1959 *Present :* **Weerasooriya, J., and K. D. de Silva, J.**

D. G. WIJEMANNE, Appellant, *and* C. COSTA, Respondent

S. C. 76, with Application 210—D. C. Panadura, 4,824

Appeal—Abatement—Security for costs—Hypothecation by bond prior to acceptance of security by Court—Effect—Officers before whom the bond may be executed—Civil Procedure Code, ss. 756 (1) and (3), 757.

An order abating an appeal would be valid if the bond hypothecating security for costs of appeal in terms of section 756 (1) read with section 757 of the Civil Procedure Code is executed before the security is accepted by the Court. However, if the security given is in cash, relief may be granted under sub-section 3 of section 756.

A bond hypothecating security for costs of appeal must be executed before the Judge or the Secretary or the Chief Clerk. A bond, therefore, hypothecating a sum of money and signed before a Justice of the Peace is not a valid hypothecation.

APPEAL, with application in revision, from an order of the District Court, Panadura.

H. V. Perera, Q.C., with *E. A. G. de Silva* and *M. L. de Silva*, for the defendant-appellant.

C. Thiagalingam, Q.C., with *T. P. P. Goonetilleke*, for the plaintiff-respondent.

Cur. adv. vult.

August 6, 1959. K. D. DE SILVA, J.—

This is an application by the defendant-petitioner for the revision of the order made by the District Judge, Panadura, on April 2, 1957 abating his appeal filed on December 14, 1956 in D. C. Panadura Case No. 4,824. There is also an appeal from this order. It is appeal No. 76 which was taken up with this application. Judgment was entered for the plaintiff respondent on December 14, 1956. On the same day the defendant-petitioner tendered a petition of appeal which was accepted by Court. Thereafter his proctors filed on the same day the notice of security calling upon the respondent to take notice that the appellant would on the 4th day of January, 1957 (or so soon thereafter as is possible) move to tender security by depositing in Court to the credit of the case a sum of Rs. 250. Order was made to issue notice of security returnable on 4.1.'57. The appellant's proctors also obtained a deposit note from the Court on December 12, 1956 to deposit a sum of Rs. 250. This sum was deposited in the kachcheri and a kachcheri receipt was obtained and filed in Court on the same day. On January 4, 1957 which was the returnable date of the notice of security the proctor for the plaintiff respondent appeared in Court and stated that he was accepting the security. The notice had already been served on him personally. Immediately after the respondent's proctor expressed his willingness to accept the security tendered, a perfected bond hypothecating the sum of Rs. 250 was filed and order was made to issue notice of appeal. The bond in question was signed by the appellant on December 31, 1956 at Colombo in the presence of a Justice of the Peace. On April 2, 1957 the respondent's proctor moved that the appeal be abated for the reasons set out in the motion. The matter was fixed for inquiry and the learned District Judge having heard Counsel who appeared for each party made his order abating the appeal for the reasons (1) that the bond had been perfected before the security had been accepted by the Court and (2) the bond in question is not a valid hypothecation as required by section 757 of the Civil Procedure Code. The learned District Judge considered himself bound by the decisions in *De Silva v. Seenethumma* [1] and *Ranasinghe v. Pieris* [2] on the question whether a bond perfected before the acceptance of the security by the Court is valid or not. In the former case a Divisional Bench held that it was irregular to accept the security tendered before the notices of security were served on all the respondents. But, in that case relief under sub-section 3 of section 756 was granted with reluctance because material prejudice had not been caused to the respondents. In

