PRIVY COUNCIL

SHIVA NARAIN JAFA (APPELLANT) *v.* JUDGES OF THE HIGH COURT OF JUDICATURE AT ALLAHABAD (RESPONDENTS)

*J. C.,** 1936 *April*, 6

[On appeal from the High Court at Allahabad]

Advocate—Professional misconduct—Legal Practitioners (Fees) Act (XXI of 1926), sections 3, 4—General Rules (Civil) for Subordinate courts, chapter XXI, rules 1 and 2.

Where an advocate, in the honest belief that he was entitled to do so, stated in his certificate of fees that he had received Rs.140 in cash and Rs.735 "by means of a promissory note" and the certificate in that form was accepted by the District Judge and the sum of Rs.735 was included in the costs allowed in the decree,

Held, that the advocate was not guilty of professional misconduct.

APPEAL (No. 100 of 1934) from an order of the High Court (October 31, 1933).

The material facts are stated in the judgment of the Judicial Committee.

1936. *January*, 13:

Parikh, for the appellant.

Wallach, for the respondents.

The case of *Bhagwant Singh* v. *Bhao Singh*, I. L. R., 54 All., 490, was referred to in argument.

The judgment of the Judicial Committee was delivered by Sir SHADI LAL:

This appeal has been brought by an advocate of the High Court of Judicature at Allahabad from a judgment of that Court convicting him of professional misconduct and suspending him from practice for a period of three months.

The appellant, Mr. Shiva Narain Jafa, was practising as an advocate at Badaun, a district situated in the United Provinces of India; and in the beginning of 1927 he was engaged to defend a suit instituted by one Bhagwant Singh, against two brothers, Bhau Singh and Lachhman Singh. On the 22nd January, 1927, he

*Present: Lord BLANESBURGH, Sir SHADI LAL and Sir GEORGE RANKIN.

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filed in the court of the District Judge, who was hearing the case, a vakalatnama (power of attorney) signed by both the defendants. It appears that they were, at that time, undergoing imprisonment for certain offences, of which they had been convicted; and the appellant, who had been paid only a portion of his fee, submitted on the 8th March, 1927, an application to the District Judge in these terms:

"In the above case it is submitted that I have been looking after this case on behalf of my clients almost from the beginning of January up to this time. The pairokars of the clients have, up to this time, paid me Rs.140. Now a new Act has come into force from 1926 and according to it a Vakil is entitled to get his legal fee and he can realise his money by filing a suit after the case is over. My clients are poor these days and actually they cannot pay up my full fee at present. If my clients will execute, in my favour, a promissory note for the amount of the remaining fee, I shall, according to law, file the certificate of fee and the defendants shall be entitled to recover the same from the plaintiff. If the promissory note is not executed, I shall not file the certificate and the defendants will suffer a double loss, because they shall have to make the payment to me and they shall not be entitled to recover the same from the plaintiff. Therefore, the prisoners may be sent for and the matter may be explained to them. If they will execute the promissory note, it will be in their own interests."

Thereupon, the District Judge recorded on that day the following brief order: "Permitted."

The defendants were then brought into the court room, but they did not sign the promissory note, as, it is explained, they being prisoners could not execute any document without the permission of the local authorities. Whether there is any justification for this explanation, their Lordships are not in a position to determine; but they observe that a promissory note was actually executed on that very day by Musammat Pania, the wife of Bhau Singh, who had given her a general power of attorney to act on his behalf. This instrument contained a promise by her to pay on demand Rs 735, the balance of the fee due to the appellant.

It is not disputed that he himself produced it before the District Judge for his perusal, and the latter placed it upon the record of the case.

Having obtained the promissory note for the balance of his fee, the appellant filed a certificate, in which he stated that he had received Rs.140 in cash and Rs.735 "by means of promissory note". On the 10th March, 1927, the District Judge delivered judgment dismissing the plaintiff's claim with costs. A decree, which followed upon the judgment, was duly prepared, and the sum of Rs.735 was included in the amount of the costs to be paid by the plaintiff, Bhagwant Singh, to the defendants. To this decree no objection was taken by Bhagwant Singh, either at the time of the taxation of costs in the trial court, or in the appeal which he preferred to the High Court on the merits of the case. It is to be observed that his appeal was ultimately dismissed for want of prosecution.

It was not until the 21st August, 1929, that Bhagwant Singh applied to the District Judge for an amendment of the decree on the ground that the appellant had filed a certificate for fee in excess of the amount which could be lawfully allowed as costs between party and party. The applicant denied his liability for the payment of Rs.735, because that sum had not been actually paid to the appellant and could not be allowed as costs to the defendants. The learned Judge overruled the contention, holding that the applicant had failed to show that the accepting of "the promissory note in lieu of actual payment was contrary to any provision of the law". He accordingly decided that "the execution of the promissory note with the sanction of the court was tantamount to actual payment".

This view was not, however, accepted by the High Court, who, on an application made by Bhagwant Singh for revising the order of the District Judge, examined the rule framed for the guidance of the subordinate courts in taxing costs, and reached the con-

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clusion that the rule contemplated actual payment of fee, and not a mere promise to pay, even if such promise was contained in a promissory note, bond, or any other instrument. The learned Judges accordingly granted the application and deleted the sum of Rs.735 from the costs payable to the defendants. The judgment of the High Court is reported at page 490 of the Indian Law Reports, Volume 54 of the Allahabad series.

