

1960

Present : Basnayake, C.J., and Sansoni, J.

MOHIDEEN ALI, Petitioner, and HASSIM, Respondent

*S. C. 524—In the matter of an Application for Restitutio in Integrum in D. C. Colombo 43561/M**Compromise of action—Counsel—Proxy given to Proctor—Absence therein of authority to consent to judgment—Right of Counsel, nevertheless, to consent to judgment—Civil Procedure Code, ss. 24, 27.*

On 30th April 1959 Counsel who appeared for the defendant obtained a postponement on agreeing that if the costs of the day were not pre-paid to the other side before 10 a.m. on the next trial date judgment should be entered for the plaintiff as prayed for. Although the proxy given by the defendant to his Proctor did not give the Proctor authority to consent to judgment in terms of Form No. 7 of the Schedule to the Civil Procedure Code, the client, who was in Court, raised no objection when the undertaking and consent to judgment were given by Counsel. Nor did the Proctor take any steps to repudiate the undertaking.

On the next trial date, evidence was led for the plaintiff that costs were not paid as agreed. The evidence was not contradicted by the defendant. Thereupon judgment was entered in favour of the plaintiff.

It was contended in appeal that the authority of the Proctor of a party to a suit was limited by the terms of the instrument of appointment and that as section 24 of the Civil Procedure Code provided that an Advocate instructed by a Proctor represents the Proctor in Court the Advocate's authority could never be greater than that given to the Proctor.

Held, that, despite the restricted terms of the proxy, the plaintiff was entitled to judgment in his favour in terms of the consent given by the defendant's Counsel. An extension of the written authority contained in the proxy could be given orally or be inferred from the client's conduct.

APPPLICATION for *restitutio in integrum* in respect of an action instituted in the District Court, Colombo.

H. V. Perera, Q.C., with *R. Manikkavasagar*, for Defendant-Petitioner.

H. W. Jayewardene, Q.C., with *M. T. M. Sivardeen*, for Plaintiff-Respondent.

Cur. adv. vult.

December 19, 1960. BASNAYAKE, C.J.—

The only question for decision on this application is whether a party to a civil suit is bound by the action of his counsel in consenting to judgment against him on his failure to pay the agreed costs of the opposing

party which he has undertaken to pay before a stated time on a stated day on condition a postponement is granted to him to enable him to summon a material witness.

Shortly the facts are as follows :—The petitioner (hereinafter referred to as the defendant) is the defendant in an action for damages for injuries suffered by the plaintiff, a minor. When the case was taken up for trial on the 30th April 1959 the defendant's counsel applied for a postponement of the trial. The relative minute in the record reads :

“ Mr. Subramaniam begs for a date. He says that a material witness for him could not be summoned for today as his name was ascertained from the Police only today. He consents to pre-pay the costs of the other side, which is agreed on at Rs. 150/-.

It is also agreed that if costs are not paid before 10 a.m. on the trial date (15/10/59) judgment should be entered for plaintiff as prayed for.

Trial is refixed for 15/10/59.”

When the case was taken up on 15th October 1959 counsel for the plaintiff stated that the costs had not been paid and moved for judgment in terms of the order of 30th April 1959. The relative minute reads :

“ Mr. Hassan says that the pre-payment order made on the last trial date 30.4.59 has not been carried out and that costs had not been paid as agreed. He moves that judgment be entered for plaintiff as agreed on on that date.

Mr. Subramaniam says that he is unable to admit this as his proctor is absent today. He moves for an adjournment.

Mr. Hassan objects and says he is able to prove that the costs have not been paid. He points to the fact that the defendant is also present and would himself know whether or not he paid the costs.”

Thereafter the plaintiff's counsel called evidence. He first called his proctor who stated that on 30th April 1959 the defendant moved for a date and consented to pre-pay Rs. 150 before 10 a.m. on 15th October 1959, and that the costs had not been paid and that it was also agreed that judgment should be entered as prayed for by the plaintiff. The next friend gave evidence to state that the defendant agreed to pre-pay Rs. 150 before 10 a.m. on 15th October 1959 but no costs had been paid either by the defendant or by his Proctor. Mr. Subramaniam then stated that he was not in a position to call any witnesses. The learned Judge then made the following order:—

“ On the last trial date, 30/4/59, the defendant obtained a date consenting to pre-pay costs agreed on at Rs. 150 before 10 a.m. today. He also agreed that judgment should be entered for the plaintiff as prayed for if he failed to pay these costs. Mr. Sheriff, proctor for the

plaintiff, and the plaintiff's next friend, have given evidence on oath that these costs have not been paid as agreed. I accept this evidence which is not contradicted. In terms of the order of 30/4/59 I enter judgment for plaintiff as prayed for."

