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EMPRESS v. SHIBO BEHARA.

The following were the opinions of the High Court :—

MITTER, J.—Whether the Judge was right or not in postponing the trial after it had once begun, I think this Court has the power to quash an illegal commitment at any stage of a criminal proceeding.

In these two cases I am of opinion that the commitments should be set aside on the ground that the sanction for prosecution under s. 211 was illegally given. Whatever might have been said in *Nusibunnissa Bibee* v. *Sheikh Erad Ali* (1), the later cases have distinctly laid it down that a sanction for prosecution under s. 211 given without hearing all the witnesses whom a complainant wishes to produce in Court, is illegal. In these cases, therefore, the original orders sanctioning prosecution under s. 211 are illegal. That being so, the commitments are also illegal. I would, therefore, set them aside as recommended by the Judge.

MACLEAN, J.—The principle involved in these cases is the same as that involved in the case of Chukrodhur Pati just disposed of; and as I am of opinion that any convictions had upon the trials under the commitments which we are asked to quash would be set aside, I think the simplest course is to set aside the proceedings at this stage.

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice White, and Mr. Justice Mitter.

KALI KUMAR ROY (PLAINTIFF) *v.* NOBIN CHUNDER CHUCKERBUTTY (DEFENDANT).* **

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January 13.

Pleaders and Muktears' Act (XX of 1865), ss. 11, 13—Muktears and Private Agent, Distinction between.

Per WHITE and MITTER, JJ.—The mere fact that a person looks after an appeal and gives instructions to pleaders in connection with such appeal, does not show that such person was practising as a muktear within the meaning of s. 13 of Act XX of 1865.

* Small Cause Court Reference, No. 2 of 1880, from Baboo Amrita Lall Chatterjee, Judge of the Small Cause Court at Dacca, dated the 19th December 1879.

(1) 4 C. L. R., 413.

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Per GARTH, C. J.—Where a person is in the habit of acting for persons in Courts of law, and holds himself out as ready to perform what is usually considered muktear's work, for reward, such person is no less acting as a muktear on any particular occasion, because he may have abstained on the particular occasion from doing any of those acts which a duly qualified muktear is alone legally capable of performing.

THIS case was referred for the opinion of the High Court; the facts being fully set out in the following order of reference:—

"The plaintiff, who had not been admitted and enrolled as a duly qualified muktear, was employed by the defendant for the purpose of looking after a regular appeal of his and giving instructions to the pleaders in connection with it. In consideration of the plaintiff's agreeing to perform these services, the defendant promised to pay him Rs. 100 as remuneration.

"The plaintiff having performed the services which he had agreed to perform, now sues the defendant for the recovery of his remuneration.

"The defendant contends that the plaintiff is, under s. 13, Act XX of 1865, incapable of maintaining the present action. His argument is, that when the plaintiff agreed to look after, and did actually look after, a case of the defendant in a Civil Court, and gave instructions to the pleaders on behalf of the latter, he was necessarily practising as a muktear in that Court in connection with that case; and that as he had not previously obtained a proper certificate authorising him so to practise, he came under the provisions of s. 13 of Act XX of 1865, and his suit is, under the latter part of that section, not maintainable in a Court of justice.

"This argument seems to me to make two assumptions, the correctness of neither of which I am prepared to admit:—1*st*, that any one who looks after a case of another and gives instructions to the pleader engaged in it, is necessarily a muktear within the meaning of Act XX of 1865; and 2*ndly*, that looking after a case of another and giving instructions to pleaders, amount to practising as a muktear within the meaning of s. 13 of the Act.

"The case of *Fuzzle Ali* (1) seems to show that a private agent may go between the client and his vakil without his being a muktear under Act XX of 1865. The Hon'ble Mr. J. Phear, in delivering the judgment of the Court, said, "there is nothing either in the words of the Act (meaning XX of 1865), or in its spirit, to prevent him (Fuzzle Ali) as *private agent* from going between the prisoner and the duly authorized vakil." The case of *Gujraj Singh* (2) would seem to show that there is nothing in Act XX of 1865 to restrain any person from supplying information to vakils in the presence of the Judge.

"Even the new Act (XVIII of 1879), which is evidently more stringent in its provisions than the one which is still in force, does not prohibit private servants of persons from giving instructions to pleaders (s. 13).

"So far as I can see, the plaintiff here was not a muktear within the meaning of Act XX of 1865, but merely a private agent of the defendant appointed for the purpose of going between him and his vakils, and giving instructions to the latter, and generally looking after the progress of the case. The words 'practise as a muktear' used in s. 13 of the Act appears to my mind to mean simply 'to appear or act as a muktear.' Looking after a case and giving instructions to pleaders appear to me to be quite different from appearing or acting within the meaning of s. 5 of the Act. 'The word act in s. 5 of the Statute has been construed to mean the doing something as the agent of the principal party, which shall be recognized, or taken notice of, by the Court as the act of that principal;' *vide Fuzzle Ali* (1).

