Privy Council Appeal No. 48 *of* 1961

Abdul Wahab Mohamed Sameen – – – – – – *Appellant*

v.

Palliyaguruge Vithanage Sumanawathie Abeyewickrema and others – – – – – – – – – – *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD APRIL, 1963

Present at the Hearing:

THE LORD CHANCELLOR

LORD EVERSHED

LORD JENKINS

LORD GUEST

SIR MALCOLM HILBERY

[*Delivered by the* LORD CHANCELLOR]

On the 15th February 1957 in the District Court of Colombo, judgment was entered for the first named respondent as substituted plaintiff against the appellant in the sum of Rs. 10,828/– and costs.

The next day, Saturday the 16th February, at about 11.00 a.m. the appellant's proctor filed a Petition of Appeal in the District Court.

Section 756 (1) of the Civil Procedure Code of Ceylon prescribes the further steps that the would-be appellant has to take. It begins as follows:—

> " (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 . . ., tender security as hereinafter directed for the respondent's costs of appeal, and will deposit a sufficient sum of money to cover the expenses of serving notice of the appeal on the respondent."
> This provision requires to be read with section 356 of the Code.

That inter alia provides that

> " 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 . . . notices, or orders is situate, under a precept of that court . . . "

It follows that unless compliance with the requirements of section 756 is waived, the appellant when his Petition of Appeal is received by the court of first instance is required " forthwith " to lodge the notice of security with that court for the necessary steps to be taken for service of the notice by the Fiscal on the respondent.

In this case the appellant's proctor made no attempt until the 28th February to follow this procedure.

Having lodged the Petition of Appeal with the District Court at about 11 o'clock on Saturday the 16th February, he telephoned to the respondent's proctors at about 11.15 a.m. He spoke to a Mr. Cooray who told him that the member of the firm dealing with the case was not available but agreed on

behalf of his firm to receive the notice of security. The appellant's proctor then prepared the notice and took it to the respondent's proctors' premises at about 1.15 p.m. on the same day, only to find that Mr. Cooray had left and that there was no one there to receive it.

On the following Monday the 18th February the notice was again taken to the respondent's proctors' offices. They then endorsed it " Received notice subject to objections ". The notice was then taken to the District Court and stamped with the seal of the Court. The entry for the 18th February in the journal of the action kept by the Court states the contents of the notice and records " Proctors for plaintiff-respondent received notice ". A later entry in the journal shows that it should have been recorded as received " subject to objections ".

On the 28th February the appellant's proctor in an endeavour to comply with section 756 filed a fresh Petition of Appeal and lodged a fresh notice of security with the District Court.

The notice received by the respondent's proctors on the 18th February was in the following terms:—

> " TAKE Notice that the Petition of Appeal of the Appellant presented by me in the above-named action on the 16th day of February, 1957, against the Judgment of the District Court of Colombo dated 15th day of February, 1957, in the said action, having been received by the said Court, Counsel on my behalf will, on the day of 8th March, 1957, at 10.45 o'clock on the forenoon, or so soon thereafter move to tender Security in a sum of Rs. 250/–, for any costs which may be incurred by you in appeal in the premises, and will on the said day deposit in Court a sufficient sum of money to cover the expenses of serving notice of appeal on you.
>
> (Sgd.).....
> Appellant
>
> The 16th day of February, 1957.
>
> (Sgd.) K. RASANATHAN
> Proctor for Appellant "

The notice filed with the District Court on the 28th February also specified the 8th March as the day on which security would be tendered.

Before their Lordships the appellant did not seek to contend that the notice lodged with the Court on the 28th February complied with section 756 or that the giving of it was any ground for relief from the requirements of that section.

Section 756 (1) also provides that on the day specified in the notice (which has to be within a stipulated time from the date of the judgment):

> " 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."

It is to be noted that while the section makes provision for the service of the notice of appeal on the respondent's proctor by the Fiscal, it does not provide for service of the notice of security on the respondent's proctor either directly or by the Fiscal. That can only be done if the court gives a direction to that effect under section 356.

On the 8th March 1957 the respondents appeared before the District Court. Notwithstanding their appearance, the respondents took the point that the appellant's notice of security was bad in that it had not been filed with the Court " forthwith " upon the Petition of Appeal being received by the Court. It was contended on their behalf that this objection was fatal to the appeal. Counsel for the appellant asked that that appeal should not be abated by the District Court but that the matter should be left to the Supreme Court.

The District Judge was of the opinion that the appeal should be forwarded to the Supreme Court and that it should be open to the respondents to take their objection there. He stated that he had been in Chambers from 10.30 a.m. to 12.30 p.m. on the Saturday the 16th February and while he could not say that he had initialled the Petition that morning, he thought that it was most probable that he had done so.

