MARTIN
V.
SUDUHAMY

SUPREME COURT.
BANDARANAYAKE, J., FERNANDO, J. AND KULATUNGA, J.
S. C. APPEAL NO. 33/90.
S. C. (SP. L. A.) NO. 85/90.
C. A. APPEAL NO. 661/83(F).
D. C. HAMBANTOTA NO. L/542.
OCTOBER 26, 1990.

Appeal - Hypothecation of security - Material prejudice - Discretion of court - Sections 757(1) and 759(2) of the Civil Procedure Code - Failure to comply with requirements of S. 757 (1).

The District Court gave its judgment on 18.10.83. Notice of appeal was presented to the District Court on 28.10.83 accompanied by the required security (a sum of Rs. 750/-) in terms of S. 755 (2) of the Civil Procedure Code. A petition of appeal was subsequently filed on 16.12.83 in terms of S. 755(4). The security deposited was not hypothecated by bond as security for the costs of appeal as provided for by S. 757(1) of the Code. When objection to the hearing was taken on this ground the appellant took a postponement but took no meaningful steps to rectify the omission. Instead at the hearing he argued that he need not comply with this requirement where security is in cash. What is therefore suggested by the failure to hypothecate is that the omission to hypothecate was not a mere mistake or oversight but intentional.

Held:

If non-compliance with the relevant provisions did cause material prejudice to the respondent both before and after 1977 (when the provisions relating to appeal were amended) the appeal had to be dismissed. If such non-compliance did **not** cause material prejudice, prior to 1977 there was prohibition on the rejection of the appeal; and the Court was required to give the appellant an opportunity of putting matters right before rejecting the appeal. After the amendments of 1977 there is no such prohibition. Instead the Court has a discretion either to grant relief, or to reject the appeal. Two questions thus arise -Does the Court of Appeal have jurisdiction

to grant relief in respect of any mistake, omission or defect in complying with the relevant provisions? If it has jurisdiction, do the circumstances warrant the exercise of its discretion to grant relief?

The continuance of litigation cannot be treated, as the Court of Appeal did, as material prejudice because that will be true of every case. What is contemplated is prejudice caused by or in consequence of the non-compliance. While relief will more readily be granted if the non-compliance is trivial, or where an excuse or explanation is offered, relief can still be granted even in respect of total or substantial non-compliance and even if no excuse is forthcoming but not where the non-compliance is, as here, deliberate. The discretion under section 759(3) is a judicial discretion. It was incumbent on the appellant to place the necessary material before the Court and to invite the Court to exercise that discretion. This the appellant failed to do. The appeal should therefore have been rejected in the exercise of the discretion vested in the Court of Appeal.

Per Kulatunge J:

Under S. 759(2) of the Civil Procedure Code "what is required to bar relief is not any prejudice but material prejudice i.e. detriment of the kind which the respondent cannot reasonably be called upon to suffer. If there is such prejudice it is no argument for the appellant to contend as a matter of right that it can be mitigated by appropriate terms such as the payment of costs".

Cases referred to:

1. *Abdul Cader v. Sittinisa* (1951) 52 NLR 536
2. *Sameen v. Abeyewickrema* (1963) 64 NLR 553, 560, 561, 562, 563 PC
3. *Pathinayake v. Kannangara* (1958) 60 NLR 188
4. *De Silva v. Seenathumma* 41 NLR 241, 245, 247
5. *Dona Ceciliana v. Kamala Piyaseeli* [1990] 1 Sri LR 226, 234
6. *Wood v. Riley* [1867] LR 3 CP 26, 27
7. *Silva v. Goonesekera* 31 NLR 184
8. *Ramalingam v. Velupillai* 38 NLR 255
9. *Zahira Umma v. Abeysinghe* 39 NLR 84
10. *Careem v. Uvais* – 57 NLR 72
11. *Noris Appuhamy v. Udaris Appu* 58 NLR 441
12. *Chelliah v. Selvanayagam* 59 NLR 119
13. *Ratnayake v. Bandara* [1990] 1 Sri LR 156, 158, 162
14. *Arulanpalam v. Daisy Fernando* [1956] 1 CALR 651
15. *Careem v. Amerasinghe* 1 Sriskantha's L. Rep. 25
16. *Silva v. Cumaratunga* 40 NLR 139, 140

17. *Kiri Banda v. Ukku Banda* [1986] 2 CALR 191, 194
18. *Vithana v. Weerasinghe* [1981] 1 Sri LR 52, 57

APPEAL from a judgment of the Court of Appeal.

P. Nanayakkara with *Edward Rodrigo* and *Sarath Upul Fernando* for defendant -appellant.

M. S. A. Hassan with *M.I. Waffa* for respondent.

Cur.adv.vult.

January 28, 1991.

BANDARANAYAKE, J.

I have had the advantage of reading the judgments in draft of my brothers Kulatunga, J. and Fernando, J.

The question that arises for consideration is whether an appeal presented to the original Court but which has not been perfected by the hypothecation of security in violation of S. 755 (2) read with S. 757 (1) can be cured by the provisions of S. 759 (2) of the Civil Procedure Code.

The facts are as follows: The District Court gave its judgment on 18.10.83. Notice of Appeal was presented to the District Court on 28.10.83 accompanied by the required security (a sum of Rs. 750/-) in terms of S.755 (2) of the Code. A petition of appeal was subsequently filed on 16.12.83 in terms of S. 755 (4). The security deposited was not however hypothecated by bond as security for the costs of appeal as provided for by S. 757 (1) of the Code.