[1] (*1940*) *41 N. L. R. 241.* [2] (*1954*) *57 N. L. R. 538.*

the latter case I held, sitting alone, that the security bond can be perfected only after the notice of security has been served on the respondent and the security has been accepted by Court. In that case the security bond had been perfected before the service of the notice of security and before the acceptance of the security by the Court and I refused to grant relief under sub-section 3 of section 756 C. P. C. In the earlier case Soertsz J., while granting relief under that sub-section, stated that that decision did not mean that in future cases relief would necessarily be given in similar circumstances. In the case of the *Demodera Tea Company Ltd. v. Pedrick Appu* [1] De Sampayo J. held that the acceptance of the security was a judicial act and should be evidenced by an order of the Court. In the instant case it was contended by Mr. H. V. Perera Q.C. that the bond had been perfected after the security had been accepted by the Court. According to him the bond in question must be considered to have been perfected only after it was tendered to Court although the bond itself was signed on December 31, 1956 in the presence of a Justice of the Peace. I am unable to agree with that view. The date of the bond is the date on which it was signed although it was tendered to Court only on January 4, 1957.

The object of giving notice of security as contemplated by section 756 is to afford an opportunity to the respondent to satisfy himself that the security proposed to be tendered is adequate if it is to be given in cash or if it is proposed to be given by hypothecating immovable property that the amount of the security is adequate and also the title to the property intended to be hypothecated is sound. Therefore if the security is to be given in cash and the amount of such security is adequate no prejudice would be caused to the respondent by the acceptance of such security even before the notice of security has been served on him although it would amount to an irregularity. It is also well known that in most District Courts there are fixed schedules of security for costs prepared by Judges in consultation with and the approval of the proctors habitually practising in those Courts and those schedules are strictly adhered to. It was not suggested that the security tendered in this case by the appellant was insufficient. Therefore I am prepared to reconsider my earlier decision (57 N. L. R. 588) with the view to the granting of relief under sub-section 3 of section 756. But unfortunately for the appellant, the 2nd objection is clearly entitled to succeed. As stated earlier this bond was signed before a Justice of the Peace. There is no provision for the execution of bonds hypothecating movable property under section 757 before a Justice of the Peace. In *Mohammud Thamby v. Pathumma* [2] an appellant tendered a security bond hypothecating immovable property signed by the obligor before the Chief Clerk of the District Court. Objection was taken to this bond because it was not executed in the manner prescribed by Ordinance No. 17 of 1840 or Ordinance No. 17 of 1852. This objection was rejected by Bertram C. J. who stated that the bond in question had been executed in accordance with a practice which had always prevailed for a long time past in our District Courts. He observed " We should hesitate very long before giving a decision contrary to that general practice. " Again the same Chief Justice gave effect to that long

[1] *(1921) 22 N. L. R. 381.* [2] *(1918) 1 Ceylon Law Recorder 26.*

standing practice in *Fernando v. Fernando* [1]. In that case the proctor for the appellant executed in his office a bond by hypothecating immovable property and tendered it to Court. Objection was taken to it on the ground that it was not executed either before the Judge or the Secretary in accordance with the established practice. That objection was upheld. In doing so the learned Chief Justice referred to the judgment of the Full Court in *Queen's Advocate v. Thamba Pulle* [2] and stated " That case established an exception to the general statutory rule that every mortgage of immovable property must be executed in accordance with the requirements of Ordinance No. 7 of 1840. The Court in establishing that exception said that the provisions of section 2 of the Ordinance No. 7 of 1840 evidently referred to conventions between parties and not to judicial hypothecs constituted as this is by the order of the Court. That exception has ever since been recognized. The question is what did the Court mean by establishing it. I think it meant to rule that the requirements of section 2 of the Ordinance No. 7 of 1840 were not intended to apply to hypothecary bonds executed as an incident in judicial procedure before the Court. " The effect of the bond under section 757 hypothecating the money in deposit is to create a judicial hypothec over that money. Surely, if in the matter of hypothecating immovable property under section 757 the bond has to be executed before the Judge or the Secretary or the Chief Clerk, as the case may be, by parity of reasoning, a bond hypothecating money as security for costs should also be executed in the same manner. This bond has not been executed either before the Judge or the Secretary and therefore section 756 (1) read with section 757 has not been complied with. The application is refused with costs. Appeal No. 76 is dismissed without costs.

WEERASOORIYA, J.—I agree.

Application and Appeal dismissed.