

411.92

No. 117

1961

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1963

Supreme Court of Ceylon,  
No. 117 (Final) of 1957.

District Court of Colombo,  
Case No. 7069/Land.

IN HER MAJESTY'S PRIVY COUNCIL  
ON AN APPEAL FROM  
THE SUPREME COURT OF CEYLON

BETWEEN

ABDUL WAHAB MOHAMED SAMEEN

of No. 591, Maradana Road, Colombo.....Defendant-Appellant.  
APPELLANT.

AND

1. PALLIYAGURUGE VITHANAGE SUMANAWATHIE  
ABEYEWICKREMA,

2. PALLIYAGURUGE VITHANAGE WIMALAWATHIE  
ABEYEWICKREMA, and

3. PALLIYAGURUGE VITHANAGE CHANDRASIRI  
ABEYEWICKREMA, all of No. 579, Maradana  
Road, Colombo. (the 2nd and 3rd minors appearing by  
their *Guardian-ad-litem*, the 1st substituted Plaintiff.)

.....Substituted-Plaintiffs-Respondents.  
RESPONDENTS.

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
19 JUN 1964  
25 RUSSELL SQUARE  
LONDON, W.C.1.

74068

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RECORD  
OF PROCEEDINGS

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No. ....

Supreme Court of Ceylon,  
No. 117 (Final) of 1957.

District Court of Colombo,  
Case No. 7069/Land.

IN HER MAJESTY'S PRIVY COUNCIL  
ON AN APPEAL FROM  
THE SUPREME COURT OF CEYLON

BETWEEN

ABDUL WAHAB MOHAMED SAMEEN

of No. 591, Maradana Road, Colombo.....Defendant-Appellant.  
APPELLANT.

AND

1. PALLIYAGURUGE VITHANAGE SUMANAWATHIE  
ABEYEWICKREMA,
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ABEYEWICKREMA, and
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their *Guardian-ad-litem*, the 1st substituted Plaintiff.)

.....Substituted-Plaintiffs-Respondents.  
RESPONDENTS.

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RECORD  
OF PROCEEDINGS

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## Plaint of the Plaintiff

De Silva and Mendis,  
Proctors, S.C.  
COLOMBO.

## IN THE DISTRICT COURT OF COLOMBO

(Dead) P. G. A. ABEYEWICKREMA of No. 579, Maradana Road, Colombo.

MRS. P. W. S. ABEYEWICKREMA in place of Plaintiff. (Dead).....*Plaintiff*.

*vs.*

<sup>10</sup> A. W. M. SAMEEN of No. 591, (formerly No. 585), Maradana Road,  
Colombo.....*Defendant*.

No. 7069/L.

*Nature* : Land.

*Amount* : Rs. 100,000/-.

*Class* :

*Procedure* : Regular.

On this 21st day of December, 1953.

The plaint of the Plaintiff abovenamed appearing by Felix Charles Aloysius Domingo De Silva and Noel Servulus Oswald Mendis practising in  
<sup>20</sup> partnership in Colombo under the name style and firm of "De Silva and Mendis" and their Assistants John Samuel Parnavitana, Joseph Domingo Bertram Fernando, Ananda Clarence Dimbulana, Rajeswary Nagalingam, Arthur Francis Bertram de Waas Tillekeratne, Maduwage Diananda de Silva and Christopher Gilbert Jayasuriya his Proctors, states as follows :—

1. The Defendant resides and the cause of action hereinafter set out arose at Colombo within the jurisdiction of this Court.
2. The Plaintiff is the owner and is lawfully seised and possessed of the land and premises (with the building which is a two storied structure standing thereon) bearing assessment No. 579, Maradana Road, Colombo described  
<sup>30</sup> in the first schedule hereto.
3. (a) The land and premises presently bearing assessment No. 591 and formerly No. 585, Maradana Road, Colombo, adjoins and is situated to the East of Plaintiff's premises No. 579, Maradana Road, (described in the second schedule hereto).
- (b) The Defendant is the owner and is possessed of the land and premises bearing assessment No. 591, Maradana Road, Colombo.

4. The building on the Plaintiff's land is occupied and used for the purpose of carrying on his business known as the "Eastern Furniture Company." The said business consists *inter alia* in the manufacture and sale of furniture.

5. The Plaintiff has the right to the lateral and subjacent support for his land and for the building standing thereon.

6. The Defendant is conducting building operations on his land for the erection of a three storied building thereon. The work on this building has reached the second floor level and the pillars of the super-structure have been completed and the shuttering is being erected for the third floor. 10

7. In the course of such operations the Defendant wrongfully and in violation of the Plaintiff's rights made, or caused to be made, certain excavations alongside and under the foundations of the building which stands on Plaintiff's land. The Defendant has :—

- (i) excavated or cause to be excavated earthwork under the foundations of the wall of the building adjoining Defendants land (hereinafter referred to as Plaintiff's wall) almost to the centre line of the said wall, thus removing lateral support to the Plaintiff's foundation to a width of about 5 to 5 1/2 inches,
- (ii) cut away, or caused to be cut away, the foundation of the 20 Plaintiff's building to make room for the concrete foundation of the defendant's building,
- (iii) undermined, or caused to be undermined, Plaintiff's foundation in order to insert therein M. S. Rods for providing a reinforced concrete base for the foundation of Defendant's building.

8. The said wrongful acts of the Defendant, complained of above, has caused the gradual and continuing subsidence of the foundations of the Plaintiff's building. The subsidence will increase, and be accelerated, as work on the Defendant's building progresses.

9. The said subsidence has caused *inter alia* :— 30

- (i) the complete collapse of a portion of the Plaintiff's wall to a height of 8 feet 6 inches from ground level.
- (ii) horizontal and diagonal cracks (which are increasing and widening out) in the Plaintiff's wall,
- (iii) horizontal cracks in the two piers flanking the collapsed wall,
- (iv) large cracks in the ground floor of the building bordering Plaintiff's wall to a length of approximately 90 feet,
- (v) the floor between the floor cracks and the end of the Plaintiff's wall has subsided to a depth of 1/4 inch. (which depth is increasing). 40

10. Should the third storey of Defendant's building be constructed or any building operations be continued for the construction of the third storey, the foundation and the subsoil (which subsoil is poor) will necessarily be required to carry additional loads and further subsidence of the Plaintiff's foundation will necessarily result. Thus the cracks in the Plaintiff's building will increase and widen and the Plaintiff's building will be endangered, thereby causing irreparable and irremediable damage and injury to Plaintiff and to his building.

11. The Defendant has also encroached on the Plaintiff's right to extend his wall upwards by allowing the concrete floor of the second storey of Defendant's building to project beyond Plaintiff's wall. In addition the said projection carries on top a surface water drain which discharges surface water on to the Plaintiff's wall thereby causing damage to the said wall.

12. The Plaintiff assesses the damage which up to date hereof has been sustained by him at Rs 45,000/-.

13. The Defendant is fully aware of the damage caused to the Plaintiff and also that further damage will be caused to the Plaintiff by reason of the building operations on his land. The Defendant persists in his conduct despite the protests of the Plaintiff.

14. The Plaintiff apprehends that Defendant will persist in his conduct and proceed with the construction of the third storey of his building and thereby cause irreparable and irremediable damage and injury to the Plaintiff and to his building unless restrained by injunction from doing so.

15. A cause of action has accrued to the Plaintiff to sue the Defendant for a permanent injunction restraining the Defendant from interfering or violating Plaintiff's rights (referred to in the plaint) and from constructing the third storey of his building or from conducting any building operations for the construction of the third storey of his building (b) for a mandatory order on the Defendant to remove all erections which have been made or erected and referred to in the plaint in violation of all or any of the Plaintiff's rights aforesaid (c) for the recovery of the sum of Rs. 45,000/-.

16. The Plaintiff values the subject matter of this action at Rs. 100,000/-.

Wherefore the Plaintiff prays :—

(a) for judgment against Defendant in the sum of Rs. 45,000/-.

(b) for a permanent injunction restraining the Defendant from interfering with or violating the Plaintiff's rights (referred to in the plaint) and from constructing the third storey of his building or from conducting any building operations for the construction of the third storey of his building,

(c) for a mandatory order on the Defendant to remove all erections which have been made or erected (referred to in the plaint) in violation of all or any of the Plaintiff's rights aforesaid,

No. 1  
Plaint of  
the Plaintiff  
21-12-53  
—continued.

(d) for costs, and

(e) for such other and further relief as to this Court shall seem meet.

(Sgd.) DE SILVA AND MENDIS,  
*Proctors for Plaintiff.*

#### THE FIRST SCHEDULE ABOVE REFERRED TO

All that the divided and defined portion of land together with the buildings and premises standing thereon (being a portion of all that one fourth part of the house and ground bearing assessment No. 151 depicted in plan dated 13th November, 1895 made by Chas Schwallie, Licensed Surveyor and registered in A49/236 Land Registry, Colombo) presently bearing assessment No. 579 situated at Second Division Maradana within the Municipality and District of Colombo, Western Province, bounded on the North by the properties bearing assessment No. 58/1-14 of A. C. Abdeen, East by the properties bearing assessment No. 31/9-21 of W. A. de Silva, South by the property bearing assessment Nos. 31/4-6, 1/25, 23/4-6 and 581 of A. W. M. Sameen and West by the Maradana High Road containing in extent ten and one tenth perches (A0.R0.P10 1/10) according to Survey and description thereof bearing No. 156 dated 7th August, 1949 made by E. S. Tudugalla Licensed Surveyor.

#### THE SECOND SCHEDULE ABOVE REFERRED TO

All that land and premises presently bearing assessment No. 591, and formerly No. 585 situated at Second Division Maradana Road, Colombo, within the Municipality and District of Colombo Western Province, bounded on the North by premises bearing assessment No. 579, Maradana Road, East by property belonging to Marikkar Bawa, South by a passage and on the West by Maradana High Road.

(Sgd.) DE SILVA AND MENDIS,  
*Proctors for Plaintiff.*

*Settled by :*

MR. P. NAVARATNARAJAH,  
*Advocate.*

30

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#### No. 2

#### Answer of the Defendant

#### IN THE DISTRICT COURT OF COLOMBO

P. G. A. ABEYEWICKREMA, of No. 579, Maradana Road, in Colombo.....*Plaintiff.*

No. 7069/Land.

*vs.*

A. W. M. SAMEEN of No. 591, (formerly No. 585,) Maradana Road, in  
Colombo.....*Defendant.*

No. 2  
Answer  
of the  
Defendant  
29-3-55



On this 29th day of March, 1955.

The answer of the defendant abovenamed appearing by K. Rasanathan, his Proctor states as follows :—

No. 2  
Answer  
of the  
Defendant.  
29-3-55  
—continued.

1. The Defendant admits his residence within the jurisdiction of this Court and also admits the Courts jurisdiction to hear and determine this action.

2. The Defendant denies all and singular the averments contained in paragraphs 1, 5, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the plaint subject to the express admissions contained herein.

10 3. Answering paragraph 2 of the plaint the defendant admits that the Plaintiff is the owner of premises bearing Assessment No. 579, Maradana Road, Colombo but is unaware of and hence proforma denies the correctness of the description of the said premises contained in the First Schedule to the Plaint.

4. The defendant admits paragraph 3 and pleads further that the said land and premises includes an extent of 14 . 97 perches shown and described in Plan No. 2524 dated 3rd November, 1942 made by M. I. L. Marikar, Licensed Surveyor.

5. The defendant admits paragraph 4 of the plaint.

20 6. Answering paragraph 6 of the plaint the defendant admits completion of the ground floor and two storeys of the three storeyed building to be erected thereon. The construction of the third storey has been stayed as a result of an injunction issued by this Court.

7. Originally the common wall dividing the two premises (Plaintiffs and Defendants) supported the roofs of both premises and had been built under unknown circumstances. In or about 1949 or 1950 the Plaintiff in erecting additions to his property raised the common wall and imposed new loads thereon without providing the adequate safeguards necessary to support the new loads. The subsidence, if any, of the foundations of the Plaintiff's building was due to such new loads and also due to the wrongful removal of the  
30 cross walls that gave support to the common wall, prior to the new additions to his building made by the Plaintiff. By reason of imposing such new loads the plaintiff has lost his rights if any to lateral support for such common wall from the Defendant's land.

8. The Defendant as he lawfully might started the erection of a new building providing foundations well within his land and premises and after making an allowance of half the common wall and a gap of about seven inches average within his own land and premises. The load of the proposed building is borne entirely by the defendant's land and has not caused and will not cause any damage to Plaintiff's building.

