary application to the Supreme Court for relief. There is no doubt that the application does not indicate that the legality or propriety of the order of abatement is in any way questioned and it is therefore obviously incumbent upon us to regard it as if it had been properly preferred. That being so, the question is whether the circumstances attaching to this case justify our giving relief.

The petitioner says, that the last day for entering the petition of appeal was July 3, 1936, and the last day for tendering security was July 15, 1936. Under section 756 it was her duty forthwith to give notice to the respondent that she would tender security at the proper time and the relevant form in which this notice is to be given contains a provision specifying in what manner the security is to be tendered. She did not give notice of security but she produced a security by way of mortgage at the proper time, although there was no inquiry as to whether that security was satisfactory. She says she was unable at the time when she ought to have given notice of security to say what form the security was going to take, but she says that in view of the fact that she has produced an adequate security within the proper time and that no material prejudice has been caused to the respondent she ought to receive the relief which we are empowered to give in an appropriate case. I think, however, that if we gave relief in this case we should be completely ignoring that provision of section 756 which says that notice of security must be given and the fact that no material prejudice has resulted, and I see no reason why in the circumstances we should inquire as to whether it has resulted, cannot be regarded as an excuse for non-compliance with an essential term of section 756. The petitioner says that she did everything she could, but she has not given any excuse for not doing what she should.

It seems to me that there are two forms of a breach of section 756 in respect of which this Court ought not to give relief. One is when, whether a material prejudice has been caused or not, non-compliance with one of the terms of section 756 has been made without an excuse, and the other is when though non-compliance with an essential term

may be trivial, a material prejudice has been occasioned. This case seems to me to fall under the first of these categories.

Two cases have been cited to us in aid of the petitioner. The first was *Jayawardene v. Abdul Carder*[1] and the other *Martin Singho v. Paulis Singho*[2]. It is sufficient to say that neither of these cases gives an assistance to the petitioner.

The application should, in my opinion, be dismissed with costs.

MAARTENSZ J.—I agree.

SOERTSZ J.—I agree.

Application dismissed.