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for the detention of the head-constable Provat Nath Barat, in my judgment it would not be right for this Court to make this Rule absolute. For these reasons, in my judgment, the Rule should be discharged.

WALMSLEY, J. I agree.

E. H. M. *Rule discharged.*

APPEAL FROM ORIGINAL CIVIL.

Before Mookerjee and Fletcher JJ.

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March 23.

JACOB AND COMPANY

v.

RASH BEHARI GHOSE.*

Counsel—Instructions direct from lay client—Professional usage and etiquette—Judge, formerly a counsel for one of the parties.

Mr. X, a counsel, on direct instructions from client, inserted a ground in the memorandum of appeal which constituted a libel on the Judge in the Court below :—

Held, that the conduct of Mr. X was highly improper.

Doe d. Bennet v. *Hale* (1). *Hobart* v. *Butler* (2), *Gobindo* v. *Hendry* (3) and *Moran* v. *Dewan Ali* (4) referred to.

It is no disqualification for a Judge trying a case that before his appointment he was counsel in other matters for one of the parties to the case.

Thelluson v. *Rendlesham* (5), *Tatham* v. *Wright* (6), *Phillips* v. *Headlam* (7), *Lewis* v. *Branthwaite* (8), *Townsend* v. *Hughes* (9) and *Carr* v. *Fife* (10) referred to.

* Appeal from Original Civil, No. 98 of 1919, in Suit No. 1197 of 1917.

(1) (1850) 15 Q. B. 171.
(2) (1859) 9 Ir. C. L. R. 157, 172.
(3) (1875) 14 B. L. R. 12 (App.).
(4) (1872) 8 B. L. R. 418.
(5) (1858) 7 H. L. C. 429.
(6) (1831) 2 Russ. & M. 1.
(7) (1831) 2 B. & Ad. 380, 385.
(8) (1831) 2 B. & Ad. 437, 445.
(9) (1676) 2 Mod. 150, 151.
(10) (1895) 156 U. S. 494.

APPEAL from a judgment of Ghose J.

The circumstances under which the judgment was delivered are fully stated therein.

Mr. A. K. Ghose, for the appellant.

Mr. L. P. E. Pugh and *Mr. Langford James*, for the respondents.

Cur. adv. vult.

MOOKERJEE J. This is an appeal from the judgment of Mr. Justice Ghose in a suit instituted by the respondent, Rash Behari Ghose, against the appellant Jacob and Company for recovery of money due on the sale of shares in the Nalbona Coal Company. When the appeal was called on for final disposal on the 18th March, Mr. Ghose, counsel for appellant, made an application for adjournment, which was opposed on behalf of the respondent. At the same time, our attention was drawn by Mr. Pugh, the leading counsel for the respondent, to the first ground taken in the memorandum of appeal. The application for adjournment did not appear to be reasonable and was refused. Counsel for the appellant, thereupon, stated that he was not prepared to open the appeal, but added that Mr. X, who had conducted the case for the defence in the Court below and had certified the grounds of appeal, might perhaps appear to support them. Mr. X came later, and intimated that he had not been instructed to proceed with the appeal. In reply to a question put by the Court, with reference to the first ground in the memorandum of appeal, he mentioned that he had inserted it on instruction received, not from the attorney on record, but from one of the partners of the defendant firm. In answer to a further question from the Court as to whether he had, in the Court below, taken exception to the trial of the suit

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by Mr. Justice Ghose for the reasons specified in the first ground, he stated that to the best of his recollection objection had not been taken in that precise form ; but that he had intimated to Mr. Justice Ghose that the defendant desired not to have the case tried by him. Mr. Langford James, who had conducted the case in the Court below on behalf of the plaintiff, thereupon stated that Mr. X had added that his own wishes did not coincide with those of his client, with the result that the trial proceeded in due course. Mr. X was then asked, why, in view of what had taken place in the Court below, he had included the first ground in the memorandum of appeal. Mr. X answered that the lay client who gave him the instruction assured him that new facts had been discovered which were not known when the trial commenced in the lower Court and which were set out in the first ground of appeal. After this explanation, as counsel for appellant expressed his inability to proceed with the appeal, we dismissed the appeal with costs ; but we intimated at the same time that we would pass orders later, with refernce to the contents of the first ground and the manner in which it came to be inserted in the memorandum. We shall now proceed to deal with this aspect of the matter ; but before we do so, it will be convenient to set out the ground which was in these terms :

"1. For that the learned Judge should not have tried "the case at all, having regard to the fact that when "he was at the Bar he was counsel for Sukhlal "Kernani who was the real plaintiff in this case, "instructed by Messrs. Pugh & Co., in several suits "in which the defendant firm were the opposite party "and also having regard to the fact that the very "question involved in this case was incidentally raised "in one of such suits when the said learned Judge

"must have received instructions from his said client "adverse to the defendant firm, and also having "regard to the fact that the said learned Judge was "counsel for W. A. Lee in a suit in this Hon'ble Court "which was looked after and managed by the present "plaintiff's father, Nitye Charan Ghose, who instructed "the said learned Judge therein as counsel."

