

1873.
March 6.

[ORIGINAL CIVIL JURISDICTION.]

Appeal Suit No. 203.

RÁV SÁHEB V. N. MANDLIK.....*Plaintiff.*

KAMALJABAI SAHEB NIMBALKAR Mother and
Guardian of GOPALRAV HANMANT NIMBALKAR
SAR LASKÁR BAHÁDUR, a minor residing at
Kolhap.....ur.....*Defendant.*

Power of Attorney—Attorney's authority to enter into special agreement with a Vakil—Vakil—Special agreement as to reward proportional to amount recovered—Public policy.

The defendant, on behalf of her minor son, gave to S. M. a power of attorney by which she authorized S. M. "for her and in her name and on her behalf to appear in or sue or defend * * * any suit, appeal, or special appeal, * * * and to act in all such proceedings in any way in which she might, if present, be permitted or called on to act."

Held that the above power did not authorize S. M. to enter into a special agreement with a *Vakil*, under which the *Vakil* (in an appeal which he was employed to conduct for the defendant on behalf of her minor son) was to receive for his services a *minimum* reward of Rs.4,000, and, in case of success, a reward proportional to the amount awarded by the Appellate Court,

Whether such a special agreement as the above is one that the Court would enforce—*Quere.*

THIS was an appeal from the decree of GRIBS, J., made on the 15th of July 1872.

The suit was brought to recover the sum of Rs. £ 371-15-0 with interest at 9 per cent. per annum from the 6th of May 1869 until judgment. The plaint averred that the defendant, on the 18th of October 1867, by her agent Sadashiv Mahipat, executed, in favour of the plaintiff, a bond in the Maráthi language, and then set out the substance of the bond which is printed below,

It was then averred that the plaintiff acted as *vakil* in the special appeal mentioned in the bond on behalf of the minor son of the defendant, and that, on the 6th day of April 1869, the special appeal was allowed and the decree of the Lower Court reversed, and that the estate of the said minor, of which the defendant had charge, was thereby benefited to the amount of Rs. 21,487-14-2.

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The plaintiff submitted that the defendant was liable to pay the moneys claimed by the plaintiff, and also that the estate of the minor in the hands of the defendant was chargeable with the payment of the moneys claimed.

The plaint also contained a count for work and labour done at the request of the defendant.

The Maráthi bond or agreement mentioned in the plaint was addressed to the plaintiff and ran thus :—

"I, Sadáshiv Mahipat Altekar, on behalf of the Sar Laskar, inhabitant of Kolhapur, at present residing at Bombay, * * * give in writing as follows :—Whereas Gopálráv H. Nimbálkar Sar Laskar Bahádur, a minor, by his guardian, his mother Kamaljábái, has given to you a *vakil patra* to make a special appeal against Govind Bhimji and others relating to the Sholapur Náyakship. Now, should the decision in respect of the said special appeal be in our favour, * * * we will pay you a reward of Rs. 4,000, and in case it should be directed that less than the Rs. 21,487-14-2 adjudged by the Judge should be paid, then we will pay you as a reward a fourth of as many rupees as shall be awarded less. And should the court, on the other hand, adjudge Govind Bhimji and others to pay us money, we will pay the whole of the said money to you in addition to the Rs. 4,000 * * * We will pay the money within a month from the date of the decision"; dated 18th October 1867 and signed "Sadáshiv Mahipat on behalf of Gopálráv Nimbálkar Bahádur Sar Laskar by his guardian Kamaljábái Sáheb Nimbálkar, my own handwriting."

The power of attorney, under which Sadáshiv Mahipat signed the above agreement, was in a form which was stated to be common in the Mofussil.

"HER MAJESTY THE QUEEN.

A GENERAL POWER OF ATTORNEY.

I Gopálráv Hanmant Nimbálkar Sar Laskar, a minor in age, therefore (represented by his) guardian (and) mother Kamaljábái of the town of Solahpur, by this writing, have chosen and appointed * * * my true

1873. and lawful attorney for me and in my name and on my behalf to appear in, or sue, or defend, and to receive all papers and process in any suit appeal special appeal, or other judicial proceedings whatsoever in any court, and to act in all such proceedings in any way in which I might, if present, be permitted or called on to act."

