

1959

*Present* : Basnayake, C.J., and Pulle, J.

LEELIS SINGHO and another, *and* JOHN SINGHO and others,  
Respondents

*S. C. 79, with Application 38—D. C. Kalutara, 28,855*

*Appeal—Notice of tendering security—Mode of service—Civil Procedure Code, ss. 59, 60, 63, 356, 756.*

Section 356 of the Civil Procedure Code provides for the mode of service of notices which are required to be given by the Code.

Notice of tendering security for the costs of an appeal was not served on some of the respondents. Instead, a notice was affixed to a tree on the land that formed the subject matter of the action. There had been no report from the Fiscal that he was unable to effect personal service.

*Held*, that notice of tendering security was not given to the respondents in the manner prescribed by section 756 of the Civil Procedure Code.

*Held further*, that omission to give notice of security in the prescribed manner was not an omission for which relief could be given under subsection 3 of section 756.

**A**PPEAL from a judgment of the District Court, Kalutara.

*G. T. Samerawickreme*, with *E. A. G. de Silva*, for 21st and 22nd Defendants-Appellants and for Petitioners in Application No. 38.

*Nimal Senanayake*, for Plaintiffs-Respondents and for Respondents in Application No. 38.

*Cur. adv. vult.*

May 29, 1959. BASNAYAKE, C.J.—

This is an application by the appellants for relief under section 756 (3) of the Civil Procedure Code.

On 27th December 1955 the 21st and 22nd defendants lodged an appeal against the judgment of the District Judge which was delivered on 17th December 1955. At the same time they gave notice of tender of security and moved "To issue the notice to be served personally on Mr. D. E. Almeida, Proctor for plaintiffs, Kalutara, and also by affixing to a tree on the land, the subject matter of this action which will be pointed out by the appellant". This application was allowed. Besides the plaintiffs-respondents they named twenty of the defendants as respondents in the petition of appeal. Notice of tender of security was served personally on the proctor for the plaintiffs. Notice was not served on the 1st-20th defendants-respondents. Instead a notice was affixed to a tree on the land that formed the subject matter of the action. The notice bore the same caption as the petition of appeal and was

addressed to “The Respondents abovenamed” and required them to take notice that security will be tendered in a sum of Rs. 100 in cash for the costs of all the respondents.

Objection was taken to the appeal by the 1st and 10th defendants on the ground that notice of tender of security had not been served on them in the manner prescribed by section 756 of the Civil Procedure Code, and the learned District Judge upheld their objection and held that in terms of the second limb of section 756 (2) the petition of appeal had abated.

The appellants ask for relief under section 756 (3) against that order. The learned District Judge is right in holding that notice of tender of security had not been given in the prescribed manner. Section 356 provides for the mode of service of notices which are required to be given by the Code. It reads :

“All processes of court not being writs, or warrants directed to the Fiscal or other person for execution, and all notices and orders required by this Ordinance to be given to or served upon any person, shall, unless the court otherwise directs, be issued for service to the Fiscal of the province or district in which the court issuing such processes, notices, or orders is situate, under a precept of that court as is hereinbefore provided for the case of the summons to the defendant in an action. And the enactments of the sections of this Ordinance from section 59 to section 70, both inclusive, relative to the service of such summons shall apply, so far as is practicable, to the service of such processes, notices, and orders.”

Now section 59 provides that service of summons shall, subject to the provisions in Chapter XXIII of the Code, be made by delivering or tendering to the defendant personally a duplicate thereof. Section 60 provides :

“Whenever it may be practicable, the service of summons shall be made on the defendant in person ; but if, after reasonable exertion, the Fiscal is unable to effect personal service, he shall report such inability to the court in a fair-written return to the precept, having the summons attached thereto as an exhibit, and it shall be competent for the court, on being satisfied by evidence adduced before it that the defendant is within the Island, to prescribe any other mode of service as an equivalent for personal service.”

It is not necessary for the purpose of this judgment to reproduce the proviso to the section. Section 63 which is also relevant to the question under consideration reads :

“When there are more defendants than one, service of the summons shall be made on each defendant.”

In the instant case there is no report from the Fiscal that he is unable to effect personal service. The court had therefore no power to make an order under section 60 of the Code prescribing a mode of service other than personal service.

Notice has therefore not been given to the defendants-respondents in the manner prescribed by section 756. The failure to do so is fatal to the appeal. The next question that arises for consideration is whether the appellants are entitled to relief under section 756 (3). It has been laid down authoritatively by this court in *de Silva v. Seenathumma*<sup>1</sup> that omission to give notice of security in the prescribed manner is not an omission for which relief can be given under subsection (3) of section 756. We are bound by that decision and we are unable to grant the appellants the relief they ask for.

The appeal is dismissed and the application for relief is refused with costs.

PULLE, J.—I agree.

*Appeal dismissed.*  
*Application refused.*

<sup>1</sup> (1940) 41 N. L. R. 241.

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