[IN REVISION.]

1944 *Present:* **Soertsz J.**

PERERA *v.* MUTHALIB.

M. C. Gampaha, 20,715.

Forfeiture of bond—Surety for accused—Inquiry before forfeiture—Notice to surety—The powers of the Supreme Court in revision—Criminal Procedure Code, s. 411 (1),—

Where a person has bound himself as surety to a bond entered by an accused "to attend at the Magistrate's Court immediately after the proceedings in the case have been returned to that Court from the Supreme Court after appeal and there surrender",—

Held, that the Magistrate is bound, before making an order forfeiting the bond, to hold an inquiry and satisfy himself that the bond has been foreited and to give notice and an opportunity to the surety to show cause against the forefeiture.

The revisionary powers of the Supreme Court are not limited to those cases in which no appeal lies or in which no appeal has for some reason been taken.

The Court would exercise those powers where there has been a miscarriage of justice owing to the violation of a fundamental rule of judicial procedure.

THIS was an application to revise an order made by the Magistrate of Gampaha.

E. W. Perera in support.

T. S. Fernando, C.C., for Attorney-General.

Cur. adv. vult.

August 23, 1944. SOERTSZ J.—

This is an applicaton for the exercise of the revisionary powers of this Court in respect of an order made by the Magistrate of the Gampaha Courts, on June 16, 1944, forfeiting the full amount of a bond by which the petitioner, who was the surety for an accused party, had bound himself for the due performance by that accused party of certain conditions imposed upon him by the bond.

Crown Counsel by way of a preliminary objection, contended that, the petitioner having had a right of appeal from such an order as was made in this case and having omitted to avail himself of that right, is now debarred from making the present application for revision inasmuch as—so he said—the extraordinary jurisdiction of revision is exercised in cases in which there was no other remedy. He relied on the case of *Gunasekera v. Jayaratna* [1] in which it was pointed out that there was a right of appeal from an order forfeiting the bond of a surety. That ruling amply justifies the first part of the Crown Counsel's contention. In regard to the second part of his contention, namely, that the petitioner is not entitled to revision because he failed to exercise hs right of appeal,

[1] *Bal. Rep. 154.*

I would invite attention to the observations made by Wood-Renton J. in the *King v. Nordeen* [1]. He said:—

" I do not think that that power (*i.e.*, revisionary power) is at all limited to those cases in which either no appeal lies or for some reason or other an appeal has not been taken ", but he went on to add that this power would be exercised only when a strong case is *made out* " amounting to a positive miscarriage of justice in regard to either the law, or the judge's appreciation of the facts ". In the case I am dealing with I should have felt compelled to give relief solely on the ground that what may well be said to be a failure of justice has been brought to the notice of this Court, and technical rules must make way for the granting of redress in such a case. There has been a violation of the fundamental rule of judical procedure that a person sought to be affected by an order shall first be heard. But, in this instance there is yet another ground upon which this application for revision ought to be exercised and that is that the petitioner had no knowledge of the order made against him till the time for preferring an appeal had elapsed. I over-rule the preliminary objection.

On the merits the petitioner has a strong case. By the bond the accused entered into, he bound himself " to attend at the Magistrate's Court . . . . immediately after the proceedings in the case . . . . been returned to the said Magistrate's Court from the Supreme Court after appeal and there surrender ". The petitioner on his apart bound himself as surety for the due performance of that condition by the accused.

Now, it is true that the obligation undertaken by the accused and his surety is not absolutely impossible of performance but, it is so onerous an obligation that in a commonsense view of the matter, it may be regarded as reasonably impossible. It could have been fulfilled if at all, only by constant attendance in the Magistrate's Court in the interval between the listing of the appeal and of the record being received back in the Magistrate's Court. There is good reason for doubting that the accused and his surety appreciated that that was the extent of their undertaking even if we presume that the terms of the bond were explained to them. The later journal entries show that they were expecting to be " noticed " and that they understood that they were to appear immediately on being noticed.

In the case of *Modder v. Ismail Lebbe* [2] the accused and his surety entered into a similar bond. On the return of the proceedings from the Supreme Court, both of them made defaults in spite of summonses and thereupon their bonds were declared forfeited. Moncrieff J. in allowing the surety's appeal said that " it had not been customary to forefeit the surety's bond without giving him notice and an opportunity of showing cause against the forfeiture of the bond ". The case under consideration is a stronger case than that case for the surety, here, received no summons or notice of any kind. If I may say so with great respect Moncrieff J. might have put the matter higher than he did when he said that it had not been customary to forfeit the bond without notice or without a hearing, for such a course not only violates a fundamental rule of judicial

[1] *13 N. L. R. 115.* [2] *8 N. L. R. 104.*

procedure, but also disregards a positive requirement of the relevant section of the Criminal Procedure Code, section 411 (1) which provides that—

> " Whenever it is proved to the satisfaction of the Court . . . . that the bond has been forfeited, the Court shall record the grounds of such proof and may call upon any person bound by such bond to pay the penalty . . . . or to show cause why it should not be paid. "

The phrase " whenever it is proved to the satisfaction of the court " necessarily presupposes an inquiry. Indeed even if the words that had been employed had been less cogent, for instance " if the court is of opinion ", still, inasmuch as a Judicial Officer as distinct from an administrative officer is concerned an inquiry is a necessary condition precedent to the reaching of an opinion.

In this case, there was no inquiry whatever before the bond was forfeited. What the Magistrate did was similar to putting the cart before the horse, for he forfeited the bond on June 16, 1944, and on June 21, 1944, called upon the petitioner to show cause why he should not pay the full amount of the bond. The whole proceeding was misconceived and extremely unsatisfactory. If the Magistrate's object was to save time, labour, and money there were obviously much less drastic methods of attaining that object.

I set aside the order forfeiting the bond.

Set aside.