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The material issues raised at the trial were the second, fifth, and sixth.

II. Whether the defendant, by her agent or otherwise, executed or delivered to the plaintiff the bond as in the 2nd paragraph of the plaint alleged,

V, Whether the sum of Rs. 5,371.-15-6, claimed in the plaint, is not an extravagant and unreasonable charge.

VI. Whether the contract in the second paragraph of the plaint set forth is not void on grounds of public policy.

The plaintiff was called. He proved that he had been employed by Sadāshiv Mahipat to prosecute the special appeal, and that it resulted in favour of the appellant. He said that he had seen similar agreements to the one he had entered into with Sadāshiv Mahipat, and that there was hardly a case in which such agreements were not made between *vakils* and their clients, for that otherwise *vakils* could not practise, their fees being so small. He said he had never seen Kamaljabai. He also said that he was willing to take a decree against Kamaljabai personally, and the case proceeded on that footing. No other evidence was given.

The learned Judge found the second issue in the affirmative for the plaintiff, and the fifth and sixth issues in the negative and for the plaintiff, and passed a decree in favour of the plaintiff with costs against the defendant personally.

The appeal was argued before SARGENT, Acting C.J., and MELVILL, J., on the 16th and 17th of January 1873.

Anstey and Latham (with them *Kassinath Telang*) for the appellant.—By the bond that is sued upon we contend that Kamaljabai intended to bind her son's estate not herself personally. Her signature, like that of a tutor in Roman Law, supplies the defect of age on the part of the minor. But

even assuming that she is personally bound by the terms of the bond or contract, we say that the power of attorney, which she signed, did not authorize Sadāshiv Mahipat to enter into, and bind her personally by, a spacial agreement of this nature: Story on Agency pl. 62. *et seq*; *Gardner v. Baillie* (a); *Howard v. Baileie* (b). A power of attorney must be construed strictly: *Attwood v. Munings* (c).

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The agreement is also, we contend, void for champerty or rather as being opposed to public policy: *Grase v. Amirta mayi* (d), *Stanley v. Jones* (e), *Reynell v. Sprye* (f), *Spryev. Porter* (g), *Earle v. Hopwood* (h), *Grell v. Levy* (i). To enforce an agreement of this kind would be a dangerous precedent to establish for *vakils* practising in the Mofussil.

Marriott and Macpherson for the respondent — The guardian of an infant is primarily liable for the costs of a suit instituted for the benefit of the infant: *Marnell v. Pickmore* (j), *Hawkes v. Cottrell* (k), Chitty's Archbold's Practice 1243. There is no evidence to show that the agreement sued upon is unreasonable, and so the learned Judge has held, and it is shown, upon the evidence, that it is not an unusual agreement. That being so, Kamaljabai's attorney had power to enter into it on her behalf. If not, the plaintiff is entitled to recover on a *quantum meruit*. Section 7 of Act I of 1846 enables *vakils* legally to enter into special contracts for their remuneration.

Anstey in reply,

Our. adv. vult.

SARGENT, J.:—The plaintiff in this suit seeks to recover from the defendant, Kamaljabai Saheb Nimbalkar, the sum of Rs. 6,361-10-11 alleged to be due to him for services performed as her *vakil* on behalf of her infant son, Gopalrav Haumant, in a certain special appeal heard and determined

(a) 6 Term Rep. 591. (b) 2 H. Bl. 618. (c) 7 B. & C. 278. (d) 4 Beng. L. Rep. O. C. I. G. (e) 7 Bing. 369. (f) 1 Be M. & G. 660. (g) 7 El. & B. 58. (h) 9 C. E. N. S. 566. (i) 16 C. B. N. S. 73. (j) 2 Esp. 473. (k) 27 L. J. Exch. 369.

