

Present : De Sampayo J.

1921.

THE DEMODERA TEA CO., LTD., *v.* PEDRIC APPU.

210—*C. R. Badulla, 2,935.*

Appeal—Security bond—Acceptance of bond by chief clerk without reference to Court.

The acceptance of security tendered by an appellant under section 756 of the Civil Procedure Code is a judicial act and should be evidenced by an order of Court. The act of a chief clerk, who, without any reference to Court, allowed security bond to be entered into, is not a compliance with the provision of section 756 of the Code.

THE facts appear from the judgment.

E. W. Jayawardene, for defendant, appellant.

Alwis, for plaintiff, respondent.

January 20, 1921. DE SAMPAYO J.—

This is a very unusual appeal. The defendant-appellant on July 6, 1920, duly lodged a petition of appeal from the judgment of the Commissioner, and on the same day his proctor gave written notice to the plaintiff's proctor that he would on July 9, 1920, tender security in appeal. The security proposed was a bond for any

¹ (1919) 6 C. W. R. 296.

² (1920) 21 N. L. R. 413.

³ (1920) 21 N. L. R. 492.

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sum not exceeding Rs. 150 to be entered into by the defendant with L. H. D. John Singho as surety. To the notice was annexed a headman's report as to the worth of the proposed surety. The written notice was not taken out from the Court nor served through the Fiscal, but was shown to the plaintiff's proctor, who made on the paper this endorsement: "I cannot consent to surety on report of worth. Let a deed be given." The notice paper, with this endorsement, was submitted to the chief clerk of the Court. On July 9, 1920, which was referred to in the notice, the chief clerk made a minute that the defendant's proctor filed "deed in favour of surety as well as headman's report. Security bond entered into." The chief clerk himself, without any order of Court, appears to have accepted the security bond signed by the defendant and his surety. Subsequently, the plaintiff's proctor moved, with notice to the defendant's proctor, that the appeal may be declared to have abated on the ground that the defendant had failed to give security. On this motion the Court made order declaring the appeal to have abated. It is from this order that the present appeal is taken. I doubt whether this is an appealable order, but as the point involved was argued by counsel on both sides, I shall deal with it.

It is rather difficult to understand what the plaintiff's proctor meant when he endorsed on the notice paper the words "Let a deed be given." I should say that he probably wanted a mortgage of some property of the surety should be given. But the matter was dealt with in the Court below on the footing that a title deed for a land of the surety was to be produced and filed in Court. Even so, the question is whether security in appeal was duly given. Section 756 of the Civil Procedure Code contemplates that the acceptance of the security tendered should be by the Court, for it provides that on the day for which notice is issued the respondent shall be heard to show cause, if any, against the security being accepted, and in the event of security being accepted, then the Court shall immediately issue notice of the appeal. It is clear that the acceptance of the security is a judicial act, and should be evidenced by an order of Court. But in this case the matter was not even submitted to Court. The act of the chief clerk, who, without any reference to Court, allowed the security bond to be entered into, is not a compliance with the provision of section 756. I should say that, even where the proposed security is consented to by the respondent, the Court should sanction the acceptance of the security. In this case there was an objection, and the disposal of it was a matter for the Court. In my opinion security in appeal was not duly given, and the order declaring the appeal to have abated was right.

The appeal is dismissed, with costs.

Appeal dismissed.