He also recorded that the security tendered was accepted and that there was a perfect bond and he issued notice of appeal for the 23rd March 1957.

On the 9th, 10th and 11th November, 1959 the matter was heard by the Supreme Court (Sinnetamby and Fernando J. J.). The preliminary objection was taken that the notice was not given " forthwith " as section 756 requires. Judgment was given on the 1st February 1960. Sinnetamby J. held that the notice was not given " forthwith ". He treated the notice lodged with the Court on the 18th February as filed too late. He did not in the course of his judgment deal with the question of relief. It may, their Lordships think, be assumed that he did not do so because in the light of the decision of the Supreme Court in *De Silva v. Seenathumma* (1940) 41 N.L.R. 241 he had no power to grant relief on account of failure to give the notice of security " forthwith ".

From this decision the appellant now appeals.

Their Lordships' attention was drawn to the conflicting views of Bertram C. J. in *Fernando v. Nikulan Appu* (1920) 22 N.L.R. 1 and Basmayake C. J. in *Thenuwara v. Thenuwara* (1959) 61 N.L.R. 49 as to the meaning to be attached to the phrase at the commencement of section 756 (1) " when a petition of appeal has been received by the court of first instance under section 754 ". Section 754 requires the Petition to be " presented " to the court of first instance and states " the court to which the petition is so presented shall receive it and deal with it as hereinafter provided. If those conditions are not fulfilled it shall refuse to receive it."

Sections 755 and 758 state how the Petition is to be drawn and its language and form. Section 759 gives the Court power to reject the Petition if it is not properly drawn up or to return it for amendment or to amend it then and there.

Bertram C. J. expressed the view (at page 3 of the Report) that the notice of security " must follow forthwith, not upon the presentation of the petition, but upon its receipt. The receipt " he said " is the act of the Court, and before receiving the petition the Court must verify the fact that the petition is in time." Basnayake C. J. took the contrary view, namely that the Petition was " received " for the purposes of section 756 when it was handed to the appropriate officer of the court.

As in this case it was common ground that the Petition was " received " in both senses in the morning of the Saturday the 16th February, it is not necessary for their Lordships to decide which view is right.

The importance which has been attached to the meaning of " received " in section 756 would appear to be due to the narrow interpretation which has been given to the word " forthwith ".

In *Fernando v. Nikulan Appu supra* Bertram C. J. held that in the circumstances of that case a notice of security was given forthwith despite the fact that two days elapsed between the presentation of the Petition and the giving of the notice. He pointed out that the Judge might have "received " the Petition at the end of one day at the conclusion of the court and that on that supposition the petitioner could have ascertained that fact and filed the notice the next day. On that basis there was a delay of one day. He held and Shaw J. agreed with him that a delay of one day did not prevent the court from holding that the notice was given forthwith.

Bertram C. J. added (at page 4):

> " I think, however, that, as a general rule, it is the intention of the section that the notice should be filed on the same day as the receipt is verified or can reasonably be verified. It is important that this principle

should be observed, all the more so as delays may interpose themselves between the filing of the notice in Court and its actual delivery by the Fiscal's officer."

In *De Silva v. Seenathumma supra* the question was whether relief should be given under section 756 (3) on account of the fact that the plaintiff-respondent was not served with the notice of security until after the date specified in the notice. This case was heard by a bench of five Judges who held that the court had no power to grant the relief asked for.

In the course of his judgment with which the other four Judges agreed, Soertsz J. said (at page 247):

> " The next question is what are the requirements of Section 756 that *must* be complied with unless they have been *expressly* waived. Section 756 (1) sets them forth explicitly. They are (1) that the appellant, once the petition of appeal has been received, shall give notice *forthwith* that he will *on* a date within 20 days from the date of the decree or order appealed against (*a*) tender and perfect his security, (*b*) that he will deposit a sum of money sufficient to cover the expenses of serving the notice of appeal . . . "

At the conclusion of his judgment (at page 249) he said

> " To sum up, the conclusions reached are that . . . 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 (*Fernando v. Nikulan Appu supra*)."

In the present case Sinnetamby J., following this decision, stated that the notice was eventually filed in court on the 18th February and held that it should have been filed on the same day as the Petition, that is to say, the 16th February. Fernando J.'s judgment was to the same effect.

In their Lordships' opinion it is not right to construe the word "forthwith" as meaning " on the same day ". If it had been intended that the notice must be filed on the same day as the Petition of Appeal, that could have been expressed in section 756 by the use of the words " on the same day ". It is to be observed that the decision in *Fernando v. Nikulan Appu supra* does not support the interpretation placed on " forthwith " by Soertsz J. at the end of his judgment. The decision in that case was that the delay of one day did not prevent the court from holding that the notice was given " forthwith ".

