DAYARATNE

v.

HERATH

SUPREME COURT
DHEERARATNE, J.
BANDARANAYAKE, J. AND
ISMAIL, J.
SC APPLICATION NO. 192/97
CA NO. 136/89
DC MARAWILA NO. 538/M
31ST JANUARY, 2000

Civil Procedure Code - Action against a public officer - Substitution of the Attorney-General as a party defendant - Section 463 of the Civil Procedure Code - Steps to appear and defend the officer in the action - Establishment Code, Chapter XXXIII section 6.1 - Exemption of the defendant's documents from stamp duty - Stamp Duty Act, No. 43 of 1982, sections 5(14)(b) and 71.

The defendant (the appellant) was the Headquarters Inspector, Wennappuwa Police Station. The plaintiff (the respondent) instituted an action in the District Court of Marawila in respect of acts purporting to have been done by the appellant in his official capacity, after giving him notices under section 88 of the Police Ordinance and Section 461 of the Civil Procedure Code. The Attorney-General decided to undertake the defence of the appellant and instructed the appellant to give his proxy to the State Attorney assigned to the Marawila District Court. Thereafter, the appellant's answer was settled by State Counsel and sent to the State Attorney to be filed. The respondent submitted that the proxy and the answer be rejected as they were unstamped. The District Judge disallowed this application. But the Court of Appeal having taken the view that it was only if the Attorney-General's name was substituted as a party defendant that documents filed by him were exempted from stamp duty, made order that the proxy and the answer be rejected and the case be fixed for ex parte trial.

Held :

By an inveterate practice which has been judically recognized and since incorporated in section 6.1 Chapter XXXIII of the Establishment Code, the Attorney-General may undertake the defence of a public officer either by making an application to the court under section 463 of the Civil Procedure Code to be substituted as a party-defendant or by taking steps

to appear and defend in the action by assigning State Counsel to appear for the defendant who is a public officer. The proxy and the answer of the appellant were, therefore, exempt from stamp duty. In any event, by virtue of the provisions of section 5(14)(b) read with section 71 of the Stamp Duty Act, No. 43 of 1982, the appellant being sued "virtute officii" the appellant's appointment given to the State Attorney and his answer were documents which were exempt from stamp duty.

Cases referred to :

1. De Silva v. Illangakoon (1956) 57 NLR 457
2. Sita Rajasingham v. Maureen Seneviratne (1995) 2 Sri LR 71
3. Vettivelu v. Wijeyeratne (1956) 60 NLR 442 at 443
4. The Secretary to the Treasury, Colombo v. Mediwaka (1971) 74 NLR 503
5. Abeywickrama v. Pathirana (1986) 1 Sri LR 120 at 139
6. Maryland Vas Co. v. Macormack KY : 488 S.W. 2d 347 349
7. Aldridge v. Wooten 68 Ga. APP 887, 24 S.E. 2d 700, 701
8. State v. Roy 41 N.M. 308 68 P. 2d 162, 165
9. Yuma County v. Wisener 45 Ariz, 475, 46 P. 2d 115, 118

APPEAL from a judgement of the Court of Appeal reported in (1997) 3 Sri LR 74

Uditha Egalahewa, S.C. for defendant - appellant

J.W. Subasinghe, PC for plaintiff - respondent.

Cur. adv. vult.

22nd March, 2000

DHEERARATNE J.

The plaintiff - respondent (the respondent) instituted action against the defendant - appellant (the appellant), in the District Court of Marawila, claiming damages on three causes of action. At the time material to the action, the respondent was a lawyer of about twenty five years standing and the appellant was the Headquarters Inspector of the Wennappuwa Police Station. The respondent averred in his plaint that on 13.01.1988 about 4 p.m. he took two photographs of certain premises, in respect of which there was an ongoing litigation in the District Court of Marawila, for one of the parties for

