

1939

*Present* : Hearne S.P.J. and de Kretser J.

ABDUL WAHID *et al.* v. MOHAMMED HASSIM.

347-8—D. C. Colombo, 1,030.

*Appeal petition—Failure to tender correct amount of stamps—Withdrawal of petition—Substitution of another—Fatal irregularity.*

The defendants, who were separately represented by proctors, joined in stating their grounds of appeal in one petition which was filed on the day judgment was delivered and to which stamps were affixed sufficient to cover one petition of appeal. On the following day the proctors moved to withdraw the petition of appeal and filed a fresh petition and tendered sufficient stamps to make up the full amount required for two appeals.

*Held*, that the failure to tender the correct amount of stamps with the first petition was a fatal irregularity and that there was no provision in our law which permits an appellant to withdraw a petition of appeal and substitute another.

<sup>1</sup> 5 *Balasingham's Notes of Cases*, p. 17.

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

L. A. Rajapakse (with him E. B. Wikremanayake), for defendants, appellants.

N. Nadarajah (with him H. W. Thambyah), for plaintiff, respondent.  
Cur. adv. vult.

October 30, 1939. HEARNE S.P.J.—

After judgment was entered on October 18, 1938, in favour of the plaintiff and against the first and second defendants, the latter who were separately represented by proctors joined in stating their grounds of appeal in one document which was filed on the day judgment was delivered and to which stamps were affixed sufficient to cover one petition of appeal only. This was obnoxious to the rule in *James v. Karunaratna*<sup>1</sup>.

On October 19, 1938, well within the time limited for appeal, the proctors for the defendants moved to withdraw the petition of appeal filed on October 18, and filed a fresh petition of appeal. Stamps for Rs. 18 were tendered and the Court was moved to accept the stamps tendered with the petition on October 18, in order to make up the full amount required for two appeals. The Court allowed the motion and the effect was that on October 19 the petition of appeal then filed was stamped as for two appeals. In this way the appellants had, as is claimed, brought themselves within the rule laid down in *James v. Karunaratna (supra)*.

It is to be noted that while the proctors acting for the defendant gave as their sole reason for applying to withdraw the first petition of appeal and to substitute another in its place the fact that the former was improperly stamped, their application was in fact designed to serve another purpose. The grounds of appeal in the first petition were redrafted and elaborated and an additional ground of appeal was raised. The second petition of appeal is a very different document from the first.

The ordinary consequence of withdrawing an appeal is an order of Court dismissing the appeal, and I know of no provision in our law which permits an appellant, in the circumstances of this case, to withdraw a petition of appeal and file another in its place. It would appear that in India, by reason of an enactment in the Indian Code, the provisions for the withdrawal of an action apply also to appeals, but there is no corresponding provision in our Code (see Hutchinson C.J. in *11 N.L.R. 110*).

According to the interpretation placed by this Court on the provisions of the Code relating to appeals read with the Stamp Ordinance the initiation of an appeal must be in strict compliance with the requirements of the law, and nothing can be done later to cure non-compliance with the law at the time the petition of appeal is presented.

In *Attorney-General v. Karunaratna et al.*<sup>2</sup>, a Divisional Bench followed *Bandara v. Baban Appu*<sup>3</sup>, which decided that the stamps for the certificate of appeal and for the Supreme Court judgment must be supplied along with the petition of appeal, while in *Sinnappoo v. Theivanai et al.*<sup>4</sup> it was held that failure to tender the proper amount of stamps is a fatal irregularity. In this case the correct amount of stamps was tendered after the time limit and it was held that the defect could not be so cured.

<sup>1</sup> (1935) 37 N. L. R. 154.

<sup>2</sup> (1935) 37 N. L. R. 57.

<sup>3</sup> 1 *Matura Cases* 203.

<sup>4</sup> (1937) 39 N. L. R. 121.



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It seems to me that following these decisions which bind us the petition of appeal filed on October 18 must be rejected, and that as there is no provision whereby the petition of appeal filed on October 19 could be substituted in its place the latter must be regarded merely as a document which has improperly been accepted as a petition of appeal.

In the result the appeal must be rejected with costs.

DE KRETZER J.—I agree.

*Appeal rejected.*