40 9. The Defendant constructed his new building on plans approved by the local authority with the express knowledge and consent of the plaintiff and without any objections thereto being raised by the Plaintiff. The Defen-

No. 2  
Answer  
of the  
Defendant  
29-3-55  
—continued.

dant has at considerable expense erected his new building and the non-completion thereof will cause irreparable damage. The plaintiff is stopped from denying the right of the defendant to complete his building, and from complaining about the present structure.

10. The completion of the said building has been interrupted as a result of an injunction sued out wrongfully from this Court by the Plaintiff. The plaintiff had also wrongfully prevented the defendant from making the necessary building operations to protect the common wall aforesaid from the effects of the elements and the immediate cause for the subsidence if any, complained of by the plaintiff was due to such wrongful obstruction on the 10 part of the Plaintiff.

11. By reason of the injunction wrongfully obtained by the plaintiff the defendant has suffered damages in a sum of Rs. 100,000/- and continues to suffer damages at the rate of Rs. 1,000/- per month till the injunction is dissolved.

WHEREFORE THE DEFENDANT PRAYS :—

- (a) That the Plaintiff's action be dismissed,
- (b) That the injunction issued in this case be dissolved,
- (c) That judgment be entered for the defendant against the plaintiff for the sum of Rs. 100,000/- aforesaid, 20
- (d) For continuing damages at Rs. 1,000/- per month from the 1st day of March, 1955 till the dissolution of the said injunction,
- (e) for costs and for such other and further relief as to this Court shall seem meet.

(Sgd.) K. RASANATHAN.  
*Proctor for Defendant.*

No. 3  
Replication  
1-6-55

No. 3

Replication

IN THE DISTRICT COURT OF COLOMBO

P. G. A. ABEYEWICKREMA of No. 579, Maradana Road, in Colombo.....*Plaintiff.* 30

No. 7069/Land.

*vs.*

A. W. M. SAMEEN of No. 591, formerly No. 585, Maradana Road, in Colombo.....*Defendant.*

On this 1st day of June, 1955.

The Replication of the Plaintiff appearing by Felix Charles Aloysius Domino De Silva, Noel Servulus Oswald Mendis, and Cyril Xavier Martyn,

practising in partnership in Colombo under the name style and firm of " DE SILVA AND MENDIS " and their Assistants, John Samuel Parनावитана, Joseph Domingo Bertram Fernando, Christopher Gilbert Jayasuriya, Rajeswary Nagalingam, Arthur Francis Bertram De Waas Tillekeratne, Maduwage Diananda de Silva, Sugathadasa Gunasekera, Florence Augustus Iris Ratnayaka, Shelton Ernest Abeyasuriya, and George Ternus Bibile Makalande, his Proctors states as follows :—

No. 3  
Replication  
1-6-55  
—continued.

1. The Plaintiff joins issue with the Defendant upon the several denials of the averments contained in the plaint and states :

- 10 (a) Replying to paragraph 4 of the answer the plaintiff is unaware of the extra extent pleaded therein.
- (b) Replying to paragraph 7 of the answer the Plaintiff denies that the subsistence of the Plaintiff's foundation or the damage done to Plaintiff's building was due to the act or acts of the Plaintiff as alleged in the answer but state that it was entirely due to the act or acts of the Defendant as set out in the plaint.
- (c) Replying to paragraph 8 of the answer the Plaintiff denies the averments therein contained.
- 20 (d) Replying to paragraph 9, 10 and 11 of the answer the plaintiff states that he is unaware as to whether the plans were approved by the local authority and the plaintiff expressly denies the other averments contained in the said paragraphs.

WHEREFORE THE PLAINTIFF PRAYS :—

- (a) that the Defendant's claim in reconvention be dismissed.
- (b) that judgment be entered as prayed for in the plaint.
- (c) for such other and further relief as to this Court seems meet.

(Sgd.) DE SILVA AND MENDIS,  
*Proctors for Plaintiff.*

*Settled by :*  
30 NEVILLE SAMARAKOON ESQR.  
*Advocate.*

Journal Entries

(RELEVANT EXTRACT)

- (67) 15-2-57. Messrs. De Silva and Mendis for Plaintiff.  
Mr. K. Rasanathan for Defendant.

*Vide* Judgment delivered in Open Court.

(Intd.) .....

- (68) 16-2-57. Mr. K. Rasanathan, Proctor for Defendant-Appellant files  
Petition of Appeal.  
File.

10

(Intd.) .....

A. D. J.  
7069/L

- (69) 18-2-57. Mr. K. Rasanathan, Proctor for Defendant-Appellant states  
that the Petition of Appeal of the appellant and presented  
by him on 16-2-57 against the Judgment of D. C. Colombo  
of 15-2-57 having been received by the said Court, Counsel  
on his behalf will, on 8-3-57 at 10-45 o'clock in the forenoon,  
or soon thereafter move to tender security in Rs. 250/- for  
any cost which may be incurred by him in appeal in the 20  
premises, and will on the said day deposit in Court a suffi-  
cient sum of money to cover the expenses of serving notice  
of appeal on him. Proctors for Plaintiff-Respondent  
received notice.

1. Call Case on 8-3-57 for security.
2. Issue Paying-in-Voucher for Rs. 250/-.

(Intd.) .....

A. D. J.

- (70) 21-2-57. Sir, *Vide* J. E. (69) I regret that by an oversight I had failed  
to journalise the fact that the Proctor for Plaintiff-Res- 30  
pondent received notice subject to objections.  
He may raise his objections on 8/3.

(Intd.) .....

A. D. J.

- (71) 21-2-57. Proctor for Defendant-Appellant tenders application for  
typewritten copies and moves for a paying in voucher for  
Rs. 25/-.

Issue P.I.V. for Rs. 25/-.

(Intd.) .....

P/V Issued.

A. D. J. 43

(72) 28-2-57. Mr. K. Rasanathan, Proctor for Defendant-Appellant files fresh Petition of Appeal.  
File.

(Intd.) .....  
A. D. J.

No. 4  
Journal  
Entries  
(relevant  
extract)  
15-2-57 to  
15-11-60  
—continued.

10 (73) 28-2-57. Mr. K. Rasanathan, Proctor for Defendant-Appellant states that he files affidavit explaining reason for not giving of Notice of Security on the same day and *ex Abundante Cantela*. He files fresh Petition of Appeal and notice of security.  
*Vide* order at J. E. 74.

(Intd.) .....

20 (74) 28-2-57. Mr. K. Rasanathan, Proctor for Defendant-Appellant states that the Petition of Appeal of the Appellant presented by him on 16-2-57, against the Judgment of the D.C. Colombo dated 15-2-57 in the said action having been accepted, Counsel on his behalf will, on the day of 8-3-57 at 10-45 o'clock in the forenoon, or soon thereafter move to tender security in a sum of Rs. 250/- for any costs which may be incurred by him in appeal in the premises, and will on the said day deposit in Court a sufficient sum of money to recover the expenses of serving notice of appeal on him.

- 1. Issue Notice of Security for 8-3-57.
- 2. Issue Paying-in-Voucher for Rs. 250/-.

(Intd.) .....  
A. D. J.

(75) 1-3-57. Notice of Security sent to Fiscal to be served on Proctor for Plaintiff-Respondent.

(Intd.) .....

30 (76) 8-3-57. Messrs. De Silva and Mendis for Plaintiff-Respondent. Mr. K. Rasanathan for Defendant-Appellant.  
*Vide* Journal Entries (69 and 74) Case called for security.  
No return to Notice of Security.  
*Vide* proceedings.  
Call 22-3-57.

Proceedings and order filed.

(Intd.) .....

No. 4  
Journal  
Entries  
(relevant  
extract)  
15-2-57 to  
15-11-60  
—continued.

- (77) 8-3-57. Mr. K. Rasanathan, Proctor for Defendant-Appellant tenders Bond to Prosecute, Kachcheri Receipts for Rs. 250/- and Rs. 25/- and Notice of Appeal.  
Issue Notice of Appeal for 22-3-57.  
(Intd.) .....  
*Asst. Secretary.*
- (78) 8-3-57. Notice of Appeal sent to Fiscal/W.P. to be served on Proctors for Plaintiff-Respondent.  
(Intd.) .....  
7069/L 10  
Notice of Appeal served.  
(Intd.) .....  
14/3
- (79) 22-3-57. Messrs. De Silva and Mendis for Plaintiff-Respondent. Mr. K. Rasanathan for Defendant-Appellant.  
*Vide Journal Entries 76 and 77 Case called.*  
Notice of appeal served.  
Forward record to Supreme Court.  
(Intd.).....  
*A. D. J. 20*
- (80) 30-3-57. The Municipal Engineer, Colombo requests to forward the documents stated in the attached copy.  
Move after appeal is decided.  
Inform M/E accordingly.  
(Intd.) .....  
*A. D. J.*
- (81) 21-5-57. The Appeal Branch requests fees to be called from the following :—  
Mr. K. Rasanathan, Rs. 237.50  
Messrs. De Silva and Mendis Rs. 525/- (2 copies). 80  
Call for by registered post.  
(Intd.) .....  
*A. D. J.*
- (82) 13-6-57. Kachcheri Receipt X No. 2912 of 31-5-57 for  
13 032733  
Rs. 525/- filed.  
(Intd.) .....

(83) 20-7-57. Informed Messrs. Silva and Mendis, Proctors for Plaintiff to enter the Decree.

(Intd.) .....

(84) 24-7-57. Kachcheri Receipt  $\frac{X}{13}$  No.  $\frac{2097}{035983}$  of 22-6-57  
for Rs. 237/50 filed.

(Intd.) .....

(85) 13-7-59. *Vide* Journal Entry (83).

10

Decree not tendered by Messrs. de Silva and Mendis yet. Registrar Supreme Court inquires what the delay is (No. APL of 7-7-59).

1. Call on 15-7-59 for decree.
2. Write to Messrs. de Silva and Mendis to tender on 15-7-59.

(Intd.) .....  
*A. D. J.*  
13-7-59.

(86) 13-7-59. Letter sent to Messrs. De Silva and Mendis calling for decree.

20

(Intd.) .....

(87) 15-7-59. Messrs. De Silva and Mendis for Plaintiff-Respondent.  
Decree due — not filed.  
File on 5/8.

(Intd.) .....  
*A. D. J.*  
15-7-59.

(88) 5-8-59. Messrs. De Silva and Mendis for Plaintiff-Respondent.  
*Vide* Journal Entry (87).  
Decree due — filed.  
Forward record.

30

(Sgd.) A. L. S. SIRIMANNE,  
5-8-59.

(89) 14-8-59. *Vide* Journal Entry (74).  
Supreme Court Judgment stamps for Rs. 78/- (1st Appeal) affixed.

(Intd.) .....  
14/8.

(90) 14-8-59. Record with Supreme Court Judgment stamps for Rs. 78/- sent to Registrar Supreme Court with two copies of appeal briefs and two sets of Journal entries.

40

(Intd.) .....

No. 4  
Journal  
Entries  
(relevant  
extract)  
15-2-57 to  
15-11-60  
—continued.

- (91) 10-2-60. Proctors for substituted Plaintiff tenders an application for execution of Decree by seizure and sale of immovable and movable property by issue of writ against Defendant.  
Vide Journal Entry 93 below.  
Mention on 10-3-60.  
(Sgd.) A. L. S. SIRIMANNE,  
20-2-60.
- (92) 17-2-60. Registrar Supreme Court returns record with Supreme Court Judgment. The Petition of Appeal of defendant-appellant is abated. It is further ordered and decreed that the 10 defendant-appellant do pay to the substituted-Respondents the taxed costs of appeal.  
File.  
(Sgd.) A. L. S. SIRIMANNE,  
A. D. J.  
20-2-60.
- (93) 19-2-60. As the Defendant has filed application for Conditional leave to Appeal to the Privy Council in Application S.C. No. 60 and notice on the Respondents has been ordered returnable 8-3-60, Proctor for Defendant moves that no application 20 for execution be allowed without notice to the Defendant.  
Vide 37 N.L.R. 133.  
Mention on 10-3-60.  
(Sgd.) A. L. S. SIRIMANNE,  
20-2-60.
- (94) 10-3-60. Messrs. De Silva and Mendis for substituted-Plaintiff. Mr. K. Rasanathan for defendant vide Journal Entries (91) and (93). Mention.  
Inquiry 7-4-60.  
(Sgd.) A. L. S. SIRIMANNE, 30  
10-3-60.
- (95) 7-4-60. Messrs. De Silva and Mendis for substituted-Plaintiff. Pt. Mr. K. Rasanathan for Defendant. Pt. vide Journal Entry (94) Inquiry.  
Of consent call on 16-5-60.  
(Sgd.) A. L. S. SIRIMANNE,  
A. D. J.  
7-4-60.
- (96) 16-5-60. Messrs. De Silva and Mendis for substituted-Plaintiff instructing Mr. Fernando. 40  
Mr. K. Rasanathan for Defendant. vide Journal Entry (95).  
Of consent case called.  
Of consent Call 27-6-60.  
(Sgd.) A. L. S. SIRIMANNE,  
16-5-60.



