

1971

Present : Sirimane, J., and Wijayatilake, J.

THE SECRETARY TO THE TREASURY, COLOMBO, Appellant,
and A. MEDIWAKE, Respondent

S.C. 188/69 (Inty.)—D.C. Colombo, 1768/Z

Public officers—Action instituted against a public officer—Right of Attorney-General to undertake the defence—Scope of s. 463 of Civil Procedure Code—Appeal filed by public officer—Security for respondent's costs in appeal—Exemption of Crown from tendering it.

The Attorney-General may undertake the defence of a public officer, although he has not made an application under section 463 of the Civil Procedure Code to have his name substituted as the party defendant. In such a case, if the public officer files an appeal, the Crown is not bound to give security for the respondent's costs in appeal.

Where an action against a Public office which is held by different persons at different times is dismissed with costs on the ground that for the purposes of instituting the action the defendant named in the caption was not a legal "persona" and that he was a "non-existent person", the person physically in existence as named in the plaint is entitled to the issue of writ for the recovery of costs.

A PPEAL from an order of the District Court, Colombo.

K. M. M. B. Kulatunga, Crown Counsel, for the defendant-appellant

Plaintiff-respondent absent and unrepresented.

September 14, 1971. SIRIMANE, J.—

A preliminary objection had been lodged in the lower Court to the hearing of this appeal as no security for costs of appeal had been furnished by the appellant.

The plaintiff-respondent filed this action against "the Secretary to the Treasury". Proxy was filed by the Crown Proctors on behalf of the person holding that office at that time, and after answer had also been filed, Crown Counsel appeared at the trial.

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 recognized and approved in *Vettivelu v. Wijeratne*¹. It has long been recognized that the Crown is

¹ (1956) 60 N. L. R. 442.

not bound to give security for a respondent's costs in appeal—Vide *Kekulawala v. Attorney-General*¹, which was decided as far back as 1911. The preliminary objection to the hearing of the appeal therefore fails.

The appeal is by the defendant from an order refusing the issue of writ for the recovery of costs.

The action was filed, as stated earlier, against "The Secretary to the Treasury". There is in fact such a Public office, which is held by different persons at different times. Summons was served on the person holding that office at the address given in the plaint. Proxy and answer were filed by that person as named in the plaint. One of the objections taken in the answer was that the action had been filed against the wrong person as the defendant named was not the legal "persona" capable of being sued. This objection was upheld and the action was dismissed with costs. There was no appeal from that judgment. In the course of the judgment the learned Judge stated that the defendant was "a non-existent person". It is obvious that he meant, that for the purposes of instituting an action the defendant named in the caption was not a legal persona. It is fallacious to argue from the use of that phrase that there was no person physically in existence as named in the plaint. The application for issue of writ by the defendant has been refused on that basis, which in my opinion is erroneous.

The application to issue writ is allowed.

WIJAYATILAKE, J.—I agree.

Appeal allowed.

¹ (1911) 30 N. L. R. 64.