1873. in this Court, under and by virtue of an agreement, dated
 Rav Sahib the 18th October 1867, entered into between himself and
 V. N. Mandlik one Sadāshiv Mahipat, acting as her agent. The plaint also
 V. seeks to charge the estate of her infant son in her hands
 Kamaljabai. with the payment of the said sum.

At the hearing, an objection was taken that the minor ought to have been made a party to the suit, in order to charge his estate, and it was ultimately arranged that the claim should be treated exclusively as one against the defendant Kamaljabai in her individual capacity.

The defendant, by her written statement pleads that the agreement was executed by Sadāshiv without any authority from her authorizing him in that behalf. At the hearing, however, the claim was further disputed as being an extravagant and unreasonable charge and also as being void on the ground of public policy; and appropriate issues were framed to raise those questions.

The Court below, having decided both these issues in favour of the plaintiff, proceeded to say:—"I can see no objection of a decree being given against the defendant personally. She alleges she is guardian of her infant son, a resident beyond the British territory. She has been allowed to appear in that capacity in the Courts, but whether in this case she acted for his benefit or no is not a question for me to decide so as to bind the estate. All I am asked to do is to decree against her for a sum which her own constituted attorney engaged to pay in her behalf, and I do not see any objection to my doing so."

It is not necessary for us to express any opinion on the issues, as to the extravagance of the claim or the illegality of the agreement, as we find ourselves unable to agree with the learned Judge that Sadāshiv executed the bond in question, being duly authorized in that behalf.

The employment of the plaintiff as *vakil* arose out of the following circumstances :—

A suit had been filed by the defendant on behalf of her infant son to recover possession of 19 fields situated at Sholapur, in which an adverse decree had been passed by the Mansif, which was afterwards confirmed by the District Judge of Dharwar. In 1865, a special appeal was presented to the High Court, which resulted in the case being remanded for certain accounts to be taken, and the decree on the remand not being favourable to the plaintiff, a second special appeal was presented to this Court in 1867. On this occasion, a *vakilat nama* was granted to the plaintiff by one Sadashiv Mahipat as general attorney for the plaintiff, guardian of her infant son, and on the same day the bond in question was executed by Sadashiv. (His Lordship read the bond.)

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Now, it can scarcely be doubted, we think, looking at the whole of this instrument that the particular object of it is to enable the attorney to represent the party to the suit in all judicial proceedings to the same extent as the party himself, if present, might be permitted or called upon to do. Authority is given, it is true, to "sue and defend," but those words must, as Mr. Justice Story says in his work on Agency, Sec. 62, be construed in subordination to the particular subject matter in connexion with which they are used. Here, from the position which they occupy, they plainly denote the two-fold character of plaintiff or defendant in which the attorney may be called upon to appear and act "in any suit appeal, special appeal, or other judicial proceeding whatsoever in any Court," and whatever acts might otherwise be properly included in the expressions "sue and defend" if they stood alone, they are here, we think, clearly confined to acts done in the above proceedings.

This view derives corroboration from the circumstance that the power is identical in form with the general power promulgated in the Circulars of this Court in its Appellate jurisdiction for constituting a recognized agent as contemplated by Secs. 16 and 17 of the Code of Civil Procedure, i.e. for the purpose of making all applications to and appearances in any Civil Court. This form of power of attorney is

1873. in general use throughout the Mofussil, and even on this
 Rav Saheb ground it would be difficult to hold that it was the intention
 V. N. Mandlik, of the defendant to give Sadashiv greater powers than those
 v. contemplated by the above sections, or that the plaintiff, who
 Karzaljabai. was perfectly familiar with the form of power, could have
 supposed that such was her intention. These remarks are
 sufficient to dispose of the case. Assuming, however, that
 the words "sue and defend" should, as was contended for the
 plaintiff, be read apart from the context which limits them,
 as we think, to acts done in judicial proceedings, we should
 equally find it impossible to construe them as authorizing
 the execution of the bond in question. It was said that a
 power to sue would authorize the appointment of a *vakil*,
 and that as special arrangements with *vakils* for the remuneration
 of their services are allowed by law and are of every
 day occurrence, and that the bond was, therefore, within the
 power as one of the usual and appropriate means for accomplishing
 the object of the agency. But the general rule, which allows
 of the agent resorting to all usual means for carrying out his
 agency, has always received a restricted application in construing
 formal and deliberate instruments of this sort as distinguished
 from ordinary documents conveying instructions and letters of
 advice which are of such constant use in commercial matters.
 Mr. Justice Story, in Sec. 68 in his treatise on Agency, says,
 formal instruments of this sort are ordinarily subjected to a
 strict interpretation, and the authority is never extended beyond
 that, which is given in terms, or which is necessary and proper
 for carrying the authority so given into full effect; and the
 English cases cited by him (which, however, we do not think it
 necessary to refer to more particularly, as they all turn upon
 their own special circumstances) undoubtedly establish that
 principle of construction.