The former Civil Procedure Code provided for the deposit of security and hypothecation by bond in terms of S. 757 of that Code. The Administration of Justice Law which replaced that earlier Code provided for the deposit of cash in a Bank in terms of the Rules made under S. 15 thereof. There was no need for hypothecation. However, under the present law the Civil Procedure Code - Law No. 19 of 1977 - there is express provision for hypothecation in terms of s. 757 (1). Early case law has treated the necessity for hypothecation as being peremptory, affecting the validity of an appeal. Vide - *Careem v. Uvais* (10), *Nonis Appuhamy v. Udaris Appu* (11) *Chelliah v. Selvanayagam* (12). The Privy Council in *Sameen v. Abeywickrema* (2) took a more liberal approach to which I am attracted. In more recent times the Court of Appeal in *Don Ceciliyana v. Kamala Piyaseeli* (5) has held that failure to hypothecate is fatal as it is the act of execution of the bond that provides the security required by the Code.

In the instant case the Court of Appeal held that hypothecation was integral to a valid appeal and rejected the appeal. It is true that there has been no compliance with the requirement of hypothecation but the relief available under S. 759 (2) is for non-compliance with ....." any of the preceding provisions of Chapter LVII "which therefore should include relief for non-compliance with the requirement of hypothecation contained in S. 757 (1), provided the Court forms the opinion that the respondent will not be materially prejudiced if relief is granted. This means the Court can grant relief but need not. The opinion of the Court could be either—

(i) that it will prejudice the respondent if relief is granted, or,
(ii) that it will not.

The Court can form an opinion only upon a consideration of all circumstances relevant to the appellant's failure to

comply with the requirement for hypothecation. I am in agreement with the views expressed by Fernando, J on this matter.

Thus on the question as to why the appellant failed to comply with the need for hypothecation we have the fact that when the objection to the hearing of the appeal was taken on this ground the appellant took a postponement but took no meaningful step thereafter to rectify the omission. The appellant merely argues before us that he need not comply with the requirement. His conduct and his failure to offer an explanation suggest that his failure to hypothecate was not by a mere mistake or oversight but probably intentional. Such conduct in my view shoud be regarded as materially prejudicial to the respondent and not a trivial inconvenience. The appeal should therefore be rejected. The appeal is dismissed with costs.

FERNANDO, J.

I have had the advantage of reading the judgment, in draft, of my brother Kulatunga, and while I am in agreement with his conclusion that this appeal should be dismissed. I wish to set out my reasons briefly.

The Civil Procedure Code requires that a "notice of appeal shall be accompanied by.....security for the respondent's costs of appeal **in such amount and nature** as is prescribed in the rules made under section 15 of the Administration of Justice Law, No. 44 of 1973" (section 755(2) (a)), and that "the security to be required from a party appellant shall be by bond [with sureties]....., mortgage of immovable property, or deposit and hypothecation by bond of a sum of money sufficient to cover the cost of the appeal and to no greater amount" (section 757 (1)). When these two sections and the rules are considered together, there is no ambiguity or inconsistency: where cash is offered as security, the rules prescribe the amount (Rs. 750/-), and section 757(1) requires that this sum be deposited and hypothecated by bond. Section 755

(2)(a) does not make the rules applicable in their entirety, but only that part of the rules which relates to the nature and amount (in this instance cash in a sum of Rs. 750/-). Neither section 755(2)(a) nor the rules make any provision as to the manner and form in which this sum is to be "secured" to meet the successful respondent's costs of appeal. It is section 757(1), which specifies the manner (i.e. deposit) and the form (i.e. hypothecation by bond). I therefore agree with my brother Kulatunga that the Appellant's first contention - that hypothecation is not required - fails; the fact that this contention was throughout placed in the forefront of the Appellant's case strongly suggests that the failure to comply with section 757(1) was deliberate.

What then are the consequences of the Appellant's failure to comply with the requirements of section 757(1)? The law prior to 1960 was strict. Section 756(2) then provided that where the appellant "has failed to give the security and to make the deposit..... the petition of appeal shall be held to have abated". The power granted by section 756(3), to give relief in respect "of any mistake, omission or defect.....in complying with the provisions of this section" (i.e. section 756 only) was narrowly construed. Our law reports of the 1950's are full of instances where non-compliance in respect of security and other matters resulted in the rejection of appeals. However, there were judicial pleas for legislative relaxation. Thus in *Abdul Cader v. Sittinisa,* (1) only Rs. 20/- (instead of Rs. 25/-) had been deposited as fees for typewritten copies; although the appeal was declared to have abated, the Court acted in revision and granted relief to the appellant. Gratiaen, J., observed —

> "until the present rule is relaxed I see no reason why the revisionary powers of this Court should not be exercised in appropriate cases".

Pulle, J., considered it —

> "unfortunate that whereas the Legislature has made express provision in section 756(3)..... to relieve an

appellant from mistakes, omissions or defects in complying with section 756(1) there is no corresponding rule to enable the Court to grant relief in respect of mistakes or omissions in applying for typewritten copies. The frequency with which objections based on non-compliance with the rules are taken, and the extremely harsh manner in which they operate in certain cases are grounds which call for an urgent amendment of the rules".