"There is nothing to show in the present case that the plaintiff did anything of the kind in connection with the regular appeal, which he was employed to look after, which could in any sense be construed to be the doing of something as the agent of defendant which could be recognized, or taken notice of, by the Court as the act of the defendant. Looking after a case and giving instructions to pleaders do not, in my opinion, amount to either appearing or acting as a muktear, or, which is

(1) 19 W. R., Cr. Rul., 8. (2) 10 W. R., 355.

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the same thing, practising as such; *vide Kali Charan Chund* (1). The plaintiff, therefore, did not practise as a muktear within the meaning of s. 13 of Act XX of 1865, by simply looking after the progress of a regular appeal in a Civil Court and giving instructions to the pleaders engaged in it. The section does not in consequence stand as a bar to the maintenance of the present suit.

"I have, however, serious doubts as to the correctness of my conclusions, firstly, because I have nowhere been able to find a correct definition of the word 'muktear' as used in Act XX of 1865, and also because I have been pressed with the conviction that dalals or touters who ought not to be allowed to enter the precincts of our Courts of Justice will be encouraged to ply their trade if the opinion which I have come to on the question of law involved in the case be good and correct law."

The Judge decreed the case in favor of the plaintiff, contingent on the opinion of the High Court on the following points :—

1. Whether looking after a case of another and giving instructions to the pleaders engaged in it necessarily amount to practising as a muktear?

2. Whether an agreement to do these acts by a person not duly admitted and enrolled as a muktear is contrary to law?

3. Whether upon the facts found above plaintiff is entitled to recover?

No one appeared before the High Court.

The following were the opinions of the Court :—

WHITE, J. (MITTER, J., concurring):—The third point as stated by the Small Cause Court Judge virtually raises all the questions upon which the opinion of this Court is sought.

The third point is whether, upon the facts found, the plaintiff is entitled to recover.

The facts found are these :—The plaintiff, who has not been admitted and enrolled as a muktear, and consequently is not

(1) 9 B. L. R., Ap., 18; S. C., 18 W. R., Cr. Rul., 27.

in possession of a certificate authorizing him to act as a muktear, was employed by the defendant for the purpose of looking after a regular appeal which has been preferred by the defendant and also for giving instructions to the pleaders in connection with that appeal. The remuneration for the services was fixed by agreement at Rs. 100. The services have been performed. The plaintiff sues for the Rs. 100. The defendant resists payment on the ground that, by virtue of s. 13 of Act XX of 1865, the plaintiff is incapable of maintaining a suit for the agreed reward. Section 13 of the Act cited enacts, amongst other things, that any person who shall practise as a muktear in any Civil or Criminal Court without having previously obtained a certificate, shall be liable to fine, and shall also be incapable of maintaining any suit for any fee or reward for or in respect of anything done by him as such muktear.

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 a practising as a muktear within the meaning of the section. There is no definition in the Act of what the Legislature meant by practising as a muktear. But I think the meaning may be gathered from s. 11 of the Act, which enacts that "muktears" duly admitted "and enrolled may, subject to the conditions of their certificates as to the class of Courts in which they are authorized to practise, appear and plead 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 muktear 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 the latter Court.

It is not stated in the reference whether the regular appeal preferred by the defendant was a civil or criminal appeal, but this will not affect the decision, as upon the facts found the plaintiff was clearly not employed to plead for the defendant.

Did the plaintiff then appear or act in Court? I think not. These words have a well-defined and well-known meaning.

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To appear for a client in Court is to be present and to represent him in the 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. It is true that, in rendering the stipulated services, he must have attended the Court and frequented the offices of the Court at certain times, but his presence there was not for the purpose of representing his client or taking any steps in the suit on his behalf, but to watch his case and see that others had taken the necessary steps and were fully informed as to the nature and facts of his employer's case and as to the best mode of conducting it. It would, I think, be a straining of the language of the Act to hold that attendance at the Court and its offices for the latter purposes was a practising as a muktear.

The authorities cited in the reference are in favor of this view.

In the case of *Gujraj Singh* (1), which was an appeal against an order of the Judge of Tirhoot restraining all persons from coming into his Court and instructing pleaders except muktears duly enrolled under Act XX of 1865, Jackson, J., set aside the order saying, 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 vakils." In the case of *Kali Charan Chund* (2), the Officiating Joint Magistrate had fined the petitioner under s. 13 of the Act for practising as a muktear without having a certificate. What the petitioner had done was to write out a petition of complaint for one Komiruddin, which Komiruddin presented himself in the Officiating Joint Magistrate's Court.

