1939 *Present :* **de Kretser J.**

SUPPRAMANIAM CHETTIAR *v.* SENANAYAKE *et al.*

173—C. R. Colombo, 45,706.

Security for costs—Notice to all respondents—Even to those respondents against whom no relief is claimed—Civil Procedure Code, s. 756, sub-section (3).

Security for costs and notice of security must be given to all persons who are made respondents to an appeal, even to those against whom no relief is claimed.

Failure to give such security or notice is a non-compliance with the terms of section 756 of the Civil Procedure Code in respect of which relief cannot be granted under sub-section (3) of the section.

APPEAL from a judgment of the Commissioner of Requests, Colombo.

L. A. Rajapakse (with him *M. M. I. Kariapper* and *J. E. Alles*), for plaintiff, appellant.

J. R. Jayawardene, for defendants, respondents.

December 1, 1939. DE KRETSER J.—

The appellant sued three persons on a promissory note. A proxy was filed which purported to come from the first and second defendant but was in fact signed by the second defendant alone. The Court required a proxy to be filed from the first defendant and several dates were given, but before the proxy was filed a minute of consent was placed before the Court by which the first and second defendants consented to judgment and asked to be allowed to pay by instalments. The Court was then only concerned, apparently, with the recovery of the stamp duty on the proxy which should have been filed, and that was duly recovered. The proxy remained unsigned by the first defendant. At a late stage the first defendant took objection to the issue of writ against him on the ground that he was a public servant at the time when the note was made and decree entered against him. The objection was upheld. The plaintiff then appealed, making all three defendants respondents to his appeal, and he stated that, though the second and third defendants were made respondents no relief was claimed against them. He then purported to deposit in Court, by a motion dated July 31, a sum of Rs. 26 as security for costs of appeal of the first defendant-respondent,

which seems to have been received in Court on August 2 and to have been minuted against the date August 3. The proctor, who still had no proxy from the first defendant, received notice and had no cause to show.

The order appealed from had been made on July 31 and notice had been given not to the respondent but to a person who purported to be his proctor.

No objection to the constitution of the appeal has been taken on this ground, but it is argued that no notice of the tendering of security and no security had been given to the second and third defendants, although they had been made respondents.

Now, in terms of section 756, every person made a respondent is entitled to notice and to such security as the Court orders. In this case the appellant, probably thinking that no security was required for those against whom no relief was claimed, did not serve any notice on them nor tender security, but he has made them respondents, apparently feeling for some reason that their presence was necessary to constitute a proper appeal, and it is impossible to say at this juncture whether the mere fact that he claimed no relief against them on his appeal necessarily meant that they might not be prejudiced by the appeal or by their absence at the hearing of the appeal. It is contended that their liability remained the same, whether the appeal succeeded or not, and in fact their position might conceivably be better if the appeal succeeded since it is conceivable that the plaintiff might levy against the first defendant alone, and in any case each of the other parties would have a right of contribution from the first defendant. This may or may not be so. It may be the respondents' desire to be present in Court so as to give whatever support they could to the appellant's case; or it may be, as suggested by the respondents' counsel, that one of them is a public servant himself and therefore interested in the result.

It is impossible to canvas these questions at this stage. It is enough that they were made respondents and that having been made respondents they should have been given notice of whatever security was being tendered. It is quite conceivable that eventually the Court might not have ordered any security in their case. There is therefore a non-compliance with the provisions of the first sub-section of section 756, and the only question is whether relief should be given under sub-section (3).

A number of authorities have been cited, some prior to the Divisional Bench judgment in *Sahira Umma v. Abeysinghe*[1], some subsequent thereto. Those prior to that case are necessarily not of much assistance now, but I might state that the decisions in *Nadarajah v. H. Don Carolis & Sons*[2], *Mendis v. Jinadasa*[3], and *Martin Singho v. Paulis Singho*[4] are very like the unreported case decided by my brother Nihill and myself (*24 D.C. Kandy, 70, S. C. Minutes of September 18, 1939*). In all those cases as a matter of fact security had been deposited with due notice, but there was only the formal defect that the sum of money deposited had not been hypothecated. Such a defect would be covered probably by the second condition imposed in the Divisional Bench judgment.

[1] *(1937) 39 N. L. R. 84.*
[2] *(1936) 38 N.L. R. 162.*
[3] *(1922) 24 N. L.R. 188.*
[4] *(2934 13 C. L. Rec. 238.*

In *Katonis Appu v Charles* [1], a case which was very similar to the present one, Abrahams C.J. rejected the appeal because security had been given only for one of many respondents although it was not clear that the other respondents would in any way be affected by the appeal.

In *Siyadoris Appu v. Abeyenayake* [2], an appeal was rejected because security was not given for one of the respondents. That case, however, was a partition case and the party for whom no security had been given seems to have made common cause with the respondents, but that does not appear to be the ground upon which relief was refused. It was refused on the ground stated in the Divisional Bench judgment, namely, that there had been a non-compliance with the terms of the section without any excuse.

In an unreported case (*S. C. 218/D. C. Ratnapura, 6,263*) decided by my brothers Soertsz and Hearne on February 20, 1939, an appeal was rejected for the same reason in very emphatic language. There is also the case (*92 D. C. Kalutara, 16,775*) decided on February 14, 1939. There is therefore quite an abundance of authority that in circumstances such as the present the appeal must be rejected. It is therefore rejected with costs.

Appeal rejected.