

1929.

Present : Fisher C.J. and Drieberg J.SILVA *v.* GOONESEKERE.169—*D. C. Galle, 2,446.*

Appeal—Failure to sign security bond—Notice of appeal not given—Irregularity—Civil Procedure Code, s. 756—Ordinance No. 42 of 1921, s. 2.

Where a party appellant has failed to give notice of appeal or to sign the security bond,—

Held, that the appellant was not entitled to relief under the amendment to section 756 of the Civil Procedure Code introduced by Ordinance No. 42 of 1921.

The amending Ordinance has no application where there has been a substantial non-compliance with the provisions of the section.

A PPEAL from a judgment of the District Judge of Galle. A preliminary objection was taken to the appeal on the ground of non-compliance with the provisions of section 756 of the Civil Procedure Code.

Croos da Brera (with *E. C. E. de Soysa*), for plaintiff, respondent.—The appeal is not properly constituted. The security bond has been executed before notice of security was served on all parties. Notice has been given out of time. There is no order of Court accepting security. The bond has not been signed by all the appellants. Notice of appeal has not been given at all. Counsel cited *Kangany v. Ramasamy Rajah*¹, *de Silva v. Madduma Appu*², *Andrew v. Abdul Latiff*³, and *Kandappen v. Elliot*.⁴

N. E. Weerasooria (with *Rajapakse*), for defendants, appellants.—The appellants had issued the notice of security within time. It is not necessary that the notice should be served within time. An

¹ (1918) 21 N. L. R. 106.² (1917) 4 C. W. R. 210.³ (1919) 6 C. W. R. 31.⁴ (1892) 2 C. L. R. 17.

order had been made by the District Judge to forward the record to the Supreme Court. The issuing of the notice of appeal was therefore rendered impossible. The cases cited were decided before the amendment to the Civil Procedure Code was made in 1921. The Supreme Court has now the power to grant relief in a case like this. Counsel cited *Mendis v. Jinadasa*¹.

Croos da Brera, in reply contended that no sufficient ground had been put forward for the granting of relief. The delay has not been explained.

November 25, 1929. FISHER C.J.—

In this case a preliminary objection was taken to the hearing of the appeal on the ground of non-compliance by the appellants with the provisions of section 756 of the Civil Procedure Code. It was admitted by the appellants that notice of appeal had not been given to any of the parties and that the security bond had not been signed by any of the appellants. The appellants applied for relief under the last paragraph of section 756 which was added to that section by section 2 of Ordinance No. 42 of 1921. The jurisdiction which is vested in this Court by section 765 to admit and entertain a petition of appeal notwithstanding that the provisions of sections 754 and 756 had not been observed seems to cover to some extent at all events the same ground as that covered by the jurisdiction conferred by the additional paragraph to section 756. The verbiage of the latter, in my opinion, shows that it is applicable in cases where, as in this case, the appeal is actually before the Court and a preliminary objection is taken by the respondent. I do not think that this additional paragraph can be held to apply to cases where there has been a substantial non-compliance with the provisions of the section. In my opinion it applies to more or less trivial omissions where it may be said that although the strict letter of the law has not been complied with the party seeking relief has been reasonably prompt and exact in taking the necessary steps. In this case the petition of appeal was filed on November 14, 1928, and the record remained in the District Court until May 27, 1929. Notwithstanding the lapse of that period the appellant failed to comply with the obligations imposed upon him by section 756. In my opinion this is not a case in which we should grant relief under the last paragraph of that section. The appeal must be dismissed with costs.

DRIEBERG J.—

I agree. The scope of the amendment of section 756 of the Civil Procedure Code by section 2 of Ordinance No. 42 of 1921 is often discussed. If not for this amendment every default in complying

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¹ (1922) 24 N. L. R. 188.

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with the requirements of section 756 would place an appellant under the necessity of applying to this Court under section 765 to admit and entertain his petition notwithstanding lapse of time.

In what cases, then, can relief be given under section 2 of Ordinance No. 42 of 1921? Assistance on this point is afforded by the statement of objects and reasons for the amendment published in the *Government Gazette* of November 16, 1921:

“ It has been found lately that a number of appeals have had to be dismissed owing to failure of strict compliance with the provisions of section 756 of the Civil Procedure Code. This non-compliance has in certain cases been in respect of matters not of material importance; and it is thought well to give the Supreme Court power to waive such failures to comply in cases where the respondent is not materially affected by such waiver. ”

On March 26, 1929, services of notice of security having been served on all the respondents, the order was made that the record be forwarded. This was a mistake, but the appellants have not been prejudiced by it, and, in any case, it was their duty to have pointed out to the Court that the record should not be sent up as notice of appeal had not issued. The record, in fact, was not sent up until May 27, 1929; it was kept back as the appellants had not submitted the originals and translations of some of their exhibits. Though the duty of serving the notice of appeal rests on the Court, copies of the petition of appeal for this purpose had to be supplied by the appellants. This they have not done, and the failure to serve this notice on the respondents is due to their default.

This is an important step, for it is from this notice that a respondent knows that the appeal has been perfected and that it will be forwarded. It is a requirement of “ material importance, ” and the complete failure to comply with it in this case is not one which this Court should excuse.

Appeal dismissed.