The Supreme Court Appeals (Special Provisions) Act, No. 4 of 1960, provided that, where an appeal has been presented within the prescribed time, "the Supreme Court shall not exercise the powers vested in such Court by any written law to reject or dismiss that appeal on the ground only of any error, omission or default on the part of the appellant in complying with the provisions of any written law.....unless material prejudice has been caused thereby to the respondent" [section 4(1)]; and in the case of an appeal which is not rejected or dismissed "shall ..... direct the appellant to comply with such directions as the Court may deem necessary for the purpose of rectifying, supplying or making good any error, omission or default.....within such time and upon such conditions as may be specified....." (section 4(2)). This legislative change was supplemented by a more liberal judicial approach reflected in *Sameen v. Abeyewickrema*, (2) P.C., to which no further reference is necessary in view of the full discussion in my brother Kulatunga's judgment.

This prohibition on the rejection of appeals for mere "technicalities", not causing material prejudice, was continued by the Administration of Justice Law (sections 353(2) and (3)) but not in the Civil Procedure Code as re-enacted in 1977. However, two changes made in 1977 are significant: the former section 756(2) was omitted, and while section 759(3) was substantially a re-enactment of the old section 756(3), it is wider as it is applicable to non-compliance with the provisions of

"the foregoing sections", (and not merely one section). Such re-enactment can be taken to be a legislative confirmation of the more liberal interpretation adopted by the Privy Council in *Sameen v. Abeyewickrema.*

The resulting position is that if non-compliance with relevant provisions did cause material prejudice to the respondent, both before and after 1977 the appeal had to be dismissed. If such non-compliance did *not* cause material prejudice, prior to 1977 there was a prohibition on the rejection of the appeal; and the Court was required to give the appellant an opportunity of putting matters right before rejecting the appeal. Now, however, there is no such prohibition. Instead, the Court has a discretion either to grant relief, or to reject the appeal. Two questions thus arise - Does the Court of Appeal have *jurisdiction* to grant relief in respect of any mistake, omission or defect in complying with the relevant provisions? If it has jurisdiction, do the circumstances warrant the exercise of its *discretion* to grant relief?

If the Court of Appeal is of opinion that the respondent has not been materially prejudiced, by non-compliance with relevant provisions, it has jurisdiction to grant relief. In the present case, the Court of Appeal was clearly in error in holding that "the very continuance of litigation would itself amount to material prejudice": if that be correct, that would be true of every case (including *Sameen v. Abeyewickrema*) in which relief is sought under section 759(3), and every application for relief would have to be refused on that ground. Such an interpretation must be resisted, unless compelled by clear words. What is contemplated is prejudice caused by or in consequence of the non-compliance. Since the judgment under appeal sets out no other basis or ground for holding that material prejudice had been caused to the Respondent, it is unecessary to consider this aspect any further. It must, however, be pointed out that the view taken by the Court of Appeal is contrary to *Sameen v. Abeyewickrema,* and is also inconsistent with *Pathinayake v. Kannangara,* (3) where a

bond was furnished by the appellant which did not contain a clause hypothecating the money deposited as security. The **prejudice** to the respondent is the same, whether there is no bond, or whether there is a bond which lacks a vital clause, namely, it gives rise to the possibility that the sum deposited as costs might not be available to the successful respondent. But is this prejudice "material"? In the context of prevailing costs of litigation in the appellate Courts, I find it difficult to regard the prejudice caused by the possible non-availability of a sum of Rs. 750/- as "material" or "substantial", in a case where the respondent has obtained judgment in a sum of Rs. 26,000 with interest from 1978, as well as damages at the rate of Rs. 13,000 per annum from 1978.

It then becomes necessary to consider whether the Court of Appeal ought to have exercised its discretion to grant relief. While relief will more readily be granted if the non-compliance is trivial, or where an excuse or explanation is offered, I am in respectful agreement with Lord Chancellor in *Sameen v. Abeyewickrema* that relief can be granted even in respect of total or substantial non-compliance, and even if no excuse is forthcoming. But while the Appellant's non-compliance was by no means substantial, the material before us suggests that the Appellant deliberately did not comply with section 757(1); obtained a postponement of the hearing when the objection was taken, but refrained from taking any steps to cure his default; and made no application for relief to the Court of Appeal. The discretion under section 759(3) is a judicial discretion; it was incumbent on the Appellant to place the necessary material before the Court and to invite the Court to exercise that discretion. This the Appellant failed to do, and the appeal should have been rejected in the exercise of the discretion vested in the Court of Appeal. I therefore agree that the appeal must be dismissed with costs.

KULATUNGA, J.:

This is an appeal against a judgment of the Court of Appeal rejecting ah appeal made to that Court by the defendant-appellant from a judgment of the District Court of Hambantota. The plaintiff respondent took a preliminary objection that the appeal is invalid for the reason that the sum of Rs. 750/- deposited as security for the respondent's costs of appeal had not been hypothecated by bond, as required by S. 755 (2)(a) read with S. 757(1) of the Civil Procedure Code. The Court held that the failure of hypothecation is fatal and hence cannot be cured by recourse to S. 759 (2) of the Code. The Court was also of the opinion that (in any event) material prejudice has been caused to the respondent by such failure and hence no relief can be granted under S.759 (2); in the result it upheld the preliminary objection and rejected the appeal. This Court granted special leave to appeal from that judgment as the case involves the interpretation of s.759 (2) of the Code in regard to which there now appear to be conflicting decisions.