No. 4  
Journal  
Entries  
(relevant  
extract)  
15-2-57 to  
15-11-60  
—continued.

(97) 27-6-60. Messrs. De Silva and Mendis for Plaintiff.  
Mr. K. Rasanathan for Defendant. *vide* Journal Entry (96).  
Of consent case called.  
Of consent call on 19-9-60.

(Sgd.) A. L. S. SIRIMANNE,  
A. D. J.  
27-6-60.

10 (98) 19-9-60. Messrs. De Silva and Mendis for Plaintiff.  
Mr. K. Rasanathan for Defendant. *vide* Journal Entry (97).  
Of consent case called.  
Of consent call on 9-11.

(Sgd.) A. L. S. SIRIMANNE,  
19-9-60.

(99) 28-9-60. Registrar by his letter No. APN of 19-9-60 requests to stay  
execution proceedings.  
Note. Mention on 9-11-60.

(Sgd.) A. L. S. SIRIMANNE,  
28-9-60.

7069/L

20 (100) 9-11-60. Messrs. De Silva and Mendis for Plaintiff. Journal Entry  
(98) Case called.  
*Vide* letter from the Registrar of the Supreme Court, re-  
questing to stay execution proceedings.  
Stay execution pending appeal.

(Sgd.) A. L. S. SIRIMANNE,  
9-11-60.

30 (101) 14-11-60. Registrar Supreme Court requests that the record of  
proceedings in the case be forwarded as Final leave to  
appeal to the Privy Council has been granted by the  
Supreme Court.  
Forward proceedings.

(Sgd.) A. L. S. SIRIMANNE,  
15-11-60.

(102) 15-11-60. Record forwarded to Supreme Court.

(Intd.) .....

## Judgment of the District Court

## JUDGMENT

Plaintiff is the owner of premises bearing assessment No. 579, Maradana and the defendant the owner of the adjoining premises No. 591. There was a cabook wall which separated these premises. In about July, 1953 the defendant commenced extensive building operations on his premises. The plaintiff complains that these operations caused damage to his building particularly to the floor and to the cabook wall which partially collapsed. The defendant denies liability and suggests that any damage to the plaintiff's 10 building was the result of the act of the plaintiff himself who added a storey to his building in 1950. That is the real matter in dispute between the parties—for no one can seriously deny that the plaintiff's building has in fact been damaged.

The plaintiff claims the cabook wall as part of his property, but the defendant (despite his counsel's contention that it is a common wall) claims it as his own. This wall had been built very long ago and no conclusive evidence can be led now as to who actually constructed it. But I think the plaintiff's contention is correct. In a plan made in 1919 (P1), long before any dispute had arisen, and when the parties were on the friendliest terms, this wall is 20 shown (by a cliché) as part of the plaintiff's land. The defendant's plan (D17) made in 1942 does not take in the wall as in P1, but the defendant called a surveyor who says that a superimposition of this plan takes in the wall. This superimposition is not reliable. The lane on the east is now not exactly the same as it was in 1942 when D17 was made. Yet the superimposition D18 shows no difference on that side. The slightest shifting of a plan for even a fraction of a millimeter would make all the difference between the wall being shown inside or outside the plan, and unless there is very definite data to go by, errors could easily arise. There is an old photograph taken somewhere in 1942 (P3) which throws some light on this matter. The 30 cabook wall is directly under the plaintiff's roof which rests on it *with the caves extending beyond it*. It is possible of course that the defendant's roof rested on the wall and that at some later point of time the plaintiff's predecessors, having removed the tiles, etc. of the defendant's roof, raised the wall higher and then placed their own roof on the raised wall. That is a possibility, but in practice it is very seldom done. The probabilities are that the defendant's roof rested on pillars built right up against this wall and that the wall itself was part of the plaintiff's building. It is significant that the defendant started building 8 inches away from this wall. It suggests as Mr. Wickramanayake submits that there was a "step out" on that side (as there is on the 40 plaintiff's side) of the wall.

Admittedly the plaintiff added a storey to his building in 1950 and this must have cast an additional burden on the cabook wall. But it was not affected in any way — no cracks appeared on it — and until 1953 when the defendant commenced building, there was nothing wrong at all with the plaintiff's building. It would be wrong to assume (in my view) that in 1953 this wall suddenly started to crack up as a result of what was done three years earlier.

When work started on the defendant's building, the plaintiff says he was alarmed at the manner in which it was being done and therefore complained to the defendant about it. The defendant assured him that there would be no danger and continued the work until the plaintiff's wall started cracking and collapsed. His evidence was convincing and I accept it. On many points one finds corroboration of what he says, *e.g.* in October, 1953 he complained to the Municipal Council (P13) on 18th November, 1953 he got his proctor Mr. J. P. Perera to write to the Municipal Council (P12) and on the same day saw Mr. Gonsal the Architect. (*Vide* Gonsal's letter to the plaintiff 10 P10 dated 19-11-54 referring to an interview on the previous day.) On Gonsal's advice he got some photographs taken. P4 to P8 show the cracks on the wall and floor and the debris from the partially collapsed wall.

No. 5  
Judgment  
of the  
District  
Court  
15-2-57  
—continued.

(There was a curious incident when evidence in regard to these photographs was being led. It has been strongly suggested by the defence that these pictures had been taken about a week before the 18th. The photographer took the plaintiff's counsel completely by surprise when he said that these photographs were taken on the 11th November. But before he left the Court the exact date had been ascertained by referring to the book in which the dates are entered, and he was recalled with permission. He then said that 20 the correct date was the 19th or 20th November.)

The photographs clearly show the damage that has been done. There is also the evidence of the contractor Mr. E. G. A. Perera and Mr. Walpola a building inspector in the Colombo Municipality. Whatever criticism may be levelled against Walpola himself, one cannot get behind the fact that he did go to inspect these premises as a result of the plaintiff's complaints and saw the damage that had been done.

As to how this damage was caused, a good deal of technical evidence has been led. On the side of the plaintiff there is Mr. Gonsal. Ranged against him are Mr. Rao, Colonel Stanley Fernando, and to some extent Mr. Wynne 30 Jones. It is true that Mr. Gonsal having been "retained" by the plaintiff cannot be considered as an entirely impartial witness. On the other hand the plaintiff's complaint is that it is due to the faulty method of building construction adopted by the Eastern Hardware Stores (whom the defendant had employed to do his work) that all this damage was caused. Mr. Rao and Colonel Stanley Fernando are employees of the Eastern Hardware Stores, and it is the efficiency of the methods they used which is being questioned now. They too cannot be said to be strictly impartial witnesses, for in a sense they themselves are on trial.

Mr. Rao who ultimately called himself an engineer by experience, has 40 really no qualifications at all. He was the person directly in charge of the building operations, and his main concern was to get the work done at the minimum cost. Colonel Fernando merely paid occasional visits once in a week or ten days. As far as one could gather, he acted merely in a supervisory capacity on such matters as the correct mixture of concrete which should be used, etc. It was left to Rao to actually get the work done.

Plaintiff says that in preparing the foundation for the new wall on the west, the defendant's employees dug, what he calls a "trench," right along

the cabook wall and below the level of his foundation so that water which got into this trench weakened his wall. According to Rao and Colonel Fernando, the ground was dug in small areas for laying the foundation for the pillars — and one such area was closed before another was opened. I have my grave doubts whether this was really done. If it was, I find it difficult to believe that the plaintiff would have made all these complaints, or that his building would have suffered all this damage. One has also to remember that Mr. Rao did admit at one stage that this job was given out as “piece work” to reduce costs, and it would have been most expensive for a contractor to cut the foundation in the manner stated by Rao. It may be that the plaintiff and 10 Walpola were exaggerating in regard to the exact length of the trench, but I am inclined to believe that it was cut in sections of considerable length alongside the plaintiff’s wall.

Mr. Wynne Jones came in at a much later stage. The plaintiff had taken out an injunction and restrained the defendant from building further. Mr. Wynne Jones was then brought *by the defendant* in order to bring about a settlement of the dispute so that he (the defendant) could continue building. Mr. Wynne Jones was given certain data about the plaintiff’s building at the time of his inspection. Those present there were — on the defendant’s behalf, the defendant himself, his proctor, Mr. Rao and Colonel Fernando — on 20 behalf of the plaintiff, only himself. It was impossible for the plaintiff (who spoke no English) to have given any information to Mr. Wynne Jones. All the data had obviously been furnished by those present on behalf of the defendant.

At the time of this inspection a hole had been dug on the plaintiff’s premises at Mr. Gonsal’s instance for the purpose of ascertaining the damage done to the foundation. As far as I can gather, someone had told Mr. Wynne Jones that both this hole as well as the opening in the wall had been deliberately made for purposes of investigations and it is as a result of this information rather than on his own observations that Mr. Wynne Jones says in his 30 report that the wall had been opened for purposes of investigation. Despite what Mr. Wynne Jones says, I find it impossible to believe that the plaintiff would have broken down his wall, thus damaging his building and putting his place of business in utter disorder (he is a furniture dealer and has his show room here) merely in the hope of getting some pecuniary benefit from the defendant.

Though the architects called by the two sides give different opinions as to the cause of the damage to the plaintiff’s building, there are certain facts which cannot be denied. It is conceded that the defendant’s employees did dig below the level of the foundation of the plaintiff’s wall in such a manner 40 as to expose that foundation. I do not think that any technical knowledge is necessary to see that the plaintiff’s building was placed in grave danger by this exposure. The foundation could have been very easily damaged and the slightest damage to it would seriously affect the building.

It is also conceded that the defendant’s workmen had placed B.R.C. fabric on their own foundation in such a way that the metal prongs went underneath the foundation of the cabook wall, and found its way into the plaintiff’s premises. These metal prongs could be seen from the hole dug on

the plaintiff's premises. Colonel Fernando admits, as indeed anyone must, that if this job had been properly done these prongs should not have gone under the plaintiff's foundation. As a result of these acts the soft sub—soil had started to move and once subsidence sets in no one could say where it would end. Mr. Rao admitted that he did not realise that a heavy building in close proximity to another may effect the subsoil. In a letter dated 9-3-54 (P18) to the defendant's proctor he says that " . . . . . Whatever damage was sustained by the neighbour was not *entirely due* to settlement of sub—soil, due to loading of foundations . . . . . This loading might have contributed 10 slightly . . . . . "

No. 8  
Judgment  
of the  
District  
Court  
15-2-57  
—continued.

I think it is also clear that the defendant's workmen had stuffed the mud and soil — dug out from their premises when preparations were being made to lay their foundation and into the gap between the cabook wall and the new wall. Water falling into this gap from the defendant's raised roof (there was rain at this time) also contributed in great measure to the collapse of the plaintiff's wall. The suggestion was made that this mud and soil was put into the gap by the plaintiff himself after he had broken down part of his wall. It would have been impossible for him to have done so, for, one could see the mud and soil right *above* the opening in the wall. One could see this even 20 from a photograph like P8. I am of opinion that the damage caused to the plaintiff's building was the result of the acts of the defendant's employees.

In this view of the matter, it is immaterial whether or not the plaintiff was entitled to lateral support. The facts in the cases cited are very different from those in the present case, and in any event I am inclined to agree with the submission made by Mr. Wickramanayake, that in Roman Dutch Law the right to lateral support is not a servitude but a right which flows from the ownership of land.

Before assessing the plaintiff's damages I would deal with the defendant's claim in reconvention. This claim is based on the allegation that he has 30 suffered damages as a result of the injunction taken out by the plaintiff. The defendant had added *one storey*, to the ground floor at the time the plaintiff applied for the injunction. The photograph P9 which was filed with the papers praying for an injunction show the state of the defendant's building at the time. There is the ground floor and *one storey* above it. Those who drafted those papers had looked upon the ground floor as the first storey and the one above it as the second storey and prayed in the petition that the defendant be restrained from constructing the *third storey*. Clearly they meant the storey above the one which appears in the photograph P9. It is inconceivable that the plaintiff at that time was seeking to restrain the defen- 40 dant from building a storey over one which had not yet been built. It was at this time that the defendant sought the advice of Mr. Wynne Jones and obtained a report in order to reach a settlement and continue building. Thereafter someone on the defendant's behalf had found that the language was faulty, and that the injunction served on him would not prevent him from adding another storey to the structure as it appears in P9. All negotiations for a settlement were then abandoned and the defendant continued with his building operations and added another storey. He now pretends that he has suffered damages because he was prevented from putting up a penthouse on top of that storey too. I can see no merit in this claim. At the rate the 50 defendant was building and the manner in which the work was carried out, it

was impossible for a layman or even an architect for that matter, to foresee what damage might result to the plaintiff's buildings if the defendant was allowed to carry on unchecked, and I am not prepared to hold that the injunction was improperly taken out. But now that all the facts have been ascertained and the defendant says he wishes to put up only a very light penthouse — there can be no objection to his doing so. His claim for damages is dismissed.