While the application for revision was pending in the High Court, Bhagwant Singh invoked the disciplinary jurisdiction of that Court by making a complaint on the 19th November, 1930, against the appellant, charging him with professional misconduct. The Court referred the complaint to the Bar Council for an inquiry under section 10 of the Indian Bar Councils Act, XXXVIII of 1926. The inquiry was made by a tribunal composed of three members of the Bar Council, who, after hearing the evidence adduced by the parties, found that, according to the decision of the High Court on the application for revision preferred by Bhagwant Singh, which they were bound to follow, the certificate of fee filed by the appellant should be held to be improper, as it infringed the rule prescribed by the High Court on the subject. They were, however, of the opinion that the appellant had acted "under a *bona fide* misapprehension and misinterpretation of the rule", and had, therefore, committed "an honest mistake".

The finding of the Bar Council was duly submitted to the High Court; and, though no objection was taken to it by the Government Advocate in accordance with rule 2 of the Rules made by the High Court under section 12 of the Indian Bar Councils Act, the learned Judges held that the appellant had "deliberately filed a fee certificate which was not in accordance with the High Court rules, in order that a fee, which had not actually been paid to him, might be taxed"; and that his explanation had not succeeded in satisfying them "about his *bona fides* and straightforwardness".

This is the judgment, the correctness of which is challenged on this appeal. Their Lordships consider it unnecessary to express any opinion as to whether the procedure adopted by the High Court contravened the rules framed under the Indian Bar Councils Act, as they are clear that the facts, as set out above, do not establish any charge of deception or bad faith against the advocate. While they consider that it is a salutary rule that only the fee actually received by a practitioner should be mentioned by him in his certificate for the purpose of the taxation of costs between party and party, they observe that *vis-à-vis* his own client he has recently been placed in an advantageous position. A statute of the Indian Legislature, called the Legal Practitioners (Fees) Act, XXI of 1926, not only allows a legal practitioner to settle, by a private agreement with his client, the terms of his engagement and the fee to be paid to him for his professional services, but also authorises him to enforce that agreement by legal proceedings taken for the recovery of the fee due to him. There can, therefore, be no doubt that the Indian law does not now require a legal practitioner to receive the whole of his fee before the hearing of the case, but permits him to make an agreement for the payment in future of the whole or part of his fee.

The statute, while conferring upon a legal practitioner the right to recover the fee promised by his client, does not authorise the latter to realise it from his defeated adversary. The right of a successful party to recover the fee from the opposite party depends upon the rule framed by the High Court, which contemplates that only the fee actually paid before the hearing can be allowed as costs on taxation.

The question, which their Lordships have to decide, is whether the appellant, by including in his certificate the fee promised, but not actually paid, to him, acted dishonestly or under a misapprehension of the law. A perusal of the printed form of the certificate used

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by him shows that it differs, in certain respects, from the certificate prescribed by the High Court, but there is no material difference in so far as the statement of fee is concerned. It is beyond dispute that he made no attempt to conceal the fact that he had received only a portion of his fee in cash, and that for the balance of his fee he had obtained a promissory note which he produced in the trial court. If he thought that the execution of the promissory note amounted to a payment of the fee, he was not the only person who made that mistake. It is significant that neither the plaintiff nor his counsel suggested, at the time of the taxation of costs, that the defendants could not be allowed the fee which, though promised, had not yet been paid, by them. Nor did the plaintiff urge, in his appeal to the High Court, that the appellant was not justified in entering in his certificate the fee which he was to recover on the promissory note. There can be little doubt that, at that time, none of the persons concerned saw any impropriety in the conduct of the appellant; and that it was after the expiry of more than two years that the plaintiff or his adviser discovered that the sum promised to be paid should not have been allowed as costs. But, as stated, this objection was repelled by the District Judge; and it can not be maintained that the view taken by the learned Judge was the result of any deception practised by the appellant.

Indeed, there is no valid reason why the appellant should have acted in a dishonest manner. He had already obtained a promissory note for the fee due to him, and could, in the event of default by the promisor, enforce his claim by action. There was, therefore, no personal advantage to be gained by deceiving the court.

It is true that his clients would benefit, if the whole of the fee were allowed to them as costs; but that would be hardly an adequate motive which would impel him to take the serious risk of exposing himself to condemnation in his professional career. This aspect of

the question has, it seems, been overlooked by the learned Judges of the High Court.

The circumstances of the case point to the conclusion that the entry in the certificate, upon which the charge of misconduct is founded, was due to the belief that, as the new law enacted by the Legal Practitioners (Fees) Act of 1926 had imposed upon his clients the obligation of paying the fee due on the promissory note, they should have the corresponding right to recover it from the defeated party, which they could do only if it was stated in the certificate and allowed on taxation. This belief was honestly entertained by him, and was apparently shared by many other persons.

Their Lordships do not think that the charge of misconduct can be sustained against the appellant. Accordingly they will humbly advise His Majesty that the judgment of the High Court should be set aside, and that the appeal be allowed.

Solicitors for the appellant: *Hy. S. L. Polak & Co.*

Solicitor for the respondents: *The Solicitor, India Office.*

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Niamat-ullah and Mr. Justice Bennet

GENDA LAL (JUDGMENT-DEBTOR) *v.* HAZARI LAL (DECREE-HOLDER)*

1935 *May*, 3

Civil Procedure Code, section 11, *explanation IV—Constructive* Res judicata—*Principle how far applicable to execution proceedings—Estoppel by conduct and surrounding circumstances—Civil Procedure Code, order XXI, rules* 22, 23*—Application for execution, alleging part payment within limitation—Judgment-debtor not appearing and pleading limitation—Order for arrest passed on application and arrest effected—Subsequent raising of plea of limitation.*

The first application for execution of a money decree was made more than three years after the date of the decree, with

*Civil Revision No. 71 of 1934.