

1960

Present : Basnayake, C.J., and de Silva, J.

WICKRAMATILAKE, Appellant, and DARSIN DE SILVA, Respondent

*S. C. 315—In the matter of an Application for Revision in D. C. Balapitiya,
187/T**Appeal—Notice of tender of security—Requirement that it should be served on respondent personally—Distinction between “process of Court” and “notices”—Civil Procedure Code., ss. 24, 29, 59, 356, 756.*

Under section 756 of the Civil Procedure Code notice of tendering security for the respondent's costs of appeal must be served on the respondent himself personally. Service on the respondent's Proctor is not sufficient.

APPPLICATION to revise on order of the District Court, Balapitiya.

H. V. Perera, Q.C., with *L. W. de Silva* and *L. C. Seneviratne*, for Petitioner-Appellant.

H. W. Jayewardene, Q.C., with *G. D. Welcome* and *N. R. M. Daluwatte*, for 3rd Respondent-Respondent.

Cur. adv. vult.

July 1, 1960. BASNAYAKE, C.J.—

In this application the petitioner invokes the powers of this Court under section 753 of the Civil Procedure Code. She questions the legality of the order made by the learned District Judge on 3rd June 1959 and asks that it be set aside. It was held by the District Judge that the appeal lodged by the petitioner on 13th March 1959 against his judgment pronounced on 6th March 1959 had abated on the ground that the petitioner had failed to give security as provided in section 756 of the Code. An appellant is required by that section to give notice to the respondent that he will on a day to be specified in such notice, and within a period of twenty days from the date when the decree or order appealed against was pronounced, tender security for his costs of appeal. In the instant case the appellant purporting to act under that section tendered the following notice :—

“ IN THE DISTRICT COURT OF BALAPITIYA

In the matter of an application in terms of section 712 of the Civil Procedure Code

between

Garumuni Mallika Premawathie de Silva Wickrematileke
Wellabodde in Balapitiya

Petitioner-Appellant

and

1. B. Darsin de Silva of Mohittiwatta

3rd Respondent

2. R. M. S. Karunaratne, Proctor, Balapitiya.

To : Mr. R. M. S. Karunaratne, Proctor, Balapitiya.

TAKE NOTICE the petition of appeal presented by me in the abovenamed action on the 13th day of March 1959 against the order of the District Court of Balapitiya dated the 6th day of March 1959 in the said action having been received by the said Court counsel on my behalf will on the 20th day of March 1959 at 10 o'clock in the forenoon or so soon thereafter being within 20 days from the day of the date of such order move to tender security in Rs. 150 cash 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.

Sgd. G. M. P. de S. Wickramatilake

Appellant

(Petitioner-Appellant)

This 13th day of March 1959. ”

Objection was taken to the above notice on the ground that it does not satisfy the requirements of the statute. After hearing the parties the learned District Judge held that notice has not been given in compliance with the provisions of section 756. Where a statute requires that notice should be given to a party notice should be given to the party himself personally unless the statute declares that notice to the party's duly appointed agent is deemed to be notice to the party.

The Civil Procedure Code does prescribe that in certain cases the duly appointed agent may act for or receive notices meant for the party. For instance section 24 provides that any appearance, application, or act in or to any court, required or authorised by law to be made or done by a party to an action or appeal in such court (except only such appearances, applications, or acts as by any law for the time being in force only advocates or proctors are authorised to make or do, and except when by any such law otherwise expressly provided) may be made or done by the party in person, or by his recognized agent, or by a proctor duly appointed by the party or such agent to act on behalf of such party. Another instance of such a provision is to be found in section 29 which provides that any process served on the proctor of any party or left at the office or ordinary residence of such proctor relative to an action or appeal except where the same is for the personal appearance of the party, shall be presumed to be duly communicated and made known to the party whom the proctor represents; and, unless the court otherwise directs, shall be as effectual for all purposes in relation to the action or appeal as if the same had been given to, or served on, the party in person.