In regard to the damages suffered by the plaintiff, there is only the evidence of Mr. Gonsal who estimates it at Rs. 14,000/-. But in cross examination when asked for details, he produced a piece of paper D14 on which he has made a rough calculation of the cost of repairing the building. This amounts to Rs. 9,844-00. He says he has omitted certain items such as Foreman's charges, Architect's fees and expenses for "contingencies," in D14. I agree that the services of a good architect would be necessary to effectively remedy the damage done to the plaintiff — but I do not think any further allowances should be permitted. The architect's fee is generally 10 per cent of the cost. I would therefore add a further sum of Rs. 984/- and award the plaintiff Rs. 10,828/- as damages.

I answer the issues as follows :—

1. Yes. 20
2. (*Vide* proceedings of 9-8-56).
  - (i) Yes.
  - (ii) (a) Yes.
  - (b) Yes.
  - (c) Yes.
3. Yes.
4. Rs. 10,828/- (even independently of the right to lateral support).
5. No — not to prevent him from putting up a penthouse as stated in the evidence.
6. It may, but it does not include the cabook wall. 30
7. No.
8. No.
9. (a) He raised his own wall.
- (b) Yes probably.
10. No.
11. No.
12. No.
13. (a) No.
- (b) No.
14. No. 40
15. Yes, as far as putting up a penthouse is concerned.
16. Nil.

I enter judgment for plaintiff in a sum of Rs. 10,828/- and costs.

(Sgd.) A. L. S. SIRIMANNE,  
 A. D. J.

Delivered in Open Court.

(Sgd.) A. L. S. SIRIMANNE,  
 A. D. J.  
 15-2-57.

Decree of the District Court

DECREE

IN THE DISTRICT COURT OF COLOMBO

No. 6  
Decree  
of the  
District  
Court  
15-2-57.

P. G. A. ABEYEWICKREMA of No. 579, Maradana Road,  
Colombo.....*Plaintiff.*  
Mrs. P. W. S. ABEYEWICKREMA.....*Substituted Plaintiff.*

No. 7069/Land *vs.*

10 A. W. M. SAMEEN of 591, (formerly 585), Maradana Road,  
Colombo.....*Defendant.*

This action coming on for final disposal before A. L. S. Sirimanne Esquire, Additional District Judge of Colombo on this 15th day of February, 1957 in the presence of Mr. Advocate E. G. Wickremanayake, Q.C. with Mr. Advocate Navaratnarajah and Mr. Advocate Neville Samarakoon instructed by Messrs. De Silva and Mendis, Proctors, on the part of the plaintiff and Mr. Advocate C. Thiagalangam, Q.C. with Mr. Advocate Somasundram, instructed by Mr. K. Rasanathan, Proctor, on the part of the Defendant; It is ordered and decreed that the defendant do pay to the plaintiff the sum of Rs. 10,828/- and the costs of this action.

20

(Sgd.) A. L. S. SIRIMANNE,  
*A. D. J.*

This 15th February, 1957.

Drawn by us :  
(Sgd.) DE SILVA AND MENDIS,  
*Proctors for Plaintiff.*

Petition of Appeal to the Supreme Court

IN THE SUPREME COURT OF THE DOMINION OF CEYLON

No. 7  
Petition of  
Appeal to  
the Supreme  
Court  
16-2-57.

30 P. G. A. ABEYEWICKREMA of No. 579, Maradana Road,  
Colombo.....*Plaintiff—(dead).*

D. C. Colombo.  
No. 7069/L. *vs.*

A. W. M. SAMEEN of No. 591,(formerly of No. 585), Maradana Road,  
Colombo.....*Defendant*

*and*

No. 7  
Petition of  
Appeal to  
the Supreme  
Court  
16-2-57  
—continued.

A. W. M. SAMEEN of No. 591, Maradana Road,  
Colombo.....*Defendant-Appellant.*

*vs.*

1. P. V. S. ABEYEWICKREMA.
2. P. V. W. ABEYEWICKREMA.
3. P. V. G. ABEYEWICKREMA. 2nd and 3rd (Minors) by their *Guardian-ad-litem* the first substituted plaintiff  
.....*Substituted Plaintiff-Respondents.*

**To :**

THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER JUDGES OF THE 10  
HONOURABLE THE SUPREME COURT OF THE DOMINION OF CEYLON.

On this 16th day of February, 1957.

The Petition of appeal of the Defendant-Appellant abovenamed appearing by K. RASANATHAN his Proctor states as follows :—

1. One P. G. A. Abeyewickrema the original Plaintiff in this action and the owner of premises No. 579, Maradana Road, Colombo filed the above-styled action in the District Court of Colombo on the 21st of December, 1953, against the Defendant-Appellant for the recovery of a sum of Rs 45,000/-, being damages alleged to have been suffered by him on account of the Defendant-Appellant carrying on Building Operations on the Appellant's land 20 No. 591, Maradana Road, which adjoins and is adjacent to premises No. 579, Maradana Road. The original Plaintiff also prayed for a permanent injunction restraining the Appellant from constructing the third storey of his Building or from conducting any building operations for the construction of the third storey of his building and for a mandatory order on the Appellant to remove all erections which had been made or erected in violation of the original plaintiff's alleged rights.

2. After filing the plaint, the original plaintiff obtained an interim injunction from the Court restraining the appellant from conducting any building operations for the construction of the third storey of the Appellant's 30 building.

3. On the 29th of March, 1955 the Defendant-Appellant filed Answer denying the alleged claims of the original Plaintiff and claiming in reconvention a sum of Rs. 100,000/-, being damages suffered by the Appellant by the original plaintiff wrongfully obtaining an injunction from Court restraining the Appellant from carrying on Building operations for the third storey of the Appellant's building.

4. The Case came up finally for Trial on the 21st of February, 1956, before The Learned Additional District Judge. The Learned Additional District Judge heard evidence and argument on a number of dates. The 40 Counsel for the appellant concluded his address on the 9th of August, 1956.



5. Thereafter the original Plaintiff died and the present plaintiff respondent was substituted in place of the original plaintiff. The Counsel for the substituted plaintiff-appellant concluded his address on the 30th January, 1957 and the Learned Additional District Judge reserved its order for the 15th of February, 1957.

No. 7  
Petition of  
Appeal to  
the Supreme  
Court  
16-2-57  
—continued.

6. On the 15th of February, 1957 the Learned Additional District Judge delivered his order giving Judgment for the substituted plaintiff respondent for Rs. 10,828/-, and Costs.

7. Being dissatisfied with the said Judgment of the Learned Additional District Judge, The Defendant-Appellant begs to appeal therefrom To Your Lordship's Court on the following among other grounds that will be urged by the Appellant's Counsel at the hearing of this Appeal.

(a) The said Judgment is contrary to Law and the weight of evidence adduced in the said Case.

(b) The evidence led in the case clearly establishes the fact that the roof of the Old building on the appellant's land was supported entirely by the Cabook wall that separated the two buildings and did not rest on pillars built alongside the Cabook wall on the appellant's side.

20 At the inspection portions of the perlines — embedded in the Cabook wall and cut off when the appellants old buildings was demolished were shown to the Court. This clearly shows that the Cabook wall was originally put up by the appellant's predecessors in title and that the said wall belonged to the appellant.

(c) The Survey Plan D17 made by the appellant's Surveyor clearly shows that the Cabook wall falls entirely within the appellant's land.

30 (d) The wall of the appellant's building is eight inches away from the Cabook wall for the simple reason that the foundation of the appellant's wall just vouches the foundation of the Cabook wall and occupies the intervening distance between the Cabook walls. If the appellant's wall was built so as to touch the Cabook wall, the foundation of the appellant's wall would have to go completely under the Cabook wall. The evidence does not establish that there was a "step out" of eight inches on either side of the Cabook wall.

40 (e) The evidence established beyond any doubt that in 1950 the plaintiff in erecting additions to his property raised the Cabook wall and imposed new loads thereon without providing adequate safeguard necessary to support the new loads. The subsidence if any of the foundations of the plaintiff's building was due to such new loads. It is submitted that my reason if imposing such new loads the plaintiff had lost his rights if any to lateral support for the said Cabook wall.

No. 7  
Petition of  
Appeal to  
the Supreme  
Court  
16-2-57  
—continued.

- (f) The plaintiff's case was entirely based on the alleged right of the plaintiff to the lateral and subjacent support for his land and building. If the plaintiff had lost such right by the imposition of new loads on the Cabook wall in 1950, then the entire case of the plaintiff collapses. It is respectfully submitted that the Learned Additional District Judge had completely misdirected himself when he answered issue No. 4 as "Rs. 10,828/-, even independently of the right to lateral support."
- (g) The evidence establishes the fact that the foundation for the appellant's wall was cut trench by trench for the pillars and not cut 10 and left open for a length of eighty feet before the concrete was put in.
- (h) Mr. Wyn Jones had stated in his report and later in his evidence that the hole in the Cabook wall was artificially created. Other evidence led in the case also points towards the same conclusion. The evidence of Mr. Wyn Jones who is admittedly an expert on buildings clearly shows that the damage to the Cabook wall was caused by the superimposition of additional loads on it in 1950 by the plaintiff and not by the building operations carried on the appellant's land. In any event according to Mr. Wyn Jones the 20 damage caused to the Cabook wall could be repaired by the expenditure of about Two Thousand Rupees.
- (i) The Plaintiff's claim for a permanent injunction was not seriously pressed at the Trial and it was clear that the plaintiff had wrongfully sued out the interim injunction and thus caused serious loss and damage to the appellant.
- (j) The allegation that the employees of the appellant's constructor had put mud between the two walls during the course of construction of the appellant's building was an after thought on the part of the plaintiff. No such allegation was made in the plaint. At the 30 inspection it was shown that the space between the two walls was perfectly clear and free from any mud or earth.

WHEREFORE THE APPELLANT PRAYS :—

- (a) That the Judgment of the Learned Additional District Judge be set aside and the Plaintiff's action be dismissed with Costs and Judgment be entered for the Appellant for the claim in reconvention.
- (b) For such other and further relief as to Your Lordship's Court shall seem meet.

(Sgd.) K. RASANATHAN, 40  
*Proctor for Defendant-Appellant.*

## Notice of Security

## IN THE SUPREME COURT OF THE ISLAND OF CEYLON

P. G. A. ABEYEWICKREMA of No. 579, Maradana Road  
Colombo.....*Plaintiff (Dead).*

D. C. Colombo  
No. 7069/L.

*vs.*

10 A. W. M. SAMEEN of No. 591, (formerly of No. 585), Maradana Road,  
Colombo.....*Defendant.*

*and*

A. W. M. SAMEEN of No. 591, Maradana Road,  
Colombo.....*Defendant-Appellant.*

*vs.*

1. P. V. S. ABEYEWICKREMA,
  2. P. V. W. ABEYEWICKREMA, and
  3. P. V. C. ABEYEWICKREMA, 2nd and 3rd (Minors) by their *Guardian-ad-litem* the first substituted plaintiff.
- ..... *Substituted Plaintiffs-Respondents.*

20 *To :*

THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER JUDGES OF THE  
HONOURABLE THE SUPREME COURT OF THE DOMINION OF CEYLON.

MESSRS. DE SILVA AND MENDIS,  
*Proctors for the Respondents.*

TAKE Notice that the Petition of Appeal of the Appellant presented by me in the above-named action on the 16th day of February, 1957, against the Judgment of the District Court of Colombo dated 15th day of February, 1957, in the said action, having been received by the said Court, Counsel on my behalf will, on the day of 8th March, 1957, at 10-45, o'clock in the fore-  
30 noon, or so soon thereafter move to tender Security in a sum of Rs. 250/-, 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.

The 16th day of February, 1957.

(Sgd.).....

*Appellant*  
(Sgd.) K. RASANATHAN,  
*Proctor for Appellant.*

Received notice subject to objection.

(Sgd.) DE SILVA AND MENDIS,  
18-2-57.  
*Proctors for Plaintiff.*

No. 9  
Motion of  
Proctor for  
Defendant  
28-2-57.

