

1945

Present : Keuneman S.P.J. and Rose J.

ALIMA NATCHIAR, Petitioner, and MARIKAR *et al.*,
Respondents.

Application in revision, D. C. Kalutara, 24,682.

Appeal—Order of abatement of petition of appeal on the ground that notices of tendering security had not been served on the respondents in person—Remedy is by appeal against such order—Civil Procedure Code, s. 756 (2).

Where a petition of appeal was held to have abated on the ground that the notices of tendering security in connection with the appeal should have been served on the respondents in person and not on their Proctors—

Held, that the remedy against the order of abatement was by way of appeal and not by application in revision.

THE petitioner in this application sought to intervene in the case in the original Court but her application was dismissed. She accordingly appealed and the notices of tendering security under section 756 of the Civil Procedure Code were served on the Proctors representing the several respondents to the appeal. The second respondent thereafter moved to have the appeal abated under the provisions of section 756 (2) on the ground that the notices should have been served on the respondents

in person and not on their Proctors. The District Judge upheld the objection and made order abating the appeal. The petitioner did not appeal from this order but moved the Supreme Court to revise the said order.

H. W. Jayewardene, for the second defendant-respondent, raised a preliminary objection.—No application in revision should be entertained since the petitioner had a right of appeal from the order sought to be revised. *Vide* Courts Ordinance, section 73, *Goonewardene v. Orr*¹. This is not an application for relief under section 756 (3) of the Code nor can relief be granted under this provision for this type of non-compliance with section 756—*De Silva v. Seenathumma*². The petitioner is here questioning the correctness of the District Judge's order, hence he must appeal from that order—*Zahira Umma v. Abeyasinghe*³. The order was made by the Judge when acting judicially and hence the dictum laid down in *Palaniappa Chetty v. Mercantile Bank*⁴ has no application. That was an application under the Civil Appellate Rules.

E. D. Cosme, for the petitioner.—The District Judge's order was clearly wrong. The question is covered by authority. *Vide* *Perera v. Hendrick*⁵ and *De Silva v. Francinahamine*⁶. Applications of this nature have been entertained before—*De Silva v. James*⁷; *Siyadoris Appu v. Abeyanayaka*⁸. Even though a right of appeal lies the Supreme Court can entertain an application in revision.

H. W. Jayewardene, in reply.—Though the cases cited show that the District Judge's order is wrong yet there seem to be sufficient grounds to support it. *Vide* the terms of section 756 which draws a distinction between service of the notice of security and the service of the notice of appeal. See also Forms 126 and 127.

An application in revision is entertained where an appeal also lies only in very exceptional circumstances—*Atukorale v. Samynathan*⁹; *Silva v. Silva*¹⁰. The mere fact that the District Judge's order is wrong is no ground for departing from the general rule. No special circumstances have been urged in this case as to why this application should be entertained. The cases cited, namely, *De Silva v. James* and *Siyadoris Appu v. Abeyanayaka* (*supra*) deal with applications for relief under section 756 (3) where the correctness of the District Judge's order has been accepted. There is no such application before the Court now nor can such an application be made in a case of this nature. *De Silva v. Seenathumma* (*supra*) is in point.

J. M. Jayamanne, for the plaintiff, respondent.

Izadeen Ismail, for the fourth and fifth defendants, respondents.

November 29, 1945. KEUNEMAN S.P.J.—

We think that Mr Jayawardene for the second respondent is right in arguing that a right of appeal lay in this case to correct an error of law

¹ 2 A. C. R. 172.

² 41 N. L. R. 241.

³ 39 N. L. R. 84.

⁴ 43 N. L. R. 127.

⁵ 1 A. C. R. 25.

⁶ 41 N. L. R. 191.

⁷ 9 C. L. W. 124.

⁸ 13 C. L. W. 22.

⁹ 41 N. L. R. 165.

¹⁰ 44 N. L. R. 494.

committed by the District Judge. In the circumstances we should be slow to exercise our discretion to allow an application in revision in view of the fact that no appeal has been taken in this case.

The application for revision is dismissed with costs.

ROSE J.—I agree.

Application dismissed.
