

921.92

9/1963

No. 48 of 1961.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

BETWEEN

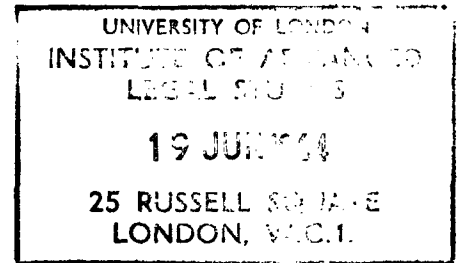
ABDUL WAHAB MOHAMED SAMEEN (Defendant) *Appellant*

AND

1. PALLIYAGURUGE VITHANAGE
SUMANAWATHIE ABEYEWICKREMA

10 2. PALLIYAGURUGE VITHANAGE
WIMALAWATHIE ABEYEWICKREMA

3. PALLIYAGURUGE VITHANAGE
CHANDRASIRI ABEYEWICKREMA
(Substituted Plaintiffs, Nos. 2 and 3 minors
appearing by their guardian—ad litem No. 1) .



74067

Respondents.

Case for the Respondents

RECORD.

1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon, dated the 1st February, 1960, upholding a Preliminary Objection to the competency, and directing the abatement, of an appeal from a Judgment and Decree of the District Court of Colombo, dated the 15th February, 1957.

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pp. 33-40.

pp. 14-18.

p. 19.

The said Preliminary Objection was taken on the ground that the notice of tender of security for the Respondent's costs of the appeal had not been duly given to the Respondent in accordance with the relevant provisions of the Civil Procedure Code. It was first raised in the said District Court on the 8th March, 1957, but, by an Order of that Court made on the same day, was left open for decision by the Supreme Court to which Court the appeal was ordered to be forwarded.

pp. 30-31.

2. The sole point for determination on this appeal is whether the Supreme Court was right in its view that notice of tender of security for the Respondent's costs of an appeal to that Court which, by Section 756 of the Civil Procedure Code, an Appellant is required to give to the Respondent "forthwith" after his petition of appeal is received by the Court of first instance, must, in accordance with Section 356 of the Code, be issued for service to the Fiscal on the same day as that on which the petition of appeal is so received, unless the Court otherwise orders; and that, in the absence of any satisfactory explanation for any delay, a failure to do so must result in an abatement of the appeal. 10

3. Relevant provisions of the Civil Procedure Code are included in an Annexure hereto.

4. The facts, relevant to this appeal, are as follows :—

p. 1.

As the owner of certain land and premises in Colombo, the original Plaintiff in these proceedings instituted an action on the 31st December, 1953, in the District Court of Colombo, against the present Appellant (hereinafter also referred to as "the Defendant"), the owner of certain adjoining land and premises, claiming relief in respect of damage caused, and likely to be caused, to his (the Plaintiff's) land and premises, by building operations carried on by the Defendant on his (the Defendant's) land. In his Complaint, dated the 21st December, 1953, the Plaintiff prayed, *inter alia*, for damages (Rs. 45,000), a permanent injunction restraining the Defendant from interfering with, or violating, the Plaintiff's rights, and a mandatory order on the Defendant to remove all erections made, or erected, in violation of the Plaintiff's rights. 20

pp. 1-4.

p. 3, ll. 32-42.

pp. 4-6.

By his Answer, dated the 29th March, 1955, the Defendant denied all material averments in the plaint and suggested that any damage to the Plaintiff's land and premises had been caused by the Plaintiff himself. In reconvention he claimed damages for the loss caused to him by reason of the injunction already obtained by the Plaintiff. 30

The Plaintiff's Replication, dated the 1st June, 1955, is printed on pages 6 and 7 of the Record.

pp. 18, 19.

5. On the 5th February, 1957, the learned District Judge, having considered the evidence adduced by both sides, entered Judgment for the Plaintiff in a sum of Rs. 10,828/- and costs.

p. 19.

pp. 19-22.

6. A Decree in accordance with the Judgment of the learned District Judge was drawn up on the 5th February, 1957, and against the said Judgment and Decree the Defendant appealed to the Supreme Court of Ceylon on the grounds set out in his Petition of Appeal, dated the 16th February, 1957. 40

p. 8, ll. 9-10.
p. 31, ll. 17-20.
Annexure.