Motion of Proctor for Defendant

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

P. G. A. ABEYEWICKREMA of No. 579, Maradana Road, in  
Colombo..... *Plaintiff (Dead).*

D. C. Colombo  
No. 7069/L.

*vs.*

A. W. M. SAMEEN of 591, (formerly of No. 585), Maradana Road, in  
Colombo..... *Defendant. 10*

*and*

A. W. M. SAMEEN of No. 591, Maradana Road, in  
Colombo..... *Defendant-Appellant.*

*vs.*

- 1. P. V. S. ABEYEWICKREMA,
- 2. P. V. W. ABEYEWICKREMA and
- 3. P. V. C. ABEYEWICKREMA, 2nd and 3rd (Minors) by their *Guardian-ad-litem* the first substituted plaintiff  
..... *Substituted Plaintiff-Respondent.*

I file my affidavit explaining reason for not giving of Notice of Security 20 on the same day and *ex abundante Cautela* — I file herewith fresh petition of appeal and notice of Security. Also stamps for certificate in appeal and S.C. Judgment.

Colombo 28th February, 1957.

(Sgd.) K. RASANATHAN,  
*Proctor for Defendant-Appellant.*

*A.D.J.*

Please see J.E. (68). This is a second appeal filed by the same proctor for the Defendant-appellant. This appeal is within time.

(Intd.)..... 30  
28/2.

No. 10  
Affidavit of  
Proctor K.  
Rasanathan  
28-2-57.

Affidavit of Proctor K. Rasanathan

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

P. G. A. ABEYEWICKREMA of No. 579, Maradana Road, in  
Colombo..... *Plaintiff (Dead)*

*vs.*

D. C. Colombo  
No. 7069/L.

A. W. M. SAMEEN of No. 591, (formerly No. 585), Maradana Road in Colombo.....*Defendant.*

and

A. W. M. SAMEEN of No. 591, Maradana Road, Colombo.....*Defendant-Appellant.*

vs.

- 1. P. V. S. ABEYEWICKREMA,
  - 2. P. V. W. ABEYEWICKREMA, and
  - 3. P. V. C. ABEYEWICKREMA, 2nd and 3rd (Minors) by their *Guardian-ad-litem* the first substituted Plaintiff.
- .....*Substituted-Plaintiff-Respondents.*

10

I, Krishnapillai Rasanathan, Proctor and Notary of No. 161/61, Hulftsdorf in Colombo, not being a Christian do hereby solemnly sincerely and truly declare and affirm as follows :—

1. I am Defendant-Appellants Proctor in this case.

2. On the 16th day of February, 1957, I filed a Petition of Appeal in this case at 11 A.M.

3. At once at 11-15, I rang Messrs. De Silva and Mendis, Proctors for the Respondents-Plaintiffs and inquired whether they would take notice of my Appeal.

4. Mr. Austin Cooray who answered the phone told me that Mr. Jayasuriya who was dealing with this case would not come in as he had other work outside but requested me to come together Office at Fort, agreeing to receive notice of Security.

5. Thereupon I prepared the Notice of Security and went to the Fort, by the time I reached their Office it was about 1-15 p.m. and Mr. Cooray had left and so the others too.

6. Then on Monday morning I rang Mr. Jayasuriya who received notice on Monday morning and which I have filed in Court.

Signed and affirmed to at Colombo on this 28th day of February, 1957 .....

(Sgd.) K. RASANATHAN.

Before me,

(Sgd.) Illegibly,  
*Commissioner of Oaths.*

No. 10  
Affidavit of  
Proctor K.  
Rasanathan  
28-2-57  
—continued.

Petition of Appeal to the Supreme Court

IN THE SUPREME COURT OF THE DOMINION OF CEYLON

P. G. A. ABEYEWICKREMA of No. 579, Maradana Road, in  
 Colombo.....*Plaintiff (Dead).*

D. C. Colombo  
 No. 7069/L.

*vs.*

A. W. M. SAMEEN of No. 591, (formerly of No. 585), Maradana Road,  
 Colombo.....*Defendant. 10*

*and*

A. W. M. SAMEEN of No. 591, Maradana Road,  
 Colombo..... *Defendant-Appellant.*

*vs.*

1. P. V. S. ABEYEWICKREMA,
2. P. V. W. ABEYEWICKREMA, and
3. P. V. C. ABEYEWICKREMA, 2nd and 3rd (Minors) by their *Guardian-ad-litem* the first substituted-Plaintiff.  
 .....*Substituted-Plaintiff-Respondents.*

*To :*

20

THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER JUDGES OF THE  
 HONOURABLE THE SUPREME COURT OF THE DOMINION OF CEYLON.

On this 28th day of February, 1957.

The Petition of Appeal of the Defendant-Appellant above-named  
 appearing by K. RASANATHAN his Proctor states as follows :—

1. One P. G. A. Abeyewickrema the Original Plaintiff in this action and the owner of premises No. 579, Maradana Road, Colombo filed the above-styled action in the District Court of Colombo on the 21st day of December, 1958 against the Defendant-Appellant for the recovery of a sum of Rs. 45,000/-, being damages alleged to have been suffered by him on account of the Defendant-Appellant carrying on Building operations on the Appellant's land No. 591, Maradana Road, which adjoins and is adjacent to premises No. 579, Maradana Road. The Original plaintiff also prayed for a permanent injunction restraining the Appeal — and from constructing the third storey of his building or from conducting any building operations for the construction of the third storey of his building and for a mandatory order on the Appellant to remove all erections which had been made or erected in violation of the original Plaintiff's alleged rights.

2. After filing the plaint, the original plaintiff obtained an interim injunction from the Court restraining the appellant from conducting any building operations for the construction of the third storey of the Appellant's building.

No. 11  
Petition of  
Appeal to  
the Supreme  
Court  
28-2-57  
—continued.

3. On the 29th of March, 1955, the Defendant-Appellant filed Answer denying the alleged claims of the original plaintiff and claiming in reconvention a sum of Rs. 100,000/-, being damages suffered by the Appellant by the original plaintiff wrongfully obtaining an injunction from Court restraining the Appellant from carrying on Building operations for the third storey  
10 of the Appellant's building.

4. The Case came up finally for Trial on the 21st day of February, 1956, before The Learned Additional District Judge. The Learned Additional District Judge heard evidence and argument on a number of dates. The Counsel for the Appellant concluded his address on the 9th of August, 1956.

5. Thereafter the original Plaintiff died and the present plaintiff-respondent was substituted in place of the Original Plaintiff. The Counsel for the substituted-plaintiff-Appellant concluded his address on the 30th day of January, 1957, and the Learned Additional District Judge reserved its order for the 15th of February, 1957.

20 6. On the 15th of February, 1957, The Learned Additional District Judge delivered his order giving Judgment for the substituted-Plaintiff-Respondent for Rs. 10,828/-, and Costs.

7. Being dissatisfied with the said Judgment of The Learned Additional District Judge, The Defendant-Appellant begs to appeal therefrom To Your Lordship's Court on the following among other grounds that will be urged by the Appellant's Counsel at the hearing of this Appeal.

(a) The said Judgment is contrary to Law and the weight of evidence adduced in the said Case.

30 (b) The evidence led in the case clearly establishes the fact that the roof of the old building on the appellant's land was supported entirely by the Cabook wall that separated the two buildings and did not rest on pillars built alongside the Cabook wall on the Appellant's side.

At the inspection portions of the perlines embedded in the Cabook wall and out off when the Appellants old building was demolished were shown to the Court. This clearly shows that the Cabook wall was originally put up by the Appellant's predecessors in title and that the said wall belonged to the Appellant.

40 (c) The Survey Plan D 17 made by the Appellant's Surveyor clearly shows that the Cabook wall falls entirely within the appellant's land.

(d) The wall of the appellant's building is eight inches away from the Cabook wall for the simple reason that the foundation of the

appellant's wall just vouches the foundation of the Cabook wall and occupies the intervening distance between the Cabook walls. If the Appellant's wall was built so as to touch the Cabook wall, the foundation of the Appellant's wall would have to go completely under the Cabook wall. The evidence does not establish that that there was a "step out" of eight inches on either side of the Cabook wall.

- (e) The evidence establishes beyond any doubt that in 1950 the plaintiff in erecting additions to his property raised the Cabook wall and imposed new loads thereon without providing adequate safeguards 10 necessary to support the new loads. The subsidence if any of the foundations of the plaintiff's Building was due to such new loads. It is submitted that my reason if imposing such new loads the plaintiff had lost his rights if any to lateral support for the said Cabook wall.
- (f) The Plaintiff's case was entirely based on the alleged right of the plaintiff to the lateral and subjacent support for his land and building. If the plaintiff had lost such right by the impositions of new loads on the Cabook wall in 1950, then the entire case of Plaintiff collapses. It is respectfully submitted that the Learned Additional 20 District Judge had completely misdirected himself when the Answered issue No. 4 as "Rs. 10,828/-, even independently if the right to lateral support".
- (g) The evidence established the fact that the foundation for the appellant's wall was cut trench by trench for the pillars and not out and left open for a length of eighty feet before the concrete was put in.
- (h) Mr. Wyn Jones had stated in his report and later in his evidence that the hole in the Cabook wall was artificially created. Other evidence led in the case also points towards the same conclusion. The evidence of Mr. Wyn Jones who is admittedly an expert on 30 buildings clearly shows that the damage to the Cabook wall was caused by the superimposition of additional loads on it in 1950, by the plaintiff and not by the building operations carried on the appellant's land. In any event according to Mr. Wyn Jones the damage caused to the Cabook wall could be repaired by the expenditure of about Two Thousand Rupees.
- (i) The Plaintiff's claim for a permanent injunction was not seriously pressed at the Trial and it was clear that the Plaintiff had wrongfully sued out the interim injunction and thus caused serious loss and damage to the Appellant. 40
- (j) The allegation that the employees of the Appellant's constructor had put mud between the two walls during the course of construction of the Appellant's building was an after thought on the part of the Plaintiff. No such allegation was made in the Plaint. At the inspection it was shown that the space between the two walls was perfectly clear and free from any mud or earth.



WHEREFORE THE APPELLANT PRAYS :—

- (a) That the Judgment of the Learned Additional District Judge be set aside and the plaintiff's action be dismissed with Costs and Judgment be entered for the Appellant for the claim in reconvention.
- (b) For such other and further relief as to Your Lordship's Court shall seem meet.

(Sgd. K. RASANATHAN,  
*Proctor for Defendant-Appellant.*

No. 11  
Petition of  
Appeal to  
the Supreme  
Court  
28-2-57  
—continued.

No. 12

No. 12  
Notice of  
Security  
28-2-57

10

Notice of Security

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

P. G. A. ABEYEWICKREMA, of No. 579, Maradana Road,  
Colombo.....*Plaintiff (Dead).*

D. C. Colombo  
No. 7069/L.

*vs.*

A. W. M. SAMEEN of No. 591, (formerly of No. 585), Maradana Road,  
Colombo.....*Defendant.*

*and*

20 A. W. M. SAMEEN of No. 591, Maradana Road,  
Colombo.....*Defendant-Appellant.*

*vs.*

- 1. P. V. S. ABEYEWICKREMA,
- 2. P. V. W. ABEYEWICKREMA, and
- 3. P. V. C. ABEYEWICKREMA, 2nd and 3rd (Minors) by their *Guardian-ad-litem* the first substituted plaintiff  
.....*Substituted-Plaintiff-Respondents.*

*To :*

30 THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER JUDGES OF THE  
HONOURABLE THE SUPREME COURT OF THE DOMINION OF CEYLON.

Messrs. De Silva and Mendis,  
Proctors for the Respondents,  
Fort, Colombo.

TAKE Notice that the Petition of Appeal of the Appellant presented by me in the abovenamed action on the 16th day of February, 1957, against the

No. 12  
Notice of  
Security  
28-2-57  
—continued.

Judgment of the District Court of Colombo dated 15th day of February, 1957, in the said action, having been received by the said Court, Counsel on my behalf will, on the day of 8th March, 1957, at 10-45 o'Clock in the forenoon, or so soon thereafter move to tender Security in a sum of Rs. 250/-, 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 recover the expenses of serving notice of appeal on you.

The 28th day of February, 1957.

(Sgd.) Illegibly.  
in Tamil. 10  
*Appellant.*

(Sgd.) K. RASANATHAN,  
*Proctor for Appellant.*

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No. 13

**Proceedings before the District Court and Order made by  
the District Judge**

D.C. 7069/L

8-3-57.

