

1951

*Present: Gratiaen J. and Gunasekara J.*

BLACKER, Appellant, and DAVID, Respondent

*S. C. 342—D. C. Colombo, 19,119/M.**Executor—Enjoys distinct persona—Representative capacity distinct from personal capacity.*

A person cannot be sued in his personal capacity in respect of a cause of action which arose against him in a representative capacity.

A person sued in his personal capacity cannot in the same proceedings claim relief by way of reconvention in respect of a cause of action which is alleged to have accrued to him in a representative capacity.

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

*E. B. Wikramanayake, K.C.*, with *Ivor Misso*, for the defendant appellant.

*D. S. Jayawickreme*, for the plaintiff respondent.

*Cur. adv. vult.*

July 20, 1951. GRATIAEN J.—

According to the evidence led in this case, the plaintiff had for many years been a trusted servant of the late Mrs. Botticelli who died in Colombo on 15th October, 1946. Mrs. Botticelli had owned and carried on a

<sup>1</sup> (1911) 13 N. L. R. 326.

<sup>2</sup> (1912) 14 N. L. R. 219.

lucrative business in the purchase and sale of pianos and musical instruments, and the plaintiff, who first entered her employment as a podian, later helped in the business in a capacity which clearly indicates that he had progressively secured her confidence. A question which may arise for adjudication in other proceedings is whether or not that confidence was betrayed.

Mrs. Botticelli was in poor health during the latter part of 1945, and from time to time until she died she was compelled to enter a nursing home for treatment. On 25th February, 1946, she had drawn a cash cheque D5 on her bank for Rs. 2,250, and an entry in the corresponding counterfoil D5A (which has been made out in the plaintiff's handwriting) indicates that out of this sum Rs. 250 was for nursing home expenses, while the balance Rs. 2,000 was "in favour of a/c for purchasing pianos". The cheque was cashed by the plaintiff. Mrs. Botticelli entered a nursing home on the day on which the cheque was cashed, and did not return home till the end of March or the beginning of April.

On the death of Mrs. Botticelli it was ascertained that she had left a last will and testament dated 8th March, 1946, appointing her personal friend the defendant to be the executrix of her estate. The plaintiff was one of the legatees under the will. The defendant thereupon in her representative capacity, took over the deceased's belongings, including a jewellery bag in which was found the cheque book containing the counterfoil D5A and also the plaintiff's Post Office Savings Bank pass book. This pass book shows that on 4th March, 1946—i.e., a few days after Mrs. Botticelli's cheque D5 had been cashed by the plaintiff—he had deposited a sum of Rs. 2,000 to his credit in the Savings Bank. The defendant's suspicions seem to have been aroused, and she taxed the plaintiff with the suggestion that the amount so deposited represented in fact the money with which he had been entrusted for the purpose of purchasing a piano as Mrs. Botticelli's agent. It is not surprising that the defendant's suspicions were not removed in view of the conversation which, according to her uncontradicted evidence, took place between herself and the plaintiff regarding the transaction shortly after the pass book came into her possession as executrix:—

"I questioned the plaintiff", she states, "about the pass book. He came and asked me for the book, I asked him from where he got this money and he said that his father gave it to him. I said that his father could not give it as he did not have so much. Then he said 'lady' gave me a gift, meaning Mrs. Botticelli. I said it was strange that the lady would have given that money to him as a gift."

The plaintiff did not choose to give evidence at the trial as to how his pass book had come into Mrs. Botticelli's possession during her life-time. Nor has he stated which, if either, of the contradictory explanations regarding the deposit of Rs. 2,000 represents the truth. He has also refrained from stating whether the money entrusted to him for the purchase of a piano was in fact expended on Mrs. Botticelli's account. I mention these matters because, in the view which I have taken regarding the scope of the present action, the plaintiff will no doubt be given a

further opportunity of satisfying Mrs. Botticelli's executrix or, in the alternative, a Court of law as to what the true position is regarding matters all of which are within his personal knowledge.

In the present action the plaintiff sued the defendant *in her personal capacity* and not in her capacity as executrix, for the return of his pass book of which, he alleges, she is in wrongful possession. The defendant denied that she could be sued in her personal capacity. At the same time she counterclaimed for a declaration that she was entitled *as executrix* to the sum of Rs. 2,000 previously referred and to the pass book in question.

Only the defendant gave evidence at the trial. An issue was specifically raised as to whether the defendant had unlawful possession of the plaintiff's pass book, and the learned District Judge, in answer to this issue, held that "the pass book came into the possession of the defendant *as executrix* of the estate of Mrs. Botticelli along with her belongings. The defendant therefore did not take unlawful possession of the pass book". Nevertheless the learned District Judge entered judgment in favour of the plaintiff as prayed for as against the defendant *in her personal capacity*. He also dismissed the defendant's claim in reconvention.

It seems to me that the defendant's claim in reconvention was rightly dismissed in this action, but not for the reasons given by the learned District Judge. A person sued in his personal capacity cannot in the same proceedings claim relief by way of reconvention in respect of a cause of action which is alleged to have accrued to him in a representative capacity. The converse proposition was laid down by Bertram C.J. and Ennis J. in *Mutunayagam v. Britto*<sup>1</sup> and the *ratio decidendi* in that case is clearly applicable in this action.

I am satisfied that the plaintiff's claim against the defendant in her personal capacity was equally misconceived. It is important to bear in mind that the executor or administrator of a deceased's estate enjoys a distinct *persona* whose obligations in that capacity cannot be confused with the obligations imposed upon him in his personal capacity. The learned Judge has held that the pass book claimed by the plaintiff came into the defendant's possession *qua* executrix, and there is no evidence that the defendant at any time thereafter took possession of the book on her personal account. If therefore the possession of the pass book was wrongful, an action for trespass could only lie at the plaintiff's instance against the defendant in her representative capacity.

For these reasons I would set aside the judgment appealed from and enter decree dismissing the plaintiff's action as well as the defendant's counterclaim. If the dispute cannot even at this stage be satisfactorily adjusted, both remedies are of course still available to the parties in proceedings properly constituted. There should be no order as to costs in the Court below, but the defendant is entitled to her costs of appeal.

GUNASEKARA J.—I agree.

*Judgment set aside.*

<sup>1</sup> (1920) 22 N. L. R. 329.