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*Before Mr. Justice Ameer Ali.*1901
DEC. 5, 6.APPELLATE
CIVIL.

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ATUL CHUNDER MOOKERJEE (*Plaintiff*) v. SOSHI
BHUSHAN MULLICK (*Defendant*).^{*} [5th and 6th December, 1901.]*Attorney and client—Attorney, application for change of—Discharge by attorney himself—Lien on cause papers—Duties of attorney on record—Costs—Refusal by attorney to act until costs incurred are paid—Costs of the application.*

Having once undertaken the conduct of a case, an attorney is bound, whether the client is rich or poor, to prosecute the case with due diligence; and he cannot say that, unless a large sum is paid to him, he will not continue to conduct the case.

Where a client himself discharges his attorney on record, the latter is entitled to hold the cause papers till his costs are paid, or an undertaking given for their payment. But where the attorney discharges himself expressly or by implication he has no such right; he must give up the papers to the new attorney to whom the client proposes to go, only retaining his usual lien on such papers.

Heslop v. Metcalfe (1), *Robins v. Goldingham* (2), *Wilson v. Emmet* (3) relied upon.

APPLICATION in chambers by the plaintiff for change of his attorney on the record, the latter having refused to prosecute the plaintiff's case, chiefly for want of funds.

It appears that the plaintiff appointed Babu Romesh Chunder Mitter, an attorney of this Court, to prosecute the suit on his behalf, and paid him from time to time sums amounting to Rs. 184 over and above all the out of pocket expenses incurred by Babu Romesh Chunder as his attorney.

[64] In August 1901, Babu Romesh Chunder engaged counsel on behalf of the plaintiff and delivered them briefs with an endorsement thereon that counsel's fees would be paid by the client himself; and the plaintiff accordingly paid those fees to counsel direct.

On November 29, 1901, Babu Romesh Chunder informed the plaintiff that, unless the latter paid him Rs. 1,000 on account of costs, he, the attorney, would no longer be able to act for the plaintiff, nor would he instruct counsel when the case would be called on for hearing. The plaintiff was unable to meet this demand, but promised to pay him his costs when taxed, but the attorney refused to act. The plaintiff called on the attorney when the case was on the board and again offered him certain terms, which were refused.

On December 3, 1901, when the case was called on for hearing, Babu Romesh Chunder Mitter did not attend the Court himself, and had told counsel, previously engaged for the plaintiff, not to appear at the hearing of the case. Counsel however, felt it their duty to be present in Court and to inform the Judge of this fact, whereupon the case was adjourned to enable the plaintiff to apply for change of attorney.

On the same date the plaintiff instructed Babu Radhika Lal Mukerjee, another attorney of this Court, to apply for change of attorney. Thereupon Babu Radhika Lal filed the necessary application, and wrote to Babu Romesh Chunder asking him, if he would consent to a change of attorney and deliver over the cause papers to him as desired by the

^{*} Application, in suit No. 512 of 1899, for change of attorney.

(1) (1872) L. R. 13 Eq. 440.

(3) (1854) 19 Beav. 233.

(2) (1887) 3 Myl. & Cr. 188.

plaintiff. Babu Romesh Chunder replied that he would consent to the change "on the usual terms."

The plaintiff applied by summons in chambers upon notice to Babu Romesh Chunder Mitter for an order that Babu Radhika Lal Mookerjee should be appointed attorney of the plaintiff in the place of Babu Romesh Chunder Mitter on such terms as to the Court might seem fit.

Babu Romesh Chunder Mitter stated on affidavit that the plaintiff did not live in Calcutta but close to French Chandernagore; and that, if he were to make over the papers in the suit to the new attorney, it would be difficult for him to recover his costs. [65] And he stated further, that a considerable sum was due to him from the plaintiff, that he had not been properly instructed, and that therefore he was unable further to prosecute the plaintiff's case.