(1) 10 W. R., 355.

(2) 9 B. L. R., Ap., 18; S. C., 18 W. R., Cr. Rul., 27.

Kemp and Glover, JJ., set aside the order and remitted the fine, remarking that "the mere writing of a petition for a party, who afterwards presents that petition himself," is not "acting in the sense of s. 11 of Act XX of 1865." In the case of *Fuzzle Ali* (1), Phear and Ainslie, JJ., set aside the order and remitted the fine inflicted upon the petitioner for practising as a muktear. The petitioner had, as appears from the judgment of the District Judge, "instructed the vakil, stood behind him during the trial, suggested questions, and taken an active part in the management of the defence." Phear, J., in giving judgment, says:—"I think the word act in s. 5 of the Act means the doing something as the agent of the principal party which shall be recognized, or taken notice of, by the Court as the act of the principal. Such, for instance, as filing a document."

I am of opinion, therefore, as well upon the authorities as upon the true construction of the Act, that the plaintiff, in rendering the services which he is found to have rendered, was not practising as a muktear within the meaning of the 13th section, and is therefore not debarred from maintaining this suit. If that be so, as the services have been performed, he is entitled to recover the agreed reward from the defendant.

GARTH, C. J.—My learned brothers, in deciding this question, have thought it right to deal with it in the same way as it has been dealt with in the Court below; that is to say, they have merely considered whether, having regard to the facts of this particular case, the plaintiff has done anything for the defendant which a person who is not a qualified muktear is prohibited by law from doing; and if I thought that this was the proper mode of dealing with the question, I should probably have arrived at the same conclusion as they have.

But I think that this is not the fair or proper mode of dealing with the question; and that, for the purpose of ascertaining the plaintiff's right to succeed in this suit, or in other words, for the purpose of ascertaining whether the plaintiff, in what he did for the defendant, *was acting as a muktear*, it

(1) 19 W. R., Cr. Rul., 8.

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is necessary to enquire whether the plaintiff really acted in this instance as a private agent of the defendant, or as a muktear habitually practising in the Courts as such. If the plaintiff merely acted as the private agent of the defendant in giving instructions to the pleader, and abstained from doing any of those acts which by law can only be done by a duly qualified muktear, then I think Mr. Rampini is quite right in holding that the plaintiff is entitled to recover his promised remuneration. But if the plaintiff is in the habit of acting for clients generally in Courts of law, and holds himself out as ready to perform what is usually considered muktear's work for reward, then I think that he was no less acting as a muktear in what he did for the defendant, because he may have abstained in this particular case from doing any of those acts which a duly qualified muktear is alone legally capable of performing. This seems to me to constitute the difference between acting as a private agent and acting as a muktear. If a man holds himself out generally as ready to conduct cases for clients for reward, and makes this his public profession or calling, in the same way as a pleader or an attorney, then he cannot with propriety be considered *a private agent.*

Unless this is the proper view of the law, the Legal Practitioners' Act, whatever the intention of the Legislature may have been, must of necessity, so far as it relates to muktears, become a dead letter; and duly qualified muktears will be deprived of their legitimate profits and privileges by men who have no right to practise in the Courts as muktears at all. In that case it is clear that either fresh Legislation is necessary or this Court must pass rules to define more particularly what "acting as a muktear" is to mean.

I should add that it has occurred to my learned colleague, Mr. Justice Mitter, that s. 13 appears to apply to those persons only who are qualified and enrolled as muktears, but who have practised as muktears without obtaining their certificates. 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 muktear, 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 muktear, 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.

But whatever may be the meaning of s. 13, s. 5 of the same Act appears to me to remove all difficulty, and to debar the present plaintiff, if he has really acted as a muktear, from the right to enforce his present claim. Section 5 enacts that "no person shall appear or act as a muktear, &c., unless he shall have been admitted and enrolled, and otherwise duly qualified to practise as a muktear, &c." The plaintiff, therefore, if he practised as a muktear when acting for the defendant, did an act which is expressly forbidden by the Legislature; and I take it to be clear, as a matter of law, that he cannot recover his fees for doing such an act. See the case of a broker suing for his fees without being licensed—*Cope* v. *Rowlands* (1), and of an appraiser suing for work done without being licensed—*Palk* v. *Force* (2).

I think, therefore (having regard to the foregoing observations), that in order to decide this case properly, the learned Judge in the Court below should be directed to ascertain whether the plaintiff, when acting for the defendant, was a private agent of the defendant, or a person who practises generally for reward in Courts of law as a muktear. But as my learned brothers are disposed to take a different view of the matter, the judgment which has been passed for the plaintiff must stand.

(1) 2 M. and W., 149. (2) 12 Q. B., 666.