In the year 1940 a Bench of five Judges in *de Silva v. Seenathumma* (4) endeavoured to resolve what Soertsz J. described therein as the "deplorable" misapprehension and uncertainty as to the meaning of S. 756 of the then Code. Subsection 3 of that section corresponds to S. 759(2) of the present Code. However, it was only after the lapse of more than two decades thereafter that the matter was finally decided by the Privy Council in *Sameen v. Abeywickrema* (2). Despite that decision, the same or similar controversy has again arisen on the interpretation of the relevant provisions of the new Code possibly for the reason that the Court of Appeal has not thought it necessary in deciding cases before it to make a general survey of the previous decisions for ascertaining the principles which may be adopted in interpreting the provisions presently in force. I consider this an appropriate case to undertake such survey. The facts of this case are as follows:

On 18.10.83 the District Judge gave judgment declaring the plaintiff-respondent to be the owner of a paddy land and for the ejectment and damages against the defendant-appellant who was in possession thereof in the purported exercise of the rights of a tenant cultivator. The notice of appeal against the said judgment was filed on 28.10.83 and was accompanied by security for the respondent's costs of appeal in a sum of Rs. 750/- in terms of S. 755 (2) (a) of the Code. The petition of appeal in terms of S. 755(3) was filed on 16.12.83 and on the same day the District Judge ordered that the appeal and other papers be forwarded to the Court of Appeal as required by S. 755(4).

It is common ground that the security deposited as above had not been hypothecated by bond as required by S. 757(1) of the Code and this point was taken as a preliminary objection to the appeal when it came up for hearing on 11.05.90. After a postponement which was applied for and obtained by the respondent in view of the preliminary objection the matter was argued on 05.06.90 at which the appellant's Counsel submitted —

(a) that hypothecation of security by bond under S.757(1) is not a step necessary to lodge a valid appeal but is only a limitation placed on the right of a respondent to demand security, which is seen by the last five words of that section;

(b) In any event the respondent has not been materially prejudiced by such omission or mistake and therefore the appeal should not be rejected.

As a matter of fact, the appellant gave no explanation for the failure to hypothecate the security by bond and the question of prejudice was not considered by the Court in depth apart from a statement in the judgment that the very continuance of litigation would itself amount to material prejudice.

In its judgment given immediately after the arguments the Court upheld the preliminary objection and rejected the

appeal, applying a previous decision of that Court in *Dona Ceciliana v. Kamala Piyaseeli* (5) which, inter alia, held that the failure to hypothecate by bond the sum deposited as security for respondent's costs of appeal is fatal. As stated above the Court also took the view that there has been material prejudice to the respondent.

This appeal was argued before us on very much the same grounds as were urged before the Court of Appeal. The learned Counsel for the appellant first submitted that upon a proper construction of the provisions of S.755(2)(a) read with S.757 (1) and the relevant rules, hypothecation by bond of the sum deposited as security for the respondent's costs of appeal is no longer required although such hypothecation was required under S.756(1) read with S.757 of the C.P.C. which were in force until the enactment of the Administration of Justice Law No. 44 of 1973. He argues that under the old Code, upon the receipt of the petition of appeal security for respondent's costs of appeal tendered by the appellant was determined by the Court after considering the respondent's objections, if any, and where the security tendered is money it had to be by deposit and hypothecation by bond of a sum sufficient to cover the cost of appeal **and to no greater amount** (S. 757). S. 318 of the Administration of Justice Law requires a "notice of appeal" instead of a petition of appeal and S.321 requires such notice to be accompanied by security for the respondent's costs of appeal in such amount and nature as is prescribed by the rules of Court unless the same is waived by the respondent or his registered Attorney. In terms of rules made under S.15 of the A.J.L. security may be in cash or mortgage of immovable property or bond with surety or sureties at the prescribed rate or value, as the case may be. Where the security selected is cash all that was required by S.322(1) of the A.J.L. was the deposit of the same to the credit of the case in a bank. When the old C.P.C. was brought back by Law No. 19 of 1977, with amendments effected by Law No. 20 of 1977, S.754(3) retained the provision for lodging an appeal by a notice of appeal and

S.757(2)(a) retained the provisions for giving security for the respondent's costs of appeal in such amount and nature as is prescribed in the rules made under S.15 of the Administration of Justice Law.

On the basis of the above developments learned Counsel contends that S.755(2)(a) read with the rules is exhaustive as regards the giving of security for the respondent's costs of appeal; that where the security selected is cash all that is required is the deposit of the sum to the credit of the Court; that the requirement in S.757(1) providing for hypothecation by bond of such sum is repugnant to S.755(2)(a); and that as indicated by the words "and to no greater amount" in S.757(1) the said requirement has been introduced as a result of verbatim reproduction of S.757 of the old Code without considering the fact that after 1973 the entire procedure of lodging an appeal had been changed and is hence superfluous. As such, Counsel submits that we should hold that the deposit of the sum of Rs. 750/- is adequate for the validity of the appeal and hypothecation of that sum by bond is unnecessary.

I am of the view that although the changes in the appeal procedure and the words appearing towards the end of S.757(1) enable learned Counsel to raise the point it would not be possible for this Court to interpret S.755(2)(a) as being exhaustive and to disregard the provision for hypothecation in S.757(1) on the ground that it is repugnant to S.755(2)(a) or is superfluous. S.755(2)(a) requires the amount and nature of security to be as prescribed by rules. Where the nature of security chosen by the appellant is cash, the amount is prescribed which in this case is Rs. 750/-. Section 322 of the A.J.L. contained further provision in such a case for the deposit of the prescribed sum of money to the credit of the Court in a bank. Under the present Code such further provision is to be found in S.757(1) which requires hypothecation by bond of such sum of money. This provision supplements S.755(2)(b); the legislature has expressly provided for hypothecation and there is no repugnancy between the two sections.

Even if there is any repugnancy, S.757(1) cannot be disregarded for as stated in Maxwell, Interpretation of Statutes 12th Ed. 187:

> "If two sections of the same statute 'are repugnant, the known rule is that the last must prevail" (*Wood v. Riley*) (6).

