

1936

Present : Akbar J.

RAMALINGAM *v.* VELUPILLAI *et al.*

88-89—C. R. Trincomalee, 4,123.

*Appeal—Security for respondents' costs—Failure to give notice forthwith—Power to grant relief—Civil Procedure Code, s. 756.*

Where a party-appellant failed to give notice of security for respondents' costs forthwith as required by section 756 of the Civil Procedure Code, the appellant may be given relief under the amendment to the section introduced by Ordinance No. 42 of 1921.

**A** PPEAL from an order of the Commissioner of Requests, Trincomalee.

*N. E. Weerasooria* (with him *E. B. Wickremenayake*), for plaintiff, appellant.

No appearance for defendant, respondents.

July 2, 1936. AKBAR J.—

This was an action brought by the plaintiff on a promissory note on March 23, 1936. The learned Commissioner dismissed the plaintiff's action with costs.

Under section 754 of the Civil Procedure Code the petition of appeal has to be presented within a period of seven days from the date of the order appealed against. That same section directs that in reckoning these seven days the date of the decree is to be excluded and also the date when the petition is presented, and also all Sundays and Public Holidays. If we exclude March 23 in reckoning these seven days,

and also one Sunday intervening, the plaintiff had time till April 1 to file his petition of appeal. As a matter of fact he filed his petition of appeal on March 31, 1936, which the learned Commissioner thought in his judgment was the very last date on which petition of appeal had to be filed.

The proctor for the plaintiff tendered notice of security for costs to be issued on the defendants to the Court. On April 3, 1936, objection was taken that this notice was not tendered as contemplated by section 756 of the Civil Procedure Code. Section 756 is to the effect that when a petition of appeal has been received the petitioner has "forthwith" to give notice to the respondent of the security which he proposes to give to the Court. The objection I take it was based on the footing that the notice having been tendered on April 3, it could not be said to have been issued "forthwith" within the meaning of section 756.

It will be seen from the judgment of the Supreme Court in *Fernando v. Nikulanappu*<sup>1</sup> that the Chief Justice although he construed the word "forthwith" very strictly in that particular case was not prepared to declare that the delay of one day prevented him from holding that the notice was given "forth" within the meaning of the section. But any difficulty that there may be on the question was set at rest by the amendment of section 756 by Ordinance No. 42 of 1921, giving power to the Supreme Court to grant relief in case of any mistake, omission, or defect on the part of the appellant in complying with the provisions of section 756 if the Court is of the opinion that the respondent has not been materially prejudiced. My brother Drieberg, who in the case of *Silva v. Goonesekere*<sup>2</sup> quoted from the statement of objects and reasons attached to Ordinance No. 42 of 1921, before it was passed, said that this Court has got the power to grant relief.

There is no appearance for the respondent in this appeal and as I cannot conceive of any material prejudice in giving relief in this particular case, I would grant such relief and direct that the costs of this appeal shall be costs in the whole cause.

The order of the learned Commissioner is set aside and the case sent back for steps to be taken in due course.

*Set aside.*

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<sup>1</sup> 82 N. L. R. 1.

<sup>2</sup> 31 N. L. R. 184.