

1104

Present: Basnayake J. and Palle J.

SIVAGURUNATHAN, Appellant, and DORESAMY et al.,
Respondents

S. C. 13—D. C. Colombo 4,707/P.

Appeal—Notice of tendering security—Failure to observe proper form—Fatal irregularity—Abatement of appeal—Objection can be taken in Appeal Court—Civil Procedure Code, Section 788 and Form No. 126 in Schedule 1.

The appellant in a partition action served notice of tendering of security on all the respondents to the appeal. In the case of the 7th respondent, however, the notice which was served on her did not include her among those in respect of whose costs the appellant proposed to give security.

Held, that although the bond executed by the appellant secured the costs of all the respondents to the appeal, including the 7th respondent, the omission to give the prescribed notice was a fatal irregularity. A notice of tendering security should inform the respondent on whom it is served that security for that respondent's costs will be tendered.

A Schedule in a Statute is as much a part of the statute and as much an enactment as any other part. The notice of tendering security required by section 756 of the Civil Procedure Code should, therefore, be in the form presented by Form No. 126 in the First Schedule to the Code.

Held further, that a respondent to an appeal is not precluded from taking objection to the hearing of the appeal although he could have asked the trial judge to hold that the appeal had abated.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, K.C., with *C. Renganathan* and *A. Nagendra*, for the 10th defendant appellant.

S. J. Kadirgamar, with *G. C. S. de Silva*, for the 15th to 17th defendants respondents.

H. W. Thambiah, with *S. Sharvananda*, for the 7th defendant respondent.

E. B. Wikramanayake K.C., with *H. W. Jayewardene*, for the 8th defendant respondent.

Cur. adv. vult.

FEBRUARY 6, 1951. BASNAYAKE J.—

This is an application for the sale under the Partition Ordinance of a land called Villiagama Estate in extent 136 acres and 12 perches owned in common by the applicant and seventeen others. Of the defendants the 8th, 10th, and 11th filed a claim praying that the land be partitioned, while the 15th, 16th and 17th who are resident outside the Island disputed the shares allotted to them in the libel. The 1st to 7th, 12th, and 13th defendants took no part in the proceedings. The learned District Judge decreed a sale of the common property as prayed for. The 10th defendant who is dissatisfied with the learned Judge's apportionment of shares and his order as to costs has appealed.

The appellant served notice of tendering of security on all the respondents. The notices contained the names of all the parties to the action and were addressed to the Proctors of some of the respondents and Personally to the others. In the case of the 7th respondent who takes objection to the appeal being heard, the notice was addressed to the Proctor, and it reads thus:-

“ Take notice that the petition of appeal presented by the above-named 10th defendant-appellant on the 26th day of November, 1948, against the order of the District Court of Colombo dated 15th November, 1948, in the said action having been received by the said Court I will on the 1st day of December, 1948, at 10.45 o'clock in the forenoon or

so soon thereafter move to tender security by depositing a sum of Rs. 500 and by hypothecating the same by bond for any costs which may be incurred by the 8th, and 15th to 17th defendant-respondents 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 the plaintiff-respondents and defendant-respondents. Copy of petition of appeal annexed. ”

It is dated 26th November, 1948, and bears the following endorsement dated December 3, 1948:

“ This notice is extended and re-issued for service on the within-named 7th defendant-respondent for 6th December, 1948. ”

The submission of learned counsel for the respondent is that as the notice expressly mentions the other respondents but makes no mention of the 7th defendant-respondent, it is not a notice to the 7th respondent though served on her. He submits that the service of a notice which does not purport to be a notice informing her that security will be given for her costs of appeal on the date mentioned therein is not a notice under the section. Section 756 requires that the appellant shall give notice to the respondent, meaning thereby to the respondents where there is more than one respondent to an appeal. Learned counsel submits that the requirements of the section are not satisfied unless the notice is addressed to the respondent for whom it is meant and informs that person that on the specified date security in respect of his or her appeal costs will be tendered. He relies in support of his argument on the language of section 756 and the form of notice prescribed in the Schedule. That form reads as follows:

“ To (respondent).

Take notice that the petition of appeal presented by me in the above-named action on the _____ day of _____, 19—, against the (order or decree) of the _____ court of _____, dated the _____ day of _____, 19—, in the said action, having been received by the said court, counsel on my behalf will, on the _____ day of _____, 19—, at _____ o'clock of the forenoon, or so soon thereafter as, &c. (being within _____ days from the day of the date of such (order)), move to tender security by (mention how) 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.

(Signed) _____, Party Appellant. ”

The notice which has been given to the 7th respondent is not in the prescribed form and does not inform her that the appellant proposes to give security for costs which may be incurred by her in appeal. She is clearly not included among those in respect of whose costs the appellant proposed to give security. Although the bond executed by the appellant secures the costs of all the respondents to this appeal, including the 7th respondent, the omission to give the requisite notice is not in my opinion thereby cured.

