

1938

*Present: Maartensz and Moseley. JJ.*SILVA *v.* CUMARATUNGA

350—D. C. Colombo, 1,334.

Appeal—Petition of appeal not signed by proctor on record—Fatal irregularity—Civil Procedure Code, s. 755.

A petition of appeal must be signed by the proctor, whose proxy is on the record at the date on which the petition is filed.

Held, further, that where the petition is not so signed the appeal should be rejected and the Supreme Court had no power to give relief.

Wace v. Angage Helena Hami (4 S. C. C. 48) followed; Fernando v. Perera et al. (1 Cur. L. R. 51) not followed.

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

N. E. Weerasooria, for plaintiff, appellant.

H. V. Perera, K.C. (with him M. C. Abeywardene), for defendant, respondent.

April 11, 1938. MAARTENSZ J.—

A preliminary objection was taken to our hearing this appeal on the ground that the petition of appeal is not signed by the proctor who was proctor on the record on the day the appeal was filed, November 12, 1937.

The facts are as follows:—The plaintiff-appellant's proctor, Mr. M. A. Van Rooyen, by a motion dated November 11, 1937, moved to revoke the proxy granted to him by the plaintiff. The plaintiff's consent to the revocation is endorsed on the motion. I may say incidentally that it was the plaintiff who should have moved for revocation with the consent of the proctor.

The motion was according to the date stamped on it received by the District Court on November 13, 1937. It was brought on the roll and allowed by the Court on November 15, 1937.

The petition of appeal is undoubtedly not signed by the proctor who was on the record on November 12, 1937. The relevant section of the Civil Procedure Code (section 755) enacts that "all petitions of appeal shall be drawn and signed by some advocate or proctor"

The first question for decision is whether the words "some proctor" are restricted to the proctor whose proxy was on the record when the appeal was filed.

It was contended that the case of *Assauw v. Billimoria*¹ was a decision to that effect by which we were bound as it was the decision of three Judges. I do not think it is. Burnside C.J., it is true, said in the course of his judgment, "Now, we have held that the proctor who signs the petition must be the proctor on the record" but he cited no authority and the statement was *obiter* to the question for decision in that case which was whether a petition of appeal signed by one proctor for another who was the proctor on the record complied with the provisions of section 755 of the Code. It was held it did not.

This question is, however, covered by authority. In the cases of *Wace v. Angage Helena Hami*² and *Romanis Baas v. Ravenna Kader Mohideen and another*³, it was held under rule 2 of the Rules and Orders of December 12, 1843, that the petition of appeal must be signed by the proctor on the record. The relevant passage in rule 2 is in exactly the same terms as the passage I have cited from section 755 of the Code and the cases are therefore authorities applicable to section 755.

Ennis J., in *Reginahamy v. Jayasundera*⁴ rejected an appeal which was not signed by the proctor on the record.

The *ratio decidendi* in the old cases, with which I respectfully agree, was that this Court cannot recognize two proctors appearing for the same party in the same cause. I accordingly hold that the petition of appeal should have been signed by the proctor on the record who was Mr. Van Rooyen.

The next question is whether we should dismiss the appeal or give the plaintiff relief if it is in our power to do so.

In the two later cases I have referred to, the appeals were rejected. In the case of *Fernando v. Perera and others*⁵, the Supreme Court remitted the petition of appeal to the District Court to be signed by the proctor on the record, but the authority for this procedure is not stated in the judgment and I do not think it should be followed. Besides in this case the proxy of the proctor who was the proctor on the record when the appeal was filed has been revoked and he cannot now be asked to sign the petition of appeal.

I am accordingly of opinion that the objection must be upheld and the appeal dismissed with costs.

MOSELEY J.—I agree.

Appeal dismissed.

¹ (1892) 2 C. L. R. 86.

² (1881) 4 S. C. C. 48.

³ (1881) 4 S. C. C. 61.

⁴ (1917) 4 C. W. R. 390.

⁵ (1909) 1 Cur. L. R. 51.