1933 *Present:* **Dalton A.C.J. and Koch A.J.**

RUDD *v.* ABDUL RAHAMAN.

97—D. C. (Inty.), Colombo, 48,302.

Execution—Application for a writ following judgment—Delay in entering decree—Defendant's application to vacate issue of writ—Order for security—Civil Procedure Code, ss. 761 and 763.

Judgment in this case was delivered on February 13, and on that day the plaintiff applied for execution of his decree, which was allowed on February 16. The decree was not entered and signed till February 15. The defendant appealed from the judgment on February 15 and applied on February 20 to have the order allowing writ to issue vacated.

Held, that the decree related back to the judgment and that, as no appeal was pending at the time of the application for writ, execution could only be stayed upon the conditions specified in the proviso to section 761 of the Civil Procedure Code.

APPEAL from a judgment of the District Judge of Colombo.

Gratiaen, for defendant-appellant in No. 97 and for plaintiff-respondent in No. 152.

Hayley, K.C. (with him *S. A. Marikar*), for plaintiff-respondent in No. 97 and for defendant, appellant in No. 152.

Cur. adv. vult.

October 25, 1933. DALTON A.C.J.—

There are two appeals before us in this case, the final appeal (No. 97) of which can be conveniently dealt with first. The appellant in that appeal is the defendant in the action. The plaintiff sought to recover from him the sum of Rs. 3,183.56, principal and interest alleged to be due on a promissory note for Rs. 2,000, dated April 1, 1921. The defendant in his answer pleaded that the note sued on was torn or destroyed on or about April 1, 1926, on the settlement of all transactions on the note. The note has been torn in two pieces about one-third of the distance from top and the two pieces are carefully joined at each side by adhesive paper.

The only question raised on this appeal before this Court was that the note appears to have been cancelled by being torn in two portions and therefore the onus lay on the plaintiff, under the provisions of section 63 (3) of the Bills of Exchange Ordinance, to show that the cancellation was made unintentionally or under a mistake or without authority.

Apart from the tear across it, the note is in good condition considering its age. When the action was started by her attorney, he swore an affidavit in the usual form on March 4, 1932, producing the note and swearing that the amount thereof was due with interest. The Justice of the Peace before whom the affidavit was sworn thereupon signed an endorsement on the back of the note to the effect that was the exhibit referred to in the affidavit. The note is torn directly through that endorsement an examination of which leads one to the conclusion that the endorsement could certainly not have been written there, as it has been written, when the note was in two portions. On an examination of this note there is nothing that in my opinion would justify any conclusion that there has been an apparent cancellation as is urged.

The case, however, does not end there, for in fact the plaintiff did begin. This was probably due to the fact that, the note dating from 1921, the action would be prescribed unless something was proved to take it out of the Ordinance. The evidence led also had reference, however, to the tearing and alleged cancellation. Mr. F. W. de Vos was called for the plaintiff. He stated she lived in England and was a client of Mr. A. Alvis, who was her attorney and had moneys of hers in Ceylon. The note is in Mr. Alvis' writing and on his stamped paper. He died in April, 1922, and Mr. de Vos who was his assistant was then made the plaintiff's attorney. Interest was paid by defendant on the note up to the end of March, 1926. The witness denies there was any settlement of the note in April, 1926, or that the note was torn up after such a settlement. In 1931 the Galaha Ceylon Tea Estates and Agency Company, Ltd., was appointed plaintiff's attorney in place of the witness, who states he thereupon handed all papers belonging to the plaintiff including the note in question to the new attorney's proctors, Messrs. Julius & Creasy. The witness states the note was not torn in half, so far as he recollects, at that date, and if it had been so torn he would have remembered it.

After this evidence, no evidence at all was led on behalf of the defendant, and the trial Judge entered judgment for the plaintiff as prayed for, with costs, giving his reasons for doing so. On the appeal, in my opinion, no ground has been put forward to show that decision is wrong and the appeal (No. 97) must therefore be dismissed with costs.

The interlocutory appeal (No. 152) arises out of a refusal of the trial Judge to allow execution to issue without plaintiff giving security in the full amount of his claim. In view of the decision now come to in the final appeal, the only question involved now in this further appeal is one of costs.

The judgment in the lower Court in favour of the plaintiff was delivered on February 13, and thereafter about noon the same day plaintiff applied for execution. The decree for some reason was not entered and signed until February 15, and this application for execution was held back until the decree was signed, being allowed on February 16. When signed, the decree bears the same date as, and relates back to, the date of the judgment. Meanwhile on February 15 the defendant appealed against the judgment, and on February 20 he applied to the Court asking it to vacate the order of February 16 allowing the writ. On February 24 this application was heard and order was made setting

aside the previous order made and allowing plaintiff to execute the decree only on his giving security to the full amount of his claim by hypothecating immovable property to that value or depositing cash for the amount. The learned Judge dealt with the matter under section 763 of the Code, dealing with plaintiff's application for writ, made on February 13, as one made after an appeal had been lodged.

I think the learned Judge was wrong. The plaintiff's application, having been made before any appeal had been lodged, came under section 761 of the Code. The plaintiff, having hastened to make the application, and at a time when she might reasonably have expected the decree to have been entered, should not be prejudiced by the failure of a clerk to enter up the decree as soon as possible after judgment. As pointed out by de Sampayo J. in *Perera v. Fernando* [1], the drawing up of the decree is a formality which when complied with relates back to the date of the judgment. The decree then here is dated February 13 and the application made thereafter is of the same date. At the time of the application no appeal had been lodged and therefore the provisions of section 761 apply to any application made for a stay of execution.

The appeal must therefore be allowed and the defendant's application to vacate the order for issue of writ and for a stay of execution should only have been allowed on the Court satisfying itself in accordance with the proviso to section 761. There was no order as to the costs of this inquiry in the lower Court, but appellant is entitled to her costs of this (No. 152) appeal.

KOCH A.J.—I agree.

Appeal allowed.

[1] *17 N. L. R. 300.*