1940 *Present:* **Howard C.J. and Soertsz, Hearne, Keuneman, and Wijeyewardene JJ.**

DE SILVA *v.* SEENATHUMMA *et al.*

1—D. C. Tangalla, 4,226.

Appeal—Notice of security for respondents' costs—Two respondents to appeal—Notice served on one and security given within time limit—Delay in service of notice on other—Powers of Supreme Court to grant relief under sub-section (3), Civil Procedure Code, s. 756 (Cap. 86).

The Supreme Court has no power to grant relief, where there has been a failure to comply with an essential requirement of section 756 of the Civil Procedure Code.

The essential requirements of the section are—

(1) Notice of security, unless waived, must be given forthwith, *i.e.*, must be tendered or filed on the day on which the petition of appeal is received by the Court.

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

Where there has been an omission to tender and perfect security and to make the deposit within twenty days or other omission, mistake, or defect in the course of tendering security or in the course of perfecting the appeal generally, relief may be granted in proper cases, if the respondent has not been materially prejudiced by such omission, mistake, or defect.

The judgment of Abrahams C.J. in *Zahira Umma v. Abeysinghe* (*39 N. L. R. 84*) explained.

THIS was a case referred to a Bench of five Judges by Howard C.J. in exercise of the powers vested in him under section 51 of the Courts Ordinance.

A preliminary objection was taken to the hearing of the appeal on the ground that it must be held to have abated in the Court below for failure to observe an essential requirement of section 756 of the Civil Procedure Code.

C. C. Rasa-Ratnam (*E. B. Wikremanayake* with him), for plaintiff, respondent.—Section 756 of the Civil Procedure Code places an imperative obligation upon the appellant to give notice as regards security for costs of appeal to the respondent, and thereby give to the respondent an opportunity to scrutinize such a security on the day appointed in the notice (Form 126) and to raise objections, if any, as to why any such security so tendered should not be accepted and perfected by the Court. (*Charles v. Jandris*[1]; *Siyadoris Appu v. Abeyanayake*[2]; *Kangany v. Ramasamy Rajah*[3].)

The failure to comply with this duty cast upon the appellant by the Legislature is a substantial non-compliance with the provisions of section 756 of the Civil Procedure Code, and as such entails the forfeiture of the right of appeal.

[1] *16 N. L. R. 159.* [2] *13 C. L. W. 23.* [3] *21 N. L. R. 106.*

Such a failure is fatal and will not be excused. (*Silva v. Goonesekere*[1]; *Saleem v. Yoosoof et al*[2]; *Suppramaniam Chettiar v. Senanayake and others*[3].)

Further, it is immaterial as to whether any material prejudice has in fact been caused to the respondent by the appellant not giving notice as regards security for respondents' costs, as such a failure is a non-compliance with an essential term of section 756 of the Civil Procedure Code. (*Zahira Umma v. Abeysinghe et al.*[4].)

The amending Ordinance No. 42 of 1921 was passed in order to cure cases of trivial omissions and technicalities. *Vide Government Gazette* of November 16, 1921.

Before the amending Ordinance, when money in cash was in fact deposited, it was held that absence of hypothecation was a fatal irregularity. (*Wickremaratne v. Fernando*[5].)

But, after the amending Ordinance No. 42 of 1921, which is now engrafted upon the old section 756 as sub-section (3), relief has been given in cases where security was tendered in cash, but where there was (*a*) some non-compliance regarding procedure (*Mendis v. Jinadasa et tl.*[6]; *Martin Singho v. Paulis Singho*[7]; *Ramalingam v. Velupillai et al.*[8]); and (*b*) where the appellant has been reasonably prompt (*Fernando v. Nikulan Appu et al.*[9]).

The excuse advanced by the appellant as to why notice as regards security for costs of appeal was not given to the respondent is that the respondent was not in the village. If so, notice could have been served on his proctor who was present every day in Court or recourse could have been made to substituted service. Such an excuse as this should not be either entertained or countenanced by this Court.