7. The said Petition of Appeal was received in the District Court on the 16th February, 1957 (a Saturday) and thereupon, in accordance with Section 756 of the Civil Procedure Code, the Defendant-Appellant was required to give notice "forthwith" to the Plaintiff-Respondent that he would, on a day specified in the Notice and within a period of

20 days (calculated from the 5th February, 1957, but exclusive of that date and Sundays and public holidays) tender security for the Plaintiff-Respondent's costs of appeal and would deposit a sufficient sum of money to cover the expenses of service of the Notice on the Plaintiff-Respondent.

Further, in the absence of any other direction given by the Court, the Defendant-Appellant was, in accordance with Section 356 of the said Code, required to effect service of the said Notice upon the Plaintiff-Respondent through the Fiscal. Annexure.

8. The Defendant made no application to the District Court in respect of the service of the said Notice and the Notice was not at any time issued for service to the Fiscal in accordance with Section 356 of the Civil Procedure Code.

Instead, the Notice was served by the Defendant's Proctor upon the Plaintiff's Proctors on the 18th February, 1957, but was received by the latter "Subject to objection". p. 23.
p. 23, ll. 37-40.

9. On the 28th February, 1957, the Defendant, conscious presumably of the defective service of the said Notice, filed a second Petition of Appeal, in terms identical with that which had been filed on the 16th February, 1957. Accompanying this second Petition was a Notice of tender of security for costs of appeal for service on the Plaintiff-Respondent. In this Notice, the Defendant referred, presumably in error, to his first Petition of Appeal (filed on the 16th February, 1957) and not to the second (filed on the 28th February, 1957). pp. 26-29.
pp. 29-30.
p. 29, l. 35.

10. The provisions of the Code as to notice "forthwith" of tender of security for the Respondent's costs of appeal not having been complied with, the Plaintiff, on the 8th March, 1957, applied to the District Court concerned to abate the appeal. For the Defendant it was argued that "the objection can be taken by the Respondents in the Supreme Court" and that the District Court "has no jurisdiction to abate the appeal once the petition of appeal has been accepted". p. 30.
p. 30, ll. 24-26.

The Order of the learned District Judge, dated the 8th March, 1957, was as follows:—

"Having heard Counsel I am of opinion that the appeal should be forwarded to the Supreme Court, and leave it open to the Respondents to raise the objection there. p. 31, ll. 13-26.

"In regard to the date of the receiving of the petition of appeal, though 16-2-57 was a Saturday, I find from my diary that I was in Chambers between 10.30 a.m. and 12.30 p.m. on that day. Though of course it is impossible to say whether I initialled this particular record on that date, it is the most probable thing. Records are sometimes sent up to Chambers a day or two after the actual journal entry is made, but that would be in routine matters like filing of lists of witnesses, etc.

"Security tendered is accepted.

"Perfect bond.

"Issue Notice of Appeal for 22.3.57."

pp. 33-40.

p. 33, ll. 14-17.

11. The appeal in the Supreme Court came up for hearing before a Bench consisting of H. N. G. Fernando and Sinnetamby, JJ., who, by their separate Judgments, dated the 1st February, 1960, upheld a Preliminary Objection to the competency of the appeal on the ground "that Notice of tender of security for costs of appeal was not given 'forthwith' by the Defendant-Appellant."

12. In his Judgment, Sinnetamby, J., having recited the facts, said :—

p. 34, ll. 31-35.

"It will thus appear that the actual Notice was not served on the Respondent or his proctors on the day on which the petition of appeal was filed although an intimation was made to them that it would be sent to them for attention. The Notice was eventually filed in Court on the 18th February, 1957, i.e. on the Monday following and it bears the Court Seal on that date . . . 10

p. 34, l. 39 to
p. 35, l. 17.

"Feeling unhappy about the turn of events the Defendant's proctor, thereupon, apparently with the object of defeating any objection which may be taken, filed another petition of appeal on the 28th February, 1957, in identically the same terms and accompanied it with other necessary papers including notices of tender of security for service on the Respondents returnable on the 8th March, 1957, and asked for a payment voucher for the security offered in cash. This was allowed for the 8th March, 1957, which was also the date mentioned in the original notice dated 16th February, 1957. Unfortunately, in the second Notice too there has been a careless mistake, for the proctor says therein that the petition of appeal of the Appellant presented on the 16th February, 1957, having been accepted he will on the 8th March, 1957, tender the security. He does not refer to the petition filed on the 28th February, 1957. Apart, therefore, from any question as to whether a defect of this nature can be cured by resorting to the doubtful expedient of filing another petition of appeal in identical terms on a subsequent date on which date a second set of notices for tending of securities is also filed. there has been, in this case, the fact that the second notice for tendering security refers only to the first petition of appeal filed on the 16th February, 1957. In any event, it seems to me that the imperative terms of Section 756 that notice should be tendered forthwith cannot be negatived and set at nought by an Appellant adopting the methods which the Appellant sought to employ in this case." 20 30