*Mr. Adv. E. B. Wickramanayake, Q.C.*, for defendant-appellant with  
*Mr. Adv. Somasunderam*, instructed by *Mr. K. Rasanathan*.

*Mr. Adv. N. Samarakoon*, for plaintiffs-respondents with *Mr. Adv. B. J. 20*  
*Martin*, instructed by Messrs. *de Silva and Mendis*.

Mr. Wickramanayake addresses Court. He refers to Section 756 of the Civil Procedure Code. He submits that the petition has been received under Section 754. He submits that the objection can be taken by the respondents in the Supreme Court and that this Court has no jurisdiction to abate the appeal once the petition of appeal has been accepted. That is even on the footing that he has failed to give notice forthwith as required under Section 756, which he does not admit. He says that under Section 756 sub-section 3 this objection should be taken in the Supreme Court which can give relief under that section. He points out that the petition of appeal was tendered 30 to the office on 16th February, which was a Saturday. He states that this Court was not sitting on that day and the day on which the petition was received was not that day but the day on which the Court gave its mind to the petition and signed it. He cites 41 N.L.R. 241. He submits that the presentation of the petition is not the date of its receipt. He cites 22 N.L.R. 1 at 3. He refers to the affidavit filed by the appellant's proctor. He says that in the circumstances the Supreme Court would consider whether relief should be given to him. He urges that the appeal should not be abated here but that the matter should be left to the Supreme Court.

Mr. Samarakoon addresses Court. He cites 21 N. L. R. 106 at 107. All 40 the preliminaries of that section must be gone through. He submits that

No. 13  
Proceedings  
before the  
District  
Court  
and Order  
made by  
the District  
Judge  
8-3-57

this Court has the power in these circumstances to make an order that the appeal be abated. He submits that the objection he now takes is an objection that is fatal to the appeal. He states that on the journal entries in the record the petition of appeal has been received on 16th February. He cites 7 N.L.R. 286. The presumption is that it was signed on the day that it was presented. On the documentary evidence there is ample proof to show that there is a fatal irregularity. He states that they could make an application to the Supreme Court for relief but that does not mean that this Court cannot abate the appeal here. He cites 52 N.L.R. 202.

No. 18  
Proceedings  
before the  
District  
Court  
and Order  
made by  
the District  
Judge  
8-8-57  
—continued.

10 Mr. Wickramanayake replies. He says that the case reported in 21 N.L.R. has nothing to do with this. That case deals with the tendering of security and not with the tendering of the notice.

ORDER

Having heard Counsel I am of opinion that the appeal should be forwarded to the Supreme Court, and leave it open to the respondents to raise the objection there.

In regard to the date of the receiving of the petition of appeal, though 16-2-57 was a Saturday, I find from my diary that I was in Chambers between 10-30 a.m. and 12-30 p.m. that day. Though, of course it is impossible to  
20 say whether I initialled this particular record on that date, it is the most probable thing. Records are sometimes sent up to Chambers a day or two after the actual journal entry is made, but that would be in routine matters like filing lists of witnesses, etc.

Security tendered is accepted.

Perfect bond.

Issue notice of appeal for 22-3-57.

(Sgd.) A. L. S. SIRIMANNE.  
A.D.J.  
8-3-57.

30

No. 14

Bond to Prosecute Appeal

IN THE DISTRICT COURT OF COLOMBO

P. G. A. ABEYEWICKREMA, of No. 579, Maradana Road,  
Colombo.....*Plaintiff (Dead).*

*vs.*

A. W. M. SAMEEN, of No. 591, (formerly of No. 585,) Maradana Road,  
Colombo.....*Defendant.*

*and*

No. 14  
Bond to  
Prosecute  
Appeal  
8-3-57.

No. 14  
Bond to  
Prosecute  
Appeal  
8-3-57  
—continued.

A. W. M. SAMEEN, of No. 591, Maradana Road,  
Colombo.....*Defendant-Appellant.*

*vs.*

1. P. V. S. ABEYEWICKREMA,
2. P. V. W. ABEYEWICKREMA, and
3. P. V. C. ABEYEWICKREMA, 2nd and 3rd (Minors) by their *Guardian-ad-litem* the first substituted-plaintiff  
.....*Substituted-plaintiff-Respondents.*

KNOW ALL MEN BY THESE PRESENTS THAT, I, A. W. M. Sameen, of No. 591, Maradana Road, Colombo, am held and firmly bound unto JOSEPH 10 HENRY FORBES, Esquire Administrative Secretary for the time being of the District Court of Colombo and his Successor in Office in the sum of Rupees Two hundred and Fifty (Rs. 250/-) deposited with the Government Agent, Western Province, Colombo under receipt No.  $\frac{X}{13}$  022766 dated 8th March, 1957, for the payment of which I bind myself and my heirs, executors and administrators firmly by these presents.

NOW the condition of this Obligation is such that if I the above bounden defendant-appellant shall duly prosecute the appeal which I have instituted against the judgment of the said Court passed on the 15th day of February, 1957 now last in the action abovementioned, and shall and well and truly 20 perform and abide by the said judgment which shall ultimately be pronounced by the Supreme Court on the said appeal, and shall pay any sum or sums of money which the said Supreme Court shall decree to be paid by me the said defendant-appellant to the respondents abovenamed and shall pay all costs, as well as those incurred and taxed in the said Court as those which shall be incurred and taxed in the prosecution of the said appeal to the respondents abovenamed if I the said defendant-appellant shall be decreed to pay the same, then this obligation to be void and of no effect otherwise to remain in full force and virtue.

The 8th day of March, 1957.

80

A. W. M. SAMEEN, by his  
*Proctor.*

(Sgd.) K. RASANATHAN,  
*Proctor for Defendant-Appellant.*

Before me.  
(Sgd.) A. L. S. SIRIMANNE,  
*Additional District Judge.*

## Judgment of the Supreme Court

No. 15  
Judgment of  
the Supreme  
Court  
1-2-60.

S.C. No. 117/57-F

D.C. Colombo No. 7069/L.

A. W. M. SAMEEN of Maradana Road, Colombo .....*Defendant-Appellant.*P. V. S. ABEYEWICKREMA of Colombo .....*Plaintiff-Respondent.**Present* : H. N. G. FERNANDO, J. and SINNETAMBY, J.*Counsel* : C. THIAGALINGAM, Q.C., with E. A. G. DE SILVA, S. SHARVANANDA  
and P. BALAVADIVEL for defendant-appellant.

10 H. W. JAYAWARDENE, Q.C., with A. L. JAYASURIYA, and C. P.  
FERNANDO for plaintiff-respondent.

*Argued on* : 9th, 10th and 11th November, 1959.*Decided on* : 1st February, 1960.

SINNETAMBY, J.

A preliminary objection was taken to the hearing of this appeal by learned counsel who appeared for the plaintiff-respondent on the ground that notice of tender of security for costs of appeal was not given "forthwith" by the defendant-appellant.

20 Judgment in this case was delivered on the 15th of February, 1957, which happened to be a Friday. On the 16th February, 1957, the proctor for the defendant did not file the necessary papers in Court for issuing notice on the respondents for tendering security for costs of appeal. Instead, he drafted a motion in the following terms :—

" TO THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER JUDGES  
OF THE HONOURABLE THE SUPREME COURT OF THE DOMINION OF  
CEYLON.

MESSRS. DE SILVA AND MENDIS,  
Proctors for the respondents.

30 TAKE Notice that the petition of appeal of the Appellant presented by me in the abovenamed action on the 16th day of February, 1957, against the judgment of the District Court of Colombo dated 15th day of February, 1957, in the said action having been received by the said Court counsel on my behalf will on the day of 8th March, 1957, at 10-45 O'clock in the forenoon or so soon thereafter move to tender security in a sum of Rs. 250/- 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.

The 16th day of February, 1957.

(Sgd. In Tamil,  
*Appellant.*

(Sgd.) K. RASANATHAN,  
*Proctor for Appellant.*”

Learned counsel stated at the bar, and it is supported by an affidavit which forms part of the record, that his proctor on the morning of the 16th of February, 1957, contacted on the telephone one of the members of the firm 10 of proctors representing the plaintiff and told him that he (the defendant's proctor) would be sending the motion in question and that the member of the firm informed him in reply that he may do so but that the matter was being dealt with by another member of the firm. This telephone conversation was stated to have taken place at 11-15 a.m. Subsequently the motion was actually taken to the plaintiff's proctor's office after 1-00 p.m. by which time the office was closed and there was no one to receive it, the 16th being a Saturday. Apart from this no other effort was made to contact the plaintiff's proctors. As a result the motion was not dealt with on that day ; instead, it was submitted to the plaintiff's proctors on 18th February, 1957, which was 20 the following Monday, and the plaintiff's proctors made the following endorsement thereon.

“ Received notice subject to objections.

DE SILVA AND MENDIS.  
 18th February, 1957.”

At one stage learned counsel for the defendant contended that Section 756 did not require notice to be given in any particular way and even suggested that it would have been sufficient if it had been given orally. When his attention was drawn to the provisions of Section 356 however, he abandoned this argument. 30

It will thus appear that the actual notice was not served on the respondent or his proctors on the day on which the petition of appeal was filed although an intimation was made to them that it would be sent to them for attention. The notice was eventually filed in Court on 18th February, 1957, *i.e.* on the Monday following and it bears the Court Seal of that date. Subsequently on the 28th of February there was filed an affidavit of the proctor, to which I have already referred, explaining the reason for not giving notice of tender of security on the same day as the petition of appeal.

Feeling unhappy about the turn of events the defendant's proctor, thereupon, apparently with the object of defeating any objection which may be 40 taken, filed another petition of appeal on 28th February, 1957, in identically the same terms and accompanied it with other necessary papers including notices of tender of security for service on the respondents returnable on

8th March, 1957, and asked for a payment voucher for the security offered in cash. This was allowed for the 8th of March, 1957, which was also the date mentioned in the original notice dated 16th February, 1957. Unfortunately in the second notice too there has been a careless mistake, for the proctor says therein that the petition of the appeal of the appellants presented on the 16th of February, 1957, having been accepted he will on the 8th March, 1957, tender the security. He does not refer to the petition filed on the 28th of February, 1957. Apart, therefore, from any question as to whether a defect of this nature can be cured by resorting to the doubtful expedient of filing  
10 another petition of appeal in identical terms on a subsequent date on which date a second set of notices for tendering of securities is also filed, there has been, in this case, the fact that the second notice for tendering security refers only to the first petition of appeal filed on 16th February, 1957. In any event, it seems to me that the imperative terms of section 756 that notice should be tendered forthwith cannot be negatived and set at nought by an appellant adopting the methods which the appellant sought to employ in this case.

On 8th March, 1957, although according to the journal entries there was no return to the notice of security, counsel for the plaintiff respondents took  
20 the objection that the notice of tendering security was not given forthwith and moved that the appeal be abated. Argument was heard and learned counsel for the appellants requested that the matter be left for decision by this Court. In the course of his order the learned trial Judge left the matter open and directed that the appeal be forwarded to the Supreme Court. He also made a note to the effect that on the 16th February, 1957, he was in his Chambers between 10-30 a.m. and 12-30 p.m. but he was unable to say definitely whether it was on 16th February, 1957, that he initialled the entry in the journal of that date relating to the filing of the petition of appeal. He continued :—

30 “ though of course it is impossible to say whether I initialled this particular record on that day it is the most probable thing. Records are sometimes sent up to chambers a day or two after the actual journal entry is made but that would be in routine matters like filing lists of witnesses and so on.”

So far as this court is concerned having regard to the journal entries it must be presumed until the contrary is proved that the entries are correct and that the petition of appeal was accepted by the Judge on the 16th February, 1957, *vide* the decision of a divisional court in *S. Seebert Silva vs. F. Aronona Silva*<sup>1</sup>.

40 The relevant facts, therefore, are that judgment was delivered on the 16th of February on which date the petition of appeal was filed. Notice of tender of security was not filed on the same date ; instead, defendant's proctor sought to serve it himself without the intervention of court by having the notice sent to the plaintiff's proctor, but this was not served as plaintiff's proctor's office was closed when the messenger reached it. Notice was accordingly served only on the following Monday, namely on the 18th of February.

The objection now taken is that the appeal should have been abated by the District Judge and that in as much as he left it for decision by this Court, an order of abatement should now be entered.

The first authoritative decision on this question is the case of *Fernando vs. Nikulan Appu*<sup>2</sup>, wherein Bertram, C. J. interpreted the word “forthwith” and said :—

“ I think, however, that, as a general rule, it is the intention of the section that the notice should be filed on the same day as the receipt is verified or can reasonably be verified.”