Where there is repugnancy the Court will endeavour to construe the language of the legislation in such a way as to avoid having to apply the rule **'leges posteriores priores contrarias abrogant'** on the general principle that an author must be supposed not to have intended to contradict himself. But there is no real contradiction between the two sections which we have to interpret since the latter only supplements the former and hence it is unnecessary to endeavour a reconciliation.

The last two sentences of S.757(1) might have been better drafted; but the failure to do so would not empower this Court to strike out the provision for hypothecation required by that section. I see no merit in the first submission of the learned Counsel for the appellant.

The resulting position is that hypothecation of security by bond is peremptory; and the failure of hypothecation would affect the validity of the appeal. The question then is whether such failure is fatal to the appeal or curable under S.759(2) of the Code. If it is curable what are the principles applicable in that regard? Appellant's Counsel contends that if hypothecation is a necessary step, it is a technical step. The money is already deposited and lying to the credit of the respondent; no material prejudice has been caused to him and the Court should have granted relief under S.759(2). The respondent's Counsel contends that the non-compliance is fatal to the appeal and that in any event relief should not be granted in the absence of a reasonable ground of excuse for such non-compliance which it is incumbent on the respondent to furnish in the case before us. Counsel submits that the respondent has failed to furnish

any such ground of excuse and hence the Court should not exercise its discretion in his favour.

An examination of the relevant decisions would provide the answers to the questions posed by me in the preceeding paragraph. The bulk of the case law on the subject consists of the decisions of the former Supreme Court in which S.756 of the old Code came in for interpretation. Several such decisions were reviewed by the Privy Council in *Sameen v. Abeywickrema* (supra). There are also three recent decisions of the Court of Appeal and one decision of this Court which I shall examine.

Silva v. Goonesekera (7) (Fisher CJ - Drieberg J) - the petition of appeal was filed on 14.11.28 and the record remained in the Court until 27.05.29; but the security bond had not been signed by any of the appellants and notice of appeal had not been given to any of the respondents, as required by S.756(1). It was held that the appellants were not entitled to relief under S.756(3) (corresponding to S.759(2) of the present Code), as there was substantial non-compliance with the provisions of S.756(1). Fisher CJ. considering S.756(3) said (p.185) —

> "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.".

Ramalingam v. Velupillai (8) (Akbar J.) - objection was taken to the notice of security for respondent's costs on the ground that the appellant had failed to give such notice 'forthwith' within the meaning of S.756. The petition of appeal was filed on 31.03.36; notice of security was given only on 03.04.36. Held that the appellant may be given relief under S.756 (3) there being no material prejudice to the respondent in giving such relief.

Zahira Umma v. Abeysinghe (9) (Abraham CJ; Maartensz and Soertsz J.) the petitioner failed to give notice to the respondent that she would give security but produced security by way of mortgage at the proper time. There was no inquiry as to whether that security was satisfactory. She said that she was unable at the time when she ought to have given notice of security to say what form the security was going to take but as she had produced an adequate security within the proper time and no material prejudice has been caused to the respondent she ought to receive relief under S.756(3). On these facts, Abraham CJ. was not prepared to give relief, stating that "the petitioner says she did everything she could, but has not given any excuse for not doing what she should". In refusing relief he also expressed the view that in the circumstances, the absence of material prejudice cannot be regarded as an excuse for non-compliance with an essential term of S.756.

Abraham CJ proceeded to specify two situations in which the Court "ought not to give relief" for a breach of S.756.

(a) Whether material prejudice is caused or not non-compliance is made without an excuse;

(b) even where non-compliance with an essential term is trivial material prejudice has been caused.

In *De Silva v. Seenathumma* (4) a Divisional Bench of five Judges assembled for the purpose of resolving "uncertainty" as to the meaning of S.756 of the Code, Soertsz J. held that the Supreme Court has no power to grant relief where there has been a failure to comply with an essential requirement of S.756 regardless of the question of prejudice. The essential requirements of the section are:

(a) 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;

(b) a copy of the petition of appeal must be furnished at or before the time the security is accepted and the deposit made;

The other requirements are —

(c) security must be tendered and perfected and the deposit made within twenty days from the date of the decree or order appealed against.

Soertsz J. took the view that the requirements at (a) and (b) are essential and non-compliance is not curable under S.756(3). Regarding the other requirements, particularly at (c), he held that the omission to tender and perfect security and to make the deposit within twenty days and other omissions, mistakes and defects occurring in the course of tendering security, and in the course of perfecting the appeal generally may be condoned under S.756(3) in proper cases i.e. if there has been "reasonable" omission, mistake or defect and the respondent has not been materially prejudiced.

The reason for holding that S.756 (3) does not cover all failures was that firstly, in the opinion of Soertisz J., if it is to be interpreted to cover all failures it 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". Secondly, he said that the requirements which he characterised as essential are immediately within the appellant's power whilst the other requirements are not within his power since they can be effectively done only with notice to the respondent (p.247).

Having so interpreted the section, the Court proceeded to decide the preliminary objection to the appeal namely that the notice of security had not been served on the respondent. Notice was served through the Fiscal who failed to serve it on the respondent as he could not be found. Had the appellant properly advised himself he could have obtained a direction of Court under S.356 to serve it on the respondent's proctor but

this had not been done. The Court held that there was no failure to comply with any special requirement of S.756 but that it was only an omission to take a more effective course in complying with an imperative requirement of S.756 which is curable under S.756(3).

