1957 *Present :* Weerasooriya, J., and Sansoni, J.

NORIS APPUHAMY and another, Appellants, *and* UDARIS APPU and others, Respondents

S. C. 887—D. C. Balapitiya, 2,000/L

Appeal—Notice of tendering security—Duty of appellant to have it served at the proper address—Civil Procedure Code, s. 756 (1) and (3).

Merely furnishing to Court, on the day on which a petition of appeal is lodged, the notice of tendering security is not sufficient where there has been in fact a subsequent failure to serve that notice on the respondent.

As it is the duty of the appellant or his Proctor to see that the precept to the Fiscal is correctly drawn up, no relief can be given to the appellant under section 756 (3) of the Civil Procedure Code in respect of the service of the notice of tender of security at a wrong address.

APPEAL from a judgment of the Supreme Court, Balapitiya.

S. W. Jayasuriya, with *Norman Abeysinghe*, for the plaintiffs-appellants.

Frederick W. Obeyesekere, for the defendants-respondents.

April 10, 1957. WEERASOORIYA, J.—

A preliminary objection to this appeal has been taken by Mr. Obeyesekere on the ground that no notice of tender of security as required by section 756 (1) of the Civil Procedure Code was given to some of the respondents who, however, did not appear at the hearing and are not the respondents whom he represents.

As personal service of the notice on the respondents could not be effected the Court on the motion of the proctor for one of the appellants ordered substituted service by affixing the notice to the land called Radatotagoda which is the subject matter of this action. But in the precept to the Fiscal the land was wrongly described as Watawalagoda and the process server's report shows that the notices were in fact affixed to

that land. For this misdescription the blame must fall on the appellants or their proctor as it was their duty to see that the precept was correctly drawn up. The result is that no notice of tender of security has been given to those respondents on whom substituted service was ordered.

Mr. Obeyesekere submits that the failure to serve the notice is fatal to the appeal and that no relief can be given to the appellants in respect of the failure under section 756 (3).

It is clear that the requirement in section 756 (1) as to the giving of notice to the respondents of the tender of security is a peremptory one. But Mr. Jayasuriya for the appellants relies on the case of *Silva v. Seenathumma*[1] in which Soertsz, J., in delivering the judgment of the Divisional Bench, held that this requirement is satisfied if notice of tender of security is furnished to Court on the day on which the petition of appeal is lodged and Mr. Jayasuriya states that this has been done in the present case.

I do not think, however, that the case cited is authority for the proposition that merely furnishing to Court on the day on which the petition of appeal is lodged notice of tender of security is sufficient where there has been in fact a subsequent failure to serve that notice on the respondent. It is clear from the further observations of Soertsz, J., that he was contemplating a case where the notice of tender of security having been furnished by the appellant at or about the time when the petition of appeal had been filed, the same was duly served on the respondent either within the period of 20 days (which according to Soertsz, J., is the time allowed under the section for the service of it) or even outside that period. In my opinion, therefore, the failure to serve the notice on some of the respondents is fatal to the appeal unless relief can be given to the appellants under section 756 (3). Mr. Jayasuriya submitted, however, that the failure to serve the notices on the respondents (and therefore a failure to give notice to the respondent) amounted to an omission on the part of the appellants in complying with the provisions of section 756 (1) and such omission came within the terms of section 756 (3). But while there is much to be said for that submission it would seem that section 756 (3) was construed otherwise in the decision referred to above where it was held that " where there has been a total failure to comply with one of the terms of section 756 relief will not be given even if it should be apparent that no material prejudice has been occasioned to the respondent by such a failure " (at page 245). That decision is binding on us.

I would also add that even if we considered ourselves free to grant the appellants relief under section 756 (3) we do not think that this is a suitable case in which to do so as the failure was occasioned by gross negligence and nothing has been done by the appellants up to date to rectify the lapse although their attention was drawn to it before the record was forwarded to this Court.

The preliminary objection is upheld and the appeal is rejected with costs.

SANSONI, J.—I agree.

Appeal rejected.

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