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not be affected by the provisions regarding the retrospective operation of the section. It follows, therefore, that if a suit commenced before the Act came into operation has not resulted in a decree, it would be governed by the provisions of the section. Therefore, although on general principles a change in the law affecting the rights of parties does not ordinarily govern pending suits, yet, in this particular instance, the Legislature having made a provision to the contrary we are bound to carry out the law.

The decision of the lower Court is therefore correct and this appeal must be dismissed with costs (1).

Appeal dismissed.

FULL BENCH REFERENCE.

Before Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson, Mr. Justice Tottenham and Mr. Justice Norris.

IN THE MATTER OF THE PETITION OF GIRHAR NARAIN.

1887 *May* 23.

TUSSUDUQ HOSAIN AND OTHERS *v.* GIRHAR NARAIN AND OTHERS.*

Legal Practitioners Act (XVIII of 1879), s. 32, *Construction of—Outsider practising as mukhtear, his liability to punishment—Mukhtears, their functions—Civil Procedure Code, s.* 37.

Act XVIII of 1879 is an amending as well as a consolidating Act, and one of the respects in which it amended the old law was the conferring upon the High Court power "to make rules declaring what shall be deemed to be the functions, powers and duties of the mukhtears practising in the Subordinate Courts.

When a person other than a duly certificated and enrolled mukhtear constantly, and as a means of livelihood, performs any of the functions or powers which the rule framed by the High Court in accordance with the provisions of the Legal Practitioners Act says are the functions and powers of a mukhtear, he practises as a mukhtear, and is liable to a penalty under s. 32 of the Act.

The words "any person" in s. 32 embrace pure outsiders as well as duly qualified and enrolled mukhtears who have failed to take out their certificates.

* Full Bench Reference in Rule No. 69 of 1886, on the hearing of a petition from an order passed by J. M. Kirkwood, Esq., District Judge of Patna, dated 6th of October, 1885.

(1) This case was followed in *Parbutty Churn Dass* v. *Komoruddin*, Appeal from Appellate Decree No. 2148 of 1886, decided by the same Judges (MITTER and BEVERLEY, JJ.) on 25th April, 1887.

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G. N., though not a certificated mukhtear, was in the habit of appointing and instructing pleaders in the Civil Courts on account of certain persons who paid him a regular monthly salary for so doing. In a proceeding against him under the Legal Practitioners Act, *G. N.* made this statement: "I receive a letter from the mofussil from a person and act for him, he sending the *vakalatnama* with his letter. I receive monthly wages from each of the persons who employ me. Each of the employers I have mentioned belongs to a distinct family and lives in a separate village."

Held that *G. N.* was neither a private servant nor a recognised agent of any of his employers within the meaning of s. 37 of the Civil Procedure Code, and was liable to a penalty under s. 32 of the Legal Practitioners Act for having practised as a mukhtear.

Held also that, having regard to the Court in which *G. N.* practised, the words in s. 32 "to a fine not exceeding ten times the amount of the stamp required by this Act for a certificate authorising him so to practise in such Court," were equivalent to the words "to a fine not exceeding Rs. 250."

ON the 2nd of October, 1885, certain certificated mukhtears of Patna presented a petition to the District Judge complaining that certain persons, Girhar Narain, Bansilal, and a number of other persons, were practising as mukhtears in the Civil Courts contrary to the provisions of Act XVIII of 1879, and the rule and direction of the High Court, contained in the *Calcutta Gazette*, Part I, page 152, February 15th, 1882, describing the functions, powers and duties of mukhtears. Upon that petition notices were issued against the parties complained against to show cause why they should not be punished under s. 32 of Act XVIII of 1879. The Judge confined his enquiries to the case of Girhar Narain and Bansilal as sample cases. In his answer to the Court, Girhar Narain made the following statement: "My masters are Tundon Singh of Gya, Babu Fatteh Bahadur of Gya, Suni Lal of Kachna in Patna, Chamari Singh of Panka, Mussummat Wajihun of the city, Mussummat Inderjit Koer of Subulpur, Babu Sadir Narain Singh of Bazonna, Babu Ram Sarun Singh of Rajabag, Babu Gajadhur Pershad of Barhonna, Babu Mahto of Jaipur, Gunpat Mahto of Kundar, and I cannot remember the others, but there are several, perhaps some ten in number. I receive a letter from the mofussil from a person and act for him, he sending the *vakalatnama* with his