Careem v. Uvais (10) (Sansoni J.) — The appeal was rejected on a preliminary objection that the bond does not provide for hypothecation of the money deposited in Court as security for costs of appeal, as required by S.757. A submission that the error was due to the illness of the appellant's proctor was not accepted in view of the fact that as the proctor had signed the bond it was not open to the appellant to say that he was not able to contact his legal adviser; the Court also held that there was prejudice to the respondent in that the bond not having been hypothecated he has no preferential right to the money.

Noris Appuhamy v. Udaris Appu (11) (Weerasuriya and Sansoni JJ) - The appeal was rejected on a preliminary objection that there has been a failure to give notice to the respondent of the tender of security in terms of S.756(1). Held that this failure is fatal unless relief can be given under S.756(3). The Court was unable to give relief in view of the binding decision of the Divisional Bench in *de Silva v. Seenathumma* (supra) where it was held:

> "Where there has been a total failure to comply with one of the terms of S.756 relief will not be given even if it should be apparent that no material prejudice has been occasioned to the respondent by such failure"

Chelliah v. Selvanayagam (12) (Weerasuriya & Sinnathamby JJ) - On an objection by the respondent to security by bond hypothecating immovable property, the Court ordered deposit of money on a date beyond the time prescribed for that purpose by S.756. The money was deposited but the

appellant failed to hypothecate the same. Held, the failure to hypothecate the sum of money in terms of S.757 within the extended time is a fatal irregularity. The appeal was accordingly rejected.

Pathinayake v. Kannangara (3) (Basnayake CJ & De Silva J) —Where the appellant had furnished a bond for security for costs of appeal but failed to include a clause therein hypothecating the money, the appellant was permitted to cure the omission under S.756(3) by including a clause for that purpose on payment of the respondent's costs. The record was sent back to the original Court to enable the appellant to furnish a bond in the proper form.

Sameen v. Abeywickrema (2) — In this case the Privy Council restated the law in different terms. The dispute which went up for its decision arose thus. On the day the appeal was lodged (Saturday the 16th) the appellant's proctor telephoned the respondent's proctor's office and spoke to Mr. Cooray who said that the member of the firm who handled the case was not available but he would receive notice of security on behalf of the firm. However, when the appellant's proctor went there with the notice there was no one to receive it. On Monday the 18th the notice was taken there again when it was received "subject to objections" and was filed in Court on the same day. The Supreme Court upheld a preliminary objection to the appeal that the notice had not been given "forthwith" and did not proceed to consider relief possibly in the light of *Seenathumma's* case which was binding.

The Privy Council held (disagreeing with the view taken in *Seenathumma's* case that had the notice been filed in Court on the 18th for service on the respondents through the Fiscal it should be treated as having been filed "forthwith"; since that expression need not in every case mean the same day"; however the said notice had first been served on the respondent's proctor without a direction under S.356 for such service and then filed in Court not for service on the respondents through

the Fiscal but for the purpose of informing the Court that the respondent's proctor had received it; and hence it was not in conformity with S.756.

Yet the Privy Council granted relief having regard to the "technicality" of the objection and the fact that the respondent had not been materially prejudiced. The Privy Council thought that Mr. Cooray agreeing to accept notice may well have led the appellant's proctor to suppose that notice was to be waived and so led him not to file the notice in Court with the appeal.

However, before granting relief, the Privy Council had to get some of the previous decisions out of the way by adopting a different and more liberal interpretation of S.756(3). In doing so their Lordships said that they did not wish to suggest that relief was not rightly refused in particular cases. The rulings of the Privy Council on the legal aspects may be summarised as follows:

(a) Disagreeing with the "limitation" placed by Fisher CJ on S.756 (3) in *Goonasekera's* case (supra) the Lord Chancellor said (p.560) —

> "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 S.756".

(b) On the relevance of an excuse for non-compliance with a requirement of the section adverted to in *Abeysinghe's* case (supra) the Privy Council clarified that Abraham CJ does not appear therein to say that the powers of the Court under s.756 were in any way restricted. The Lord Chancellor explained that the existence of an excuse is relevant to the exercise of the Court's discretion to grant relief and said —

"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" — (p.561).

(c) Commenting on the judgment of Soertsz J. in *Seenathumma's* case (supra), the Privy Council opined —

i. the view that in the case of a total failure to comply with a term of S.756 relief should not be given even if no material prejudice has been caused is not a correct reading of Abraham CJ's statement in *Abeysinghe's* case (supra) — (p.561).

ii. S.756(3) is expressed to apply in relation to any mistake, omission or defect. — (p.562).

iii. the Supreme Court has the power to grant relief on such terms as it may deem just in the case of a failure to comply with an essential requirement of S.756. "The only limitation imposed by the sub-section is that the Court has not the power to do so unless it is of the opinion that the respondent has not been materially prejudiced". — (p.562).

The Lord Chancellor concluded —

"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 originial judgment is wrong, amount to a denial of justice". (p.563).

It seems to me that the above interpretation in the context of the broad general principles ennunciated by the Privy Council, is both correct and fair. It acknowledges the flexibility which is inherent in S.756(3) corresponding to the present S.759(2); it does not fetter the discretion of the Court to decide whether relief may be granted; the Court is free to make its

decision on the facts and circumstances of each case; and finally; it does not deny the imperative charactor of the requirements of the section.

