

1960

Present : Basnayake, C.J., and de Silva, J.

GOONETILLEKE, Appellant, and GOONETILLEKE and others,
Respondents

S. C. 43 Inty.—D. C. Kurunegala, 9645/P

Appeal—Security for costs of appeal—Bond hypothecating it—Execution of it by appellant's Proctor before another Proctor—Legality—Civil Procedure Code, s. 756.

A bond hypothecating security for costs of appeal executed before a Proctor does not satisfy the requirements of section 756 of the Civil Procedure Code.

Obiter : A bond given by the appellant's Proctor in his own name cannot be deemed to be a bond given by the appellant if the authority conferred by the proxy is an authority to place the name of the appellant to a bond in his own name.

APPPEAL from a judgment of the District Court, Kurunegala.

D. S. Jayawickreme, Q.C., with T. B. Dissanayake and Annesley Perera,
for Plaintiff-Appellant.

H. W. Jayewardene, Q.C., with C. D. S. Siriwardene and C. P. Fernando,
for Defendants-Respondents.

June 30, 1960. BASNAYAKE, C.J.—

A preliminary objection is taken to the hearing of this appeal on the ground that the provisions of section 756 of the Civil Procedure Code have not been complied with, in that the bond hypothecating the security for costs of appeal has been executed not before the District Judge but before another Proctor. It would appear from the decision in *Wijemanne v. Costa* (61 N. L. R. 19) that a bond hypothecating security for costs of appeal executed before a Proctor does not satisfy the requirements of section 756. Learned counsel for the appellant does not seek to question the correctness of that decision. As the petitioner has failed to give the security as provided in section 756 the appeal must be held to have abated and is therefore rejected.

Before we part with this judgment we wish to observe that apart from the defect in its execution the bond itself does not purport to be a bond given by the appellant. It reads :

“ Know All Men By These presents that I Damian Adrian Bernard Ratnayake, Proctor, S. C., on behalf of Ernest George Anthony Goonetilleke of No. 4 Palm Grove, Colpetty, Colombo, the Plaintiff-Appellant am held and firmly bound unto Don Thomas Abeynayake the Secretary of the District Court of Kurunegala for the time being in the sum of Rupees Three Hundred (Rs. 300/-) for which sum to be well and truly paid to the said Secretary of the District Court of Kurunegala or to the Secretary of the said Court for the time being I bind myself my heirs executors and administrators by these presents.

“ And as security for the due payment of the sum of Rupees Three Hundred (Rs. 300/-) I do hereby specially assign set over and hypothecate to and with the said Secretary or with the Secretary of the said Court for the time being all that sum of Rupees Three Hundred (Rs. 300/-) deposited by me the said Damian Adrian Bernard Ratnayake, Proctor, S. C. of Kurunegala, on behalf of the said Ernest George Anthony Goonetilleke

“

“ In witness whereof I have set my hand at Kurunegala on this 23rd day of April 1958.

(Sgd.) D. A. B. RATNAYAKE
Proctor for Plaintiff-Appellant.”

This is a bond given by the appellant's Proctor and not by the appellant. Presumably it was executed under the authority conferred by the Proxy the relevant portion of which reads :—

“ . . . : and every bond or recognizance whatsoever necessary or needful in the course of proceedings for the prosecution of such appeal, or for appearance or for the performance of any order or judgment of the said Court, for and in my name and as my act and deed, to sign and deliver and before the Supreme Court upon such appeal by virtue hereof for and in my behalf appear and plead :”

The authority conferred by the words quoted is an authority to place the name of the appellant to a bond in his own name. The significant words are : “ in my name and as my act and deed, to sign and deliver.” Even if the bond was executed in pursuance of this authority it should have been in the appellant's name and bound him and not his Proctor, and it should have been signed “ Ernest George Anthony Goonetilleke ” by his Proctor D. A. B. Ratnayake.

DE SILVA, J.—I agree.

Appeal rejected.