

APPELLATE CIVIL.

Before Mr. Justice Wassoodew and Mr. Justice Sen.

1938
November 14

T. L. WILSON & Co., SOLICITORS, LONDON, A FIRM OF SOLICITORS, BY ITS PARTNERS,
DENYS HENRY BRAMALL AND ANOTHER, BY THEIR CONSTITUTED ATTORNEY
KASHINATH NARAYAN DHARAP, APPLICANTS v. HARI GANESH
JOSHI AND ANOTHER, EXECUTORS AND LEGAL REPRESENTATIVES OF SITABAI
KOM RAMCHANDRA SADASHIV KHARE, DECEASED, AND ANOTHER,
OPPONENTS.*

*Agreement—Solicitor—Client—Solicitor agreeing to defend appeal for sum less than
taxed costs—Further stipulation that in the event of success full taxed costs should be
paid—Validity—Solicitors Act, 1932, 22 & 23, Geo. 5, Chap. 37, s. 63—Payment
of costs to Solicitor out of security in Court—Application to Court for payment—
Civil Procedure Code (Act V of 1908), O. XLV, r. 7.*

An agreement between a firm of Solicitors in England and a client in India whereby
the former agreed to defend an appeal (pending before the Privy Council) for a sum
less than the full taxed costs, at the same time stipulating that in the event of
success they should be paid full costs is neither invalid, nor unenforceable.

Held, on the facts stated below, that the terms of the contract were properly
explained to and accepted by the respondent.

Having regard to the terms of the deposit and the provisions of O. XLV, r. 7 of the
Civil Procedure Code, 1908, the High Court has power to distribute the amount to the
successful party.

Bikramkishore v. Ali Ahmad,⁽¹⁾ relied on.

Perhaps in complicated cases the Court would be justified in refraining from
exercising its powers summarily.

APPLICATION for payment of costs.

On March 23, 1933, Hari Sadashiv Khare (opponent No. 3)
obtained leave to appeal to His Majesty's Privy Council
against the decision of the High Court dated February 29,
1932.

In pursuance of the order the opponent deposited in the
High Court Government Promissory Notes of the face value
of Rs. 6,000 for the security of the respondent's costs.

On July 6, 1933, Mr. K. N. Dharap (the respondent's
advocate) wrote a letter to Messrs. T. L. Wilson & Co.,

*Civil Application No. 106 of 1938.

⁽¹⁾ (1930) 58 Cal. 1034.

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Solicitors, London (applicants). After stating the facts of the case, the letter continued :—

“ Defendant No. 1 has obtained leave from the High Court to appeal to the Privy Council. We have been given notice that the record will be sent to the Privy Council as early as possible.

The Record of the case is very small, besides the judgment of both the courts there are only 100 typed papers (half sheets—foolscap size). The value of the subject matter in appeal is Rs. 11,773.

My client is a poor widow. She is unable to bear all the expenses of the appeal that are usually required. I therefore request you to see if you can give her some concession and favourable terms. I will like to know from you the following things :—

(a) The least amount of all expenditure (including your charges and counsel's fees).

(b) Whether you will insist on having the whole amount at once or would be willing to get it by instalments of course before the hearing of the appeal.

(c) What things must be done to put you properly in charge of the case.

(d) The probable date of the hearing of the appeal.

I realise that as a mere query my letter is a bit too lengthy. I apologize for the same.

I will feel myself extremely obliged if you will kindly put me in possession of all the information needed. On hearing from you I will consult my client to know if she can bear the burden. If she can bear it I will entrust the case to you; otherwise my client must remain unrepresented.”

On July 27, 1933, the applicants replied, *inter alia*, as follows :—

“ Having regard to what you say as to our client's circumstances we have seen counsel here, Mr. J. M. Parikh, who has practised for many years before the Privy Council and you are no doubt acquainted with his name. He is willing to accept somewhat reduced fees for settling the case and arguing the appeal.

In the circumstances we are willing to defend the appeal for £100. You will understand that this is a considerably reduced fee. In the event of success we shall expect to be paid the difference between the £100 and the taxed party and party costs which will be inserted in His Majesty's order.

The above sum of £100 includes all the expenses of appeal here, namely, counsel's fees, Privy Council Office fees, Printer's charges for printing case, etc., and our own charges. We shall not require the whole at once and if you would send us say £35 on account we will have the case settled as soon as the Record arrives and the balance can be sent as required for the hearing.

With regard to what is required to be done to put us in charge of the case, we now await the client's confirmation of our estimate and the remittance of £35 on account as stated.”

On September 9, 1933, respondent Sitabai wrote to her advocate in these terms :—

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“ Today Rs. 525 are sent to you by Insured Post for sending to Solicitors. You will certainly inform me of having received them. In that connection what more is to be written will become known to you from the letter of T. Ra. Ra. Rao Saheb Nagarkar which I am sending along with this insured letter. Let it be. You should take the trouble of carefully informing from time to time about whatever information you might be communicating privately to the Solicitors in your correspondence with them about my case hereafter ”.