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letter. I receive monthly wages from each of the persons who employ me. Each of the employers I have mentioned belongs to a distinct family and lives in a separate village. I sometimes get paid by the year and sometimes by the month. * * * I cannot remember the names of the other ten or so who employ me in the Civil Courts." * * * * Bansilal also made a similar statement. It was admitted by his pleaders that Girhar Narain was in the habit of appointing pleaders and instructing them in the Civil Courts on account of his several masters. The Judge held that, although neither of the men was a qualified mukhtear, they were in the habit of practising and earning the greater part of their livelihood as mukhtears and their duties far exceeded those of a private servant. He accordingly inflicted a fine of Rs. 5 as a nominal punishment on each of the persons under the provisions of s. 32 of the Legal Practitioners Act. Girhar Narain and Bansilal thereupon applied to the High Court (MITTER and AGNEW, JJ.), and obtained separate rules on the certificated mukhtears to show cause why the orders of the Judge should not be set aside. Bansilal having died in the meantime, Girhar Narain's matter alone came up for argument before MITTER and MACPHERSON, JJ., who referred the case to a Full Bench with the following observation: "Having regard to the general importance of the question raised in the rule we refer it to a Full Bench. The question for decision is whether upon the facts admitted by the petitioner he is liable to be punished under the provisions of s. 32 of the Legal Practitioners Act."

At the hearing before the Full Bench,—

Baboo *Saligram Singh* in support of the rule.—The District Judge had no jurisdiction. Such a case as this does not come under the Legal Practitioners Act. Section 32 affects only such persons as are eligible to practise as mukhtears. The words "authorising him to so practise in such Court or office" in s. 32 support the position. Even if the petitioner's case came under the Legal Practitioners Act the man has done nothing which is rendered punishable by the Act. The High Court rule simply enumerates the functions of a mukhtear. It nowhere said that by performing any of those functions a man

will be considered to be practising as a mukhtear. There is no definition of "practising as a mukhtear." The petitioner is a private servant, and a private servant or a recognised agent is not within the provisions of the Legal Practitioners Act. The Act contemplates none but legal practitioners as such—See the decision of Mitter, J., in *Kali Kumar Roy* v. *Nobin Chunder Chuckerbutty* (1); also *Gujraj Singh, In re* (2); *In re Kali Churn Chand* (3); *In re Fuzzle Ali* (4).

Mr. *Woodroffe* (with him Mr. *O'Kinealy*) opposed the rule.—The petitioner is not a certificated mukhtear. He acts as a mukhtear and shows he is no private servant. The old cases do not apply here. Those cases were under the old Act (XX of 1865), which did not confer on the High Court the power to make rules as has now been conferred by s. 11 of the present Act. For the Statutory definition of "practising as a mukhtear" one must now refer to s. 11 and the rule framed by the High Court under it. Under s. 13 a pleader becomes guilty of unprofessional conduct by receiving instruction from such a man as the petitioner. It cannot, therefore, be said that a man in the position of the petitioner may lawfully give such instructions as he has been found to have done. Section 32 of the Act is not confined to men who are eligible to practise as mukhtears. Any one who does any of the acts provided by s. 11 of the Act is within s. 32—See the marginal note. On the value of a marginal note see *Attorney-General* v. *The Great Eastern Railway Company* (5); *Venour* v. *Sellon* (6). *Claydon* v. *Green* (7) does not apply here. *Kali Churn Roy* v. *Nobin Chunder Chuckerbutty* (1), discussed.

The judgment of the Full Bench was delivered by

NORRIS, J. (MITTER, PRINSEP, WILSON & TOTTENHAM, JJ., concurring).—On 2nd October, 1885, certain certificated mukhtears presented a petition to the District Judge of Patna, complaining that many unauthorised persons were, contrary to law, acting in Court as certificated mukhtears. The District Judge caused the persons complained against to be served with notice

(1) I. L. R., 6 Calc., 585.
(2) 10 W. R., 355.
(3) 9 B. L. R., Ap. 18.
(4) 19 W. R., Cr. 8.
(5) 11 Ch. Div., 465.
(6) 2 Ch. Div., 522.
(7) L. R., 3 C. P. 511.

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to show cause why they should not be punished under s. 32, Act XVIII of 1879. On the 6th October, 1885, Girhar Narain, one of the persons complained against, appeared by pleaders to show cause. The District Judge first heard what Girhar Narain's pleaders had to say on his behalf, and then, apparently without any objection on his part, put some questions to him.