13. As to the date when the first petition of appeal was filed, the learned Supreme Court Judge (Sinnetamby, J.), referred to the statement made in the said Order of the District Judge, dated the 8th March, 1957 (see paragraph 10 hereof) and said :—

p. 35, ll. 35-39.

"So far as this Court is concerned, having regard to the journal entries it must be presumed until the contrary is proved that the entries are correct and that the petition of appeal was accepted by the Judge on the 16th February, 1957."

The journal entries in question are printed on p. 8 of the Record. They include the following entry :—

“(68) 16.2.57. Mr. K. Rasanathan, Proctor for Defendant-Appellant files petition of appeal.

“ File

Intd.

A.D.J.”

14. On the imperative statutory requirement that the notice of tender of security for the Respondent's costs of the appeal should, following the acceptance by the Court of the petition of appeal, be given “ forthwith,” the learned Supreme Court Judge (Sinnatamby, J.) said :—

“ In this case the journal entry shows that the Judge accepted the petition of appeal on the same date as it was manually handed over to the officer of the Court. The obligation therefore rested on the Plaintiff to give notice forthwith. In the case of *Fernando v. Nikulan Appu* ” (22 N.L.R. 1) “ without discussing the matter, Bertram, C.J., expressed the view that to *give* notice of tender of security, it is sufficient if the documents are *filed* in Court and that view was confirmed and adopted by a bench of five judges in the case of *De Silva v. Seenathumma* ” (41 N.L.R. 241) “ Soertsz, J., who delivered the Judgment of the Court said :—

‘ In my opinion it is clear from the words used in Section 756 that when it was provided that notice should be given forthwith what was intended was that notice should be tendered or filed forthwith, not that it should be served forthwith ’ ”.

The learned Judge drew attention also to the conclusion of the Bench in the said case which Soertsz, J., had summed up as follows :—

“ Notice of security, unless waived, must be given forthwith, that is to say, must be tendered or filed on the day on which the petition of appeal is received by the Court.”

15. On the duties of Appellants' proctors in regard to the giving of notice of tender of security for the Respondent's costs, the learned Supreme Court Judge (Sinnatamby, J.) said :—

“ If the Appellant's proctor had taken the elementary precaution of filing notices of tender of security with the petition of appeal, he would have complied with this requirement ” (i.e., of s. 756 —that notice of tender of security for Respondent's costs must, following acceptance of the petition of appeal by the Court, be given “ forthwith ”). “ It is not too difficult a matter for proctors who file petitions of appeal, to tender, along with the petition, notices in the form prescribed and embodied in the Schedule to the Civil Procedure Code and which can be printed or typed and kept in readiness for essential particulars only to be filled up as required. Despite the several occasions on which the necessity for complying strictly with the requirements of Section 756 has been stressed by the Supreme Court, proctors still continue to be lax and negligent in the performance of their duties.”

p. 37, ll. 1-20.

16. Continuing, the learned Supreme Court Judge (Sinnnetamby, J.) drew attention to the importance of the provisions of Section 356 of the Civil Procedure Code. He was clear that a party who is under a duty to serve a Notice must adopt the procedure set out in that Section and effect service through the Fiscal; and that, in the absence of any waiver of the said procedure by the Respondent, an Appellant who chooses not to tender copies of the Notice of tender of security to the Court does so at his peril.

Concluding, on this topic, the learned Supreme Court Judge said :—

p. 37, ll. 33-37.

“ The decision in *Seenathumma's case* ” (41 N.L.R. 241) “ does 10
not permit service of the Notice in any other way than through
the Fiscal, except by an Order of Court authorising such other
mode of service. No permission was obtained from the Court in
this case authorising service privately in the manner in which it
was sought to be done.

p. 37, ll. 37-43.