DEC. 5. Mr. *Bell* for the applicant: There ought to be a change of attorneys, and under the circumstances such change should be made without any order as to prepayment of the old attorney's costs, as Babu Romesh Chunder was not discharged by the client, but had discharged himself by his own conduct: *Heslop v. Metcalfe* (1); *Wilson v. Emmitt* (2); *Robins v. Goldingham* (3); *Basanta Kumar Mitter v. Kusum Kumar Mitter* (4).

Mr. *R. C. Sen* for Babu Romesh Chunder Mitter: The attorney not having been properly instructed by his client, acted properly in taking the course he did. An order for change of attorneys, if made at all, should be made on the usual terms as to payment of Babu Romesh Chunder's costs before completion of the change. In all the cases cited by Mr. *Bell* the only complaint the attorney had against his client was that he had not been put in funds; and therefore those cases are distinguishable from the present one.

Mr. *Bell* in reply.

Cur. adv. vult.

DEC. 6. AMEER ALI, J. This is an application on the part of the plaintiff for change of attorney. The application is resisted by the attorney on the record, on the ground that the order can be obtained only on the usual terms of paying the costs due to him, and that, so long as the attorney to whom the plaintiff proposes to entrust the conduct of the case does not pay the costs due to the attorney on the record, or give an undertaking for such payment, he should not be compelled to make over the papers in the suit.

The law relating to the question of an attorney's lien on papers held by him for his client is well settled. If the client himself discharges the solicitor, the latter is entitled to hold the papers till his costs are paid or a satisfactory undertaking given that such costs would be paid. But where the attorney discharges [66] himself expressly or by implication, he has no such right, and he has to make over the papers to the attorney, to whom the client proposes to go, retaining his lien on such papers. As early as the year 1837 the question was settled by the decision in *Heslop v. Metcalfe* (1).

There the same objection as is now raised was put forward before the Lord Chancellor, and the inconvenience and hardship to which the attorney would be exposed if, after embarking in a cause, he was not

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(1) (1837) 8 Myl. & Cr. 133.
(2) (1854) 19 Beav. 283.

(3) (1872) L. R. 13 Eq. 440.
(4) (1900) 4 C. W. N. 767.

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provided with sufficient funds and the case was changed to other hands, were pointed out.

The Lord Chancellor dealing with this argument and proceeding upon the judgment of Lord Eldon in the case of *Colegrave v. Manley* (1) held that, under the circumstances of that case, the solicitor was bound to make over the papers to the new solicitors, retaining his usual lien on the same. That case has been followed in many other cases. I shall refer only to two. In *Robins v. Goldingham* (2) the Vice-Chancellor, after referring to the case of the *Colegrave v. Manley* (1) and *Heslop v. Metcalfe* (3) made an order to the effect that the papers should be made over by the solicitor on the record to the new solicitors "on their undertaking to receive and hold them without prejudice to any right of lien, and to return them undefaced in reasonable time.

The same course was taken in the case of *Wilson v. Emmett* (4), and the order was in similar terms. The master of the Rolls there said: "I must follow *Heslop v. Metcalfe* (3). Sir James Wigram, in *Griffiths v. Griffiths* (5) made a like order, on the ground of discharge. The same order must be made here as in *Heslop v. Metcalfe* (3), and the paper must be given up to the new solicitors."

It is unnecessary to refer to the case of *Basanta Kumar Mitter v. Kusum Kumar Mitter* (6). I proceed now to deal with the facts of the present case. The plaintiff states in his petition that he has paid to the attorney on the record, Babu Romesh Chunder Mitter, a considerable sum of money and that he with the consent of the attorney took briefs to counsel to whom they were delivered some [67] time ago. Thereafter the attorney called on the plaintiff to pay a large sum of money, which he was unable to do, but he on his side made an offer, which the attorney refused. Thereupon Babu Romesh Chunder Mitter did not attend Court to instruct counsel and practically refused to prosecute his case. The plaintiffs statements contained in his affidavit are corroborated by the statements of counsel in Court.

Mr. *Sinha* stated that he had sent for the attorney himself and spoken to him, and that the attorney had told him and his junior not to appear at the hearing of the case when called on.