H. V. Perera, K.C. (with him *S. W. Jayasuriya* and *C. J. Ranatunge*), for first to fourth defendants, appellants.—The question is one of interpretation of sub-section (3) of section 756 of the Civil Procedure Code. It is necessary to ascertain the limits of the power of the Supreme Court to grant relief. No distinction has been drawn in decided cases between the circumstances when the Court *could* grant relief and the circumstances under which the Court *should* grant relief. *Silva v. Goonesekera* (*supra*) deals with a case where the Judges thought that they could not interfere, and *Zahira Umma v. Abeysinghe* (*supra*) merely lays down when the Court should not grant relief. My submission is that where, as in the present case, security has been given, but certain formalities have not been complied with, the Court has the power to give relief.

The instances where the Supreme Court has the power, and where it does not have the power, to grant relief have not yet been clearly defined. We do not exactly know where we stand at present. In *Zahira Umma v. Abeysinghe* (*supra*) it was stated that in no case would relief be granted where there is a non-compliance with any of the terms of section 756 *wiihout an excuse*. One should not read into section 756 (3) the words "without an excuse", because the power conferred on the Court is of a

[1] *31 N. L. R. 184.*
[2] *17 C. L. R. 117.*
[3] *16 C. L. W. 41.*
[4] *39 N. L. R. 84.*
[5] *20 N. L. R. 279.*
[6] *24 N. L. R. 188.*
[7] *13 C. L. R. 238.*
[8] *38 N. L. R. 255.*
[9] *22 N. L. R. 1.*

discretionary nature. Absence of excuse should not be elevated to the position of a statutory requirement. The interpretation given to section 756 (3) in various decisions can be traced to the view taken in *Silva v. Goonesekere* (*supra*), but undue importance was placed in that case upon the statement of objects and reasons published in the *Gazette*. The sub-section, in itself, containes no statutory limitation on the power that is given to the Supreme Court.

[HOWARD C.J.—The effect of sub-section (2) of section 756 does not seem to have been previously considered ?]

That is so. Failure to give the security and to make the deposit are the only irregularities under which an appeal would abate. In the present case, notice of security was duly given. (*Fernando v. Nikulan Appu* (*supra*).) The deposit, too, was made within twenty days. It is true that the notice of security was not served on the plaintiff within the twenty days, but that was not due to any fault of ours ; nor, in the circumstances, does section 756 require any substituted service under section 356. There is a distinction between what is of the essence of section 756 and what is merely incidental and non-essential. The giving of security is certainly an essential step, whereas giving notice of security is only a means to an end, and should be treated as incidental ; failure in the latter may be excused, provided no material prejudice has been caused.

[SOERTSZ J.— Can this Bench, as at present constituted, overrule a decision of a Divisional Bench ?]

This Bench of five Judges formed under section 51 of the Courts Ordinance can overrule the decision of three Judges in *Zahira Umma v. Abeysinghe* (*supra*).

[SOERTSZ J. pointed out that the words "shall be deemed and taken to be the judgment of the Supreme Court" appear as well in section 38 of the Courts Ordinance as in section 51.]

Some guidance can be had on the point from *Jane Nona v. Leo*[1] and *Anohamy et al. v. Haniffa*[2].

E. B. Wickremanayake, in reply.—A Bench of five Judges to-day cannot be regarded as a Collective Court. It is a Divisional Bench, and cannot overrule a decision of another Divisional Bench.

Cur. adv. vult.

March 19, 1940. SOERTSZ J.—

A preliminary objection has been taken to the hearing of this appeal, on the ground that it is not properly before this Court, inasmuch as—it is contended—it must be held to have abated in the Court below, for want of conformity with an essential requirement of section 756 of the Civil Procedure Code.