“ To my mind it makes no difference that the Notice could
not be served on Friday the 16th. Even if it was delivered to the
Respondent's proctor on the Friday and he refused to accept it
or accepted it subject to objections it would still be no service at
all. It is only if the Respondent's proctor accepted it without 20
reservations, could the Appellant be heard to say that the
Respondent waived a rule of procedure intended for his benefit,
and, therefore, is estopped from questioning the validity of the
service.

p. 38, ll. 1-8.

“ Proctors should realise the unnecessary risks they run when
they ignore the express provisions of the Civil Procedure Code and
adopt a mode of service based on an alleged practice. It seems
to me that the only mode of giving notice, forthwith, which would
involve no penal consequences, is for the Notice to be filed in Court
on the same day as the appeal is filed and then if it is feared that 30
the Notice cannot be served and the security accepted within the
20 day limit, to seek and obtain permission of the Court to serve
such Notice, or a copy thereof, in some way other than through the
Fiscal.”

pp. 38-40.

17. Arriving at the same conclusions as Sinnnetamby, J., H. N. G. Fernando, J., in his separate Judgment, referred to, and rejected, the argument advanced on behalf of the Appellant—

p. 39, ll. 16-20.

“ that if the notice is to be *served directly* on the Respondent
or his proctor, it will be duly given if served with reasonable
promptitude, and that service on the morning of Monday, 40
18th February, after an unsuccessful effort at service after ‘ early
closing ’ time on the preceding Saturday was a service ‘ forthwith ’ ”.

The learned Supreme Court Judge said :—

p. 39, ll. 21-38.

“ Section 756 does not stand alone, and has to be construed
together with other relevant provisions of the Code and with
Section 356 in particular. The latter Section requires *inter alia*

10 that all notices shall, *unless the Court otherwise directs*, be issued for service to the Fiscal . . . under a precept of the Court . . . “and undoubtedly applies to Notices under Section 756. While therefore a Notice under Section 756 *may* be given directly to a Respondent or his proctor and may be regarded as having been given forthwith even if it is so given directly on some date subsequent to the date of the receipt by the Court of the petition of appeal, this alternative to the mode of giving notice prescribed in Section 356 cannot be recognized unless it is adopted after a direction given by the Court in that behalf. No such direction was given by the Court in this particular instance, nor is it maintained that any general direction authorising direct service in such cases is in force in the District Court of Colombo. In the absence of any such direction authorising an alternative mode of service, the provision regarding service through the Fiscal applied in the present case, and accordingly the failure to file the notice of security on the 16th February, 1957, involved non-compliance with the requirements of Section 756.”

18. The learned Supreme Court Judge (H. N. G. Fernando, J.) next referred to the question as to whether the Court should grant relief under Section 756 (3), on which, he said, “the decided cases are conclusive”. He referred to the said cases and, for reasons that he gave, rejected the argument that this was an appropriate case for the grant of relief.

19. A Decree in accordance with the Judgment of the learned Judges of the Supreme Court was drawn up on the 1st February, 1960, and against the said Judgment and Decree this appeal to Her Majesty in Council is now preferred, the Appellant having been granted leave to appeal by two Decrees of the Supreme Court, dated the 16th September, 1960, and the 28th October, 1960.

30 The Respondents respectively submit that the appeal should be dismissed, with costs, for the following among other

REASONS

- 40
- (1) BECAUSE it is clear that the said Notice of tender of security for the Respondent's costs of appeal was not, after the petition of appeal had been received by the District Court, given to the Respondent “forthwith” in accordance with Section 756 read with Section 356 of the Civil Procedure Code.
 - (2) BECAUSE the said notice was not, in accordance with the said Sections, issued for service to the Fiscal under a precept of the Court on the day on which the petition was received by the District Court.
 - (3) BECAUSE there was no direction by the Court for service in any other manner under the said Section 356 and no waiver of any of the relevant statutory requirements as to service.

- (4) BECAUSE no explanation satisfactory or otherwise can remedy the defects which flow from failure to comply with the said requirements.
- (5) BECAUSE the defect in service of the said Notice was not cured by the filing of a second petition of appeal accompanied by a fresh Notice.
- (6) BECAUSE the Judgment and Decree appealed from are in accordance with Ceylon law and practice and this therefore is not an appropriate case for intervention by the Board.
- (7) BECAUSE, for reasons stated therein, the Judgments of the learned Judges of the Supreme Court are correct and ought to be affirmed.

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E. F. N. GRATIAEN.