The case came on for hearing on the 3rd of December and on the statement of counsel, Babu Romesh Chunder Mitter not being present, I sent for him to ascertain his reason for not prosecuting the plaintiff's case. He appeared after some delay and stated to the Court, what has been alleged on his behalf, that a considerable sum was due to him and he was not in a position to prosecute the plaintiff's case, and he admitted in terms that he had not been properly instructed and that therefore had told counsel not to appear, and that was why he did not attend himself.

The attorney has filed an affidavit in which he states that the plaintiff does not live in Calcutta, that he had taken the briefs from him and delivered them to counsel of his own choice without consulting him, and that, if he was to make over the papers to the new attorney, he would not be in a position to recover his costs.

It appears to me that when he took up the plaintiff's case it was his duty to assure himself whether the plaintiff was a person of substance. In my opinion, having once undertaken the conduct of a case, an

(1) (1823) 1 Turn. and Russ. 400.

(2) (1872) L. R. 13 Eq. 440.

(3) (1887) 3 Myl. and Cr. 168.

(4) (1854) 19 Beav. 283.

(5) (1854) 19 Beav. 283.

(6) (1900) 4 C. W. N. 767.

attorney is bound, whether the client is rich or poor, to proceed with due diligence in prosecuting the claim.

The law has provided him with means for realising his costs from his client. He cannot, to use the language of the learned Judges, to whom I have referred, turn round and say that, unless a considerable sum is paid to him, he will not do what he is bound to do; *viz.*, to conduct and prosecute his client's case with diligence and honesty.

It appears to me that the attorney in this case discharged himself by telling the counsel not to appear and by making it impossible for the plaintiff to proceed with the action.

[68] I will make the order on the same terms as the Vice-Chancellor in the case of *Robins v. Goldingham* (1).

I order the change of attorney. Babu Romesh Chunder Mitter is directed to make over the papers to Babu Radhika Lal Mookerjee on the latter's undertaking to receive and hold them without any prejudice to any lien possessed by Babu Romesh Chunder Mitter, and to return them undefaced within a fortnight from the conclusion of the suit. If the attorney (Babu Romesh Chunder Mitter) seeks for inspection of those papers, I will allow the same.

Mr. Bell. I ask for an order for costs of this application as against Babu Romesh Chunder personally on the ground that he has been wrong throughout: *Robins v. Goldingham* (1).

The Court. In my opinion Babu Romesh Chunder Mitter has been clearly wrong and I will make the same order as in that case and make him pay the costs of this application. I certify for counsel.

Application granted.

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*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and
Mr. Justice Banerjee.*

RAJ NARAIN MOOKERJEE v. FUL KUMARI DEBI.*

[9th July, 1901]

Surety—Probate and Administration Act (V of 1881), ss. 51 and 78—Surety bond, power of a District Court to take a—Second administratrix, mal-administration of the estate by—Contract Act (IX of 1872), s. 130—Application by a surety, who is not a beneficiary, to be discharged from his suretyship.

Under the Probate and Administration Act (V of 1881) a District Court, after once having taken a bond with sureties, has jurisdiction to take a second bond with fresh sureties, if the necessity arises.

A surety (who is not a beneficiary) for the administratrix of an estate can, so far as relates to the future, by giving notice, be released from his obligation as surety on account of mal-administration of the estate by the administratrix.

S. 130 of the Contract Act (IX of 1872) applies to such a case.

THE petitioner, Raj Narain Mookerjee, appealed to the High Court.

[69] Ful Kumari Debi was appointed, under the Probate and Administration Act, administratrix of the estate of Nistarini Debi, deceased, and Raj Narain Mookerjee stood surety for the administratrix, who was his siter. On the 25th February 1899, Raj Narain Mookerjee

*Appeal from Order No. 181 of 1899 against the order of B. L. Gupta, Esq., District Judge of Hooghly, dated the 29th of March 1899.

(1) (1872) L. R. 18 Eq. 440.