

1939

Present : de Kretzer and Nihill JJ.

PERERA *et al.* v. DE SILVA

268—D. C. Colombo, 706.

Petition of appeal—Petition not presented by Proctor on record—Fatal irregularity—Civil Procedure Code, s. 754.

The requirement of section 754 of the Civil Procedure Code that the petition of appeal shall be presented to the Court of first instance by the party appealing or his authorized Proctor is imperative.

Assauw v. Pestonjee (1 S. C. R. 221) distinguished.

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

N. E. Weerasooria, K.C. (with him Kingsley Herat), for plaintiff, appellant.

N. Nadarajah (with him H. A. Wijemanne and S. Mahadeva), for defendant, respondent.

Cur. adv. vult.

June 2, 1939. DE KRETZER J.—

The petition of appeal which is filed in this case was presented to Court on August 5, 1938, by Mr. Wanigasooriya, Proctor. At that date the appellant's Proctor was Mr. Livera, and though Mr. Wanigasooriya purported to present a proxy along with the petition of appeal he had no authority to do so since the previous proxy remained unrevoked.

Mr. Livera's proxy was revoked on August 12, and thereafter Mr. Wanigasooriya filed a fresh proxy.

Objection is taken to the appeal being received on the ground that it has not been signed by a Proctor who was authorised to sign it, and the case of *Silva v. Cumaratunga*¹ is relied upon.

Mr. Weerasooriya for the appellant quotes the case of *Assauw v. Pestonjee*² and states that although the petition has not been signed by the proper Proctor it has been countersigned by Counsel and therefore satisfies the requirement of section 755, as was held in *Assauw v. Pestonjee*; but he is met with the difficulty that section 754 enacts that the petition of appeal shall be presented to the Court of first instance by the party

¹ 40 N. L. R. 139.

² 1 S. C. R. 221.

appealing or his Proctor. Earlier in section 754 it is provided that every appeal to the Supreme Court "shall be preferred as hereinafter stated". The terms are imperative and one can well see why it is necessary that the appeal should be presented by the party appealing or his authorized Proctor. Otherwise we may have, possibly, a number of interlopers coming in. Section 755 deals with the manner in which the whole petition is to be drawn up and specifies that it shall be drawn and signed by an Advocate or Proctor, and also provides for a party who has neither an Advocate nor a Proctor to help him.

In the case of *Assaw v. Pestonjee*, the Proctor who signed purported to sign for and on behalf of the Proctor on the record—he did not purport to act independently,—and Counsel who settled the petition must be taken to have signed the petition after it had been duly drawn by the Proctor on record. While therefore the decision might apply to section 755 of the Code it could have no bearing on section 754.

The appeal in this case is therefore irregular and must be dismissed with costs.

NIHILL J.—I agree.

Appeal dismissed.