R. K. HANDOO.

ANNEXURE

THE CIVIL PROCEDURE CODE (C. 86)

356. All processes of court not being writs, or warrants directed to the Fiscal or other person for execution, and all notices and orders required by this Ordinance to be given to or served upon any person, shall, unless the court otherwise directs, be issued for service to the Fiscal of the province or district in which the court issuing such processes, notices, or orders is situate, under a precept of that court, as is hereinbefore provided

10 for the case of the summons to the Defendant in an action. And the enactments of the sections of this Ordinance from section 59 to section 70, both inclusive, relative to the service of such summons shall apply, so far as is practicable, to the service of such processes, notices, and orders.

C. 101, Vol. IV
Legislative
Enactments of
Ceylon Revised
1956 Edition.

357. It shall be the duty of every Fiscal, upon receiving any writ, or warrant, or precept directed to him by any court, by himself or by his officers, to execute such writ or warrant, and to serve every process, notice, or order conveyed to him under such precept according to the exigency of the writ, warrant, or precept.

754. (1) Every appeal to the Supreme Court from any judgment

20 decree, or order of any original court, shall be made in the form of a written petition to the Supreme Court in the name of the Appellant, and shall be preferred to the Supreme Court as hereinafter provided.

(2) The petition of appeal shall be presented to the court of first instance for this purpose by the party Appellant or his proctor within a period of ten days, or where such court is a Court of Requests, seven days, from the date when the decree or order appealed against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of Sundays and public holidays, and the court to which the petition is so presented shall receive it and deal with it as hereinafter

30 provided. If those conditions are not fulfilled it shall refuse to receive it.

756. (1) When a petition of appeal has been received by the court of first instance under section 754, the petitioner shall forthwith give notice to the Respondent that he will on a day to be specified in such notice, and within a period of twenty days, or where such court is a Court of Requests, fourteen days, from the date when the decree or order appealed against was pronounced, computed as in the same section is directed for the periods of ten days and seven days therein respectively mentioned tender security as hereinafter directed for the Respondent's costs of appeal, and will deposit a sufficient sum of money to cover the expenses

40 of serving notice of the appeal on the Respondent. And on such day the Respondent shall be heard to show cause if any against such security being accepted. And in the event of such security being accepted and also the deposit made within such period, then the court shall immediately issue notice of the appeal together with a copy of the petition of appeal, to be furnished to the court for that purpose by the Appellant, to the

Fiscal for service on the Respondent who is named by the Appellant in his petition of appeal, or on his proctor if he was represented by a proctor in the court of first instance, and shall forward to the Supreme Court the petition of appeal together with all the papers and proceedings of the case relevant to the decree or order appealed against ; retaining, however, an office copy of the decree or order appealed against for the purposes of execution if necessary. And such proceedings shall be accompanied by a certificate (form No. 128, First Schedule) from the secretary or clerk of the court, stating the dates of the institution and decision of the case, in whose favour it was decided, the respective days on which petition of 10 appeal was filed and security given, and whether either the plaintiff sued or the defendant defend in *forma pauperis*. But where an appeal is taken from the decision of a Judge of the Supreme Court sitting alone as in section 37 of the Courts Ordinance provided, the Registrar of such court shall, after doing all acts and things necessary to be done by such secretary or clerk as aforesaid preparatory to forwarding proceedings in appeal to the Supreme Court as in this section provided, proceed in manner in section 768 prescribed.

(2) The Fiscal's return to the process issued under this section shall immediately upon being received by the court of first instance be 20 transmitted to the Supreme Court, but where the appeal is from the decision of a Judge of the Supreme Court so sitting alone as in the last-mentioned Ordinance provided, such return shall be made to and filed by the Registrar with the proceedings in appeal.

And when a petition of appeal has been so received, but the petitioner has failed to give the security and to make the deposit as in this section provided, then the petition of appeal shall be held to have abated, and the further proceedings in this section prescribed shall not be necessary.

(3) In the case of any mistake, omission, or defect on the part of any Appellant in complying with the provisions of this section, the 30 Supreme Court, if it should be of opinion that the Respondent has not been materially prejudiced, may grant relief on such terms as it may deem just.

In the Privy Council.

ON APPEAL

from the Supreme Court of Ceylon.

BETWEEN

ABDUL WAHAB MOHAMED

SAMEEN (Defendant) . Appellant

AND

1. P. V. S. ABEYEWICK-

REMA and Two Others . Respondents

Case for the Respondents

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