

1921.

PERERA v. FERNANDO.

101—D. C. (Inty.) Colombo, 521.

*Notice as to tender of security—Forthwith—Costs.**Pereira, K.O. (with him Bartholomeusz), for the appellant.**M. W. H. de Silva (with him E. G. P. Jayatileke), for the respondents.*

October 28, 1921. BERTRAM C.J.—

I regret that it is not possible for us to grant relief to the appellant against his failure to observe the provisions of the Civil Procedure Code. There are two defects; firstly, notice of the tender of security was not given "forthwith" as interpreted by a previous decision of this Court, (*Fernando v. Nikulan Appu*, (1922) 22 N. L. R. 1); secondly, no notice specifying a day on which the security would be tendered was made at all. As we remarked in the case of *Kangany v. Ramasamy Rajah*, (1921) 21 N. L. R. 106, "the final paragraph of section 756 has in practice been treated as making all the provisions at the beginning of section 756 imperative and as preventing the Court from regarding them as directory only."

Mr. Pereira has sought to distinguish this case from the previous case by asking us to give a strict interpretation to what appears on the record. The note that appears on the record was to the effect that Mr. Jayasekere had received notice of the motion to tender the security offered. That note obviously had reference to a document filed in the case, and could not have been made without something in the nature either of a document or an appearance to support it; and when we turn to that document it is obvious that it does not comply with the necessary provisions of the Code, but is merely a formal motion to which a consent was anticipated, but which was not, in fact, given. I regret it is necessary for us to interpret this action strictly. But we have no option in the matter until a further latitude is given us by the Legislature.

With regard to costs, in the case above referred to, we pointed out that it was open to the respondent on the receipt of notice of appeal to move the Court for an order that the petition of appeal should be held to have abated if the provisions of section 756 have not been complied with, and that, if the respondent preferred not to take that course, but raised that objection in the Supreme Court, he did so at the risk of losing his costs. There is no merit whatever in objections of this sort taken at the last moment when parties are ready to argue the appeal, and though in this case the point must be admitted and the objection allowed, I think that, though the appeal must be dismissed, it must be dismissed without any order as to costs.

DE SAMPAYO J.—I agree.