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9/1963

IN THE PRIVY COUNCIL

No. 48 of 1961 UNIVERSITY OF LONDON INSTITUTE OF ADVANCED LEGAL STUDIES 19 JUNE 64 25 RUSSELL SQUARE LONDON, W.C.1.

ON APPEAL FROM
THE SUPREME COURT OF CEYLON

B E T W E E N :

ABDUL WAHAB MOHAMED SAMEEN
(Defendant) Appellant

74066

- and -

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1. PALLIYAGURUGE VITHANAGE SUMANAWATHIE
ABEYEWICKREME
 2. PALLIYAGURUGE VITHANAGE WIMALAWATHIE
ABEYEWICKREMA
 3. PALLIYACURUGE VITHANAGE CHANDRASIRI
ABEYEWICKREMA
- (Substituted Plaintiffs)
Respondents

CASE FOR THE APPELLANT

Record

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1. This is an appeal from a Judgment and Decree, dated the 1st February, 1960, of the Supreme Court of Ceylon (H.N.G. Fernando and Sinnetamby, J.J.), ordering and decreeing that the petition of appeal of the Appellant be abated, and that the Appellant pay to the Respondents the costs of the appeal, on an appeal from a Judgment and Decree, dated the 15th February, 1957, of the District Court of Colombo (A.L.S. Sirimanne, A.D.J.), whereby in an action between the Appellant as Defendant and the first-named Respondent as substituted Plaintiff, judgment was entered for the first-named Respondent in the sum of Rs.10,828 and costs.

pp.33 & 40.

pp.14 & 19.

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2. The question which arises in this appeal is whether the said petition of appeal was rightly abated by the Supreme Court, on the ground that the Appellant had failed to give notice of tender of security for the Respondents' costs of appeal in accordance with the provisions of the Civil Procedure Code (hereinafter referred to as "the Code").

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3. The following provisions of the Code (Legislative Enactments, 1956 edition, Chapter 101) are relevant to this appeal:

"356. 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 herein before 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."

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"357. It shall be the duty of every Fiscal, upon receiving any writ or warrant, or precept directed to him by any court, by himself or by his officers, to execute such writ or warrant and to serve every process, notice, or order conveyed to him under such precept according to the exigency of the writ, warrant, or precept."

"754. (1) Every appeal to the Supreme Court from any judgment, decree, or order of any original court, shall be made in the form of a written petition to the Supreme Court in the name of the appellant, and shall be preferred to the Supreme Court as hereinafter provided.

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(2) The petition of appeal shall be presented to the court of first instance for this purpose by the party appellant or his proctor within a period of ten days, or where such court is a Court of Requests, seven days, from the date such the decree or order appealed against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of Sundays and public holidays, and the court to which

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the petition is so presented shall receive it and deal with it as hereinafter provided. If those conditions are not fulfilled it shall refuse to receive it."

10 "756. (1) 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 such notice, and within a period of twenty days, or where such court is a Court of Request, fourteen days, from the date when the decree or order appealed against was pronounced, computed as in the same section is directed for the periods of ten days and seven days therein respectively mentioned, tender security as hereinafter directed for the respondent's costs of appeal, and will deposit a sufficient sum of money to cover the expenses of serving notice of the appeal on the respondent. And on such day 20 the respondent shall be heard to show cause if any against such security being accepted and also the deposit made within such period, then the court shall immediately issue notice of the appeal together with a copy of the petition of appeal, to be furnished to the court for that purpose by the appellant, to the Fiscal for service on the respondent who is named by the appellant in his petition of appeal, or on his proctor if he was represented by a proctor in the court of first instance, and shall forward to the Supreme Court the petition of appeal together with all the papers and proceedings of the case relevant to the decree or order appealed against; retaining, however, an office copy of the decree or order appealed against, for the purposes of execution if necessary. And such proceedings shall be accompanied by a certificate (Form No. 128, First Schedule) 30 from the secretary or clerk of the court, stating the dates of the institution and decision of the case, in whose favour it was decided, the respective days on which petition of appeal was filed and security given, and whether either the plaintiff sued or the defendant defended in forma pauperis. But where an appeal is taken from the decision of a Judge of the Supreme Court sitting alone as 40

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in section 37 of the Court Ordinance provided, the Registrar of such court shall, after doing all acts and things necessary to be done by such secretary or clerk as aforesaid preparatory to forwarding proceedings in appeal to the Supreme Court as in this section provided, proceed in manner in section 768 prescribed.

