1960 *Present :* **H. N. G. Fernando, J., and Sinnetamby, J.**

A. W. M. SAMEEN, Appellant, *and* P. V. S. ABEYAWICKREMA *et al.*, Respondents

*S. C. 117—D. C. Colombo, 7069/L*

*Appeal—Notice of tender of security for costs—Obligation of appellant to file it in Court—Civil Procedure Code, ss. 356, 756.*

When notice of tender of security for costs of appeal is given " forthwith " as required by section 756 of the Civil Procedure Code, it must conform to the procedure set out in section 356 of the Code. It must, therefore, be filed in Court and served on the respondent through the Fiscal. This rule is subject only to two qualifications, viz., (1) the Court may, after the notice is duly filed, permit service in some other manner, and (2) notice of tender of security need not be filed when security is waived by the respondent.

Judgment was entered in the District Court on February 15, 1957. Petition of appeal was filed by the defendant's Proctor on the following day, which happened to be a Saturday. No notice of tendering security for costs of appeal was filed in Court on that day. Instead, the appellant's Proctor took the notice on the same day to the respondent's Proctors' office after 1.00 p.m., by which time the office was closed and there was no one to receive it. On 18th February, which was the following Monday, the notice was submitted to the respondent's Proctors, who made the following endorsement thereon : " Received notice subject to objections ".

*Held*, that the notice of tender of security was not given " forthwith " inasmuch as it was not filed in Court on the day on which the petition of appeal was filed. The appeal must accordingly be held to have abated. If the respondent's Proctors had accepted the notice unreservedly, the respondent would have been estopped from questioning the validity of the service of the notice.

APPEAL from a judgment of the District Court, Colombo.

*C. Thiagalingam, Q.C.*, with *E. A. G. de Silva, S. Sharvananda* and *P. Balavadivel*, for defendant-appellant.

*H. W. Jayewardene, Q.C.*, with *A. L. Jayasuriya* and *C. P. Fernando*, for plaintiff-respondent.

*Cur adv. vult.*

February 1, 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.

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. v. Nikulan Appu et al.* [1] 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 day " 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 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 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

[1] *(1920) 22 N. L. R. 1.*

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 subsection (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 v. 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 ". [1] 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 v. Seenathumma et al.* (supra) 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.

[1] *(1940) 41 N. L. R. 241 at page 248.*

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.

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 & Mendis,
Proctors for the respondents.

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 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 the following Monday, and the plaintiff's proctors made the following endorsement thereon

"Received notice subject to objections. — —

De Silva & 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.

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 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 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 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 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 :—

> " 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 v. F. Aronona Silva.* [1]

The relevant facts, therefore, are that judgment was delivered on the 15th of February and on the following day 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 v. Nikulan Appu* [2] 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 v. Thenuwara* [3]. 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

[1] *(1957) 60 N. L. R. 272.* [2] *(1920) 22 N. L. R. 1.*

[3] *(1959) 61 N. L. R. 49.*

to the officer of the court. The obligation, therefore, rested on the plaintiff to give notice forthwith. In the case of *Fernando v. 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 v. Seenathumma* [1]. 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 reqiured. 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 v. 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. "

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 v. 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. "

[1] *(1940) 41 N. L. R. 241.*

If the appellant chooses not to tender copies of the notice of tender of 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 present case, if the plaintiff respondent's proctor had accepted unreservedly the notice, which was eventually served 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 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 v. Dawood Saibo* [1] in which Soertsz, J. following *Joseph v. Sockalingam Chetty* [2] 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 v. Seenathumma* (supra), and *Joseph v. 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 v. Dawood 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.

*Preliminary objection upheld.*

[1] *(1942) 20 Law Recorder 131.*

[2] *(1930) 32 N. L. R. 59.*