It is deplorable that despite the fact that this section of the Code has functioned in the Civil Courts of this Island almost daily for over sixty years, there should be so much misapprehension and uncertainty as to its meaning. In the case of *Katonis Appu v. Charles and another*[3]

[1] *(1923) 25 N. L. R. 241.* [2] *(1923) 25 N. L. R. 289.*

[3] *12 Ceylon Law Weekly 162.*

Abrahams C.J. felt compelled to observe in the year 1938 that "it is certainly about time that it was fully understood what the provisions of section 756 entail. There have been sufficient decisions over a number of years to make it perfectly clear ; but these cases still go on and litigants pay". To-day, the position is no better. If anything, it is worse. Preliminary objections to the manner in which appeals have been constituted are of such frequent occurrence, that they may be said to form a part of the order of the day in our Courts of Appeal. They have become a "positive nuisance", and they occupy so much of the time of this Court with matters of trivial routine, that my Lord the Chief Justice has thought fit to exercise the power vested in him by section 51 of the Courts and their Powers Ordinance, and give directions for five Judges to assemble and consider this matter, in the hope that the parties concerned will take occasion to co-operate in order to put an end to a state of things that may well be described as scandalous.

The facts upon which the objection taken here is based are as follows :— On August 18, 1938, the appellants tendered their petition of appeal together with a notice of security calling upon the plaintiff-respondent and the defendant-respondent to take notice that they (the appellants) would on September 1, 1938, move to tender security for the costs of the appeal by offering one A.L.M.M.M. Sahib, as surety, and that they would, on the same day, deposit a sufficient sum of money to cover the expense of serving the notice of appeal. Thereupon, the Court ordered notices to issue on the respondents to the appeal, returnable on September 1, 1938, which was the date specified in the notice as the date on which security would be tendered, and this date, although it fell within the twenty-day period mentioned in section 756, was perilously near the end of it. However, the defendant-respondent was served before that date, but the Fiscal reported on August 31, 1938, that his officer had made search for the plaintiff-respondent but could not find him and that, it was said, that he had gone to Ambalangoda in the District of Galle for medical treatment. On this, the Court made order "security will be tendered to-day . . . . Reissue on plaintiff-respondent for 3/10", a date far beyond the twenty-day period within which security for costs had to be accepted. When the case was called on that day, the Fiscal's report showed that the notice was served on the plaintiff-respondent on September 12, 1938. But he was absent, and the Court ordered notice of appeal to issue for November 3, 1938. That order, of course, implied that the Court regarded the security that was, in point of fact, tendered and perfected on September 1, 1938, eleven days before the notice of security had been served on the plaintiff-respondent, as a compliance with the requirement of section 756 that there must be pronouncement of the acceptance of the security *within twenty days* from the date of the decree or order appealed against. It was, obviously, in that view of the matter that the Court issued notice of appeal, and directed the subsequent steps to be taken for the appeal to reach this Court. It is now contended on behalf of the respondents that there was no proper acceptance of the security on September 1, 1938, because by that date the plaintiff-respondent had not received notice of security and had not had an opportunity to be heard in regard to it, and

that, therefore, the proper course for the District Judge to have taken was to hold the petition of appeal to have abated, and to have abstained from taking the further steps that he took.

Counsel for the appellants concede that there is technical force in this objection but they ask for relief under sub-section (3) of section 756 on the ground that the plaintiff-respondent has not been materially prejudiced by what has occurred in this case. The question that then arises for our consideration and decision is, in what instances of failure to observe the provision of section 756, relief may be granted under this sub-section. For the appellants, the submission is made that sub-section (3) empowers this Court to grant relief in all cases of failure, whether *substantial* or *incidental*, provided the respondent to the appeal has not been materially prejudiced.

This question was considered by a Divisional Bench of three Judges of this Court, and Abrahams C.J. who delivered the judgment of that Bench 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 ".

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. Such requirements must be put before the interests of individuals and Courts have no power to absolve from them. If I may quote the words of Maule J. in *Freeman v. Tranch* [1] " although instances are constantly occurring where Courts might profitably be employed in doing simple justice between the parties, unrestained by precedent or by any technical rule . . . ., the proceedings of all Courts must take a defined course, and be administered according to a uniform system . . . . and it is probably more advantages that it should be so, though at the expense of some occasional injustice ".

