

1934

*Present : Akbar J.*JAYAWARDENE *v.* ABDUL CADER *et al.*

152—C. R. Colombo, 83,962.

Appeal—Tender of security for respondent's costs—Notice on proctor—Irregularity—Right to relief—Civil Procedure Code, s. 756.

Where notice of tender of security for costs of appeal was sent to the respondent's proctor and was lost in the post,—

Held, that the appellant should be given relief under the provisions of section 756 of the Civil Procedure Code.

THIS was an application for relief under section 756 of the Civil Procedure Code.

H. V. Perera (with him *Mahroof*), for petitioners, applicants.

Wickremanayake (with him *H. W. R. Weerasooria*), for respondent.

February 20, 1934. AKBAR J.—

This is an application for relief under the proviso to section 756 of the Civil Procedure Code added by Ordinance No. 42 of 1921. Judgment was delivered by the District Judge against the petitioners on May 8, 1933, and petition of appeal was filed on May 17, 1933.

Under section 756 of the Civil Procedure Code the petitioner has forthwith to give notice that he will on a certain date within the time prescribed by the section tender security for the respondent's costs of appeal. What took place subsequent to the filing of the petition of appeal has been detailed by Mr. Abdul Cader, proctor, one of the petitioners, in his evidence which has been accepted by the learned Commissioner. This witness stated that he had drafted a motion regarding the security of May 17, and had sent it to the plaintiff's proctor by his clerk who gave evidence, and that the clerk had been unable to meet this proctor although he went on three occasions to his branch office at Hulftsdorp. On May 20 a letter (copy X 1) was posted by him to the

plaintiff's proctor. Letter X 1 stated the fact that on May 17, Mr. Abdul Cader's clerk had failed to see the addressee on three or four occasions and that the clerk had brought back the motion as the addressee was not in his office and that the Court had ordered notice to be served on the addressee on May 19. As there was no time to serve the notice through the Fiscal the addressee was to take notice for May 22. On May 20, 1933, the sum of Rs. 26 was deposited.

The plaintiff's proctor denied that he had received letter X 1 but he admitted that somebody may have come to see him in his office at Hulftsdorp and missed him. Mr. Saravanamuttu, proctor for petitioners, also gave evidence, corroborating Mr. Abdul Cader that a letter (a copy of which is X 1) was typed by his clerk, was signed by him and sent to Mr. Abdul Cader. The learned Commissioner has accepted the evidence of all the proctors. His finding amounts to this, that the plaintiff's proctor was missed by Mr. Abdul Cader's clerk on three occasions on May 17, the day on which the petition of appeal was filed, and that a letter of which X 1 is a copy was posted on May 20 to the plaintiff's proctor, and that the letter did not reach the plaintiff's proctor.

The Commissioner's finding on the evidence is supported by intrinsic evidence furnished by the documents X 1 and the motion of May 17. This motion is dated May 17 and is signed by Mr. Saravanamuttu, proctor for the first and second appellants, and two other proctors on behalf of third, fourth, and fifth appellants. This is the motion which Mr. Abdul Cader's clerk took with him fruitlessly to the office of the plaintiff's proctor.

The learned Commissioner was right in making order that the appeal should abate, as the notice was not served through the Fiscal and he had no power to grant relief. Under section 356 of the Civil Procedure Code all processes of Court have to be issued for service to the Fiscal, unless the Court otherwise directs. That was not done in this case, but Mr. Abdul Cader stated that the practice was for notices of deposit of security and of appeals to be served direct on the proctor of the other side and there is evidence of this practice in this record. The proctor for the plaintiff has received notice in this way of the deposit of security in the petition No. 152 now before me on June 16, 1933, for June 23, 1933.

Under the proviso to section 756 the Supreme Court has the power to grant relief in the case of any mistake, omission, or defect on the part of the appellant in complying with the provisions of that section, if the Court should be of opinion that the respondent has not been materially prejudiced. I do not think that the respondent has been materially prejudiced here, as the security was deposited and the only question left was as to its sufficiency. As regards the sufficiency of Rs. 26, the respondent's advocate withdrew a similar objection to that amount on June 29, 1933, in the matter of petition No. 152 which is the one now before me.

In *Silva v. Goonesekere*¹ relief was refused because the petition of appeal was filed on November 14, 1928, and the record was not sent up till May 27, 1929, and even then no notice of appeal had been taken out or served on the respondents.

¹ 31 N. L. R. 184.

In the case now before me, the petitioners had taken all the necessary steps as found by the Commissioner, only the notice of motion had gone astray in the post. In my opinion this is a fit case for relief, otherwise the words of the proviso to section 756 will be meaningless.

A similar objection was taken in *Kangany v. Rajah*' and upheld before the amendment by Ordinance No. 42 of 1921 was passed. In *Mendis v. Jinadasa*², the Supreme Court allowed a bond hypothecating the security deposited to be signed after objection to the appeal was taken. De Sampayo J. in the course of his judgment said as follows:—"I do not think such an extensive interpretation, if it is to be so called— as the bond is not referred to in section 756 which only was amended by 42 of 1921, and is only referred to in section 757, which was not amended,— is unjust or unfair when the object of the entire legislature is taken into consideration I think, therefore, that we ought to apply the provisions of the new Ordinance, as it is very plain that the omission to comply with the requirements of hypothecation by a bond was not a deliberate omission, but due clearly to an oversight; and no prejudice will be caused to the respondent if we say that the amount be now hypothecated by a bond."

I would therefore, acting under the proviso to section 756, set aside the order of abatement of the appeal made on June 15, 1933, and send the case back for the perfecting of the appeal on the following conditions:— The petitioners will within ten days of the receipt of the record in the lower Court deposit Rs. 21 costs of the inquiry in the lower Court, which I hold the respondent to be entitled to draw, and also take steps to perfect the appeal by issuing notice of the deposit of security through the Fiscal on the respondent or his proctor.

The costs of this appeal will abide the final decision of this matter.

Application allowed.