(2) The Fiscal's return to the process issued under this section shall immediately upon being received by the court of first instance be transmitted to the Supreme Court, but where the appeal is from the decision of a Judge of the Supreme Court so sitting alone as in the last-mentioned Ordinance provided, such return shall be made to and filed by the Registrar with the proceedings in appeal.

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

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(3) 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."

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p. 19.

4. The Judgment of the District Court of Colombo from which the Appellant sought to appeal was delivered, and the Decree of the Court was drawn up and signed, on Friday, the 15th February, 1957. The steps taken by Proctor, K. Rasanathan, the Proctor for the Appellant, to prosecute an appeal to the Supreme Court from that judgment of the District Court were as follows:-

pp.25, 33 and
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(1) A petition of appeal was presented by him to the District Court at about 11 a.m. on Saturday, the 16th February, 1957, the day after the said Judgment was delivered.

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(2) At 11.15 a.m. on the same day he spoke on the telephone to one of the members of the firm

of proctors representing the Respondents, and told the member of the firm that he would be sending notice of tender of security. The member of the firm informed him in reply that he might do so, but that the matter was being dealt with by another member of the firm.

10 (3) The notice of tender of security was taken to the office of the Respondents' proctors at about 1.15 p.m. on the said day, but the office was then closed and there was no one to receive it.

(4) On Monday the 18th February, 1957, the notice of tender of security was again taken to the office of the Respondents' proctors, and was submitted to the said proctors, who endorsed on it - "Received notice subject to objections. De Silva and Mendis. 18th February, 1957". The notice of tender of security was also filed in the District Court later on the said day, and bears the court seal of that date.

p.23.

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20 (5) On 28th February, 1957, he filed a fresh petition of appeal accompanied by a fresh notice of tender of security, in the District Court.

pp.19, 26 and 29.

p.34.

30 5. As is shown by Entry (69) of the journal entries of the District Court, on Monday the 18th February, 1957, the Court recorded the terms of the Appellant's notice of tender of security, and recorded that the proctors for the Respondents had received the notice. That entry was corrected on the 21st February, 1957, by Entry (70), which recorded that by an oversight the District Court had failed to record that the proctor for the Respondents had received the notice subject to objections, and further recorded that the Respondents' proctor would be permitted to raise his objections on the 8th March, 1957, which was the date specified in the Appellant's notice of security as the day for the tendering of security. The Court did not issue the said notice to the Fiscal for service in accordance with the provisions of section 356 of the Code. But when the Appellant's proctor filed a fresh petition of appeal and notice of security on the 28th February, 1957, the Court ordered the fresh notice of security to be issued for the 8th March, 1957, and it was sent for service to the Fiscal on the 1st March, 1957. But it appears from Entry (76),

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which states "no return to the notice of security", that the fresh notice of security was not in fact served by the Fiscal on or before the 8th March, 1957, when the case was called on for security.

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6. On the 8th March, 1957, when the case was called for security in the District Court, Counsel for the Respondents moved that the appeal be abated on the ground that notice of tender of security was not given "forthwith" upon the receipt by the Court of the petition of appeal, as required by

p.31.

Section 756 (1) of the Code. The Order of the District Court (A.L.S. Sirimanne A.D.J.) was that the appeal be forwarded to the Supreme Court, and that it be left open to the Respondents to raise the objection there. It was further recorded in the said Order that the security tendered by the Appellant was accepted by the Respondents, and that the Appellant's bond was perfect. The notice of appeal was duly served on the Respondents by the Fiscal.

