

1935

*Present : Koch J. and Soertsz A.J.*JAMES *v.* KARUNARATNA.251 and 252—*C. R. Panadure, 2,402.*

Appeal—Two defendants separately represented—Both join in one petition—Insufficient stamps—Irregularity.

Where two defendants separately represented by proctors joined in stating their grounds of appeal in one document which contained stamps sufficient to cover one petition of appeal,—

Held, that the petition of appeal was not sufficiently stamped and should be rejected. In such a case Counsel is not entitled to ask that the names of one of the appellants be struck out and the appeal be treated as that of the other.

CASE referred by Soertsz A.J. to a Bench of two Judges.

L. A. Rajapakse, for defendants, appellants.

N. E. Weerasooria (with him *T. S. Fernando*), for plaintiffs, respondents.

Cur. adv. vult.

October 10, 1935. KOCH J.—

This appeal raises an interesting point which arises on the objection by the respondents that the petition of appeal is not properly stamped and should therefore be rejected.

It would appear that in this action the defendants, three in number, were sued in ejectment by the plaintiffs who are the respondents to this appeal. Answer was filed on behalf of all these defendants through Mr. J. R. de Silva, their proctor. At a later date the proxy given by the first defendant to Mr. Silva was cancelled and Mr. M. H. Jayatilleke filed a new proxy in his favour. Thereafter accordingly the first defendant was represented by Mr. Jayatilleke, and the second and third defendants by Mr. de Silva. This arrangement continued till the trial was concluded and a petition of appeal filed.

The judgment and decree *inter alia* directed the ejectment of all the defendants. The petition of appeal that was filed against the decree was that of all three defendants who joined in presenting it. It was written on the same paper and signed by the two proctors on behalf of their respective clients. This petition bore a stamp of the value prescribed for an appeal (single) to this Court.

I think it is quite clear that though written on one paper, there are in actuality two appeals to this Court, one by the first defendant and the other by the second and third defendants. The fact that the defences did not clash and that the redress claimed in the appeal is the same does not, to my mind, make any difference. Section 754 of the Civil Procedure Code, taken in conjunction with section 755, contemplated that a party aggrieved by a decree might appeal by presenting in one form a written petition of appeal within the time specified and on production of a stamp of the prescribed value. Section 760 of the Code makes provision for parties who have a common cause, whether as plaintiffs or defendants to obtain benefit from the appeal by anyone of them, although the others have not been joined. The conclusion is irresistible that if more parties

than one appeal, each party must be considered to have separately appealed. This of course is subject to the accepted practice that two or more persons who sign a joint proxy in favour of a proctor to represent them can be treated for the purpose of pleadings and the appeal as constituting one party.

The judgments of Macdonell C.J. and Garvin J. in *British Ceylon Corporation Ltd. v. The United Shipping Board*¹ are strongly supportive of this view.

If then the petition of appeal is signed by two different parties, it follows that the paper contains two appeals and this must bear the aggregate stamp duty prescribed for two appeals. This has not been done, and if the matter rested there the appeal should be dismissed. (*British Ceylon Corporation Ltd v. The United Shipping Board (supra).*)

There is ample authority besides—*Salgado v. Peiris*², *Sinnatamby v. Tangamma*³, and *Hunt v. Attorney-General*⁴.

There has arisen, however, a point of some difficulty as the result of an application made by the appellants' Counsel that he should be permitted to strike out one set of appellants and argue the appeal on behalf of the other as if that other were the only appellant to this Court and the appeal was solely by him. He takes this step obviously to surmount the difficulty that he realizes is confronting him, and incidentally because under section 760 he can claim that if he succeeds on the appeal, the benefit can enure to the party struck out. I do not see that it is clear that he has legal authority to adopt such a course when the set of appellants he moves to be struck out is as much responsible for preferring the appeal as the party he wants retained. However this may be, the fact remains that when the paper which contained two separate appeals was presented to the Court of first instance, that paper was not properly stamped. To it was affixed the proper stamp for one appeal but not for two. The difficulty has arisen by reason of the fact that while section 750 provides conditions which if not fulfilled the Court shall refuse to receive the petition, the necessity for such petition bearing the proper stamp is not one of those conditions.

Provision for stamping the petition aright is made in section 755, but this section does not state what is to happen if the stamp is insufficient or if the document is not stamped at all. In my opinion, as I have remarked before, there is authority—which I cannot help but follow and which I consider sets out the right view—to cover a case such as this. The crucial date is the date of presentation. On that date the petition of appeal was not properly stamped. The irregularity cannot be cured later.

I therefore hold that the application cannot be permitted and that the appeal must be rejected. The appellants will pay the respondents' costs.
SOERTSZ A.J.—

The facts are stated fully in the judgment of my brother Koch. On those facts two questions arose for consideration. First, is the petition of appeal sufficiently stamped in that two sets of defendants separately represented by proctors at the date of the filing of the appeal have joined

¹ 36 N. L. R. 225.

² (1909) N. L. R. 379.

³ (1912) 1 C. A. C. 151.

⁴ (1917) 4 C. W. R. 265.

in stating their grounds of appeal on one paper stamped with stamps sufficient to cover one petition of appeal? Second, if the petition of appeal is not sufficiently stamped to cover the appeals of both defendants, is Counsel who appears on appeal for both defendants entitled to ask that the name of one of the appellants be struck out from the petition of appeal and that the petition be treated as the appeal of the other?

I agree with my brother, that the first question must be answered in the negative. There are contained in the paper submitted the appeals of defendants represented by different proctors. They decided that they should both appeal and although they stated the grounds on which they were appealing on one paper there were really two appeals and each of the appellants was liable to furnish a stamp sufficient to cover his appeal. If their appeals succeeded with costs, each proctor was entitled to tax a separate bill for costs of appeal. The difficulty I felt in the case when I referred it to a Bench of two Judges arose on the application made by Counsel that he should be allowed to strike out the name of one appellant and argue the appeal as if it were the appeal of the other alone. He contended that the judgment of Garvin J. in *British Ceylon Cor. v. The United Shipping Board*¹ supported his application. Garvin J. said "Counsel then invited us to treat the appeal as that of the second defendant and reject the appeal of the first defendant. I cannot well see how we can adopt such a course. There is nothing which enables one to say that this is the second defendant's petition of appeal and not that of the first defendant. It purports to be the petition of appeal of both of them. *Had this been a case which came within the exception created by section 760 of the Civil Procedure Code it might reasonably have been contended that there could be no objection to their joining in one petition. This however is not such a case*".

Now section 760 enacts "Where there are more plaintiffs or more defendants than one in an action and the decree appealed against proceeds on any ground common to all the plaintiffs or all the defendants, any one of the plaintiffs or of the defendants may appeal against the whole decree and thereupon the Appellate Court may reverse or modify the decree in favour of all the plaintiffs or the defendants, as the case may be". It seems to me that this only enables one of a number of plaintiffs or defendants who come within this exception, to appeal, and if he succeeds, to obtain a benefit for himself and his co-plaintiff and co-defendants who had not appealed. That is not the case here. Two defendants who could have brought themselves within the rule provided by section 760, have chosen not to take the benefit of that rule, and have each preferred an appeal. It must be assumed that they had good reasons for taking such a course. In such a case, the important part of Garvin J.'s dictum cited above is that "There is nothing which enables one to say that this is the second defendant's petition of appeal and not that of the first defendant. It purports to be the petition of both". That is good reason for rejecting the application of Counsel that one of the parties appellants be struck out.

The appeal must be rejected with costs.

Appeal rejected.

¹ 36 N. L. R. 225 at p. 258.