whom he was appearing; that having taken the photographs when he was returning home by car, he was stopped by a police constable who ordered him to proceed to the Wennappuwa police station; that later at the police station, the constable handed over the custody of the camera which was with him and his car by which he travelled to the appellant; that at the police station the appellant abused and insulted him stating that he cannot permit anyone to take photographs in his area; that about 7.30 a.m. the following morning, he was informed by the appellant that he had decided to get him remanded in terms of the emergency regulations; that he was detained at the police station until about 10.30 a.m. when he was released on bail; and that although his car was released his camera and the film roll were not. As averred in the plaint, briefly, the first cause of action was for damages suffered by the respondent on account of his being illegally and maliciously arrested and detained and being insulted; the second was for damages suffered on account of his being deprived of the use of his camera and the unlawful use of the same by the appellant, for sometime; and the third, was for damages suffered on account of his being deprived of engaging in his professional work in the District Court of Marawila on 14. 01. 1988. By paragraph 25 of the plaint, the respondent averred that he gave "notice of the action by registered post on 11th March 1988, to the Senior Superintendent of Police, Chilaw division, and the Attorney - General in terms of section 88 of the Police Ordinance and section 461 of the Civil Procedure Code." I may pause here, to refer to the two provisions under which notice was alleged to have been given according to the plaint.

Section 88 of the Police Ordinance reads, "All actions and prosecutions against any person which may be lawfully brought for anything done or intended to be done under the provisions of this Ordinance, or under the general police powers hereby given, shall be commenced within three months after the act complained of shall have been committed, and not otherwise; and notice in writing of such action and of the cause thereof shall be given to the defendant, or to the principal officer of the

district in which the act was committed, one month at least before the commencement of the action; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant."

Section 461 of the CPC reads, "No action shall be instituted against the Attorney - General as representing the State or against a Minister, Deputy Minister, or public officer in respect of an act purporting to be done by him in his official capacity, until the expiration of one month next after notice in writing has been delivered to such Attorney - General, Minister, Deputy Minister, or officer (as the case may be), or left at his office, stating the cause of action and the name and place of abode of the person intending to institute the action and the relief which he claims; and the plaint in such action must contain a statement that such notice has been delivered or left".

Notice in terms of section 461 was rightly given to the appellant, as an allegation of malice in the plaint does not exempt a plaintiff from his duty to give a defendant public officer due notice of the action. See *De Silva* Vs. *Illangakoon*[1].

The Attorney - General after calling for particulars of the incident complained of by the respondent from the appellant's superiors, acceded to the request of the appellant's superiors to undertake the defence of the appellant in the District Court. The Attorney - General then instructed the appellant to hand over his proxy to Mr. Dalpathadu, the State Attorney assigned to the Marawila District Court, who filed the same and obtained a date to file answer. The answer of the appellant was thereafter settled by State Counsel and sent to the State Attorney to be filed. Neither the proxy nor the answer was stamped at the time of filing. At the trial, the respondent appeared in person having revoked the proxy already given to

an Attorney-at-Law and the appellant was represented by State Counsel. The respondent submitted that the proxy and the answer be rejected as they were unstamped. This application was disallowed by the learned District Judge and the respondent moved the Court of Appeal in revision against that order. The Court of Appeal, having taken the view that it was only if an application was made by the Attorney-General and his name substituted as a party defendant that documents filed by him were exempted from stamp duty, made order that the proxy and the answer be rejected and the case be fixed for ex parte trial. The present appeal is the sequel. (The Court of Appeal Judgment in Jayatissa Herath Vs. Dayaratne is reported in (1997) 3 SLR 74).

I may straight away mention that, ordinarily, a document may be rejected for non - stamping, only if any law requires that stamps should be supplied at the time of its presentation. (see the case of *Sita Rajasingham* v. *Maureen Seneviratne*[2]. Even in that class of document, in certain circumstances, which need not bother us here, it may be possible for a Court to make an order to supply any deficiency in the value of stamps subsequently. The proxy not being in that class of document, (if it otherwise attracts stamp duty), cannot be rejected for non - stamping. Stamps could be supplied subsequently. Therefore the order made by the Court of Appeal in respect of the proxy cannot in any event be justified. As regards the stamping of the answer, I am also unable to find, on the facts of this case, contrary to what the Court of Appeal thought, that any link existed between the Attorney - General being substituted as the party defendant and exempting the answer of the appellant from stamp duty . As I shall demonstrate later, exemption from stamp duty can arise, even without the Attorney - General being made a party defendant or even his undertaking the defence of the appellant.

Since certain comments were at the hearing of this appeal on the correctness of the procedure adopted by the Attorney - General in undertaking the defence of the appellant in this

case, I shall make my observations on that matter, to set at rest any misgivings that may have arisen.

