

1971 Present : Alles, J., and Weeramantry, J.

K. GIANCHAND, Appellant, and T. M. N. HYDER ALI and 3 others,  
Respondents

S. C. 200 (F)/67—D. C. Colombo 61676/M

*Appeal—Ex parte hearing owing to absence of respondents' Counsel—Application made thereafter by respondents for re-listing the appeal—Civil Procedure Code, s. 771—"Sufficient cause".*

Queen's Counsel and Junior Counsel had been retained to appear for the plaintiffs-respondents. When the appeal was heard on 6th June 1970 there was no appearance for the respondents and, after the argument of Counsel for the defendant-appellant was heard and judgment was reserved, order was made on 16th July 1970 allowing the appeal of the appellant. Subsequently the present application was made by the plaintiffs-respondents under section 771 of the Civil Procedure Code for re-listing the appeal.

*Held* that the application could not be granted unless satisfactory explanations were given not only by the Queen's Counsel but also by the Junior Counsel for their failure to be present in Court when the appeal was heard.

**T**HIS was an application made by the plaintiffs-respondents under Section 771 of the Civil Procedure Code for re-listing the present appeal from a judgment of the District Court, Colombo.

*Izadeen Mohamed, Q.C., with S. C. Crossette-Thambiah, for the defendant-appellant.*

*H. W. Jayewardene, Q.C., with R. Manikkavasagar, for the plaintiffs-respondents.*

*Cur. adv. vult.*

July 1, 1971. ALLES, J.—

This is an application to have the judgment and decree of this Court delivered on 16th July 1970 vacated and the appeal re-listed for argument. The appeal was argued before my brother Weeramantry, J. and myself on 6th June 1970. Counsel appeared for the defendant-appellant but there was no appearance for the plaintiffs-respondents. After hearing the argument of Counsel for the appellants, we reserved our order and the Court, in a considered judgment, made order on 16th July 1970 allowing the appeal and dismissing the plaintiffs-respondents action with costs.

The plaintiffs-respondents have now partially explained the circumstances in which they were not represented at the hearing of the appeal and an affidavit from learned Queen's Counsel—not Queen's Counsel

who appeared in support of the application—has been submitted for our consideration. According to Counsel's affidavit, he had been retained to appear for the plaintiffs-respondents in July 1968, but his Clerk had inadvertently failed to notify the Registrar of the Court of this fact. This case was listed for hearing on 6th June 1970, which was not one of the free dates of learned Queen's Counsel and consequently he was not present in Court on that date. It was only on 17th July 1970 that learned Queen's Counsel became aware that the appeal had been heard and that this Court had delivered judgment dismissing his client's action. We accept, without reservation, the averments contained in Counsel's affidavit explaining his inability to be present in Court on 6th June 1970. If the matter stood there, we might have been disposed to have the case listed anew for argument, particularly as Counsel for the appellant, who was the successful party at the appeal had no objections to the appeal being re-argued. There is however no explanation before this Court why Junior Counsel, who must have been retained to assist learned Queen's Counsel, failed to be present in Court on 6th June 1970. If we were to permit this application, in the absence of such an explanation, we would create an unhealthy precedent. It is also pertinent to take note of the fact that it was publicly announced at the conclusion of the argument, that judgment had been reserved. Had the plaintiffs-respondents' legal advisers been alert, they would have been aware that the appeal had been listed, heard and that judgment had been reserved soon after 6th June 1970. It was only on 17th July 1970 when learned Queen's Counsel brought the lapse to the notice of this Court, that steps were taken to re-list the appeal for argument.

This is not a case in which the client's legal advisers had mistaken a date—an explanation which may amount to "sufficient cause" under Section 771 of the Civil Procedure Code but a case where Junior Counsel has not placed any explanation before Court for his failure to be present in Court on the relevant date. In *Kalavane Dhammadassi Thero v. Mawella Dhammavisuddhi Thero*<sup>1</sup> 57 N. L. R. 400, an application for the re-listing of an appeal, which had already been disposed of, was allowed by the same Bench that heard the appeal. The Court held that the petitioner had satisfactorily explained that he was prevented by "sufficient cause" from appearing either personally or by Counsel, at the hearing of the appeal. In that case the petitioner had provided the fees for retaining Counsel to his Proctor. His Proctor however misappropriated the fees and consequently no Counsel was retained and understandably, no Counsel appeared for the petitioners on the date when the appeal was argued. In the instant case, the facts are quite different. There is no explanation before this Court why Counsel who had been retained as Junior to Queen's Counsel failed to appear on the due date. Consequently we hold that the plaintiffs-respondents have

<sup>1</sup> (1955) 57 N. L. R. 400.

not satisfactorily explained to the Court why Counsel, who would have been retained as Junior to Queen's Counsel, was not present in Court on 6th June 1970 and we are, therefore, constrained to refuse this application. Since Counsel for the appellant was agreeable to the application being allowed, we make no order as to the costs of this application.

WEERAMANTRY, J.—I agree.

*Application refused.*

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