Bertram C. J. in expressing his opinion that as a general rule it was the intention of the section that the notice should be filed on the same day as the receipt was verified or could reasonably be verified, did not hold that as a matter of law the notice must be filed the same day as the Petition of Appeal was received. If he had held that, it would have been in conflict with the decision in that case.

In their Lordships' opinion Soertsz J. in *De Silva v. Seenathumma supra* was wrong in saying that the notice must be filed the same day as the Petition was received. In many cases it may well be that unless the notice is filed the same day it cannot be said to be filed " forthwith " but it may be filed forthwith even though not filed the same day. Their Lordships do not propose to attempt to define " forthwith ". The use of that word clearly connotes that the notice must be filed as soon as practicable, but what is practicable must depend upon the circumstances of each case.

Sinnetamby J. in this case said that the notice was eventually filed on the 18th February. If it had been filed for the purpose of complying with the requirements of section 756, namely to secure the service by the Fiscal of the notice on the respondent, it may well be that, having regard to the circumstances of this case and in particular to the fact that the court did not sit on the Saturday afternoon, it should be treated as having been filed forthwith.

Before their Lordships it was submitted by counsel for the respondent that the notice filed on the 18th February was not filed for that purpose and this was agreed by counsel for the appellant. It would seem that the

purpose of filing it was to inform the court of the contents of the notice and of the fact that the respondent's proctors had received it. In these circumstances their Lordships do not think it would be right to hold that the filing of the notice on the 18th February complied with section 756. It follows that the prescribed procedure was not followed by the appellant, with the consequence that unless he is granted relief his appeal is abated.

Section 756 (3) of the Civil Procedure Code. which was added in 1921 after the decision in *Fernando v. Nikulan Appu supra*, reads as follows:

> " In the case of any mistake, omission, or defect on the part of any appellant in complying with the provisions of this section, the 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."

This provision has been the subject of judicial consideration on a number of occasions. In *Silva v. Goonesekere* (1929) 31 N.L.R. 184, it was admitted that notice of appeal had not been given to any of the parties and that the security bond had not been signed by any of the parties. The Court refused to grant relief under 756 (3) and Fisher C. J., in the course of his judgment, said (at page 185):

> " I do not think that this additional paragraph [756 (3)] can be held to apply to cases where there has been a substantial non-compliance with the provisions of the section. In my opinion it applies to more or less trivial omissions where it may be said that although the strict letter of the law has not been complied with the party seeking relief has been reasonably prompt and exact in taking the necessary steps."

Their Lordships do not consider that the limitation placed by Fisher C. J. on the scope of section 756 (3) is justified. The sub-section begins:

> " In the case of *any* mistake, omission, or defect on the part of any appellant in complying with *the provisions* of this section ".

It does not attempt to distinguish between substantial or more or less trivial mistakes, omissions or defects, and the sub-section, in their Lordships' view, applies in relation not just to some, but to all, the provisions of section 756.

Their Lordships do not wish to suggest that relief was not rightly refused, but in their view Fisher C. J. was wrong in thinking that there was any such limitation on the power to grant relief.

In *Zahira Umma v. Abeysinghe* (1937) 39 N.L.R. 84 Abrahams C. J., in the course of his judgment (at page 85) said:

> " It seems to me that there are two forms of a breach of section 756 in respect of which this Court ought not to give relief. One is when, whether a material prejudice has been caused or not, non-compliance with one of the terms of section 756 has been made without an excuse, and the other is when though non-compliance with an essential term may be trivial, a material prejudice has been occasioned."

Abrahams C. J. does not appear to have been intending to say that the powers of the court under section 756 were in any way restricted, but only to have been expressing his opinion as to the circumstances in which the court should not, in the exercise of its discretion, grant relief. Whether or not there was an excuse for non-compliance with a requirement of the section is a material circumstance to be taken into account in deciding whether or not, the Court should in the exercise of its discretion, grant relief. But the sub-section itself does not provide that relief shall not be granted if there is no excuse for non-compliance and to interpret it in this way is, in their Lordships' opinion, wrong.

In *De Silva v. Seenathumma supra* Soertsz J. cited this passage from the judgment of Abrahams C. J. and said (at page 245):

> " This is an authoritative decision of this Court and, if we may say so, contains a correct statement of the meaning of section 756 read as a whole, but in view of the fact that that decision does not appear to have been duly appreciated, in the succinct form in which it has been expressed, it seems desirable to elucidate its meaning. The first part of that

> statement is intended to lay down that where there has been a *total failure* to comply with one of the terms of section 756, relief will not be given even if it should be apparent that no material prejudice has been occasioned to the respondent by such a failure, for peremptory requirements of the law must be given full effect."