Now, the bond in question provides for the case of the
 decision on the special appeal being in favour of the appellant,
 in which case it is agreed that the plaintiff is to have a reward
 of Rs, 4,000; 2ndly,—in case a less sum should be directed to

be paid by the appellant than that fixed by the decree of the Court below, then that the plaintiff should be paid one fourth of the difference; and lastly, if any money should be ordered to be paid to the appellant by the respondent, then that such sum should be paid to the plaintiff in addition to the Rs. 4,000. It will scarcely be denied that this agreement is of a most special character. It was, indeed, stated by the plaintiff in his evidence that agreements similar to the above are frequently entered into between *vakils* and their clients—agreements by which *vakils* are, over and above the ordinary remuneration for their services, rewarded, in case of success, with a sum out of all measure with what they would be otherwise entitled to by law and depending upon the fruits of victory; but, whether that be so or not, we think it impossible that such an agreement, if indeed any special agreement contemplated by Act I. of 1846, can be deemed to be necessary and proper for carrying out a simple authority to “sue and defend.” In the present case there is the additional circumstance that the authority was given by a person in a representative character and for and on behalf of the estate of a minor.

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This circumstance would alone confine the authority to such ordinary acts as were obviously necessary for its execution, as it could not reasonably be presumed that the guardian intended to empower the agent to bind her personally (as indeed would be the legal effect of the agreement) by any arrangement, however onerous, which he might think proper to enter into with her *vakil*.

At the hearing, indeed, we were asked to allow the plaintiff to be examined as to acts of corroboration by the defendant. Such a course would, however, be entirely opposed to the practice of this Court. It would be to allow the plaintiff to set up a case which was not alleged in his plaint, as to which no issue was framed, and which is not supported by any evidence on the record.

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For these reasons, we are unable to agree with the Court below that Sadāshiv had an authority to bind the defendant or the estate of the infant by the bond in question.

The appeal must, therefore, be allowed, and judgment passed for the defendant with costs in the Court below. Parties to pay their own costs of appeal.

Attorney for the plaintiff—*Venayekrao Harichand.*

Attorney for the defendant—*D. S. Garud.*

Note—See the concluding portion of the judgment in *Vinayak Raghunath v. G. I. P. Railway Co.*, at page 118, 7 Bom. H. C. R. where the Court declined to recognise an agreement somewhat similar to above that in the case.

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[APPELLATE CIVIL JURISDICTION]

Regular Appeals Nos. 1 and 2 of 1871 under the Land Acquisition Act X. of 1870.

No. 1.

A. D. CAREY, ASSISTANT to the COLLECTOR
 OF SURAT.....*Appellant.*
 BANU MIYA and another.....*Respondents.*

No. 2.

A. D. CAREY, ASSISTANT to the COLLECTOR
 OF SURAT.....*Appellant.*
 KALU MIYA and another.....*Respondents.*

Market Value—Land Acquisition Act X. of 1870—Valuation of Land—Annual Rental.

In assessing the market value of house property, situated in the town of Bulsar, acquired for public purposes under Act X. of 1870, the court awarded a capital sum which, at the rate of six per cent. per annum, would yield interest equal to the ascertained annual rental of the premises after deducting the amount necessarily expended for annual repairs.