We are of opinion that when Mr. X received instruction direct from the client, he acted in contravention of the well-established usage and etiquette of the profession. The usage and etiquette of the profession require that in all but some exceptional cases (which need not be enumerated here, as the present case is not one of them), counsel should not undertake any professional work as regards which the relation of counsel and client can arise except on the instructions of a solicitor. There is no statutory rule of law to prevent a litigant from instructing counsel directly or to prevent counsel so instructed from appearing on behalf of a litigant; but Judges of the highest eminence, such as Lord Campbell C. J., in *Doe d. Bennett* v. *Hale* (1), and Pigot C. B. in *Hobart* v. *Butler* (2) have emphasised the importance of strict adherence to the long established professional usage in this matter. In this Court, departure from this practice has been allowed only in the case of appeals from the moffusil: *Govindo* v. *Hendry* (3), *Moran* v. *Dewan Ali* (4).

It is plain that there must be a real and not merely a formal compliance with the requirements of professional usage in this respect, which, it has been stated, is "expedient in the interest of suitors "and for the satisfactory administration of justice."

(1) (1850) 15 Q. B. 171; 81 R. R. 540.

(2) (1859) 9 Ir. C. L. R. 157, 172.

(3) (1875) 14 B. L. R. 12 (App.).

(4) (1872) 8 B. L. R. 418.

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Consequently, communication should pass between counsel and attorney, and not between counsel and the lay client without the intervention of the attorney, otherwise the salutary principle that the attorney stands between the client and his counsel in all legal proceedings, might in substance be abrogated by means of personal communications between counsel and client. Judged by this test, the conduct of Mr. X cannot possibly be approved.

The gravity of the matter, however, is intensified by the nature of the communication accepted by the counsel direct from his client. On the strength of that communication, Mr. X inserted in the memorandum a ground which constitutes a libel on the learned Judge in the Court below. There can be no room for controversy that this ground imputes bias and partiality to the learned Judge; this is made clear beyond the possibility of doubt by two other grounds in the memorandum, to which Mr. X has attached a certificate "that in his opinion the above are good grounds of appeal."

"13. For that the said learned Judge did not "approach or deal with the case in a judicial or "unbiased frame of mind, but was biased in favour "of the plaintiff and against the defendant firm and "his judgment was affected and was erroneous as a "result thereof."

"24. For that the said learned Judge's dicta "regarding the evidence of the defendants and their "witnesses and the way they gave it, are the result "of bias, and are arbitrary, perverse and unsupported "by any assigned reason or any reason in fact, "whereas he should have accepted and acted on the "said evidence."

Let us pause for a moment to analyse the contents of the first ground in the memorandum of apeal. I

is maintained that the learned Judge should not have tried the case for a three-fold reason: (i) That when he was at the Bar, he was counsel for Suklal Kernani (who is alleged by the defendant to be the real plaintiff in this case) instructed by Pugh & Co. in several suits in which the defendant firm were the opposite party; (ii) That the very question involved in the present case was incidentally raised in one of such suits, when the learned Judge must have received instructions from his client (Sukhlal Kernani) adverse to the defendant firm; (iii) That the learned Judge was counsel for one W. A. Lee in a suit in this Court which was looked after and managed by the present plaintiff's father Nitye Charan Ghose who instructed him therein as counsel.

Now, an advocate of Mr. X's standing in the profession should have known that the first of these allegations, even if true, is no ground why the learned Judge should not have tried the present case. It is no objection to a Judge trying a case that before his appointment he was counsel in other matters for one of the parties. Indeed, as late as 1859, the House of Lords held that the fact that a Judge was, prior to his elevation to the Bench, engaged in the particular cause was no disqualification, though according to custom sanctioned by long usage, a Judge would refuse to adjudicate upon a case if he had been engaged as counsel therein or in a matter intimately connected therewith: *Thellusson* v. *Rendlesham* (1). The observations of Lord St. Leonards, Lord Chelmsford and Lord Brougham in the case just mentioned may be usefully recalled here:

"When these appeals were called on, Lord St. "Leonards took the opportunity of observing that he "had been counsel in various branches of this cause on

(1) (1858) 7 H. L. C. 429, 430; 115 R. R. 229.

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"different occasions; in 1825, on the question of the "right of presentation to the advowson, and again in "1831, when he argued a point which was not now in "dispute: he mentioned these facts, but as he did not "conceive that they absolved him from doing his "duty in giving advice to their Lordships in the "appeal now to be heard, he intended to take part in "the hearing.