Mr. Nagarkar's letter was in these terms :—

“ The original letters of both the Solicitors Nehra and Wilson received from you, are sent back to you with this letter after keeping copies. You should give brief of respondent Shrimati Sitabai Khare in the Privy Council to Wilson Solicitor as yourself and all the well-wishing persons here approve of him. It should not be given to Nehra. Today Sitabai has sent by Insured Post Rs. 525 to you for sending £35 to Wilson. You should make up the amount from your own moneys if some amount in addition is required, and should inform what amount of your own was required. We shall send it then. If after spending for sending £ 35 some balance remains, you should keep it with you as credit and inform here You are requested to inform us necessarily of what further arrangement is made by you about the appeal. Let it be known.”

On September 15, 1933, the respondent's advocate wrote to the applicants the London Solicitor as follows :—

“ After getting your reply I communicated with my client about it; and I am glad to say that she has accepted all your terms. Particularly I may mention to you that she is quite willing to accept your term about the fees viz., that in case we succeed she will give to you the difference between £100 and the costs that will be taxed. In case of success you will have earned them and the client has no right to claim them.

I have also received the amount of £35 from the client and I shall send it on to you as soon as I hear from you that you have accepted the case. Let me also know if I can send it on to you by means of a cheque on say “Thomas Cook & Co.” or “ P. & O. Company.”

On October 5, 1933, the applicants wrote to the respondent's advocate asking him to send the amount by a cheque which the latter remitted along with his letter dated October 26, 1933.

On February 4, 1936, the respondent died and Hari Ganesh Joshi and another (opponents Nos. 1 and 2) were substituted as her executors and legal representatives.

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On April 13, 1937, opponent No. 3's Appeal No. 57 of 1934 was decided in favour of the respondent and the appellant was directed to pay the sum of £199 3s. 9d. as costs incurred in England.

After the decision of the appeal the applicants requested opponents Nos. 1 and 2 to pay them £97 3s. 9d. viz., the difference between the taxed costs, that is £199 3s. 9d. and the sum of £102 already received by them, but the opponents refused to pay, asking the applicants to recover the amount from the respondent's advocate if he had agreed to pay the same.

In 1937, opponent No. 3 applied to the Court for the return to him of his securities on taking from him the amount of Rs. 2,718-15-11 which represented the total costs payable to the respondent.

On January 28, 1938, the applicants, through their constituted attorney, applied to the High Court, praying, *inter alia*, as follows :—

"That Your Lordship's Petitioners therefore most humbly pray that Your Lordships should be pleased to order that an amount of £97 3s. 9d. or its equivalent in rupees on the date of payment, be paid to them either from the securities deposited in Court by the opponent No. 3 or from the amount of Rs. 2,718-15-11 which he is prepared to deposit for getting back his securities as aforesaid and to pass all other orders which the Honourable Court may deem to be necessary and proper in that connection."

The application was heard.

H. C. Coyajee, with *P. B. Gajendragadkar*, for the applicants.

B. R. Ambedkar, with *L. G. Khare*, for opponents Nos. 1 and 2.

Y. V. Dixit and *B. N. Gokhale*, for opponent No. 3.

WASSOODREW J. This is a petition made by Messrs. T. L. Wilson & Co., Solicitors of London, who had acted on behalf of one Sitabai, widow of Ramchandra Sadashiv Khare, respondent in a Privy Council Appeal No. 57 of 1934, which was decided in her favour on the 13th April 1937, for payment

of the balance of the costs not received from their client or her executors out of the security deposited in this Court by the appellant under the provisions of O. XLV, r. 7, of the Civil Procedure Code, 1908.

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The petitioners allege that they have received £100 from the respondent Sitabai towards their legal charges and an extra sum of £2 from her executors after her death when they were brought on the record in her place, and that they are entitled, under the terms of their agreement, to the difference between that sum and the sum taxed in the Bill of Costs in the Order in Council, the total sum payable under that order being £199 3s. 9d. It seems that under pressure and persuasion of Sitabai's agent, one K. N. Dharap, an advocate of this Court who represented that she was helpless and poor, the solicitors agreed to defend the appeal for a sum less than the full taxed costs, but at the same time stipulated that they should be paid full costs in the event of success. The terms of the agreement are thus set out in their letter dated July 27, 1933 :—

"In the circumstances we are willing to defend the appeal for £100. You will understand that this is a considerably reduced fee. In the event of success we shall expect to be paid the difference between the £100 and the taxed party and party costs which will be inserted in His Majesty's order."

It may be noted that the amount deposited by the appellant is sufficient to pay the full taxed costs; and the depositor of the security in Court, namely, the appellant in the Privy Council appeal, has no objection to the payment of the amount claimed by the solicitors out of the money deposited. But the objection proceeds from the executors of Sitabai, in whose favour the order of costs was made by the Privy Council, on the ground that the terms of the contract were not properly explained to, and accepted by, the deceased Sitabai, that such a contract is void and illegal and that the relief claimed should not be given in these summary proceedings.