Section 463 of the CPC reads "if the Attorney - General undertakes the defence of an action against a Minister, Deputy Minister, or a public officer, the Attorney - General shall apply to the court, and upon such application the court shall substitute the name of the Attorney - General as a party defendant in the action ." For convenience, I shall henceforth refer to the persons mentioned in this section generically as public officials.

Section 464 reads "if such an application is not made by the Attorney - General on or before the day fixed in the notice for the defendant to appear and answer to the plaint, the case shall proceed as in an action between private parties, except that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree."

The latter section gives the consequences of the Attorney - General not making an application to substitute himself as a party defendant; section 462 had already laid down that no writ against person or property shall be issued against the Attorney - General in any action brought against the State, or in any action in which he is substituted as a party defendant. The words in section 464, "the case shall proceed as in an action between private parties", should be read in the context of the contents of section 462. There is hardly any difference in the procedure to be adopted in an action between private parties and in an action between the Attorney - General and a private party, except that in the latter case, no writ against the person or property shall be issued against the Attorney - General. (For the sake of completeness, I may mention here, although no writ could be issued against the Attorney - General, the State, as a matter of practice, never fails to honour a civil judgement pronounced against it, in the name of good governance). The words "except that the defendant shall not be liable to arrest, nor his property to attachment,"

in section 464, could only mean that the defendant public official is immune from being arrested and his property from being sequestered before judgement, as provided for in Chapter XLVII of the CPC. It was contended on behalf of the respondent that when the action becomes an action between private parties, the proxy and the answer of the appellant attracts stamp duty. The action becomes an action between privates parties insofar as the CPC is concerned and that cannot apply to matters covered by any other enactment, unless the CPC or any other enactment expressly provides so. It is significant that an application for substitution in terms of section 464 could be made only on or before the day fixed in the notice for the defendant to appear and answer the plaint and not thereafter. What if a situation demands a public official intervening in an action as a necessary party and then getting the Attorney - General to undertake the defence on his behalf? Section 464 could be of no assistance in such a situation. It is obvious that the word "notice" in section 464 is a reference to a summons (form no. 16) and not a notice of action (form no. 79), firstly as the latter does not fix a date for appearance and answer and secondly, after section 461 A was introduced, the notice of action could be given even after the institution of the action.

An inveterate practice, not in anyway repugnant to the provisions of the CPC, has been in operation, whereby the Attorney - General undertakes the defence of a public official referred to in section 463, without seeking to substitute himself as a party defendant and this practice is well known among those acquainted with the working of the Attorney - General's Department. Furthermore, this practice has been judicially recognized by this Court in at least two decided cases. In the case of *Vettivelu* Vs. *Wijeyeratne*[3] K.D. de Silva J. (Sansoni J. agreeing) stated , "The fact that the Attorney - General had not made an application under section 463 of the Civil Procedure Code does not disentitle him from assigning a Crown Counsel to appear for the defendant who is a public

officer from the Bar that when public officers are sued in tort the Crown does not take up the defence but the Attorney - General instructs the Crown Counsel to appear for them. No objection can be taken to that practice". Again, in the case of the *Secretary to the Treasury, Colombo,* Vs. *Mediwaka*[4], Sirimane J. (with Wijayatillake J. agreeing) observed "It is obvious that the Attorney General had undertaken the defence of the officer concerned, although there was no strict compliance with section 463 of the Civil Procedure Code. When public officers are sued, it is the practice of the crown proctors to file their proxy and a crown counsel to appear at the trial, and this practice has been recognised and approved in Vettivelu Vs. Wijeyeratne".

It is not a matter of surprise that this long standing practice found its way into the Establishment Code, which Code as learned State Counsel correctly submitted, has all the binding force of a statute. See the observations of Sharvananda CJ. in *Abeywickrama* Vs. *Pathirana*[5]. In the chapter XXXIII of the Establishment Code, section 6 is titled "Defence of an action against Public Officers in their official capacity".

Section 6.2 reads, "If an officer who is not the Head of a Department receives notice of a civil action in respect of an act purporting to be done by him in his official capacity he should communicate immediately with the Head of his Department, who should consult the Attorney - General as in the same manner as in subsection 6.1.

If the Attorney - General is of opinion that he should undertake the defence of such public officer, he will apply to Court for substitution of the Attorney - General as a party defendant in the action in place of such public officer, **or take steps to appear and defend in that action as may be appropriate.**" (emphasis added)

(The identical provision is laid down in section 6.1 in relation to a Head of a Department receiving notice of a civil action).