The statement of the pleaders and the examination of Girhar Narain are thus recorded by the District Judge: "It is admitted by his pleaders that Girhar Narain, a certificated revenue agent, appoints pleaders and that he instructs them in the Civil Courts; but they say that he only does so on account of certain persons who are his masters, and who pay him a regular monthly salary for so doing." In answer to the Court Girhar Narain states: "My masters are Tundon Singh of Gya, Babu Fatteh Bahadur of Gya, Suni Lal of Kachna in Patna, Chamari Singh of Panka, Mussummat Wajihun of the city, Mussummat Inderjit Koer of Subulpur, Babu Sadir Narain Singh of Bazonna, Babu Ram Sarun Sing of Rajabag, Babu Gajadhur Pershad of Barhonna, Babu Collector Mahto of Jaipur, Gunput Mahto of Kundar, and I cannot remember the others, but there are several, perhaps some ten in number. I receive a letter from the mofussil from a person and act for him, he sending the *vakalatnama* with his letter. I receive monthly wages from each of the persons who employ me. Each of the employers I have mentioned belongs to a distinct family and lives in a separate village. I sometimes get paid by the year and sometimes by the month. Collector Mahto pays me Rs. 10 a year; he pays me that every Assin, and has done so every year for 12 years. The business I have referred to, and the names I have given as those of my employers, refer only to those who employ me in Civil Courts. I cannot remember the names of the other ten or so who employ me in the Civil Courts, but they pay me a yearly retainer. Mussummat Gujibun gives me, for what I do for her in connection with the Civil Courts, Rs. 25 per mensem. She pays me more than any one else. Tundon Singh gives me Rs. 80 a year." Upon this admission and statement the District Judge passed judgment as follows:—

"I am of opinion that the action admitted by Girhar Narain

far exceeds action as a private servant. In India pleaders and mukhtears seldom get cases out of the circle of their own recognised clients; they each have clients who habitually employ them. That is precisely the nature of the employment admitted by Girhar Narain, but he says he receives remuneration by the month or year instead of for the act. He may do this in some cases, but I doubt his doing so in all; if he does, his memory is marvellously short in not being able to mention their names, and I do not think the method of remuneration makes any real difference. When a man is so little of a private servant that he admittedly acts for at least twenty different families in different parts of this and other districts, he seems to me to be practising generally and professionally, earning a greater part of his livelihood thus as a mukhtear. This is a sample case, and I inflict the nominal fine of Rs. 5 under s. 32 of Act XVIII of 1879, my object being not so much to punish what has already been done as to prevent similar conduct for the future."

On the 5th January, 1886, Girhar Narain moved before Mitter and Agnew, J.J., for a rule calling upon the certificated mukhtears to show cause why the order of the District Judge should not be set aside on the following grounds, *viz.*: First, that it was made without jurisdiction; second, that ss. 10 and 32 of the Legal Practitioners Act, 1879, did not apply to the case; third, that the District Judge ought, upon the materials before him, to have held that the nature of the petitioner's work was not in contravention of any law or of any rule of the High Court, and as such he was guilty of no offence against the provisions of the Legal Practitioners Act; fourth, that the District Judge had misunderstood and misconceived the law in determining the case. The learned Judges granted a rule, which, on 8th December, 1886, came on for hearing before Mitter and Macpherson, JJ., who made the following order, *viz.*: "Having regard to the general importance of the question raised in this rule we refer it to a Full Bench; the question for decision which we refer is whether, upon the facts admitted by the petitioner, he is liable to be punished under the provisions of s. 32 of the Legal Practitioners Act."

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The case was argued before us on the 15th April, when Baboo Saligram Singh was heard in support of the rule, and Mr. Woodroffe and Mr. O'Kinealy appeared to show cause. At the conclusion of the arguments we took time to consider our judgment. The first argument urged by the learned vakeel for the petitioner was that, assuming that Girhar Narain had practised as a mukhtear without being duly authorised so to do, yet he was not liable to punishment under the provisions of s. 32 of Act XVIII of 1879, as that Act applied only to mukhtears who had passed the required examination, received a certificate, and had practised, after neglecting to renew the certificate, or during suspension, or after dismissal. In support of his first argument the learned vakeel referred to the preamble of the Act, and pointed out that it was an Act "to consolidate and amend the law relating to *Legal Practitioners*"; to the definition of "Legal Practitioner" as given in s. 3 of the Act; to the power conferred upon the High Court by s. 6, "to make rules as to the qualifications, admission and certificates of proper persons to be mukhtears;" to the provision of s. 7 as to the granting and renewing of certificates; and to the provisions of ss. 10 and 11, and from the language used in these sections, he argued that the Act was not applicable to a person in the position of his client, but only to "Legal Practitioners" as defined by the Act. The learned vakeel also laid much stress on the words of s. 32. That section enacts "that any person who practises in any Court in contravention of s. 10 shall be liable, by the order of such Court, to a fine not exceeding ten times the amount of the stamp required by this Act for a certificate authorising him so to practise in such Court." The words "the amount of the stamp required by this Act for a certificate authorising him so to practise," it was urged, pointed clearly to the case of a person who had passed the necessary examination for a mukhtear and was practising without a certificate, and not to an entirely unauthorised person such as the petitioner.