Their Lordships are unable to agree with these observations made by the learned judge. As has been said, Abrahams C. J. was not, so it would seem, intending to state the meaning of section 756 read as a whole but merely expressing an opinion as to the exercise of their discretion by the court. Their Lordships cannot agree that the first part of Abrahams C. J.'s statement was intended to lay down that where there has been a total failure to comply with one of the terms of section 756, relief will not be given even if it should be apparent that no material prejudice has been occasioned to the respondent.

Later in his judgment (at page 247) Soertsz J. said:

> "The result thus reached is that this Court is not empowered by sub-section (3) to grant relief where there has been a failure to comply with an essential requirement of section 756 regardless of the question of prejudice, but may do so in cases in which there has been ' mistake, omission, or defect *in complying* with the provision of section 756 ' provided the respondent has not been materially prejudiced.
>
> I cannot read sub-section (3) in the manner proposed by the appellant's Counsel as covering ' all failures ', for to read it in that way, that sub-section will have to be recast, for instance, as follows: *in the case of a failure to comply with, or* of any mistake, omission, or defect *in complying with* ".

The distinction sought to be drawn by the learned judge between " a failure to comply with " and " a mistake, omission or defect in complying with " is not, in their Lordships' opinion, a valid one. The failure to comply with a requirement may be due to a mistake or omission. An omission in complying with a requirement must, so it seems to their Lordships, involve a failure to comply with the requirement.

Their Lordships are accordingly unable to accept the learned judge's view as a correct interpretation of section 756 (3). As their Lordships have said, that sub-section is expressed to apply in relation to the provisions of section 756 and there is no justification for saying that it applies to some and not to all the provisions of that section. It is also expressed to apply in relation to *any* mistake, omission or defect.

In their Lordships' view the Supreme Court is given by this sub-section the power to grant relief on such terms as it may deem just where there has been a failure to comply with an essential requirement of the section. The only limitation imposed by the sub-section is that the court has not power to do so unless it is of the opinion that the respondent has not been materially prejudiced.

This decision was followed in a number of cases cited by Basnayake C. J. in his judgment *Thenuwara v. Thenuwara supra*, and by the learned Chief Justice in that case. It was followed by the Supreme Court in this case with the result that that court did not consider whether it would have granted relief if it had thought it had power to do so.

Can it be said that there are any grounds for an opinion that the respondents were materially prejudiced by the appellant's failure to comply with the requirements of section 756? The obvious intention of the provision that they should be given notice of security forthwith is that they should have due notice of the day fixed for them to show cause, if they wished, against the security tendered being accepted. On Monday 18th February they had notice that the date for that would be the 8th March and on the 8th March the respondents were represented at the hearing before the District Court. In fact they may well have had notice of that date at an earlier time than they would have had if the procedure laid down by the Civil Code had been carried out. If the appellants had filed notice of security

in the District Court on Saturday 16th February or on the morning of the 18th February, the Court would have then had to issue a precept to the Fiscal and then some delay might have occurred before the Fiscal served the notice.

In the circumstances, in their Lordships' opinion, the respondents cannot have been materially prejudiced by the failure to file the notice of security with the court for service by the Fiscal.

It does not follow that relief should be given even if the respondents have not been materially prejudiced but relief should not be lightly withheld, for the effect of refusing relief may be to deprive a litigant of access to the Supreme Court and, if the original judgment is wrong, amount to a denial of justice.

In this case importance is to be attached to the fact that on the Saturday 16th February Mr. Cooray, a member of the respondent's proctors' firm agreed to accept notice of security. That may well have led the appellant's proctor to suppose that the respondent's proctors were prepared to waive compliance with the requirements of section 756 and so have led him not to have filed the notice at the Court that morning.

While the respondents were entitled to object on the Monday on the ground that section 756 had not been complied with, it may well be regarded as somewhat surprising that they should have done so in view of the statement made by Mr. Cooray on the Saturday.

Their Lordships were invited to remit the case to the Supreme Court to consider whether relief should be granted, it being urged that as the Supreme Court had held, regarding themselves bound by authority that they did not have power to grant relief in respect of this non-compliance, this course should be taken.

Their Lordships, bearing in mind the technicality of the respondent's objection and the fact that the respondent cannot have been materially prejudiced, have come to the conclusion that it would not be right to take this course, and so prolong litigation which started so long ago as 1957. In their Lordships' view there can be no doubt that in the circumstances of this case relief should be granted and the appeal not abated and accordingly their Lordships will humbly advise Her Majesty that the appeal should be allowed with costs and with the costs incurred in the Supreme Court.

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In the Privy Council

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v.

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