In regard to “receipt,” the learned Chief Justice took the view that it involved receipt of the petition by the Court and not by the officer who ordinarily deals with the manual handling of the petition of appeal when it is tendered to court. That view, however, has been dissented from by the Supreme Court in the recent case of *Thenuwara vs. Thenuwara*<sup>3</sup>, Basnayake, C. J. therein having discussed the matter took the view that a petition of appeal is received by the court when it is handed to the appropriate officer of the court at its office. Whichever view one takes, in this case the journal entry shows that the judge accepted the petition of appeal on the same date as it was manually handed over to the officer of the court. The obligation, therefore, rested on the plaintiff to give notice forthwith. In the case of *Fernando vs. Nikulan Appu* (supra) without discussing the matter, Bertram, C. J. expressed the view that to give notice of tender of security, it is sufficient if the documents are filed in court and that view was confirmed and adopted by a bench of five judges in the case of *De Silva vs. Seenathumma*<sup>4</sup>, Soertsz, J. who delivered the judgment of the court said :—

“ In my opinion it is clear from the words used in Section 756 that when it was provided that notice should be given forthwith, what was intended was that notice should be tendered or filed forthwith, not that it should be served forthwith.”

If the appellant’s proctor had taken the elementary precaution of filing notices of tender of security with the petition of appeal, he would have complied with this requirement. It is not too difficult a matter for proctors who file petitions of appeal, to tender, along with the petition, notices in the form prescribed and embodied in the schedule to the Civil Procedure Code and which can be printed or typed and kept in readiness for essential particulars only to be filled up as required. Despite the several occasions on which the necessity for complying strictly with the requirements of Section 756 has been stressed by the Supreme Court, proctors still continue to be lax and negligent in the performance of their duties. In the case of *De Silva vs. Seenathumma* (supra) Soertsz, J. in summing up the conclusions reached by the bench stated, *inter alia*, that

“ 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.”



Section 356 of the Civil Procedure Code which was considered by the bench in that case expressly provides that

“ all processes of court . . . . . 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.”

This is an important provision and, unless the court otherwise directs, a party is obliged to adopt the procedure set out in that section namely :—

“ have processes served through the fiscal.”

10 That, however, is subject to the overriding power of the Court to direct service in some other manner. Attention to this provision is drawn by Soertsz, J. in *De Silva vs. Seenathumma* (supra) in the following words :—

“ In view of the peremptory direction in Section 756 that the security should be accepted within 20 days, they (that is the appellants) 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.”

If the appellant chooses not to tender copies of the notice of tender of 20 security to court he does so at his peril. The only situation in which Justice Soertsz contemplated the possibility of the notices not being filed in court is where security is waived. In such a case, despite the fact that notices are not tendered, the court took the view that the appeal will not abate on the ground that

“ 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.”

Applying this principle to the facts of the case, if the plaintiff respondent's proctor had accepted unreservedly the notice, which was eventually served 30 on him, he may then have been estopped from raising an objection to the hearing of the appeal ; but, where he took it subject to objections, he will not be so estopped.

The decision in *Seenathumma's* case does not permit service of the notice in any other way than through the fiscal, except by an order of Court authorising such other mode of service. No permission was obtained from Court in this case authorising service privately in the manner in which it was sought to be done. To my mind it makes no difference that the notice could not be served on Friday the 16th. Even if it was delivered to the respondent's proctor on the Friday and he refused to accept it or accepted it 40 subject to objections it would still be no service at all. It is only if the respondent's proctor accepted it without reservations, could the appellant be heard to say that the respondent waived a rule of procedure intended for his benefit, and, therefore, is estopped from questioning the validity of the service.

Proctors should realise the unnecessary risks they run when they ignore the express provisions of the Civil Procedure Code and adopt a mode of service based on an alleged practice. It seems to me that the only mode of giving notice, forthwith, which would involve no penal consequences, is for the notice to be filed in court on the same day as the appeal is filed and then if it is feared that the notice cannot be served and the security accepted within the 20 day limit, to seek and obtain permission of court to serve such notice, or a copy thereof in some way other than through the fiscal.

Our attention was drawn to the case of *Mohideen vs. David Saibo*<sup>5</sup>, in which Soertsz, J. following *Joseph vs. Sockalingam Chetty*<sup>6</sup>, held that a notice sent by post within the time required by Section 756 was a sufficient compliance. No reference was made to the earlier divisional bench case of *De Silva vs. Seenathumma* (supra) and *Joseph vs. Sockalingam Chetty* (supra) was a decision under the rules governing appeals to the Privy Council where there is no requirement similar to Section 756 in regard to service forthwith. In my view the decision in *Mohideen vs. David Saibo* (supra) has not the same binding effect as the divisional bench case and, if I may say so, with great respect, appears to have been wrongly decided.

I am, therefore, of the view that the notice of tender of security in this case was not given forthwith. The appeal must accordingly be abated. I would so order. The respondents will be entitled to the costs of appeal.

(Sgd.) N. SINNETAMBY,  
*Puisne Justice.*

(1) 60 N. L. R. 272.

(4) 41 N. L. R. 241.

(2) 22 N. L. R. 1.

(5) 20 Law Recorder 131.

(3) 61 N. L. R. 49.

(6) 32 N. L. R. 59.

S.C. 117 (F) 1957

D.C. Colombo No. 7069/L.

A. W. M. SAMEEN.....*Defendant-Appellant.*

*vs.*

P. V. S. ABEYEWICKREMA *et al*.....*Plaintiff-Respondents.* 30

*Present* : H. N. G. FERNANDO, J. and SINNETAMBY, J.

*Argued on* : 9th, 10th and 11th November, 1959.

*Decided on* : 1st February, 1960.

H. N. G. FERNANDO, J.

During the argument on the preliminary objection taken on behalf of the respondents to this appeal, there seemed to me to be two grounds upon which

the objection might fail. In agreeing therefore, with the contrary view expressed by my brother Sinnetamby in his judgment, it is well that I should briefly indicate the reasons which induce me to agree.

No. 15  
Judgment of  
the Supreme  
Court  
1-2-60  
—continued.

When a petition of appeal has been received by the Court of first instance, section 756 of the Code requires the petitioner to *forthwith* give notice (of security) to the respondents. As long ago as in the year 1920, Bertram, C.J. held in *Fernando et al vs. Nikulan Appu et al*<sup>1</sup>, that the section intended that the notice should be *filed* on the same day as the receipt of the petition is verified, and in the present case it is perfectly clear that “the same 10day” was 16th February, 1957, for the petition of appeal was undoubtedly received by the District Judge on that day. That being so, the *filing* of a notice on 18th February cannot now be held to be in compliance with section 756. But Bertram, C. J. also pointed out that “forthwith” means “within a reasonable time from the point of view of the person who is called upon to give the notice.”

At first sight, therefore, there is scope for the argument that if the notice is to be *served directly* on the respondent or his proctor, it will be duly given if served with reasonable promptitude, and that service on the morning of Monday 18th February after an unsuccessful effort at service after “early 20 closing” time on the preceding Saturday was a service “forthwith.” But section 756 does not stand alone, and has to be construed together with other relevant provisions of the Code and with section 356 in particular. The latter section requires *inter alia* that all notices shall, *unless the Court otherwise directs*, be issued for service to the Fiscal.....under a precept of the Court.....”, and undoubtedly applies to notices under section 756. While therefore a notice under section 756 *may* be given directly to a respondent or his proctor and may be regarded as having been given forthwith even if it is so given directly on some date subsequent to the date of the receipt by the Court of the petition of appeal, this alternative to the mode of giving 30 notice prescribed in section 356 cannot be recognized unless it is adopted after a direction given by the Court in that behalf. No such direction was given by the Court in this particular instance, nor is it maintained that any general direction authorising direct service in such cases is in force in the District Court of Colombo. In the absence of any such direction authorising an alternative mode of service, the provision regarding service through the Fiscal applied in the present case, and accordingly the failure to file the notice of security on 16th February, 1957 involved non-compliance with the requirements of section 756.

On the second question, whether relief should be granted under sub-40 section (3), the decided cases are conclusive. The fact that relief was given in the case referred to above is of no avail, because the ground for relief in that case was that the word “forthwith” had previously not been strictly construed in practice; in other words, a wrong practice previously acquiesced in by the Courts, of accepting as valid the “delayed” filing of notices of security was excused on that particular occasion. But the practice of giving notice directly without a direction from the Court under section 356 is one recognized if at all only by practitioners and not by the Courts. The custom for practitioners to accept direct notice without raising objections as to the mode of service cannot be said to have established a practice of the Courts, for

the very reason that such a custom has apparently been followed without any direction in that regard from the Court.

In seeking relief counsel for the appellants has relied on certain observations of Soertsz, J. in *De Silva vs. Seenathumma et al* :— “ 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<sup>2</sup>.” He argued that whereas some period of time would necessarily elapse before a notice filed in Court can reach a respondent through service by the Fiscal, the device of direct service in the present case enabled the appellant to deliver the notice to the respondents’ proctors on 18th February, *i.e.* much sooner than it would have reached the proctors if served through the Court. Soertsz, J. had observed that in some cases direct service would be necessary in order to ensure that the notice would reach the respondents before the date fixed for tendering security. Indeed in the case of *De Silva vs. Seenathumma et al*<sup>2</sup> the Court granted relief in respect of the omission to effect such direct service. But that decision is no authority for the proposition that an appellant is at liberty at his option to effect direct service in lieu of filing the notice of security. Soertsz, J. himself underlined the words “ unless the Court otherwise directs,” which occur in section 356, and said clearly that the appellants “ could have asked to be allowed to serve the notices on the proctors for the respondents.” Relief was there granted, not against a failure to file the notice forthwith, but only because a notice duly filed did not reach the respondent through the normal and authorised mode of service. Since notice of security was not duly filed in the present case, no question arises of giving relief against some other omission on the part of the appellants. 30

(Sgd.) H. N. G. FERNANDO,  
*Puisne Justice.*

(1) 22 N. L. R. 1,

(2) 41 N. L. R 241 at Page 248.

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No. 16

Decree of the Supreme Court

S.C. 117/57 (F)

ELIZABETH THE SECOND, QUEEN OF CEYLON AND OF HER OTHER  
REALMS AND TERRITORIES, HEAD OF THE COMMONWEALTH

IN THE SUPREME COURT OF THE ISLAND OF CEYLON 40

(Dead) P. G. A. ABEYEWICKREMA of No. 579, Maradana Road,  
Colombo.....*Plaintiff.*

MRS. P. V. S. ABEYEWICKREMA of No. 579, Second Division,  
Maradana, Colombo.....*Substituted-Plaintiff.*

*vs.*

A. W. M. SAMEEN of No. 591, (formerly No. 585), Maradana Road,  
Colombo.....*Defendant.*

A. W. M. SAMEEN of No. 591, Maradana Road,  
Colombo.....*Defendant-Appellant.*

*against*

- 10      1. MRS. P. V. S. ABEYEWICKREMA,  
          2. P. V. W. ABEYEWICKREMA and  
          20    3. P. V. C. ABEYEWICKREMA all of No. 579, Second  
              Division, Maradana, Colombo, 2nd and 3rd  
              (Minors) by their *Guardian-ad-litem* the first  
              substituted-Plaintiff..... *Substituted-Plaintiffs-Respondents.*

Action No. 7069/Land

District Court of Colombo.

This cause coming on for hearing and determination on the 9th, 10th and  
11th November, 1959 and 1st February, 1960 and on this day, upon an appeal  
preferred by the Defendant-Appellant before the Hon. Hugh Norman Gregory  
Fernando, and the Hon. Nadaraja Sinnatamby, Puisne Justices of this Court,  
20 in the presence of Counsel for the Defendant-Appellant and Substituted-  
Plaintiffs-Respondents.

It is ordered and decreed that the Petition of appeal of the Defendant-  
Appellant be and the same is hereby abated.

And it is further ordered and decreed that the Defendant-Appellant do  
pay to the Substituted-Plaintiffs-Respondents the taxed costs of this appeal.

Witness the Hon Hema Henry Basnayake, Q.C., Chief Justice at Colombo,  
the 11th day of February, in the year One thousand Nine hundred and Sixty  
and of Our Reign the Ninth.

(Sgd.) P. KATHIRAVELUPILLAI,  
*Deputy Registrar, S.C.*

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**No. 17**

**Application for Conditional Leave to Appeal  
to the Privy Council**

**IN THE SUPREME COURT OF THE ISLAND OF CEYLON**

In the matter of an application for Conditional leave to appeal to Her Majesty  
The Queen in Council.

S.C. No. 117  
D.C. Colombo  
No. 7069/Land.

