

1953

Present: Gratiaen J. and Gunasekara J.

NELSON DE SILVA, Appellant, and S. CASINATHAN (Acting Rubber Commissioner), Respondent

*S. C. 20—D. C. Colombo, 17,622*

*Action—Plaintiff described as public officer—Right to sue in personal capacity.*

A plaintiff, merely because he describes himself by reference to his public office in the caption to the plaint, is not precluded from obtaining, with the consent of the defendant, a decree in his favour in his personal capacity.

*Proctor—Proxy not filed—Circumstances when failure may be excused.*

An application for the execution of a decree was signed by a proctor in whose favour no proxy had been granted by the plaintiff. It was, however, established that he was an assistant to the proctor on record and that he had signed the application on behalf of the latter, and not as a proctor purporting to act independently on his own responsibility. Further, there was evidence of acquiescence on the part of the defendant and of ratification by the plaintiff.

*Held*, that in the circumstances the irregularity occasioned by the absence of a proxy in favour of the proctor was cured.

**A**PPEAL from a judgment of the District Court, Colombo.

*C. Renganathan*, for the defendant appellant.

*H. W. Jayewardene*, with *D. R. P. Goonetilleke* and *M. L. de Silva*, for the plaintiff respondent.

*Cur. adv. vult.*

February 9, 1953. GRATIAEN J.—

This action was instituted on 6th February, 1947, in the District Court of Colombo by S. Casinathan, who was described in the caption to the plaint as “the Acting Rubber Commissioner of Ceylon”, to recover from the defendant a sum of Rs. 5,976·75 in connection with certain rubber transactions which had taken place between the parties. The defendant denied liability, and pleaded *inter alia* that it was “not competent to the plaintiff either in his personal capacity or as Acting Rubber Commissioner to maintain the action”. He counter claimed a sum of Rs. 11,839·73 from the plaintiff, which, he alleged, would be found due to him in respect of the transactions referred to in the plaint.

In March, 1949, before the action had been concluded, the parties agreed to submit their disputes to the arbitration of an Advocate of the Supreme Court, and the memorandum embodying their agreement expressly provided, *inter alia*, that “in the event of any sum being found due from the defendant to the Rubber Commissioner on the cause of action pleaded in the plaint, then and in such case the defendant should pay the sum to the plaintiff”.

The arbitrator made an order awarding to the plaintiff a sum of Rs. 5,979·75 and costs, and rejected the defendant’s counter claim.

In due course a decree of Court was entered in terms of the award, and on 30th January, 1950, the learned District Judge allowed an application made on the plaintiff's behalf for execution of the decree against the defendant. The Fiscal thereupon seized certain properties belonging to the defendant, who later intervened and applied for a recall of the writ on the ground that it had, for a variety of reasons, been irregularly issued. On 14th March, 1951, the learned Judge, after due inquiry, refused the application with costs, and declared that the execution proceedings were valid. The present appeal is from this order.

The only grounds upon which learned Counsel for the defendant challenged the correctness of the order under appeal were :

- (1) That the decree entered in terms of the arbitrator's award was in effect a decree in favour of the plaintiff not personally but in his "representative capacity" as "the Acting Rubber Commissioner of Ceylon"; and that, when the plaintiff had vacated that office on 1st April, 1950, his rights under the decree and under the pending execution proceedings had been "transmitted by operation of law" to his successor in office, who alone was competent thereafter to proceed with the litigation.
- (2) That the application for the execution of the decree had been signed by Mr. John Wilson (junior), Proctor, in whose favour no valid letter of appointment had at that time been filed of record authorising him to represent the plaintiff in the action (vide Sec. 27 of the Civil Procedure Code); and that in the result the execution proceedings were void *ab initio* and inoperative as against the defendant.

The view which I have taken is that there is no substance in either of these grounds of objection. The decree must, in my opinion, be interpreted as having been entered in favour of the plaintiff *personally*, and the commission issued to the arbitrator makes it clear that this was done in conformity with the expressed intention of the parties. If the defendant had contracted with the plaintiff purely as a public officer acting for and on behalf of the Government of Ceylon, the action should, in accordance with the provisions of the Civil Procedure Code, have been instituted in the name of the Attorney-General, and not in the name of the plaintiff either personally or in any representative capacity. The public office of "Rubber Commissioner" has not been declared by statute to create a distinct legal *persona* competent to sue or to be sued in our Courts, or capable, as such, of being "represented" in legal proceedings by someone else. The words "Acting Rubber Commissioner" appearing after the plaintiff's name in the caption to the plaint are therefore words only of description. If the cause of action pleaded by the plaintiff did not entitle him to assert a personal right to sue the defendant (vide *Bowstead on Agency*, 9th Edn., Art. 130) the defendant should not have agreed that, in the event of his liability being established, a decree should be entered against him *in favour of the plaintiff*. He is certainly precluded from raising the issue at this stage. Indeed, the plaintiff has now explained that he was in truth acting as an agent for and on behalf of an undisclosed

principal, namely, the Board of Trade in England, and not on behalf of the Government of Ceylon. The terms of his agency and of his contract with the defendant do not rebut the presumption that, in these circumstances, he was entitled to institute the action in his own name for the benefit of his principal in London. I therefore hold that the plaintiff's rights under the decree sought to be executed were not extinguished by reason of his retirement from the office of Rubber Commissioner.

There remains for consideration the effect of the admitted irregularity occasioned by the absence of a proxy granted by the plaintiff in favour of the proctor who had signed the formal application to execute the decree. It is common ground that the only proctor authorised in writing to act for the plaintiff at that time was Mr. John Wilson (senior), whose son had joined his father's business as an assistant. Nor is it disputed that, at various stages during the trial and the arbitration proceedings, Mr. Wilson (junior) had from time to time, without objection from the defendant or his lawyers, acted as the plaintiff's proctor in the litigation in his father's absence. It has been argued that the acquiescence of the defendant's lawyers in these professional appearances had been prompted only by courtesy. That I do not doubt, but the courtesy extended to Mr. Wilson (junior) was, nevertheless, the courtesy of recognition, *vide Cassim Satar v. Marikar*<sup>1</sup>.

There are two other matters which are relevant to a consideration of this particular ground of objection. In the first place, Mr. Wilson (junior) had admittedly signed the formal application *on behalf* of the proctor on record, and not as a proctor purporting to act independently on his own responsibility. In the second place, when the defendant obtained an interim order for a stay of execution pending the inquiry into the main application, he had raised no objection at the time complaining that the application for execution of the decree had been initiated by a proctor without authority. This conduct constituted a further recognition of Mr. Wilson (junior)'s professional status in the litigation. At a much later date, when the objection to Mr. Wilson (junior)'s status was for the first time taken on the defendant's behalf, the plaintiff formally appointed him to act in association with his father as his assistant, and expressly ratified all professional steps previously taken by him in that capacity. In the circumstances of this case, I take the view that the earlier defects of which the defendant had belatedly complained were cured. Different considerations would no doubt have arisen if Mr. Wilson (junior) had purported to act as the plaintiff's proctor in substitution for and to the exclusion of the proctor whose proxy stood unrevoked at the relevant date, but in the present case there is no room for applying the rule that a principal cannot by subsequent ratification give validity to an act which was at its inception unlawful or void.

In my opinion the defendant's appeal must be dismissed with costs, and I would make order accordingly.

GUNASEKARA J.—I agree.

*Appeal dismissed.*

<sup>1</sup> (1885) 7 S. C. C. 42.