The provisions of the A.J.L. and the present Code prescribing the procedure of an appeal are much simpler than those contained in S.756 of the old Code and on the whole less stringent. In particular the express provisions in S.756(2) for abatement of the appeal for failure to give security and make the deposit as required by the section has been deleted. Hence the interpretation of S.756(3) by the Privy Council should apply to the corresponding S.759(2) of the present Code with greater force. The Court of Appeal is bound by the judgment of the Privy Council but this Court is not so bound. *Ratnayake v. Bandara* (13). Nevertheless, for the reasons given above I see no reason to depart from the interpretation given by the Privy Council. Viewed in this light the statements contained in the judgment under appeal and in some of the previous decisions of the Court of Appeal are erroneous.

In *Arulampalam v. Daisy Fernando* (14) the question of the validity of the appeal was raised not as a preliminary objection to the appeal itself but in proceedings before the Court of Appeal against an order allowing writ of execution. That order had been obtained by the plaintiff on an application made on the 25th day from the date of the judgment in his favour. By that date the defendant had given the initial notice of appeal against the judgment. This was followed by the petition of appeal. The order issuing the writ was challenged by the defendant on the ground that the application for it had been made in breach of S.761 of the Code before the expiry of the time allowed for appeal i.e. 60 days allowed for filing the petition of appeal as was held in *Careem v. Amarasinghe* (15). The plaintiff submitted that the defendant had failed to give a valid notice of appeal and as such the bar under S.761 did not apply. The Court of Appeal accepted this submission holding that there is no valid notice of appeal in that —

(a) it had been signed by an Attorney-at-Law who is not the registered Attorney-at-Law, in breach of S.755(1) which is fatal to its validity; and

(b) the money deposited as security had not been hypothecated by bond as required by S.755(2)(a) read with S.757(1) which is "a fatal irregularity".

Jameel J. (with G.P.S. de Silva J. agreeing) held that as the notice is bad in law, no appeal could be filed after the lapse of 14 days, and the 14 days becomes the operative period of time for S.761. The application for writ is well beyond this 14 days time limit and was therefore, not filed during the applicable period and pending appeal. In the result the Court allowed the order allowing the writ.

On the first ground Jameel J. relied on *Silva v. Cumaratunga* (16) which held that the petition of appeal should be signed by the proctor whose proxy is on record and that in default, the Supreme Court, had no power to grant relief. On the second ground he cited *de Silva v. Seenathumma* (supra) and *Chelliah v. Selvanayagam* (supra) and added that the notice of appeal is incurably defective. On the defendant's prayer for order to stay execution pending appeal he said —

> "In the circumstances, this Court cannot..... act under S.759 (2) and grant any relief to the defendant....."

I think that the case could have been decided on the first ground alone. The power of the Supreme Court under subsection (3) of S.756 of the old Code was expressly limited to curing mistakes etc. in complying with the provisions of that section and hence did not cover a defect in the drawing and signing of the petition of appeal as required by S.755. In the way the new Code has been re-arranged, relief under S.759(2) would, upon a literal construction, appear to apply even to such a non-compliance; thus S.759(2) covers "any mistake, omission or defect.....in complying with the provisions of the

foregoing sections" and the expression "foregoing sections" can on its plain meaning refer even to S.755(1) relating to the drawing and signing of the notice of appeal. However, where the non-compliance arises by reason of the fact that such notice of appeal has been signed by an Attorney-at-Law who is not the registered Attorney-at-Law it is a breach not merely of S.755(1) but of S.24 which requires that an Attorney-at-Law, if he is to represent a party has to be duly appointed; and S.759(2) cannot be invoked to cure such breach. Thus in *Cumarasinghe's* case (supra) Maartensz J. said (p.140) —

> "The ratio decidendi in the old cases, with which I respectfully agree, was that this Court cannot recognise two proctors appearing for the same party in the same cause".

In the circumstances, the statements contained in the Court of Appeal judgment in relation to the second ground can be regarded as obiter.

Coming to the merits of the second ground it is to be noted that in *Seenathumma's* case cited by Jameel J. Soertsz J. himself did not classify the provision for hypothecation of the money deposited as security as an essential requirement the non-compliance of which is not curable under s.756(3). In *Selvanayagam's* case Weerasuriya J. gives no reason for treating such non-compliance as a "fatal irregularity". He may have so described it possibly for the reason that the failure there was to hypothecate money, deposited beyond the prescribed date on an order of the Court.

It is also significant that nothing in the judgment of the Court of Appeal indicates that the defendant's Counsel sought any relief under S.759(2). On the contrary his submission which the Court refused to accept was that the Court cannot in the course of an application to stay execution pending appeal, reject the notice of appeal but must postpone the decision as to its validity until the hearing of the main appeal. For

these reasons too *Daisy Fernando's* case cannot be regarded as an authoritative decision on S.759(2).

In *Kiri Banda v. Ukku Banda* (17) Perera J. (with Bandaranayake J. agreeing) rejected an appeal on a preliminary objection that it had not been presented within 60 days of the judgment as required by S.755(3). The Court declined to grant relief under S.759(2) in the absence of "reasonable cause", on a submission that the mere statement that there has been a mistake, omission or defect would entitle a party to seek relief under this section in the absence of prejudice to the opposing party, Perera J. said (p.194) —

> 'If this construction ..... is accepted, even where such failure in occasioned by gross negligence, carelessness or neglect of the defaulting party or his registered Attorney, it would result in such conduct being condoned by the Court".

The decision of this Court in *Vithana v. Weerasinghe* (18) was distinguished. This decision of the Court of Appeal is in accord with precedent and the principles ennunciated by the Privy Council in *Abeywickrema's* case (supra).