Now, section 756 speaks in imperative terms when it enacts that the petitioner " shall forthwith give notice to the respondent that he will on a day to be specified in such notice, and within a period of twenty days . . . . tender security . . . . and will deposit a sufficient sum of money to cover the expenses of serving notice ". In the case before that Divisional Bench, the appellant gave no notice at all of security to be tendered, but within the period of twenty days, she produced what she claimed to be adequate security, and the first part of the statement I have

[1] *21 L. J. C. P. at 215.*

cited from the judgment of Abrahams C.J. dealt with the actual case before the Bench, and held that the failure on the part of the appellant to give notice for security was fatal. But in coming to that conclusion Abrahams C.J. appears to have taken notice of the fact that the failure was one for which no excuse was given, for in the preceding sentence he said " the petitioner says she did everything she could, but she has not given any *excuse* for not doing what she should ". The argument in the course of the case before us indicated that this qualification has created some doubt and difficulty. The qualification seems to imply that a complete non-compliance with one of the terms of section 756 may be condoned if a good excuse is forthcoming, but I think I am in a position to say—and the context supports the view—that when Abrahams C.J. used the words " without an excuse ", he had in mind the practice that obtained in some Courts for proctors to waive security for costs by arrangement among themselves, and he intended to say that in a case where no notice of security was given in pursuance of that practice, an objection taken in this Court that the letter of the law had not been complied with would be overruled and the failure excused, for a party may waive a rule of Civil Procedure intended for his benefit, and such a waiver would estop him from thereafter insisting upon the requirement he had waived. I can imagine no other excuse that could avail a party who has failed to comply with the peremptory requirement to give notice of security. In the case Abrahams C.J. was considering, it is not quite correct to say that the appellant " has not given any excuse for not doing what she should ". She did, in fact, put forward an excuse. She said " 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 ", and so she waited till she could ascertain that. Logically, this appears to be a valid and cogent excuse, but it was rejected, just as any other excuse than the one I have referred to would have had to be rejected, in view of the peremptory terms of the requirements.

Again, in the course of the argument in this case there was indication that difficulty had arisen from the use of the words "ought not to give relief", when in the course of the judgment Abrahams C.J. stated " 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* ". It was submitted to us that those words imply that in regard to both forms of breach, this Court could give relief, if it would, but that Abrahams C.J. took the view that this Court ought not to exercise its discretion to do so, and upon that submission, it was contended that such a judicial dictum was no more than a " pious opinion ". I am unable to accept that suggestion. It seems to me that here too, in the context " ought not " must be taken to mean " ought not for the reason that the law does not permit " for after saying that, Abrahams C.J. went on to say that the other breach that this Court " *ought not* " to relieve from " is when though non-compliance with an essential term may be trivial, a material prejudice has been occasioned ". It is obvious that in that context " *ought not* " must mean " cannot " for sub-section (3) implies beyond any manner of doubt that relief may not be granted when the respondent has been materially prejudiced by the failure.

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 appellants' 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 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 explicity. 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 twenty 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; (2) that he shall furnish a copy of the petition of appeal for service on the respondent or his proctor. Two of these matters are immediately in his power, namely, the giving of notice forthwith and the furnishing of the copy of the petition of appeal. The two other matters, namely, the tendering of the security and of the deposit to cover expenses of the service of notice of appeal are not immediately in his power, for they can be effectively done only with notice to the respondent. Section 756, therefore, gives him twenty days' time for that purpose, and of course, requires him to contrive things so as to discharge those obligations within twenty days. The effect of section 756 is that the failure on the part of the appellant to comply with the matters immediately and completely in his power may not be excused, the other matters may be excused if there has been "reasonable" omission, mistake or defect and the respondent has not been materially prejudiced.

The question then arises as to how the present case stands. There can be no question that these appellants duly furnished a copy of the petition of appeal and gave notice of security forthwith for they tendered this notice with their petition of appeal. In my opinion, it is clear from the words used in section 756 that when it was provided that notice should be *given* fothwith, what was intended was that notice should be *tendered* or *filed* forthwith, not that it should be *served* forthwith, for there is made available by the section itself an interval within the period of twenty days within which to serve notice. It is in this sense that the words "*give* notice forthwith" were interpreted in *Fernando v. Nikulan Appu*[1], and our ruling too is that that is the meaning of the words "give notice" in this section. There has, therefore, been a compliance by the appellants with the requirements of section 756 that were immediately and completely at their disposal, but in consequence of the mode employed by them to have this notice served on the respondents, it came to pass that service on the plaintiff-respondent could not be effected in time to afford him an