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7. At the commencement of the hearing of the appeal by the Supreme Court (H.N.G. Fernando and Sinnetamby J.J.), on the 9th November, 1959, a preliminary objection to the hearing of the appeal was taken by Counsel for the Respondents, on the same grounds as had been raised before the District Court, and after the matter had been argued on the 9th, 10th and 11th November, 1959, the Judgment and Decree of the Supreme Court, given on the 1st February, 1960, was that the petition of appeal of the Appellant be abated and that the Appellant do pay the costs of the appeal.

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8. In regard to the question whether the Appellant had complied with the requirements of Section 756(1) of the Code, the decision of the Supreme Court was as follows:-

(1) The Appellant's petition of appeal had been "received" by the District Court on Saturday the 16th February, 1957.

(2) The duty of a petitioner in an appeal to "give" notice of tender of security to the respondent is, by reason of the provisions of Section 356 of the Code, to be performed by filing the notice in the court of first instance, unless the court otherwise directs, or unless service of the notice through the court is waived by the respondent.

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(3) Service of the notice of security in accordance with the Code had not been waived.

(4) The Appellant's notice of security dated the 16th February, 1957, was not given "forthwith", because it was not filed in the District Court on the same day as the petition of appeal was received by the court, namely on Saturday the 16th February 1957.

10 (5) The failure to comply with the provisions of Section 756(1) of the Code was not cured by the filing of the fresh petition of appeal and notice of security.

9. The Supreme Court refused to grant relief to the Appellant under Section 756(3) of the Code. Sinnatamby J. did not make any reference in his judgment to the question of relief. Fernando J. gave as his reason for refusing relief that the decided cases were conclusive, but did not name the cases to which he was referring. The provisions for relief in subsection (3) of Section 756 of the Code were introduced into the Code by amending legislation in 1921 (Ordinance No. 42 of 1921). Since that date it has been decided by the Supreme Court in a number of cases that the courts have no power to grant relief under subsection (3) of Section 756 in a case where there has been a substantial non-compliance with the requirements of Section 756, or a failure to comply with an essential requirement of the section, by the appellant (see e.g. Silva v. Goonesekere, 31 N.L.R. 184). The first case in which it was held that the requirement of service of notice of security "forthwith", i.e. on the same day as the petition of appeal is received by the Court, was an essential requirement of Section 756, and that the court had no power to relieve a failure of strict compliance, was De Silva v. Seenathumma, 41 N.L.R. 241, but the material part of the judgment of the court (delivered by Soertsz J.) was obiter. In Thenuwara v. Thenuwara, 61 N.L.R. 49, decided in 1959, in which the facts were that the notices of security to certain respondents to the appeal were lodged with the petition of appeal but were defective, the Supreme Court (Easnayake C.J. and Pulle J.) held that these notices had not been given "forthwith" and that, following De Silva's case, the court had no power to grant relief. It would seem from the

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Judgment of Basnayake C.J. that he would in any event have refused to exercise his discretion in favour of the appellant on the grounds of the negligence of his proctor. But Pulle J. said that he would have been inclined to grant relief to the appellant had he not felt himself precluded from doing so by the decision in De Silva's case.

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10. After stating that the decided cases were conclusive against the granting of relief, Fernando J. went on to give reasons why in his judgment the actual decisions in Fernando v. Nikulan Appu, 22 N.L.R. 1, and in De Silva v. Seenathumma were of no avail to the Appellant. In regard to the first mentioned case, in which the appellant had filed notice of security in the court on the second day after he had presented the petition of appeal, Fernando J. said that "relief was given" because the word "forthwith" had previously not been strictly construed in practice, and that a wrong practice previously acquiesced in by the courts of accepting as valid the delayed filing of notices of security was excused on that occasion. The learned Judge did not allude to the fact that the case was decided in 1920, shortly before subsection (3) of Section 756 was introduced into the Code by amending legislation, and that the basis of the decision was a liberal interpretation of the word "forthwith" in the special circumstances of the case, and not an application of the relieving provisions of the Code.