Section 6.3 states that in either of the cases referred to previously (that is in the case of an officer who is a Head of a Department or an officer who is not a Head of a Department) if the Attorney - General is of the opinion that he should not undertake the defence of the action, he should forward papers, along with the reasons for his opinion to the Minister of Justice.

I can find no repugnancy or contradiction between the provisions of the CPC and the Establishment Code in relation to the Attorney - General undertaking the defence of a public official. Nor have those provisions in either enactment any bearing on the stamping or non-stamping of the proxy and the answer in the present case.

The relevant part of section 5 of the Stamp Duty Act No. 43 of 1982, as truncated by me would read, "The following instruments and documents shall be exempt from the payment of stamp duty: (14) the following documents filed in legal proceedings - (b) documents filed in any Court, by public officers suing, or being sued or intervening, **virtute officii,** in any proceeding in such Court". The interpretation section 71, defines a document in relation to legal proceedings, to include inter alia, an appointment of an attorney and an answer.

Is the appellant in the instant case being sued **virtute officii,** which would literally mean by virtue of office? The respondent denies that the appellant is sued in that capacity. But section 461 of the CPC under which the notice of the action was given to the appellant and the form of notice (no 79) both indicate that the appellant was sued "in respect of an act purporting to be done by him in his official capacity"

Learned State Counsel drew our attention to the definition of the English term **virtue of office** and the Latin expression **virtute officii** in Black's Law Dictionary. That reads:

Virtue of office : An act done by virtue of office is one in which the act is within the authority of the officer but in doing it he exercises that authority improperly or abuses the confi-

dence which the law imposes on him. *Maryland Cas. Co.* V. *Macormack*[6].

Virtute officii : By virtue of his office. By the authority vested in him as the incumbent of the particular office. An officer acts "virtute officii" when he acts by the authority vested in him as the incumbent of the particular office. *Aldridge* Vs. *Wooten*,[7]. Where acts done are within the authority of the officer, but in doing them he exercises that authority improperly, or abuses the confidence which the law reposes in him, whilst acts done "colore officii" are where they are of such a nature that his office gives him no authority to do them. *State* V. *Roy*,[8], *Yuma County* V. *Wisener*,[9].

Learned President's Counsel for the respondent contended that the Stamp Ordinance No. 22 of 1909 (as amended) was not repealed by the Stamp Duty Act No. 43 of 1982 and therefore the former enactment is still in force; that the definition of the term "instrument" in section 92 of the Stamp Ordinance is an inclusive definition, wide enough to include a proxy and an answer; and that subsection 8(3) of the Stamp Ordinance provided as follows:

"It shall be the duty of every officer in the service of the Government . . . to see that no instrument liable to stamp duty is received or admitted . . . unless, it shall have been duly stamped".

Learned President's Counsel submitted that on the application of subsection 8(3), the appellant's proxy and answer should be rejected. He further contended that this argument had not been advanced in the course of arguments in the case of Sita Rajasingham (supra). It is quite evident, that in making the submission based on the Stamp Ordinance, learned President's Counsel has overlooked section 68 of the Stamp Duty Act, which reads:

"The Stamp Ordinance (Chapter 247) shall not apply to any instrument executed on or after the appointed date".

The appointed date in terms of section 1 of the Stamp Duty Act, as determined by the Minister and gazetted, is 1st January 1983. The Stamp Ordinance defines only the term "instrument" whereas the Stamp Duty Act defines separately the terms "instrument" and "document." It is quite obvious that in the context of section 68, the term "instrument" refers to an "instrument" within the meaning of the Stamp Ordinance and not to an "instrument" within the meaning of the Stamp Duty Act; the interpretation section 71 of the Stamp Duty Act provides that the definition of an "instrument" in that Act shall apply "unless the context otherwise requires". I am unable to pursuade myself to agree with the submission made by Learned President's Counsel based on the Stamp Ordinance.

For the above reasons, I allow the appeal and set aside the judgment of the Court of Appeal. I direct the District Judge Marawila to proceed with the trial of the action. The respondent will pay the appellant a sum of Rs. 10,000 as costs of this appeal.

BANDARANAYAKE, J. - I agree.

ISMAIL, J. - I agree.

Appeal allowed.