No. 16  
Decree of  
the Supreme  
Court  
1-2-60  
*—continued.*

No. 17  
Application  
for  
Conditional  
Leave to  
Appeal to  
the Privy  
Council  
10-2-60.

No. 17  
Application  
for  
Conditional  
Leave to  
Appeal to  
the Privy  
Council  
10-2-60  
—continued.

A. W. M. SAMEEN of No. 591, Maradana Road  
Colombo.....*Defendant-Appellant-Petitioner.*

*vs.*

1. P. V. S. ABEYEWICKREMA
2. P. V. W. ABEYEWICKREMA, and
3. P. V. C. ABEYEWICKREMA all of No. 579, Maradana,  
Colombo (the 2nd and 3rd Minors) appearing by  
their *Guardian-ad-litem* the 1st substituted-  
plaintiffs.....*Substituted-Plaintiffs-Respondents.*

To :

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THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER JUDGES OF THE  
SUPREME COURT OF THE ISLAND OF CEYLON.

On this 10th day of February, 1960.

The Petition of the defendant-appellant-Petitioner abovenamed appearing  
by K. Rasanathan his Proctor states as follows :—

1. That feeling aggrieved by the judgment and order of the Honourable  
Court pronounced on the 1st day of February, 1960 in the above action the  
defendant-Appellant-Petitioner is desirous of appealing therefrom to Her  
Majesty The Queen in Council.

2. That the said judgment is a final judgment and the matter in dispute 20  
on the appeal amounts to or is of the value of Rs. 5,000/- or upwards and/or  
the appeal involves directly or indirectly same claim or question to or respect-  
ing property amounting to or of the value of Rs. 5,000/- or upwards.

3. The defendant-appellant-Petitioner has in terms of Rule 2 of the  
schedule to the appeals (Privy Council) Ordinance given the following notice  
to the substituted plaintiff-respondents of his intended application to this  
Court for leave to appeal to Her Majesty The Queen in Council on the 3rd day  
of February, 1960.

“ Take Notice that I Abdul Whab Mohamed Sameen, the defendant-  
Appellant-Petitioner in the above styled action will in accordance with the 30  
Appeals (Privy Council) Ordinance apply to the Honourable The Supreme  
Court of the Island of Ceylon for leave to appeal to Her Majesty The Queen  
in Council against the order and judgment of the Supreme Court in the above  
action pronounced on the February 1st, 1960.

The application for conditional leave will be filed within thirty days of  
the said order and judgment of the Supreme Court.”

4. The defendant-appellant-Petitioner served the above notices on the  
substituted-plaintiffs-respondents by sending same to them to their place of  
business and place of residence by registered post, by ordinary post with  
certificate of posting and by services on them personally through one 40

Mohamed Packeer Mohamed Muzzamil, the Appellant's Clerk. The defendant-appellant-Petitioner files herewith receipts of ordinary post with certificate of post marked " A " receipts of Registered Post marked " B1 " and " B2 " and an affidavit from the said Mohamed Packeer Mohamed Muz-zamil who served the same by personal delivery marked " C."

No. 17  
Application  
for  
Conditional  
Leave to  
Appeal to  
the Privy  
Council  
10-2-60  
—continued.

Wherefore the defendant-appellant-Petitioner prays for conditional leave to appeal to Her Majesty The Queen in Council against the said judgment and order of this Court dated February 1st, 1960 and for costs and for such other and further relief as To Your Lordships' Court shall seem meet.

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(Sgd.) K. RASANATHAN,  
*Proctor for Defendant-Appellant.  
Petitioner.*

*Documents filed with the Petition.*

1. Receipt of Ordinary post with certificate of posting marked " A ".
2. Receipt of Registered Post marked " B1 " and " B2."
3. Affidavit of Mohamed Packeer Mohamed Muzzamil marked letter " C ."

(Sgd.) K. RASANATHAN,  
*Proctor for Defendant-Appellant.  
Petitioner.*

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No. 18

Motion of Proctor for Defendant

IN THE DISTRICT COURT OF COLOMBO

MRS. P. V. S. ABEYEWICKREMA and others.....*Substituted-Plaintiffs.*

No. 7069,L

A. W. M. SAMEEN of Colombo.....*Defendant.*

As the defendant has filed application for Conditional Leave to Appeal to the Privy Council in Application S.C. No. 60 and notice on the respondents has been ordered returnable on 8-3-60, I move no application for execution be allowed without notice to the defendant *vide* 37 N.L.R. 133.

No. 18  
Motion of  
Proctor for  
Defendant  
19-2-60.

Colombo 19-2-60.

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(Sgd.) K. RASANATHAN,  
*Proctor for Defendant.*

No. 19

**Decree granting Conditional Leave to Appeal to the  
Privy Council**

S.C. Application No. 60/60

ELIZABETH THE SECOND, QUEEN OF CEYLON AND OF HER OTHER  
REALMS AND TERRITORIES, HEAD OF THE COMMONWEALTH

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

In the matter of an application by the Defendant-Appellant dated 10th February, 1960 for Conditional Leave to Appeal to Her Majesty the Queen in Council against the judgment and decree of this Court dated 10th 1st February, 1960 in S.C. 117/57 (Final) — D.C. Colombo case No. 7069/Land.

A. W. M. SAMEEN of No-. 591, Maradana Road,

Colombo.....*Defendant-Appellant.  
Petitioner.*

*against*

P. V. S. ABEYEWICKREMA and 2 others of No. 579, Maradana,  
Colombo. (the 2nd and 3rd Minors) appearing by their  
*Guardian-ad-litem* the 1st substituted plaintiff

.....*1st to 3rd Substituted-Plaintiffs. 2d  
Respondents.*

Action No. 7069/Land.

District Court of Colombo.

This cause coming on for hearing and determination on the 16th day of September, 1960, before the Hon. Kaludura Dhammikasiri de Silva and the Hon. Thusew Samuel Fernando, Q.C., Fuisne Justices, of this Court, in the presence of Counsel for the Defendant-Appellant-Petitioner and 1st to 3rd Substituted-Plaintiffs-Respondents.

It is considered and adjudged that this application be and the same is hereby allowed upon the condition that the applicant do within one month from this date :—

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1. Deposit with the Registrar of the Supreme Court a sum of Rs. 3,000/- and hypothecate the same by bond or such other security as the Court in terms of Section 7 (1) of the Appellate Procedure (Privy Council) Order, 1921 shall on application made after due notice to the other side approve.

2. Deposit in terms of provisions of Section 8 (a) of the Appellate Procedure (Privy Council) Order, 1921, with the Registrar a sum of Rs. 300/- in respect of fees mentioned in Section 4 (b) and (c) of the Appeals (Privy Council) Ordinance (Chapter 85.)



Provided that the applicant may apply in writing to the said Registrar stating whether he intends to print the record or any part thereof in Ceylon, for an estimate of such amounts and fees and thereafter deposit the estimated sum with the said Registrar.

Witness the Hon. Hema Henry Basnayake, Q.C., Chief Justice at Colombo, the 30th day of September, in the year One thousand Nine hundred and Sixty and of Our Reign the Ninth.

(Sgd.) B. F. PERERA,  
*Deputy Registrar, S.C.*

No. 19  
Decree  
granting  
Conditional  
Leave to  
Appeal to  
the Privy  
Council  
16-9-60  
—continued.

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## No. 20

**Application for Final Leave to Appeal to the  
Privy Council**

**IN THE SUPREME COURT OF THE ISLAND OF CEYLON**

In the matter of an application for Final Leave to appeal to Her Majesty the Queen in Council.

1. P. V. S. ABEYEWICKREMA
2. P. V. W. ABEYEWICKREMA, and
3. P. V. C. ABEYEWICKREMA all of Borella Cross Road, in  
Colombo..... *Substituted-Plaintiffs.*

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*vs.*

A. W. M. SAMEEN of No. 477, Dematagoda Road,  
Colombo..... *Defendant.*

*and*

A. W. M. SAMEEN of No. 477, Dematagoda Road,  
Colombo..... *Defendant-Appellant.*

*vs.*

1. P. V. S. ABEYEWICKREMA
2. P. V. W. ABEYEWICKREMA, and
3. P. V. C. ABEYEWICKREMA all of Borella Cross Road, in  
Colombo..... *Substituted-Plaintiffs-Respondents.*

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No. 20  
Application  
for Final  
Leave to  
Appeal to  
the Privy  
Council  
20-10-60.

No. 20  
Application  
for Final  
Leave to  
Appeal to  
the Privy  
Council  
20-10-60  
—continued.

S. C. Application No. 60.  
S.C. Final No. 117.  
D.C. Colombo No. 7069/L

To :

THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER JUDGES OF THE  
HONOURABLE THE SUPREME COURT OF THE ISLAND OF CEYLON.

On this 18th/20th day of October, 1960.

The humble petition of A. W. M. Sameen of No. 477, Dematagoda Road, in Colombo the abovenamed Defendant-Appellant appearing by K. Rasanathan his Proctor states as follows :—

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1. That the defendant-appellant on the 16th day of September, 1960, obtained Conditional Leave from this Honourable Court to appeal to Her Majesty The Queen in Council against the judgment of this Court pronounced on the 1st day of February, 1960.

2. The appellant in compliance with the conditions on which such leave was granted have deposited Rs. 3,000/- with the Registrar of the Supreme Court as security for costs of such appeal and have deposited a further sum of Rs. 300/- with the Registrar of the Supreme Court as his fees and the Bond was duly signed on the 14th day of October, 1960.

3. The Appellant has given notice of this application with a copy of his 20 Petition to the Respondents by registered post — registered postal receipts are annexed.

WHEREFORE the defendant-appellant prays that he may be granted Final Leave to appeal against the said judgment of this Court dated 1st February, 1960 to Her Majesty The Queen in Council and for such other and further relief as To Your Lordships' Court shall seem meet.

(Sgd.) K. RASANATHAN,  
*Proctor for Defendant-Appellant.*

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No. 21

Decree granting Final Leave to Appeal to the  
Privy Council

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S.C. Application No. 438.

ELIZABETH THE SECOND, QUEEN OF CEYLON AND OF HER OTHER  
REALMS AND TERRITORIES, HEAD OF THE COMMONWEALTH

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

In the matter of an application dated 18th/20th October, 1960, for Final Leave to Appeal to Her Majesty the Queen in Council by the Defendant-Appellant against the decree dated 1st February, 1960.

No. 21  
Decree  
granting  
Final Leave  
to Appeal to  
the Privy  
Council  
28-10-60.

A. W. M. SAMEEN of No. 477, Dematagoda Road,  
Colombo.....*Defendant-Appellant.*  
*Petitioner.*

*against*

P. V. S. ABEYEWICKREMA and 2 others of Borella Cross Road in  
Colombo.....*1st to 3rd Substituted-Plaintiffs.*  
*Respondents.*

No. 21  
Decree  
granting  
Final Leave  
to Appeal to  
the Privy  
Council  
28-10-60  
—continued.

Action No. 7069/Land (S.C. 117' 57 (Final).

District Court of Colombo.

10 This cause coming on for hearing and determination on the 28th day of October, 1960 before the Hon. Miliani Claude Sansoni and the Hon. Hugh Normal Gregory Fernando, Puisne Justices of this Court in the presence of Counsel for the Defendant-Appellant-Petitioner.

It is considered and adjudged that this application be and the same is hereby allowed.

Witness the Hon. Edwin Herbert Theodore Gunasekera, Acting Chief Justice at Colombo the 4th day of November in the year One thousand Nine hundred and Sixty and of Our Reign the Ninth.

(Sgd.) B. F. PERERA,  
*Dy. Registrar, S.C.*

48

1961

Supreme Court of Ceylon,  
No. 117 (Final) of 1957.

District Court of Colombo,  
Case No. 7069/Land.

*In Her Majesty's Privy Council  
on an Appeal from  
the Supreme Court of Ceylon*

**BETWEEN**

ABDUL WAHAB MOHAMED SAMEEN  
of No. 591, Maradana Road,  
Colombo ..... *Defendant-Appellant.*  
**APPELLANT.**

**AND**

1. PALLIYAGURUGE VITHANAGE SUMANAWATHIE  
ABEYEWICKREMA,
2. PALLIYAGURUGE VITHANAGE WIMALAWATHIE  
ABEYEWICKREMA, and
3. PALLIYAGURUGE VITHANAGE CHANDRASIRI  
ABEYEWICKREMA, all of No. 579, Maradana Road,  
Colombo. ( the 2nd and 3rd minors appearing by their  
*Guardian-ad-litem*, the 1st Substituted Plaintiff.)

..... *Substituted-Plaintiffs-Respondents.*  
**RESPONDENTS.**

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**RECORD  
OF PROCEEDINGS**