In *Dona Ceciliana v. Kamala Piyaseeli* (5) Goonawardena J. held that the failure to hypothecate money deposited as security for the respondent's costs of appeal is a failure to comply with an essential step in perfecting the appeal and is not correctable under S.759(2). He said that the presence of S.756(2) in the old Code providing that "the petition of appeal shall be held to have abated", where the petitioner fails to give security as provided supports the view that S.756(3) of that Code had no application to a situation where the failure was to furnish security. Citing the case of *Chelliah v. Selvanayagam* (supra) he thought that this view has equal application to the present provision. He also relied on the case of *Daisy Fernando* (supra). Assuming that S.759(2) has application, he was of the opinion that in any event on the facts and circumstances

of the case material prejudice had been caused to the respondent and upheld the preliminary objection and rejected the appeal.

The decision of the Court of Appeal to reject the appeal can be sustained on the second ground alone. It was on this basis that special leave to appeal from that decision was refused by this Court - S.C. **Special L.A. No. 17/90 SCM of 19.07.90.** As regards the Court's opinion on the meaning of S.759(2) it is observed —

(a) the presence of S.756(2) of the old Code was no bar to relief under S.756(3). It has been held that such relief may be sought against an order of abatement under S.756(2) *Abeysinghe's* case (supra). In any event S.756(2) of the old Code has been deleted in the present Code.

(b) the Court's opinion on the meaning of S.759(2) is not supported even by the very strict construction of the corresponding S.756(3) of the old Code in *Seenathumma's case* (supra).

(c) The Court's opinion is contrary to the Privy Council decision in *Abeywickrema's* case (supra) which enlarged the power of the Court to grant relief which decision is binding on that Court.

In *Vithana v. Weerasinghe* (18) this Court adopted the reasoning of the Privy Council in Abeywickrema's case (supra). Having cited a passage from the Lord Chancellor's judgment Wanasundera J. said (p.57) —

> "The provisions we are called upon to consider though similarly worded are much wider in scope....."

Applying the above principles to the case before us, I hold that the opinion expressed by the Court of Appeal on the applicability of S.759 (2) of the Code is wrong. This leaves me with the question as to whether the respondent ought to have been given relief under that section on the facts and circum-

stances of the case. In view of its strong opinion on the applicability of S.759(2) the consideration of this question by the Court of Appeal is scanty and is limited to prejudice arising by reason of the continuation of the litigation. Had that Court altogether declined to consider the question of prejudice and this Court were left with no material on that question I would have remitted this case to that Court with a direction to consider the matter. Since this is not the case here, I am of the view that this Court can and should, in the interest of justice, make the decision in that regard.

Section 759(2) reads —

> "In the case of any mistake, omission or defect on the part of the appellant in complying with the provisions of the foregoing sections, the Court of Appeal may, if it should be of the opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just".

Precedent shows that these provisions are flexible and the power of the Court is wide. Such power has to be exercised in furtherence of substantial justice, having regard to the need to comply with imperative requirements of the law. I am inclined to the view that it is not a power coupled with a duty as is understood in the field of writs. No doubt if the preconditions exist the Court must grant relief but the evaluation of the relevant material and the forming of the opinion as to prejudice are all matters in the discretion of the Court. It is to be noted in this connection that 'prejudice' has not been defined for the purpose of this section. In this context "prejudice" means "injury, detriment or damage caused to a person by judgment or action in which his rights are disregarded; hence injury to a person or thing likely to be the consequence of some action" (The Shorter Oxford English Dictionary 3rd Ed.). It includes past as well as prospective harm or detriment. Prima facie the section connotes prejudice which has occurred but continuing

prejudice is not excluded. What is required to bar relief is not any prejudice but material prejudice i.e. detriment of the kind which the respondent cannot reasonably be called upon to suffer. If there is such prejudice it is no argument for the appellant to contend as a matter of right that it can be mitigated by appropriate terms such as the payment of costs.

The discretion of the Court is exercised on the basis of the facts and circumstances of each case. The Court may consider the impact of continuance or the protraction of litigation, in particular in the context of what Goonawardena J. described as the "living problems of laws delays" in *Dona Ceciliana's* case (5). It is no answer to this to say that the individual appellant himself is not responsible for the delay in the particular case. When a preliminary objection is raised by reason of this mistake, the litigation is protracted on that account at the expense of the respondent. It cannot be repaired by an order for costs. The Court may in appropriate cases consider whether there is an explanation for the mistake, which the defaulting applicant alone may be in a position to give. In that event, he cannot fold his hands and insist on his right to relief. If he cannot explain his failure, the inference of gross negligence or carelessness may result. In which event the Court may exercise its discretion against him and refuse relief under S.759(2). If that discretion is exercised fairly this Court will not interfere.

In the instant case, the notice of appeal was filed in 1983 and when the preliminary objection was taken on 11.05.90 the appellant obtained a postponement in view of the objection. If that was done in order to check with the registered Attorney-at-Law the reason for the failure to hypothecate security, no material whatever was submitted to the Court when the matter came up for argument on 05.06.90. Instead, Counsel for the appellant argued that hypothecation is unnecessary as a matter of law and alternatively claimed relief under S.759(2) with

a mere statement that no material prejudice has been caused to the respondents by the omission.

I think that in the circumstances of this case the lack of any explanation for the non-compliance, the fact that the bond not having been hypothecated, the respondent has no preferential right to the money and the protraction of the litigation militate against the grant of relief under S.759(2). As such, the refusal to grant relief under S.759(2) is justified.

In the result, I dismiss the appeal with costs.

Appeal dismissed.