In the case of *Kali Kumar Roy* v. *Nobin Chunder Chuckerbutty* (1), which was a case under Act XX of 1865, which is repealed by Act XVIII of 1879, it seems to have occurred to Mitter, J.,

(1) I. L. R., 6 Calc., 585.

that s. 13 of Act XX of 1865, which corresponds to s. 32 of Act XVIII of 1879, "applied only to such persons as were qualified and enrolled as mukhtears, but who had practised as mukhtears without obtaining their certificates." This view does not seem to have been shared by White, J., for he makes no reference to it in his judgment; and Garth, C.J., says: "The language of s. 13 does certainly seem to afford some ground for this view; and yet it would seem an absurdity that a man who is duly qualified and enrolled as a mukhtear, and who has only neglected to take out his certificate, should be subject to penalties and disabled under that section from suing for his fees, whilst a man who is neither qualified nor enrolled as a mukhtear, nor certificated, should be enabled to recover his fees, and be subject to no penalties; it is difficult to conceive that this could have been the intention of the Legislature." Whatever may be the proper construction to be put upon s. 13 of Act XX of 1865, upon which I express no opinion, I feel no difficulty in holding that the construction sought to be put on s. 32 of Act XVIII of 1879 is not the true one. Section 32 in distinct terms imposes a penalty on "any person" who practises in any Court in contravention of the provisions of s. 10, "which enacts that no person shall practise as a mukhtear in any Court not established by Royal Charter, unless he holds a certificate issued under s. 7 and has been enrolled in such Court, or in some Court to which it is subordinate." I am altogether unable to give the words "any person" in s. 32 the narrow construction sought to be placed upon them. They seem to me to embrace pure outsiders like the petitioner, as well as duly qualified and enrolled mukhtears who have failed to take out their certificates. The words in s. 32 "to a fine not exceeding ten times the amount of the stamp required by this Act for a certificate authorising him so to practise in such Court" are, I think, equivalent (in this particular case, having regard to the Court in which the petitioner practised) to the words "to a fine not exceeding Rs. 250." It is to be observed that, where the Legislature wishes to deal with the duly qualified and enrolled mukhtear, it does so in precise terms—see ss. 33 and 34 and clause (*c*) of s. 36. The second argument of the learned vakeel was that the petitioner had not practised

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as a mukhtear. In support of the argument reliance Bal placed on the case of *In re Gujraj Singh* (1) decided by L.M Jackson, J., on *In re Kali Churn Chand* (2, ; on *In re Fuzzle Ali* (3) ; and on the before-mentioned case of *Kali Kumar Roy* v. *Nobin Chunder Chuckerbutty* (4). All these cases were cases under the old Act of 1865, which conferred no power on the High Court " to make rules declaring what shall be deemed to be the functions, powers and duties of mukhtears,"—such powers were first given by s. 11 of Act XXIII of 1879. In the case of *In re Gujraj Singh*, L. S. Jackson, J., says : " The Court has had frequent difficulties in answering enquiries as to what the Legislature appeared to contemplate as the functions or privileges of mukhtears under the Pleaders and Mukhtears Act," and then goes on to decide that " there is nothing in the provisions of that Act which restrains any person from coming into the presence of the Judge and supplying information to the vakeels." In *In re Kali Churn Chand* (2) Kemp and Glover, J.J., held that the mere writing out of a petition for a party who himself presented it in Court was not an " acting " as a mukhtear within the meaning of s. 11 of Act XX of 1865. In *In re Fuzzle Ali* (3) Phear and Ainslie, JJ., held that " acting as a mukhtear " within the meaning of s. 5 of Act XX of 1865 meant " the doing something as the agent of the principal party which shall be recognised or taken notice of by the Court as the act of that principal, such, for instance, as filing a document." In *Kali Kumar Roy* v. *Nobin Chunder Chuckerbutty* (4) White, J., speaking for himself and Mitter, J., said : " The question then resolves itself into this, whether the looking after a regular appeal and the giving instructions to pleaders in connection with it are practising as a mukhtear within the meaning of the section. There is no definition in the Act of what the Legislature meant by practising as a mukhtear, but I think the meaning may be gathered from s. 11 of the Act which enacts that ' mukhtears duly admitted and enrolled may be subject to the conditions of their certificates as to the class of Courts in which they are authorised to practise, appear and act ' (in the

