

1945

Present : Soertsz A.C.J. and Jayetileke J.

MAPALAGAMAETHIGE CARLINA, Petitioner, v. MARY
NONA SILVA, Respondent.

In revision D. C. Kalutara, 23,406.

Appcal—Notice of security to Proctor—Wrongful abatement of petition of appeal—Remedy by appeal against order—Civil Procedure Code, s. 756 (2) and (3).

Where an appellant gave notice of security for respondent's costs to the latter's proctor and the Court wrongly made an order of abatement of the petition of appeal, the remedy is by way of appeal and not by way of an application for relief under section 756 (3) of the Civil Procedure Code.

THIS was an application to revise an order of the District Judge of Kalutara.

J. A. L. Cooray, for the petitioner.

Izadeen Ismail, for the plaintiff, respondent,

Cur. adv. vult.

December 20, 1945. JAYETILEKE J.—

The question at issue in the application before us is simple and short. The answer, in our opinion, is equally so. The respondent filed action No. 23,406 of the District Court of Kalutara for the partition of a land. The petitioner sought to intervene in the action and his application was refused. On October 2, 1945, he tendered his petition of appeal and moved that notice of security be issued returnable on October 11, 1945, on which date the notice was reported to have been served on the respondent's proctors. The District Judge held that the service of notice on the respondent's proctors was bad in law and made an order of abatement under section 756 (2) of the Civil Procedure Code. The present application is for relief under section 756 (3). The sub-section reads as follows :

“ In case of any mistake, omission, or defect on the part of any appellant in complying with the provisions of this section, the Supreme Court, if it should be of opinion, that the respondent has not been materially prejudiced, may grant relief on such terms as it may deem just ”.

At the argument before us Mr. Cooray contended that the petitioner had complied with the provisions of section 756 (1). He relied on the judgment of De Kretser J. in *De Silva v. Francinahamine*¹ where it was

¹ 41 N. L. R. 191.

held that the service of notice of tender of security for costs of appeal on the respondent's proctor was sufficient compliance with the requirements of section 756 of the Civil Procedure Code.

It seems to us that this contention is sound. The question for our decision is whether the present application is in order. On the materials before us we are of opinion that the petitioner is not entitled to ask this court for relief under section 756 (3). He does not say that he failed to comply with the provisions of section 756 (1) owing to a mistake, omission, or defect on his part. On the contrary he questions the legality of the order made by the District Judge. In these circumstances his remedy was clearly by way of appeal. This view has the support of Keuneman and Rose JJ. in *Ali Marikar v. Urban Council*¹. The preliminary objection taken by Mr. Ismail is entitled to succeed. We would, accordingly, dismiss the application with costs.

SOERTSZ A.C.J.—I agree.

Application refused.