"The Lord Chancellor (Lord Chelmsford) said, there "could be no doubt about the propriety of the course "adopted by his noble and learned friend, but he felt "himself to be in a different position. While at the "Bar, he was counsel in the very case, the decision in "which was now the subject of appeal, and he should "therefore take no part in the judgment upon it. He "should merely sit as Lord Chancellor, but should not "deliver any opinion.

"Lord Brougham trusted that it would not be as-"sumed that he having been counsel in a cause operated "as a disqualification to prevent the same person, when "raised to the Bench, from taking part in the decision "of that cause; for, if that was the rule, it might, under "certain circumstances, produce terrible delay and "expense to the suitor, and even an absolute denial "of justice, especially if applied to a Judge of the Court "of Chancery. It so happened that shortly after he "became Lord Chancellor, the case of *Tatham* v. "*Wright* (1) in which he had been counsel on the "Northern Circuit, came before him in Chancery, on "a matter which involved the exercise of the Judge's "discretion, namely, an application for a new trial. "He could not have refused to hear it without causing "great expense and delay, and almost a denial of justice "to the suitor; he therefore heard it; and what he "did to satisfy his own mind was this, he obtained

(1) (1831) 2 Russ. & M. 1.

"the assistance of two learned Judges, Lord Chief "Justice Tindal and Mr. Baron Alderson, and having "done that, he himself took part in pronouncing the "decision.

"The Lord Chancellor feared that he had been some- "what mistaken. He did not suggest that he laboured "under any disqualification, for that would be putting "the matter much too strongly. If he had been the "only Judge having the authority to hear the cause, "he should have been in the situation in which Lord "Brougham had been in the case of *Tatham* v. *Wright* "(1), and should have acted in the same way. Here "there were noble and learned Lords who had not been "counsel in the case and could hear and decide it, and "therefore as a matter of personal feeling he should "abstain from taking any part in it."

As illustrations of the statement that if counsel who has advised on or be engaged in a case is raised to the Bench and the same case comes before him, the practice is for him to refuse to adjudicate on it; reference may be made to *Phillips* v. *Headlam* (2) where Patteson J. and *Lewis* v. *Branthwaite* (3) where Taunton J. gave no opinion, having been counsel in the respective causes. This, however, has not always been so; for in *Townsend* v. *Hughes* (4) Scroggs J. quaintly observed "that he was of counsel "with the plaintiff before he was called to the "Bench and might therefore be supposed to give "judgment in favour of his former client, being pre- "possessed in the cause, or else (to show himself "more signally just) might, without considering the "matter, give judgment against him, but that now "he had forgotten all former relation thereunto" and then proceeded to deliver his opinion. But whatever

(1) (1831) 2 Russ & M. 1.
(2) (1831) 2 B. & Ad. 380, 385.
(3) (1831) 2 B. & Ad. 437, 445.
(4) (1676) 2 Mod. 150, 151.

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view might have prevailed at one time, the greatest delicacy is now constantly observed on the part of Judges when matters come before them, with which they had been connected as counsel before their elevation to the Bench. The practice which induces Judges voluntarily to decline to hear such cases is but an evolution of the elementary maxim that no man should be a Judge in his own suit and preside in a case in which he is not wholly free, disinterested, impartial and independent. But this principle has manifestly no application when objection is taken to a Judge trying a cause on the ground that he had, before his appointment, acted as counsel in other matters for one of the parties. As an instance where such an objection was unsuccessfully taken, we may mention the case of *Carr* v. *Fife* (1), where the Supreme Court of the United States negatived the contention and added that the Judge alone could decide for himself whether it was improper for him to sit in trial of the suit. We are clearly of opinion that the first reason included in the first ground of appeal is entirely unsubstantial. The third reason stands on the same footing and is, if possible, even more unfounded. It is solemnly maintained that the learned Judge should not have tried the case, not only because he had been counsel, in some other suit for the person alleged to be the real plaintiff in this case, but also because he had been counsel in another suit which was looked after by the father of the plaintiff who is said to be only the nominal plaintiff in this litigation. The second reason is based upon an indefinite and improved assertion, and, as no details are furnished regarding the suit referred to, it is impossible for any body to test its truth. It is consequently manifest that the first ground in its

(1) (1895) 156 U. S. 494.

entirety is not a good ground of appeal as certified by Mr. X, but constitutes a tissue of reckless aspersions on one of the Judges of this Court. We do not overlook or minimise the vital importance of allowing to counsel freedom and latitude both in speech and in the conduct of the cases of their clients, but we must hold that in the present instance there has been a flagrant transgression of all concievable bounds of propriety. We have accordingly anxiously considered whether disciplinary measures should be taken. We have however, decided, not altogether without hesitation, that we should, on the present occasion, content ourselves with an emphatic expression of our disapprobation of the conduct of the counsel concerned, in the hope that the censure which this implies will serve as a warning and prevent the recurrence of similar abuse.

FLETCHER J. I agree.

N. G.

Attorney for the appellant: *J. A. Arnowitz.*
Attorneys for the respondent: *Pugh & Co.*