(1) 10 W. R., 355.
(2) 9 B. L. R., Ap. 18.
(3) 19 W. R., Cr. 8.
(4) I. L. R., 6 Calc., 585.

report the word 'plead' is evidently by mistake used for 'act') in any Civil Court, and may appear, plead and act in any Criminal Court within the same limits. It may fairly be concluded from this that by practising as a mukhtear in a Court, the Legislature meant, in the case of a Civil Court, appearing or acting in that Court, in the case of a Criminal Court, appearing, pleading or acting in that Court. Did the plaintiff then appear or act in Court? I think not. These words have a well-defined and well-known meaning. To appear for a client in Court is to be present and to represent him in various stages of the litigation at which it is necessary that the client should be present in Court by himself or some representative. To act for a client in Court is to take on his behalf in the Court, or in the offices of the Court, the necessary steps that must be taken in the course of the litigation in order that his case may be properly laid before the Court. What the plaintiff is found to have done in the present case was not appearing or acting for the defendant in the sense in which, I think, the words must be understood, nor involved any such appearance or acting."

The Act of 1879 is, as was pointed out by Prinsep, J., in the course of the argument, an "amending" as well as a "consolidating" Act: and one of the respects in which it amended the old law was the conferring upon the High Court power "to make rules declaring what shall be deemed to be the functions, powers and duties of the mukhtears practising in the Subordinate Courts," thus obviating the difficulty which had been felt by the learned Judges in the cases above cited. The High Court has accordingly framed a rule prescribing the functions, powers and duties of mukhtears practising in the Subordinate Courts, and I am clearly of opinion that, if any person other than a duly certificated and enrolled mukhtear constantly, and as a means of livelihood, performs any of the functions or powers which the rule says are the functions or powers of a mukhtear, he practises as a mukhtear and is liable to a penalty under s. 32. One of the functions or powers of a mukhtear practising in the Subordinate Courts is that of "appointing and instructing pleaders." This the petitioner admits he does, and that not for

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one person only but for twenty; he has therefore practised as a mukhtear.

It was also argued that the petitioner was the private servant or recognised agent of his various employers, and therefore outside the provisions of the Act. No doubt under s. 13 a pleader may take instructions from the private servant of a party or the recognised agent of such party within the meaning of the Civil Procedure Code, but there is no provision authorising a mukhtear to take such instructions, and if there were I do not think the petitioner is the private servant of any of his employers or the recognised agent of any of them within the meaning of s. 37 of the Civil Procedure Code.

I would answer the question referred to us in the affirmative.

The result will be that the rule will be discharged with costs.

K. M. C. *Rule discharged.*

APPELLATE CRIMINAL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

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April 30.

SUKAROO KOBIRAJ (APPELLANT) *v.* THE EMPRESS (RESPONDENT).*

Causing death by a rash and negligent act—Kobiraj—Surgical operation—Unskilled medical practitioner—"Good faith"—"Accepting risk"—Penal Code (Act XLV of 1860), ss. 304A, 88 and 52.

A kobiraj operated on a man for internal piles by cutting them out with an ordinary knife. The man died from hæmorrhage. The kobiraj was charged, under s. 304A. of the Penal Code, with causing death by doing a rash and negligent act.

It was contended that, inasmuch as the prisoner had performed similar operations on previous occasions, it was not a rash act within the meaning of that section, and that at all events he was entitled to the benefit of s. 88 of the Penal Code as he did the act in good faith, without any intention to cause death, and for the benefit of the patient who had accepted the risk.

Held, that, as the prisoner was admittedly uneducated in matters of surgery, and having regard to the meaning of "good faith" as defined in s. 52 of the Penal Code, he was not entitled to the benefit of s. 88.

* Criminal Appeal No. 173 of 1887, against the order passed by J. R. Hallett, Esq., Sessions Judge of Rungpore, dated the 14th of March, 1887.