

1960 Present : Basnayake, C.J. and H. N. G. Fernando, J.

BALAMKIKAI, Appellant, and THAMOTHERAMPILLAI et al.,
Respondents

S. C. 300—D. C. Jaffna, 7733

Appeal—Petition of appeal prepared by Secretary of Court—Form of attestation—Civil Procedure Code, s. 755.

Where a petition of appeal is prepared by the secretary of a Court under the proviso to section 755 of the Civil Procedure Code, the attestation should recite the fact that the appellant stated *viva voce* his wish to appeal together with the grounds of appeal, and that they were taken down concisely in writing in the form of a petition of appeal by the secretary from the mouth of the party, and the attestation containing those recitals should be signed and dated by the secretary himself.

A PPEAL from a judgment of the District Court. Jaffna.

T. B. Dissanayake, for Defendant-Appellant.

N. Kasirajah, for Purchaser-Respondent.

March 1, 1960. BASNAYAKE, C.J.—

Learned counsel for the respondent takes a preliminary objection to this appeal being entertained by us on the ground that the petition of appeal has not been drawn and signed by an advocate or proctor as required by section 755 of the Civil Procedure Code. That section excluding the proviso to which reference will be made later reads :

“ All petitions of appeal shall be drawn and signed by some advocate or proctor, or else the same shall not be received. ”

Counsel for the appellant quite correctly does not seek to maintain that the petition of appeal has been drawn in accordance with section 755. A petition of appeal unless drawn and signed in the manner prescribed in section 755 should not be received by the District Judge. In the instant case if the District Judge had observed the imperative prohibition in the section this appeal would not have come up to this Court and the parties would have been saved all the expense of preparing briefs and retaining counsel to argue the appeal. There is a further objection to this appeal and that is that the order appealed from is one made of consent.

As the party appellant seems to have intended to proceed under the proviso to section 755 we think it is necessary to say a word about the proviso to that section. It reads :

“ Provided always that any party desirous to appeal may within the time limited for presenting a petition of appeal, and upon his producing the proper stamp required for a petition of appeal, be allowed to state *viva voce* his wish to appeal together with the particular grounds of such appeal, and the same shall (so far as they are material) be concisely taken down in writing from the mouth of the party by the secretary or chief clerk of the court in the form of a petition of appeal, when it shall be signed by such party and attested by the secretary or chief clerk, and be received as the petition of appeal of such party without the signature of any advocate or proctor.”

The proviso requires the party appellant to state *viva voce* to the Court his wish to appeal together with the particular grounds, and the secretary is required to take down concisely in writing in the form of a petition of appeal the statements made by the appellant so far as they are material. Thereafter the petition must be signed by the petitioner and attested by the secretary. All that the appellant appears to have done is to take a typed petition of appeal to the secretary and sign it before him. That is not compliance with the proviso. Where a petition is prepared by the secretary under the proviso, the attestation should recite the fact that the appellant stated *viva voce* his wish to appeal together with the grounds of appeal, and that they were taken down concisely in writing in the form of a petition of appeal by the secretary from the mouth of the party, and the attestation containing those recitals should be signed and dated by the secretary himself.

In the instant case neither the petitioner nor the secretary has observed the requirements of the section.

It is important to note that the Code requires the party appellant to state *viva voce* to the Court his wish to appeal and the grounds of appeal. The appellant's statement under section 755 must therefore be made to the Judge when he is exercising his judicial functions *qua* a Court. The record does not show that the appellant stated her wish to appeal together with her grounds to the Court.

The appeal is therefore rejected.

As this objection was not taken in the lower court there will be no costs of the appeal.

H. N. G. FERNANDO, J.—I agree.

Appeal rejected.