Learned counsel submits that the omission to give the 7th respondent the prescribed notice is fatal to the appeal and relies strongly on the Full Bench decision of this Court in the case of *de Silva v. Seenathumma*¹. That case lays down that the requirements of section 756 are imperative and that failure to comply with those requirements is fatal to an appeal. In my opinion the respondent's objection is entitled to succeed. Section 756 provides that 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 the notice tender security for the respondent's costs of appeal. That section when read with the form prescribed by the Code clearly indicates that the notice given thereunder should inform the respondent on whom it is served that security for that respondent's costs will be tendered on the date mentioned therein. In the instant case the notice served on the 7th respondent does not do so. The notice cannot therefore be taken as a notice to the 7th respondent that security will be tendered for her costs in appeal on the date mentioned therein. The 7th respondent was therefore under no duty to appear on the date mentioned in the notice and show cause, if any, against the security which the notice indicated would be tendered in respect of the other respondents.

Where a statute prescribes that notice should be given to a party to a suit and indicates the form in which that notice should be given, that notice should comply with the requirements of the statute and should be in the prescribed form. A notice under section 756 must be addressed to the party to whom notice has to be given and delivered to the party and inform him that on the date specified therein security for his costs in appeal will be tendered. The fact that section 756 makes no express reference to Form No. 126 in the First Schedule to the Code—Form of Notice to Respondent that Appellant will tender security in Appeal—does not in my opinion permit an appellant to ignore that form and act as if it had not been enacted.

A schedule in a statute is as much a part of the statute and as much an enactment as any other part². The rule of construction of statutes containing schedules is that where the enacting part and the schedule cannot be made to correspond, the latter must yield to the former³. In regard to the forms themselves the rule is that they are to be followed implicitly so far as the circumstances of each case may admit⁴. Section 756 and Form No. 126 not being in conflict, the notice required by the section should be in the prescribed form and no other⁵.

Learned counsel for the appellant contends (a) that the notice is sufficient, and (b) that it is not open to the respondent to take objection to the hearing of the appeal on the ground of non-compliance with section 756 in this Court, but that he should have done so in the court of trial. I have already dealt with (a), and only (b) remains to be discussed.

¹ (1940) 41 N. L. R. 241.

² *Reg. v. Lumsdaine*, (1839) 10 A. & E. 157 at 160; 8 L. J. M. C. 69 at 71. *Attorney General v. Lamplough* (1878) 3 Ex. D. 214 at 229; 47 L. J. Ex. 555 at 562.

³ *Reg. v. Baines*, (1840) 12 Ad. & E. 210 at 227.

Dean v. Green, (1882) 8 P. D. 79 at 89, 90.

⁴ *Bartlett v. Gibbs*, (1843) 5 Man & G. 81 at 95, 96; 13 L. J. C. P. 40 at 42.

⁵ *Ryan v. Oceanic Steam Navigation Co.*, (1914) 3 K. B. 731.

The limb of section 756 under which an appeal abates on failure to give security in the prescribed manner reads as follows:..

“ And when a petition of appeal has been so received, but the petitioner has failed to give 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. ”

The further proceedings that are prescribed in the section are—

- (a) the issue of the notice of appeal on the respondents,
- (b) the forwarding of the petition of appeal to the Supreme Court together with the certificate of the Secretary or Clerk of the Court,
- (c) the transmission to this Court of the Fiscal's return to the process issued under the section.

The meaning of the expression “ abated ” in this context is indicated by the words which follow. The failure to observe the requirements as to security results in no further steps being taken by the court on the petition of appeal. The words “ shall be held ” in the context “ the petition of appeal shall be held to have abated ” suggest that the Court has to give its mind to the matter and hold that the provisions as to security have or have not been observed. The language of the second limb of section 756 (2) enables a party to invite the court of first instance to hold that an appeal has abated in consequence of non-compliance with the requirements of sub-section (1) of that section, but if the respondent to an appeal omits to do so it does not follow that this Court is bound to hear an appeal which has no right to come here.

In my opinion the power to decide whether an appeal is properly before it is implied in the power to hear an appeal and an appellate tribunal has power to reject an appeal that is not properly before it. This Court has always exercised that power and rejected¹ appeals by appellants who have no right to be heard. That being the case the respondent is not precluded from taking objection to the hearing of this appeal although he has not asked the trial judge to hold that the appeal has abated.

Finally, learned counsel for the appellant submitted that if in our view the appellant had failed to give the requisite notice this was a case in which the relief provided by section 756 (3) of the Civil Procedure Code should be granted. That provision reads:

“ 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. ”

¹ *De Silva v. Seenathumma et al.* (1940) 41 N. L. R. 241.
Vanderpoorten v. Settlement Officer (1942) 43 N. L. R. 230.
Kanagasunderam v. Podihamine, (1940) 42 N. L. R. 97.
Attorney General v. Karunaratne et al. (1935) 37 N. L. R. 57.
British Ceylon Corporation Ltd. v. United Shipping Board et al. (1934) 36 N. L. R. 225.

In the instant case we have no explanation from the appellant for his failure to give the 7th respondent notice of tendering security as provided in the section. The omission to mention the 7th respondent in the notice appears to be not accidental but deliberate. There has therefore been no intention to give her the prescribed notice. It is now settled by the case of *de Silva v. Seenathumma* (*supra*) that "the failure on the part of the appellant to comply with the matters immediately and completely in his power" cannot be excused.

For the above reasons I uphold the objection and make order rejecting the appeal with costs.

PULLE J.—I agree.

Appeal rejected.

