1956 *Present :* H. N. G. Fernando, J., and T. S. Fernando, J.

A. P. FERNANDO, Appellant, *and* C. T. ANTHONY, Respondent

S. C. 74 — D. C. Gampaha, 4,165/L

Appeal—Abatement—Application for typewritten copies—Failure to furnish the necessary fees along with it—Fatal irregularity—Civil Appellate Rules, 1938, Rules 2 (1) and 4—Payment into Court Order, 1939, Clause 1 (5).

The provision of Rule 2 (1) of the Civil Appellate Rules, 1938, that an application for typewritten copies " shall be accompanied by the fees prescribed in the schedule hereto " is an imperative, and not merely a directory, provision of law. Failure to comply with it is fatal to the reception of the appeal.

Under Clause 1 (5) of the Payment into Court Order, 1939, the date of the receipt given by an authorised Treasury officer is deemed to be the date of a payment into Court of any money required by any written law to be paid in connection with any action or proceeding.

APPEAL from a judgment of the District Court, Gampaha.

A. H. C. de Silva, Q.C., with *N. U. Weerasekera*, for the defendant-appellant.

Walter Jayawardene, with *M. Sanmuganathan*, for the plaintiff-respondent.

Cur. adv. vult.

November 20, 1956. T. S. FERNANDO, J.—

A preliminary objection to the hearing of this appeal has been raised on the ground that the appeal has abated in terms of rule 4 of the Civil Appellate Rules, 1938, on the appellant failing to make application for typewritten copies of the record in accordance with the requirements of rule 2 (1) of the same Rules.

Rule 2 (1) requires that an application for typewritten copies "shall be accompanied by the fees prescribed in the schedule hereto". The application was made on 27th January 1956 at the time the petition of appeal was itself filed in court, but the fees prescribed were paid to the Treasury officer specially stationed at Gampaha only on 2nd March 1956. There was therefore a failure to comply with the requirements of rule 2 (1), and the question that now arises is whether this provision of law embodied in the rule is an imperative or mandatory provision or one which is merely directory.

In dealing with the construction of enabling Acts of Parliament, it is stated in Craies on Statute Law, 5th ed., at page 242, that

> "It being, then, well settled that the neglect of the requirements of an Act which prescribes how something is to be done will invalidate the thing being done, if the enactment is absolute, but not if it is merely directory, we have now to consider whether there is any general rule as to when an enactment is to be considered absolute and when merely directory".

After adverting to a dictum of Grove J. to which I shall now refer, it is further stated that, except as to time, there is no general rule as to when enabling Acts are absolute and when directory. In the case of *Barker v. Palmer* [1], Grove J., in interpreting a certain rule of the County Court Rules, 1875, which required a plaintiff to deliver the summons to the bailiff within a stated number of days, said that "in construing Acts of Parliament provisions which appear on the face of them obligatory, cannot, without strong reasons given, be held directory. The rule is that provisions with respect to time are always obligatory, unless a power of extending the time is given to the Court". It is of interest in this connection to observe that, whereas in the Civil Appellate Rules of 1913 there was express provision (in rule 5) enabling the Court, where it appeared to the Court to be reasonable, to allow an extension of time for an application to be made for typewritten copies, in the present Civil Appellate Rules which superseded the 1913 Rules the provision relating to extension of time has been omitted. There is therefore a further

[1] *L. R. (1881) 8 Q. B. D. 10.*

indication of the intention of the framers of the Rules as to the consequences of the failure to make the application in accordance with the Rules. Moreover, it may be mentioned that Pulle J. has already held in the course of the decision in *Abdul Cader v. Sittinisa* [1] that that part of the rule 2 (1) which states that the application shall be accompanied by the fees prescribed in the schedule is clearly fundamental. I am in respectful agreement with that view and would hold that rule 2 (1) embodies an imperative or mandatory provision of the law and that the failure to comply with that provision is fatal to the reception of this appeal.

Learned Counsel for the appellant urged that it is not now possible to comply with the provisions of rule 2 as the Secretary of the District Court of Gampaha does not accept payment in cash and that administratively payment has to be made to a Treasury officer specially stationed at Gampaha. It appears to have been assumed in the course of an argument that took place in the District Court of Gampaha that, whereas the rule requires the appellant to make payment for the copies in cash to the Secretary of the District Court, an administrative practice exists in the District Court whereby everybody acts contrary to rule 2 by making payment to the Treasury officer referred to above. In making this assumption, the learned District Judge appears to have lost sight of The Payment into Court Order, 1939, made under section 49 of the Courts Ordinance and published in *Gazette* 8,526 of 13th October, 1939. An examination of this Order will show that the practice referred to by the learned District Judge as merely an administrative practice is entirely legal, and indeed the only procedure now authorised by law for payment into Court of money required by any written law to be paid in connection with any action or proceeding. By clause 1 (5) of this Order, the date of the receipt given by the authorised Treasury officer is to be deemed to be the date of payment into Court.

Learned Counsel for the appellant also invited us to follow the course adopted by the learned judges who decided the case of *Abdul Cader v. Sittinisa* (*supra*) and hear by way of revision argument on the merits of the questions raised by the appellant in his petition of appeal. It should be remembered that in that case the Court heard argument by way of revision purely as a matter of indulgence, Pulle J. observing that the Court had the satisfaction of knowing that it has interfered (in revision) with the judgment of the District Judge substantially on a point of law only. It is quite unnecessary to go into the question as to when this Court will exercise its powers of revision. Learned Counsel conceded that there is no substantial question of law which he seeks to raise in this Court ; on the other hand, he hopes to convince us that a review of the facts should result in a reversal of the decision reached by the learned District Judge. I do not consider that there is any good ground for dealing with the case in revision.

The preliminary objection is upheld and the appeal is dismissed with costs.

H. N. G. FERNANDO, J.—I agree.

Appeal dismissed.

[1] *(1951) 52 N. L. R. 536 at 546.*