

1941

*Present : Hearne and Nihill JJ.*MOHAMED *v.* CONDRAD.

173—D. C. Colombo, 4,235.

Appeal—Failure to give notice of security—Alleged waiver by respondent's proctor—Subsequent waiver is no excuse—Civil Procedure Code, s. 756.

On March 27, 1941, the appellant tendered his petition of appeal but he did not forthwith give notice that he would on a specified date tender security for respondent's costs. On April 4 the appellant moved the Court, by consent of the respondent's proctor for leave to deposit a sum of money as security. This motion bore on the face of it, over the signature of the respondent's proctor, the words "Received notice, I consent".

Held, that there had been no waiver of security by respondent.

Held, further, that even if there had been a waiver on April 4, it would not cure the failure to comply with an essential requirement of the section on March 27 which would abate the appeal.

As no notice was given to appellants' Counsel of the preliminary objection, the appeal was rejected without costs.

A PPEAL from a judgment of the District Judge of Colombo.

N. E. Weerasooria, K.C. (with him *Ivor Misso*), for plaintiff, appellant.

S. Subramaniam for defendant, respondent.

Cur. adv. vult.

December 9, 1941. NIHILL J.—

A preliminary objection has been taken to the hearing of this appeal on the ground it is not properly before this Court as it must be held to have abated in the Court below for want of conformity with an essential requirement of section 756 of the Civil Procedure Code.

The facts on which the objection has been taken are as follows:— On March 27, 1941, the appellant tendered his petition of appeal. He did not, however, forthwith give notice to the respondent that he would on a specified date tender security for the respondent's costs. On April 4, however, the appellant moved the Court by consent of the respondent's proctor for leave to deposit Rs. 75 as security for the respondent's costs. This motion bears on the face of it over the signature of the respondent's proctor the words "Received notice and I consent".

It is now clear following the decision of five Judges in *de Silva v. Seenathumma*¹ that the tendering of notice of security forthwith is an essential requirement of section 756, and the judgment of Soertsz J., with which the other learned Judges agreed, makes it also clear that where there has been a *failure* to comply with an essential requirement of the section the Court is not empowered by sub-section (3) of the section to grant relief. In the course of the same judgment reference was made to the judgment of Abrahams C.J. in *Zahira Umma v. Abey-singhe*² which was a case decided by a divisional Bench of three Judges. In giving the judgment of that Bench, Abrahams C.J. said:—"It seems to me that there are two forms of a breach of section 756 in respect of which this Court *ought not* to give relief. One is when, whether a material prejudice has been caused or not, non-compliance with one of the terms of section 756 has been made *without an excuse*, and the other is when, though *non-compliance with an essential term may be trivial*, a material prejudice has been occasioned".

In explaining this passage, Soertsz J. said thus:—

"I think I am in a position to say—and the context supports the view—that when Abrahams C.J. used the words 'without an excuse' he had in mind the practice that obtained in some Courts for proctors to waive security for costs by arrangement among themselves, and he intended to say that in a case where no notice of security was given in pursuance of that practice, an objection taken in this Court that the letter of the law had not been complied with would be overruled and the failure excused, for 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. I can imagine no other excuse that could avail a party who has failed to comply with the peremptory requirement to give notice of security."

It will be seen then that the point for our decision is whether the consent given by the respondent's proctor on April 4 can waive an irregularity committed on March 27. In other words can a waiver have a retrospective effect? Certainly the respondent has not been materially prejudiced because on April 4 he was satisfied with the security offered. No difficulty would arise had the respondent waived the requirement to give notice of security on March 27, but there was no waiver then or, in fact, subsequently, for the consent of April 4 was in terms a consent to the motion and nothing more, for I think the words "Received notice"

¹ 41 N. L. R. 241.

² 39 N. L. R. 51.

must mean notice of the motion. Even if the document which the respondent's proctor signed on April 4 had expressly included a waiver of the irregularity committed on March 27, I should doubt its effectiveness, because I think the true position is that this appeal abated on March 28 by reason of the failure to comply with an essential requirement on the day previously. If that be so, subsequent agreements between the parties cannot put the clock back. To hold otherwise might well put out of gear the whole machinery of the Code relating to appeals.

Although I have no sympathy with the respondent, I think he must succeed on this objection. As notice was not given to the appellant's Counsel that a preliminary objection would be taken, I think the appeal should be rejected without costs.

HEARNE J.—I agree.

Appeal rejected.

