

1957

Present : Basnayake, C.J., and Pulle, J.

THE GENERAL INSURANCE CO., LTD., Petitioner, and
T. A. DON ABRAHAM, Respondent

*S. C. 213—In the matter of an Application under Section 769 of
the Civil Procedure Code to relist the Appeal in S. C. 139
D. C. Colombo 27,523 (F)*

*Appeal—“Dismissal for non-appearance”—Application for reinstatement—Civil
Procedure Code, ss. 768, 769.*

In this application to reinstate an appeal which had been dismissed under section 769 of the Civil Procedure Code for non-appearance—

Held, (i) that an appeal “comes on for hearing” within the meaning of section 768 of the Civil Procedure Code although it has been listed without regard to the order of its position on the roll of causes.

(ii) that appeals “come on for hearing” within the meaning of section 769 of the Civil Procedure Code even when they are first called in the order in which they are on the day’s list before Counsel are called upon to make their submissions. If, at that time, an appellant or his Counsel is not present when his appeal is called, the appeal is liable to be dismissed for non-appearance.

APPPLICATION for the reinstatement of an appeal.

E. B. Wikramanayake, Q.C., with *C. Renganathan* and *D. R. P. Goonlilleke*, for Petitioner.

H. V. Perera, Q.C., with *M. Hussain*, for Respondent.

Cur. adv. vult.

October 16, 1957. BASNAYAKE, C.J.—

This is an application under the proviso to section 769 (2) of the Civil Procedure Code for the reinstatement of the appeal in S. C. 139 (F)—D. C. Colombo 27,523/M dismissed under that section as the appellant did not, when the appeal came on for hearing, appear either by counsel or in person. This application is opposed by learned counsel for the respondent who maintains that the appeal has been rightly dismissed.

The action in which this appeal has been preferred was instituted on 3rd November 1952. The petition of appeal was presented on 6th August 1955, was received in the Registry of this Court on 22nd February 1956, and was listed for hearing on 16th May 1956 and 1st August 1956. On the latter date as neither the appellant nor his counsel appeared when the appeal came on for hearing it was dismissed with costs, counsel for the respondent being present. It was later on the same date reinstated, on the application of counsel for the appellant, without objection

from counsel for the respondent. After its reinstatement the appeal again came on for hearing on 2nd October 1956, 14th November 1956, 11th December 1956, and 7th February 1957. On the last mentioned date it was again dismissed with costs as neither the appellant nor his counsel appeared, when the appeal was called by the Clerk of Appeal. On this occasion too counsel for the respondent was present. At 2.15 in the afternoon of the same day counsel for the appellant appeared and applied again for reinstatement of the appeal.

The following order was made on his application.

“ Mr. P. Somatilakam appears at 2.15 and states that he was held up in another Court and was unable to be present at the time the above case was called and was dismissed with costs. He submits that he appears for the appellant and moves that the case be restored to the list.

“ Mr. H. V. Perera who appears for the respondent states that he is unable to consent to the appeal being relisted as his client who was in Court is aware of the result of the case and his Proctor has been given the receipt for the fees paid to counsel.

“ Mr. S. J. Kadirgamar's appearance is noted on the list, but Mr. Somatilakam states that Mr. Kadirgamar was the original counsel retained in the case but has since surrendered his brief. We inform Mr. Somatilakam that we are prepared to issue notice on the respondent on condition that the appeal will be relisted only if the respondent consents to it, but, in any event if the application is allowed or refused the appellant will have to pay the respondent's costs. Mr. Somatilakam agrees to the issue of notice on the respondent on those conditions. We accordingly direct that notice be issued on the respondent.”

The appellant has since filed a statement from his counsel to the effect that his engagements in the other divisions of this Court prevented his attendance at the time this appeal was called by the Clerk of Appeal in this Court. It is not unusual for counsel to be actually engaged in one division of the Appeal Court when a case of his in another division is called on for hearing. Recognising this fact the Judges of this Court have made the following Standing Order :

“ When a case is called and counsel engaged therein is unable to attend and an application in that behalf is made by another counsel, the case will be allowed to go to the bottom of the list. If no application is so made the appeal will be dismissed with costs. If a case so placed at the bottom of the list is again reached and counsel therein is not present and no sufficient cause for adjournment is shown by another counsel the appeal will be dismissed with costs.”

Learned counsel for the appellant does not seem to have taken advantage of this Standing Order for if he did his appeal may not have been dismissed on either occasion.

Learned counsel for the petitioner also contended that the appeal had not been listed in the manner prescribed by section 768 of the Civil

Procedure Code and that when the order of dismissal was made it had not come on for hearing as contemplated in section 769 (1) of the Civil Procedure Code. The present procedure for listing of appeals has been in existence for a number of years and is well established and well known to counsel who practise in the Appeal Court though it is not strictly in accordance with section 768 of the Code. I do not think that it can be said that the appeal did not come on for hearing on the day it was dismissed a second time merely because the appeal had not been listed in the order of its position on the roll. He also made a point of the fact that in this division the appeals are first called in the order in which they are on the day's list before counsel are called upon to make their submissions. He submitted that when an appeal is thus called it cannot be said to come on for hearing as contemplated in section 769 (1). I am unable to accept that submission of counsel for the petitioner.

For the purpose of section 769 an appeal "comes on for hearing" each time it is on the daily list. If the appellant or his counsel is not present when the appeal is called in Court whether for the purpose of hearing the submissions of counsel or for any other purpose, it is liable to be dismissed.

The application is refused with costs.

PULLE, J.—I agree.

Application refused.