Learned counsel for the defendant submits that as the defendant had not, by the instrument appointing him, given the proctor authority to consent to judgment, counsel appearing for him had no authority to do so. Learned counsel invited our attention to sections 24 and 27 of the Civil Procedure Code and the form of appointment of a proctor in the Schedule to the Code. He submitted that the authority of the proctor of a party to a suit was limited by the terms of the instrument of appointment and that as section 24 provided that an advocate instructed by a proctor represents the proctor in Court the advocate's authority could never be greater than that given to the proctor. He compared the forms of appointment of a proctor in the Schedule to the Code with the instrument of appointment in the instant case and pointed out that the words "and consent to a judgment being entered against . . . as to . . . said Proctor shall appear fit and proper" in the form in the Schedule did not appear in the instrument of appointment given by the petitioner, and that the proctor had therefore no authority to consent to judgment.

Although the Schedule to the Code contains a form of appointment giving specific authority to the proctor as in the case of a power of attorney, section 27 does not contemplate such an appointment. It states :

- (1) The appointment of a proctor to make any appearance or application, or do any act as aforesaid, shall be in writing signed by the client, and shall be filed in court ; and every such appointment shall contain an address at which service of any process which under the provisions of this Chapter may be served on a proctor; instead of the party whom he represents, may be made.
- (2) When so filed, it shall be in force until revoked with the leave of Court and after notice to the proctor by a writing signed by the client and filed in court.

An authority granted by a lay client to his Proctor in writing (commonly known as a Proxy) undoubtedly limits the Proctor's authority. He cannot go counter to it ; but I do not think that it can be said that the writing is exhaustive of his powers nor is the lay client precluded from enlarging the scope of the powers granted by the writing either expressly or impliedly. Such extension of the proctor's authority may be given orally or may be inferred from the lay client's conduct. In the instant case the lay client was in Court both when the undertaking was given and when his counsel consented to judgment. He chose not to give evidence when the plaintiff did so. The affidavit of the plaintiff's Proctor shows that he called at the office of the defendant's Proctor on three occasions and requested him to forward a cheque for Rs. 150 from his client as costs in compliance with the order of 30th April 1959 and the

defendant's Proctor's clerk informed him that his employer had been informed of his visits to his office and that a cheque would be sent. There is no counter affidavit from the defendant's Proctor and I see no reason to reject the statements made by the plaintiff's Proctor. The Proctor knew about the undertaking but took no steps to repudiate it. It must therefore be presumed that the Advocate acted not only with the authority of the lay client who was present in Court and who according to the plaintiff's affidavit was consulted by his counsel but also that of his Proctor who did nothing to repudiate his counsel's action before the next date on the ground that he had acted in excess of his authority and outside his instructions. In the instant case even if the writing is regarded as exhaustive—and I have already stated above it is not—the petitioner and his proctor by their conduct must be taken to have ratified their advocate's action.

The application is refused with costs.

SANSONI, J.—

I cannot accept the interpretation which Mr. H. V. Perera seeks to give to section 24 of the Code, which says that an advocate instructed by a proctor "for this purpose" represents the proctor in Court. I find it impossible to say what the words "for this purpose" mean in the context. I think this sentence in the section was only intended to say that the advocate and not the proctor should conduct the case of his client in Court. I do not accept the proposition that the advocate, by reason of this section, is merely the agent of the proctor who has retained him to appear. The limitation which Mr. Perera seeks to impose on an advocate's authority is something quite revolutionary, and it is opposed to a long line of decisions in which the powers of counsel have been considered and laid down.

This Court has always accepted the view that an advocate has the same authority as a counsel who appears in the English Courts. In *Mathews v. Munster*¹, Lord Esher, M.R., said that when a client has requested counsel to act as his advocate "he thereby represents to the other side that counsel is to act for him in the usual course, and he must be bound by that representation so long as it continues, so that a secret withdrawal of authority, unknown to the other side, would not affect the apparent authority of counsel." He also pointed out that while counsel has no power over matters that are collateral to the suit, his consent to a verdict against his client is a matter within his authority. "If the client is in Court and desires that the case should go on and counsel refuses, if after that he does not withdraw his authority to counsel to act for him, and acquaint the other side with this, he must be taken to have agreed to the course proposed."

¹ (1887) 20 Q. B. D. 141.

In my view, when an advocate is retained and briefed by a proctor he has complete authority over the action. The manner of conducting it, whether he should abandon it or not, whether he should enter into a compromise, are all matters within his discretion. He is not the mere mouthpiece either of his client or of his proctor. His authority is a general one, which includes the power to compromise or to make an admission. If any limitation is placed on his authority, it must be communicated to the other side in order to be effective. "He has the power to act without asking his client what he shall do. He has no master, but he is the conductor and regulator of the whole thing." ¹ I do not think it is necessary to cite further authority, for these propositions are too well known.

There is no merit in the present application, because when the order of 30th April, 1959, was made, the defendant was present in Court, and this is an added circumstance which renders the agreement entered into on that day binding on him. I agree that the application should be refused with costs.

Application refused.