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We are satisfied upon the affidavits of Nagarkar and Dharap and the correspondence produced that the terms set out in that letter were explained to, and accepted by, Sitabai and that her acceptance was conveyed to the solicitors by Dharap, her agent, on September 15, 1933, in these terms :—

“I am glad to say that she has accepted all your terms. Particularly I may mention to you that she is quite willing to accept your term about the fees, viz., that in case we succeed she will give to you the difference between £100 and the costs that will be taxed. In case of success you will have earned them and the client has no right to claim them.”

In accordance therewith the amount settled was remitted and appeal was defended by the solicitors. Nagarkar, who is a close relative and a respectable gentleman, has in his affidavit supported the statement of Dharap that Sitabai appreciated the contents of the letter of the solicitors and agreed to abide by its terms. It is alleged that the proposals disclosed by the solicitors' letter amount only to a bare expectation and are no part of the terms of the contract. The expression “We shall expect to be paid” is a courteous way of saying that it shall form a term in the contract. It is misnomer to say it is a *nudum pactum* as counsel for the opponents has characterised it. A *nudum pactum* is a promise not supported by consideration. The agreement to pay or pay something on one side without any compensation either in service or in any other manner will certainly not support an action. But it has always been recognised that for service undertaken at the request of the promissor who has enjoyed the benefit of the service, an action for compensation will lie for it is not a bare promise.

We think that the contract in question is enforceable in law. Here we are dealing with a special agreement between a solicitor and his client. The validity of such an agreement will depend in England upon the Solicitors' Act (1932) 22 & 23 Geo. V, Ch. 37. That Statute prescribes the terms on which such agreements should be held valid. The

relevant provisions in that Act are contained in s. 63. It says :—

“(i) Nothing in the four last preceding sections of this Act shall give validity to . . . (ii) any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding stipulates for payment only in the event of success in that action, suit or proceeding.”

That is a provision against champertous agreement which is not the case here. The agreement is neither opposed to any principle of common law as applicable to the remuneration of solicitors in India who receive reasonable remuneration after it is taxed by the Master in Equity and the Taxing Officer. All that is demanded here by the solicitors is extra payment in the event of success but not in excess of the taxed costs. The relevant section in the Act would be s. 60, cl. (1) (i) and (ii), and the provisions of that section are not offended against in the present case. It is said that such an agreement is as offensive as an agreement to receive reward in the event of success and Courts should discourage it. The argument is based on false analogy. Where undue influence is not apparent and the solicitor has agreed to accept taxed costs in the event of success so as to lighten the burden on his client in the event of failure, the agreement could not be looked upon with disfavour, and the Court will respect the terms of such an agreement of employment. Therefore, neither in practice nor in law such an agreement can be regarded as invalid or unenforceable.

There then remains the question whether we should not exercise our summary powers in a claim of this kind, assuming it is essentially not one to enforce a solicitor's subsisting lien. The petition is for payment out of the security for costs which is required as a condition precedent to the grant of a certificate in all appeals taken to the Privy Council. The object of the security is obviously to secure the successful party against costs awarded to him in terms of the Order in Council. The amount is in the custody of the Court and can be paid out in terms of the security and in compliance with the Order in Council. Perhaps in complicated cases

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a Court would be justified in refraining from exercising its powers summarily. But the fact that it does possess such powers to distribute the amount to the successful party cannot be disputed having regard to the terms of the deposit and the provisions of O. XLV, r. 7, of the Civil Procedure Code. If authority were needed, I would refer to *Bisramkeshore Manikya v. Ali Ahmad*.⁽¹⁾ There the High Court ordered the amount deposited as security to be paid to the respondent's solicitors in England in satisfaction of their bill of costs taxed before the Privy Council.

We, therefore, allow this petition and direct the payment of the costs from the deposit with the Registrar in terms of the prayer in the petition with costs which shall be paid by opponents Nos. 1 and 2. Opponent No. 3 will bear his own costs.

Petition allowed.

Y. V. D.

⁽¹⁾ (1930) 58 Cal. 1034.

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Before Sir John Beaumont, Chief Justice, Mr. Justice Ramnagar and Mr. Justice Wadia.

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SAHEBGOUDA ADOPTIVE FATHER NINGAPPA PATIL (ORIGINAL DEFENDANT), APPELLANT v. SHIDDANGOURA NINGAPPA PATIL AND ANOTHER, BOTH MINORS BY THEIR GUARDIAN NATURAL MOTHER GIRJABAI KOM NINGAPPA PATIL (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hindu law—Patilki Watan—Succession to impartible property—Adopted son—After-born legitimate son—Who has preferential claim to succeed.

Where there is a dispute as to succession to an impartible property in which the rival claimants are an adopted son and the after-born legitimate son, the succession devolves on the after-born legitimate son in preference to the adopted son.

Ramasami Kamaya Naik v. Sundaralingasami Komaya Naik,⁽¹⁾ relied on.

Pratap Singh Shrivastav v. Agarsingji Raisingji⁽²⁾ and *Gangadhar Bagle v. Hira Lal Bagle*,⁽³⁾ referred to.

*First Appeal No. 12 of 1937.

⁽¹⁾ (1894) 17 Mad. 422.

⁽²⁾ (1918) L. R. 46 I. A. 97, s. c. 43 Bom. 778.

⁽³⁾ (1916) 43 Cal. 944.