For the purpose of this application it is not necessary to consider section 24; but section 29 calls for notice. That section applies to any process served on the proctor of a party. Now what is process? The word has a variety of meanings depending on the context in which it

occurs. For the present purpose it is necessary to ascertain its meaning in the Civil Procedure Code. The word is not defined therein. Its meaning has therefore to be gathered from the context in which it occurs i.e., the whole Code with such assistance as may be gained from standard law dictionaries. In Sweet's Law Dictionary it is stated: "In civil actions process is of two kinds: (i) Against a defendant, and this again is of two kinds, viz. (a) process to compel him to appear, now consisting of a writ of summons; and (b) process of execution, by which the judgment, decree etc. is executed or carried into effect; (ii) Process against persons not parties to the action e.g. process to summon jurors, witnesses etc." In our Code the summons to a defendant to appear and answer the plaint is treated under a separate heading: "On the Issue and Service of Summons", and the associated provisions are grouped under a distinct Chapter (VIII). Section 29 cannot apply to a summons to a defendant to appear and answer the plaint not only because at the stage of the issue of summons on the defendant there would ordinarily be no proctor appointed by him to represent him in the action, but also because a summons to defend in Form No. 16 requires the personal appearance of the party defendant. Apart from those considerations section 59 requires that such a summons must be served on the defendant personally. A clue as to the sense in which the word "process" is used in the Code is to be found in Chapter XXIII. Having referred in section 355 to writs or warrants to levy money or to take any person in arrest, or to detain any person in custody, or to deliver possession of property, or for the sequestration of any property, the Code refers in section 356 to "all processes of court not being writs, or warrants directed to the Fiscal or other person for execution and all notices and orders required by this Ordinance to be given to or served upon any person". The latter section indicates unmistakably that "notices and orders" required by the Code to be given to or served upon any person do not come within the scope of the expression "process". The distinction that section 356 makes between "process" and "notices" is consonant with the basic concept of process in Civil Procedure. Process is a mandate, summons, or writ issuing from a court. Here we are concerned with a notice required by the Code to be given not even by the court but by the appellant to the respondent. Such a notice not being a "process" section 29 would have no application. Section 356 requires that unless the court directs otherwise such a notice must be issued for service to the Fiscal under a precept of the court as in the case of a summons to a defendant and sections 59 to 70 both inclusive are made applicable, so far as practicable, to the service of such notices. As a notice required by section 756 to be given to the respondent is not a process such a notice must be served on the respondent personally as in the case of a summons to the defendant in an action. The service on the proctor of the 3rd respondent in the instant case is not authorised by the Code. The 3rd respondent has therefore not been given the notice required by the section. Apart from the fact that a notice required to be given by section 756 to the respondent is not a process, that section itself contains an indication

that only one of the notices required to be given thereunder may be given to the respondent's proctor. It provides expressly that the notice of appeal together with a copy of the petition of appeal may be served on the respondent or his proctor. The rule of construction where there is express mention of one thing is *expressio unius est exclusio alterius*. By implication therefore the notice of tender of security must be addressed to and served on the respondent personally. Forms 126 and 127 are also designed to give effect to what section 756 provides for. The heading of the former is—

“ FORM OF NOTICE TO RESPONDENT THAT APPELLANT WILL
TENDER SECURITY IN APPEAL, &C.

(Head with the title of the action in the lower court)

To (*respondent*) ”.

and of the latter

“ FORM OF NOTICE OF APPEAL TO BE SERVED ON
RESPONDENT OR HIS PROCTOR

(Head as in last form)

To (*party respondent or his Proctor*).”

There are decisions of this court which hold that a notice to the respondent under section 756 may by virtue of section 29 be served on his proctor. In those cases it has been assumed that “process” includes “notice” and the distinction which the Code makes between “process” and “notice” has not received the attention that it deserves. In *Perera v. Hendrick*¹ which is the decision of a single judge section 356 has not been referred to at all. In the next case of *De Silva v. Francinahamine*² it appears to have been assumed that “process” includes “notice” and the distinction that the Code makes between “process” and “notice” has not been given effect to. In the recent case of the *Urban Council of Dehiwela-Mount Lavinia v. P. Andy Silva*³ my brother de Silva observed: “In my opinion it is sufficient if the notice of tendering security is served on the respondent's proctor in view of the provisions of section 29 C. P. C.” His attention does not appear to have been drawn by counsel to the basic concept of “process” and how in section 356 the Code preserves its basic meaning by distinguishing it from “notice”. Nor has his attention been drawn to the fact that where the Legislature intended that service on the proctor was sufficient it expressly so provided both in section 756 and in the relative form in the case of the notice of appeal. In the absence in the Civil Procedure Code of a definition of “process” so as to embrace notices and such like the rules of interpretation of statutes require that the word should be given the meaning it bears in the context of the Code. In that context it does not include “notice”.

¹ (1906) 1 A. C. R. 25 at 27.

² (1939) 41 N. L. R. 191.

³ (1956) 57 N. L. R. 562.

It is clear therefore that the requirement of section 756 as to the giving of notice of the tendering of security to the 3rd respondent has not been complied with in the instant case.

The learned District Judge is right in holding that the appeal had abated.

The application is refused with costs.

DE SILVA, J.—I agree.

Application refused.