opportunity to be heard in regard to the security if he had any objection to offer to its acceptance before the twenty days elapsed. If I may say so with respect the view taken in the case of *Kangany v. Ramasamy*[1] is correct, namely, that the notice that should be given to a party respondent is an effective notice, that is to say, a notice that is served on him time to enable him to be heard in regard to the security before it is accepted within the twenty days allowed by section 756. In that case a notice that reached the respondent " a day after the date on which security was tendered and perfected " was held to be an insufficient compliance with the section and the appeal was rejected for that reason. That case, however, was decided in 1918, when sub-section (3) was not in existence. To-day the position is different.

When the appellants in this case tendered the notice of security for costs, they followed the course usually taken in regard to service of processes or notices, for section 356 of the Code says 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 ". Evidently the appellants hoped that it would be possible to serve the notices on the respondents through the Fiscal, within time, but in view of the peremptory direction in section 756 that the security should be accepted within twenty days, they ought to have considered the desirability of asking for special directions to be given by the Court for the service of this notice. They could, for instance, have asked to be allowed to serve the notices on the proctors for the respondents. But, their failure to do that was not a failure to comply with any special requirement of section 756, for there is no requirement in that section in regard to the manner in which notice of security shall be served, it was only an omission to take a more effective course in complying with an imperative requirement of section 756, namely, the requirement of giving notice of security. As an omission, it falls within the words of sub-section (3), and this Court has the power to grant relief from the consequences of the omission, if no material prejudice has resulted to the respondent. Now, it seems clear that in this case there is sufficient security given for the respondents' costs of appeal. The defendant-respondent who was served with notice in time had nothing to say against it, and the plaintiff-respondent himself has not, up to now, urged anything against it, and I can imagine no prejudice that will result to the respondents from this omission, mistake, or defect. The next question is, ought we to grant relief. In regard to that matter, I think we must not overlook the fact that the appellants took the course that has been usually followed for giving notice of security. They were able by those means to have notice served in time on the defendant-respondent. It was the extraordinary fact that the other respondent had just at this time left the district temporarily, that prevented service being effected on him within the period of twenty days.

For these reasons, I am of opinion that relief may properly be granted in this case and direction given that the appeal be listed in the usual course. But I think we should state quite clearly that our decision in this case does not mean that in future cases we shall, necessarily, give relief

[1] *21 N. L. R. 106.*

in similar circumstances. The experience of these appellants in this case must serve to teach other appellants the hazards to which they expose themselves when in too sanguine expectation, they resort to the usual mode prescribed for the service of processes and notices, oblivious of the fact that while in nearly every other instance there is no time limit imposed by the Ordinance for the service, in the instance of section 756 a definite and somewhat exiguous period is fixed. That is a fact to which appellants should pay careful attention, and they should not omit to ask for special directions from the Court whenever it appears likely that the usual mode of service may not serve their purposes.

To sum up, the conclusions reached are that (*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 (*Fernando v. Nikulan Appu* (*supra*)); (*b*) a copy of the petition of appeal must be furnished at or before the time the security is accepted and the deposit made; (*c*) security must be tendered and perfected, and the deposit made within twenty days from the date of the decree or order appealed against security; (*d*) failure to comply with (*a*) and/or (*b*) is fatal and sub-section (3) of section 756 does not permit relief to be granted by this Court, in respect of it; (*e*) omission to tender and perfect security and to make the deposit within twenty days, and other omissions, mistakes, and defects occuring in the course of tendering security, and in the course of perfecting the appeal generally, may be condoned by virtue of sub-section (3), in proper cases, if the respondent has not been materially prejudiced by such omission, mistake, or defect.

In view of these conclusions, the case before us appears to be typical of the cases in which relief may be granted and for that reason, I have already expressed my opinion that it should be listed in the ordinary course, for consideration on the merits of the appeal.

In all the circumstances, I think that no order for the costs of this preliminary discussion need be made.

HOWARD C.J.—I agree.

KEUNEMAN J.—I agree.

HEARNE J.—I agree.

WIJEYEWARDENE J.—I agree that the order proposed by my brother Soertsz should be made in this case.