1937 *Present :* **Moseley J. and Fernando A.J.**

RUTHIRA REDDIAR *v.* SUBBA REDDIAR.

263—D. C. Colombo, 258.

Bias—Advocate acting as Judge—Subsequent appearance as Counsel—No impropriety—Waiver.

An advocate as acting District Judge made an order in this action giving the defendants leave to appear and defend. Subsequently he appeared as Counsel for the defendant. At a later stage of the action the advocate realizing that he had made an order in the case brought it to the notice of the Court. The Court directed the advocate to proceed as counsel.

Held, that there was no possibility of bias at the time that the advocate acted as judge as he had not then been retained as counsel and that there had been no transgression of the rule that justice should manifestly be seen to be done.

Dyson v. Kanagammah (*31 N. L. R. 473*) referred to ; *King v. Sussex Justices* (*L. R. 1924, 1 K. B. 256*) distinguished.

APPEAL from a judgment of the District Judge of Colombo.

Rajapakse (with him *Jayawardene*), for plaintiff, appellant.

C. Nagalingam, for defendant, respondent.

Cur. adv. vult.

February 1, 1937. MOSELEY J.—

This is a suit by the plaintiff on a promissory note given him by the two defendants. The defendants raised a number of defences impugning the validity of the note. On most of the issues raised at the trial the learned Judge found in favour of the plaintiff, but he held on issues 10 and 11 that the plaintiff was a money lender and had not kept books as required by the Money Lending Ordinance and therefore dismissed his action.

Two grounds of appeal have been urged before us. The first is that the advocate for the defence, Mr. S. C. Swan, had previously acted as District Judge and in his capacity as such had made an interlocutory order in this very action giving the defendants leave to defend.

It is not suggested that at the time of making the order Mr. Swan had any interest in the action and it was only after the hearing had been in progress for some time that he appeared in the absence of another advocate, and it was he who, realizing at a later stage that he had made the order referred to, informed the Court accordingly.

The learned Judge requested Mr. Swan to proceed and any opposition there may have been on the part of the plaintiff was withdrawn.

The point, I think it may safely be said, was waived and that may account for the reluctance felt by Counsel for the appellant in bringing the matter to our notice.

Mr. Rajapakse relied upon an unreported judgment of Dalton J. in S. C. No. 63, C. R. Colombo, No. 40,396 [1], the facts of which in all material points are on all fours with those now before us. Dalton J. viewed the matter as a very grave irregularity which must vitiate the proceedings. He referred to what he described as a similar kind of case which came before a Divisional Court in England, viz., the *King v. Sussex Justices* [2]. In that case the Justices while considering their decision were attended by the Justices' clerk who happened to be a member of a firm of Solicitors who were acting against the accused in a civil action for damages arising out of the same circumstances. It was asserted that the Justices, in convicting the accused, arrived at their decision without consulting the clerk who, in fact, scrupulously refrained from referring to the case. Hewart L.C.J., in the course of his judgment, said :—

> "The question, therefore, is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered ; the question is whether he was so related to the case in its civil aspect, as to be unfit to act as clerk to the Justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

The conviction was quashed. It will be observed that in that case the clerk, at the time when he was in a position to influence the justices, was already an interested party. In the case before us the position is entirely

[1] *S. C. Minutes, February 17, 1930.*

[2] *L. R. (1924) 1 K. B. 256.*

different. At the time when Mr. Swan sat as District Judge he had no interest whatever in either of the parties to the suit, and it is difficult to conceive that it could occur to any one that an impropriety had been or might have been committed.

The crux of the matter is surely the possibility of bias on the part of the Judge when the case came before him. Here that possibility did not exist.

We have also been referred to the case of *Dyson v. Kanagammah*[1]. In that case Jayewardene A.J. cited with apparent approval the judgment of Dalton J., but the learned Acting Judge was evidently under some misconception as to the facts as he described the case as one "where an advocate who appeared for one of the parties sat as Judge later and made certain orders". Had that been the case there could hardly be a graver irregularity.

As, however, the facts are on an entirely different footing, I do not think there has been a transgression of the rule, if I may so term it, that justice should manifestly be seen to be done.

In my view, therefore, there is no substance in that ground of appeal.

I would add that in the case of *The King v. Sussex Justices*[2], Hewart L.C.J. indicated that, had there been a waiver he would have affirmed the conviction. In this case, therefore, even if I had not come to the conclusion which I have, it would appear that any impropriety has been cured by waiver.

The second ground of appeal is that the Judge was wrong in holding that the plaintiff was a money lender. Counsel for the appellant contended that the number of loans granted was small and that the borrowers belonged to a restricted class. It does not seem to me that either of these circumstances is necessarily relevant, nor does the fact that the appellant was a dairyman negative the possibility of his also being a money lender.

In my opinion, there is evidence upon which the learned Judge could find that the appellant was in fact a money lender.

I would, therefore, dismiss the appeal with costs.

FERNANDO A.J.—I agree.

Appeal dismissed.