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11. In regard to the decision in De Silva's case, Fernando J. explained that relief was granted in that case, not against a failure to file notice of security forthwith, but because a notice duly filed did not reach the respondent through the normal mode of service by the Fiscal.

12. In the submission of the Appellant, the reference by Fernando J. to the facts in De Silva's case, and his statement that the decided cases are conclusive against the granting of relief in this case, are plain indications that the Supreme Court did not exercise its discretion in regard to the Appellant's claim to relief, but held as a matter of law that the Court had no power to grant relief where notice of security had not been filed on the same day as the petition of appeal. In the

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respectful submission of the Appellant the Supreme Court was wrong in so holding, and in so far as the decided cases referred to in paragraph 9 hereof support that decision, they were wrongly decided.

13. The Appellant respectfully submits, that, while a failure to comply with the requirements of Section 756 of the Code may in certain circumstances be of such a total or radical character as to take the case outside the ambit of the provision for relief, the failure of the Appellant in this case was not of such a character, but was a "mistake, omission or defect" in complying with the provisions of the section, within the meaning of Section 756 (3).

14. The Appellant further submits that the Supreme Court should have exercised its discretion to grant him relief for the following reasons:-

(1) The Respondent did not suffer any material prejudice.

(2) The Appellant's proctor had good reason to believe that the Respondents' proctor would accept direct service of the notice of security, thereby waiving the requirement of service through the court.

(3) The Supreme Court had not previously disapproved the practice for proctors to waive service of notice of security through the court, by arrangement among themselves, and the practice was alluded to without criticism in the judgment of the court in De Silva v. Seenathumma, 41 N.L.R. 241 at 246.

(4) Notice of security was filed in the District Court on Monday the 18th February, 1957, and the delay was not significant, more particularly because that day was, by reason of the provisions of Sections 756(1) and 754(2) of the Code, the first day of the period of twenty days allowed for giving security by Section 756(1).

(5) If the Appellant's proctor had presented the petition of appeal to the District Court at 11 a.m. on Monday the 18th February, 1957, instead of on the preceding Saturday, or if the preceding Saturday had been a full working day, the Appellant would not have been in default.

(6) The failure of the District Court to issue the Appellant's notice of security to the Fiscal for service was an omission for which the Appellant should not be held responsible.

14. On the 28th October, 1957 final leave to appeal to Her Majesty in Council was granted by Decree of the Supreme Court.

15. The Appellant humbly submits that this appeal should be allowed and that the Judgment and Decree of the Supreme Court of the 1st February, 1960, should be set aside, and that an order should be made granting relief to the Appellant and restoring his appeal from the District Court or alternatively directing the Supreme Court to determine the Appellant's application for relief according to law, and that the Appellant should be awarded his costs in the Supreme Court and of this appeal, for the following among other

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R E A S O N S

(1) BECAUSE upon the true construction of Section 756 of the Code, and in all the circumstances of the case, the Appellant is entitled to relief.

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(2) BECAUSE the Supreme Court wrongly held that it had no power to grant relief to the Appellant.

(3) BECAUSE De Silva v. Seenathumma and Thenuwara v. Thenuwara were wrongly decided by the Supreme Court in so far as it was held that the courts could not or should not grant relief in the circumstances of this case.

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(4) BECAUSE the Supreme Court should have exercised its discretion under Section 756(3) of the Code in the Appellant's favour for the reasons set out in paragraph 13 hereof.

(5) BECAUSE the refusal of the Supreme Court to exercise its discretion will result in injustice being done to the Appellant.

KENNETH POTTER.

No. 48 of 1961

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COURT OF CEYLON

B E T W E E N :

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(Defendant) Appellant

- and -

PALLIYAGURUGE VITHANAGE
SUMANAWATHIE ABEYEWICKREMA
and Others
(Substituted Plaintiffs)
Respondents

CASE FOR THE APPELLANT

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