

JAYATISSA HERATH

v.

DAYARATNE

COURT OF APPEAL.
EDUSSURIYA, J.
CALA 136/89.
D.C. MARAWILA 528/M.
JUNE 10, 1997.

Civil Procedure Code – Section 463 – Defence of a Public Officer by Attorney-General – State Counsel assigned – Applicability of section 5(14) (b) of the Stamp Duty Act.

Held:

(1) There was no application by the Attorney-General under section 463 undertaking the defence of the defendant-respondent. However the Attorney-General is entitled to assign a State Counsel to appear for the defendant-respondent.

(2) It is only if an application has been made by the Attorney-General and his name substituted as a party defendant, that any document filed by the Attorney-General is exempted from Stamp Duty, because the Attorney-General is then a party to the case.

In this case since the Attorney-General has not undertaken the defence, and he has merely assigned a State Counsel to appear for the defendant neither the Proxy nor the Answer filed on behalf of the defendant are exempt from Stamp Duty. Therefore both the Proxy and Answer must be rejected and the case fixed for *ex parte* trial.

AN APPLICATION in Revision from the Order of the District Court of Marawila.

Cases referred to:

1. *Vettivelu v. Wijeratne* – 60 NLR 442.
2. *Secretary to the Treasury v. Mediwaka* – 74 NLR 503.

J. W. Subasinghe, P.C. with *J. A. J. Udawatte* for appellant.
Adrian Pereira, S.S.C. for respondent.

Cur. adv. vult.

July 17, 1997.
EDUSSURIYA, J.

This is an application to revise and set aside the order of the learned District Judge of Marawila, dated 7th December 1989 which

held 1) that the Attorney-General can without strict compliance of section 463 of the Civil Procedure Code undertake the defence of a public officer and assign a State Counsel to appear for such public officer 2) that where the Attorney-General came forward to (පෙණි සිටීමට ඉදිරිපත් වූ විට) to appear on behalf of the defendant who is a public officer all documents that are filed on behalf of the defendant are exempt from stamp duty under section 5(14) (b) of the Stamp Duty Act.

On those grounds the learned District Judge refused the application of the plaintiff-petitioner to reject the proxy and answer filed by a member of the unofficial Bar, and fix the case for *ex parte* trial on the basis that there is no Answer filed by the defendant-respondent properly before Court.

The learned District Judge relied on the decisions in *Vettivelu v. Wijeratne*⁽¹⁾ and *The Secretary to the Treasury v. Mediwaka*⁽²⁾ in arriving at his decision.

In the case of *Vettivelu v. Wijeratne (supra)* the Deputy Solicitor-General had stated from the Bar that when public officers are sued in tort the **Crown does not take up their defence** but the Attorney-General instructs a Crown Counsel to appear for them and Their Lordships of the Supreme Court **held that a Crown Counsel being an Advocate is not unqualified to appear in Court and represent parties in private litigation**, and accordingly the fact that the Attorney-General has not made an application under section 463 of the Civil Procedure Code does not disentitle the Attorney-General from **assigning** a Crown Counsel to appear for a defendant who is a public officer.

In the case of *The Secretary to The Treasury v. Mediwaka (supra)* where a proxy was filed by the Crown Proctors on behalf of the person holding the office of the Secretary to the Treasury at that time and where Crown Counsel appeared at the trial, it was observed by Sirimanne, J. with Wijayatillake, J. agreeing that "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 for 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 v. Wijeratne*".

However, what Their Lordship's decided in *Vettivelu v. Wijeratne* (*supra*) was that no objection can be taken to the practice of the Attorney-General instructing a Crown Counsel to appear for public officers in private litigation **even though the Attorney-General does not take up their defence.**

Therefore it is incorrect to say that the decision in *Vettivelu v. Wijeratne* (*supra*) recognised and approved a practice that the Attorney-General can undertake the defence of a public officer although there is no strict compliance with section 463 of the Civil Procedure Code. Besides, where an application is made under section 463 of the Civil Procedure Code, the Court shall then substitute the name of the Attorney-General as a party defendant in the action.

In this case there was no application by the Attorney-General under section 463 of the Civil Procedure Code **undertaking the defence** of the defendant-respondent. However, the Attorney-General is entitled to assign a State Counsel to appear for the defendant-respondent, but it must be borne in mind that **the Attorney-General has not undertaken the defence** of the action against the defendant.

It is only if an application has been made by the Attorney-General and his name substituted as a party defendant that any documents filed by the Attorney-General are exempted from stamp duty, because the Attorney-General is then a party to the case.

In this case since the Attorney-General **has not undertaken** the defence, and he has merely assigned a State Counsel to appear for the defendant, neither the Proxy nor the Answer filed on behalf of the

defendant are exempt from stamp duty. Therefore both the Proxy and Answer, in my view must be rejected and the case fixed for *ex parte* trial.

The application is therefore allowed with costs fixed at Rs. 3150/- payable by the respondent to the petitioner.

Application allowed.
