[FULL BENCH.] 1915.

Present : Wood Renton C.J., Ennis J., and De Sampayo A.J.

UKKUWA *v.* THE ALLUTA RUBBER AND PRODUCE CO., LTD.

D. C. Kandy, 22,729.

Appeal—Waiver of security by proctor for respondent—Civil Procedure Code, ss. 756 and 757.

An appeal lies without security for costs where the respondent's proctor waives security.

THE facts are set out in the judgment.

A. St. V. Jayewardene, for the applicant.—The provisions of the Civil Procedure Code as to security are intended for the benefit of respondent parties, and it is open to them to waive such benefit at their option. In *Jayasekera v. Jansz*[1] it was held that a respondent way waive security for costs. That case has been followed ever since. [Wood Renton C.J.—The question here is, whether the proctor can waive, and not whether the party respondent can waive.]

It was always conceded that a proctor can get the whole money due to his client, and give a good discharge. If so, why should not he waive the security for costs? He would be liable to his client if he had acted without his client's authority. Counsel referred to *Parkgate Iron Company, Limited, v. Coates*,[2] 50—D. C. Colombo, 32,412.[3]

Cur. adv. vult.

July 30, 1915. WOOD RENTON C.J.—

This is an application by the defendants for an order requiring the District Judge of Kandy to forward the record and their petition of appeal to this Court. The learned District Judge had declined to do so on the ground that the defendants had failed to give security for the costs of the plaintiff-respondents, as required by section 757 of the Civil Procedure Code. It would appear that, in conformity with a practice which had prevailed in the District Court of Kandy up to December the 9th, 1914, the respondent's

[1] *(1892) 2 C. L. R. 25.* [2] *(1870) L. R. 5 C. P. 634.*
[3] *S. C. Mins., June 4, 1914.*

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proctors had agreed to waive security for costs; and this agreement was duly recorded in the journal entries, together with a motion by the defendants' proctors that the appeal having been otherwise perfected should be transmitted in due course to the Supreme Court. The learned District Judge, as I have already said, disallowed this motion, for reasons given by him on December 9 last, in No. 44—D. C. Kandy, 22,801. These reasons are, in effect, that section 757 of the Civil Procedure Code peremptorily prescribes the form in which security shall be given; that the matter concerns the public revenue; and that, if the proctor for a respondent is permitted to waive the benefit conferred upon him by section 757, and accept a sum of money in cash in lieu of the security prescribed by the Code, the respondent incurs the risk of losing the money altogether, if, for example, the proctors concerned should fall into pecuniary embarrassment, and the amount deposited should be seized in execution against them. There is, in my opinion, great force in the reasoning of the learned District Judge, which might be reinforced by an additional argument, namely, that there is in this country an even greater risk of security being dispensed with as a matter of amicable arrangement between the proctors on either side, without the respondent, who is frequently a village litigant, having been made to realize that the waiver of security forfeits a substantial benefit which the law has given to him. Although the language of the statutory form for the appointment of a proctor is wide enough to cover references to arbitration, the Civil Procedure Code has taken special precautions in the interest of litigants as regards all such references. It may well be that similar precautions would be desirable as regards waiver of security for costs, or, in any event, that the Judge of first instance should have the right to satisfy himself, if he thinks proper, that the client understands what such waiver means. But the point before us is covered by repeated and express authority, from which I do not think that we should be justified in departing (see *Jayasekera v. Jansz*,[1] S.C. No. 50—D. C. I., Colombo, No. 32,412,[2] and *Gunatilleke Mudaliyar v. Punchy Hamy*.[3]). The English case of *Parkgate Iron Company, Limited v. Coates* [4] is to the same effect.

On these grounds I would make an order in terms of the application.

ENNIS J.—

I agree with the order proposed by my Lord the Chief Justice.

DE SAMPAYO A.J.—I agree.

Application allowed.

[1] *(1892) 2 C. L. R. 25.*
[2] *S. C. Mins., June 4, 1914.*
[3] *(1908) 2 Leader R. 110.*
[4] *(1870) L. R. 5 C. P. 634.*