

1955 Present : Gratiaen, J., and H. N. G. Fernando, J.

KALAWANE DHAMMADASSI THERO, Petitioner, and  
MAWELLA DHAMMAVISUDDHI THERO *et al.*, Respondents

*Application for Restitutio in Integrum or in the alternative for Revision  
in S. C. 348 of 1952, D. C. Colombo 5,517*

*Appeal—Ex parte hearing—Right of respondent to object to decree—Civil Procedure  
Code, ss. 28, 771.*

An appeal was heard *ex parte* in the absence of the respondent, and judgment was given against him. It was subsequently shown that the respondent's Proctor had, prior to the disposal of the appeal, informed the respondent that he had duly retained Counsel to represent him although, in fact, he had not done so. Further, during the pendency of the appeal, the Proctor had been suspended from the practice of his profession for a certain period.

*Held*, that there was "sufficient cause" within the meaning of section 771 of the Civil Procedure Code to re-hear the appeal.

**A**PPPLICATION to have a judgment and decree of the Supreme Court in certain civil proceedings vacated.

*H. W. Jayewardene, Q.C.*, with *Daya Perera*, for the plaintiff-petitioner.

*H. V. Perera, Q.C.*, with *H. A. Koatlegoda*, for the defendant-respondents.

*Cur. adv. vult.*

June 7, 1955. GRATIAEN, J.—

This is an application to have a judgment and decree of this Court dated 19th July, 1954, in civil proceedings vacated. Arguments were addressed to us on behalf of both parties on the assumption that the facts set out in the petitioner's affidavit were substantially correct. I shall summarise these facts in so far as they are necessary for the purposes of our decision.

The petitioner had sued the respondents in the District Court of Colombo for a declaration that he was the lawful incumbent of Rajapushparama Vihara, situated at Galkissa. After a contested trial, judgment was entered in his favour as prayed for with costs on 19th September, 1951. The respondents then appealed to this Court and the appeal was heard on 12th and 13th July, 1954. The case for the respondents was fully argued by Counsel appearing on their behalf, but the petitioner himself was absent and was not represented by Counsel. Having reserved judgment, this Court made order on 19th July, 1954, allowing the appeal and dismissing the petitioner's action with costs in both Courts.

The petitioner has now explained the circumstances in which he was not represented at the hearing of the appeal. In the lower Court he

had granted the partners of Messrs. Perera and Senaratno, Proctors, a joint proxy appointing them to represent him at the trial and also in this Court. In October and November, 1952, he had, at Mr. Senaratne's request, paid sums aggregating Rs. 735 which were stated to be required as fees for a senior Counsel and a junior Counsel who had been retained by Mr. Senaratne to argue the petitioner's case on appeal. Mr. Senaratne later informed the petitioner that the advocates concerned had been duly briefed on his behalf, and the petitioner thereafter assumed that he would be represented at the argument when the appeal came up for hearing.

After the appeal had been disposed of, it was brought to the petitioner's notice that Counsel had not appeared for him at the argument because their fees had not been paid by Mr. Senaratne or Mr. Senaratne's firm. He also discovered for the first time that Mr. Senaratno had, in terms of an order of this Court, dated 27th October, 1953, been suspended from the practice of his profession for a period of three years on the ground of misconduct. In the result, the partners of Messrs. Perera and Senaratne had become incapable of acting jointly for the petitioner by virtue of the proxy previously granted to them.

Mr. Jayewardene's main argument was that failure to comply, even inadvertently, with the provisions of Section 28 of the Civil Procedure Code had the effect of rendering the judgment of this Court a nullity. The full implications of this Section cannot be determined without an examination of questions of much nicety, but for the purposes of this application it is sufficient, I think, to base our jurisdiction to order a re-hearing of the appeal on the provisions of Section 771 of the Code. The petitioner has satisfactorily explained that he was prevented by "sufficient cause" from appearing either personally or by Counsel at the hearing of the appeal. Moreover, the dispute as to the incumbency was certainly of sufficient gravity to make it desirable that the petitioner should not be denied an opportunity of supporting the judgment of the lower Court in his favour. I would accordingly vacate the judgment of this Court dated 19th July, 1954, and direct that the appeal be reheard before a Bench of which my brother and I (who heard the original appeal) are not members. In my opinion, the costs of this application should be costs in the cause.

There is another matter to which it is my duty to refer before I conclude. The serious allegations in the petitioner's affidavit concerning Mr. C. E. de S. Senaratne's conduct clearly calls for an investigation, and the question prominently arises whether he is a fit and proper person to be permitted to resume his practice in an honourable profession after his period of suspension comes to an end. I would therefore direct that copies of the petitioner's petition and affidavit dated 21st September, 1954, and of all supporting documents annexed thereto, be forwarded by the Registrar to the Attorney-General and to the Incorporated Law Society so as to enable them to take such action as they may consider appropriate.

H. N. G. FERNANDO; J.—I agree.

*Appeal to be re-heard.*