

ORIGINAL CIVIL.

Before Fletcher J.

1912

Dec. 9

MAHESHPUR COAL COMPANY, LD.

v.

JATINDRA NATH GUPTA.*

Attorney and Client—Practice—Refusal of Attorney to proceed until payment of costs already incurred—Discharge by Attorney—Acceptance of discharge by client—Order for change of Attorney—Payment of costs.

A firm of attorneys refused to proceed further in the conduct of a suit unless their clients paid them as promised a certain sum on account of costs incurred :—

Held, that by so doing the attorneys discharged themselves, and the clients were entitled to an order for change of attorney without first paying the costs already incurred to the attorneys on the record.

Held, further, that the mere fact that after the attorneys' refusal the clients instructed them to brief counsel to apply for an adjournment of the suit, which instructions the attorneys declined to accept, did not amount to a refusal on the clients' part to recognize the discharge of the attorneys.

Basan a Kumar Mitter v. Kusum Kumar Mitter (1) and *Atul Chandra Mukerjee v. Shoshee Bhusan Mukerjee* (2) followed.

APPLICATION.

This was an application in Chambers on behalf of the defendants, Jatindra Nath Gupta and Gopi Kristo Sen, for an order that Messrs. Manuel and Agarwalla should be appointed attorneys for the defendants in the place and stead of Messrs. Leslie and Hinds, the attorneys on the record.

The material facts were as follows: In the early part of September 1912 the accountant of Messrs. Leslie

* Application in Original Civil Suit No. 694 of 1912.

(1) (1900) 4 C. W. N. 767.

(2) (1901) 6 C. W. N. 215.

and Hinds, one Mr. Belchambers, had an interview with the defendant Gopi Kristo Sen, and the latter promised to pay a substantial sum on account of attorneys' costs by the beginning of the following month, and also to pay counsel's fees when the case came on for hearing. This promise was not fulfilled, and accordingly, on the 7th October, 1912, Messrs. Leslie and Hinds wrote a letter to the defendants of which the following are the material portions: "It is necessary that this (*i.e.*, payment) be done without delay otherwise we shall not be able to proceed in your matter when it is called on after the vacation."

No reply was received to this letter, but on the 21st November 1912 the defendant Gopi Kristo Sen called at Messrs. Leslie and Hinds' office and requested them to deliver briefs to counsel. This, however, Messrs. Leslie and Hinds refused to do unless they were put in funds to defray their out-of-pocket costs and the fees payable to counsel. Thereupon this application was made on the 29th November 1912, and ordered to be postponed. The defendants upon this instructed Messrs. Leslie and Hinds to brief counsel to apply for an adjournment of the suit pending the hearing of the application.

Messrs. Leslie and Hinds delivered a brief to counsel, but intimated to him that they could not hold themselves responsible for his fee. In these circumstances counsel returned the brief, and upon the defendants tendering the amount of the fee to Messrs. Leslie and Hinds the latter refused to accept it.

At the hearing of the application, Messrs. Leslie and Hinds through their counsel expressed their willingness to consent to the order for change of attorney being made upon payment to them of their taxed out-of-pocket costs.

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Mr. P. R. Das, for the applicants. The practice of the Original Side is that when an attorney discharges himself the client is entitled to an unconditional order for change: *Basanta Kumar Mitter v. Kusum Kumar Mitter* (1), *Atul Chandra Mukerjee v. Shoshee Bhusan Mukerjee* (2). Before the Judicature Act the practice of the English Common Law Courts was that a change of solicitors could only be obtained upon payment of costs due; in Chancery the client was always entitled to a change. The old Common Law rule is only applicable in India to cases where the discharge is by client, not where as here the discharge is by the attorney.

The circumstances of this case amount to a discharge of the attorneys by themselves: *Robins v. Goldingham* (3). Cordery on the Law relating to Solicitors, 3rd edition, p. 105. *Underwood, Son, and Piper v. Lewis*(4).

Mr. P. L. Buckland, for Messrs. Leslie and Hinds the attorneys on record. In this case the discharge is by the clients and not by the attorneys. The clients expressly agreed to put the attorneys in funds and by failing to do so they discharged the attorneys. Even assuming that the discharge was by the attorneys, the clients by requiring them to brief counsel to apply for an adjournment showed that they did not accept such discharge and cannot now rely upon it. Reference was made to an order made by Sale J., on the 8th June 1906, in an unreported case No. 595 of 1904.

Mr. P. R. Das, in reply, cited *Bluck v. Lovering & Co.* (5).

Cur. adv. vult.

(1) (1900) 4 C. W. N. 767.

(3) (1872) L. R. 13 Eq. 440.

(2) (1901) 6 C. W. N. 215.

(4) [1894] 2 Q. B. 306.

(5) (1886) 35 W. R. 232.

FLETCHER J. This is an application for a change of attorneys by the defendants in the suit.

The applicants ask that the order for change be made without ordering the clients to pay to the attorneys the amount of their bill which may be found due on taxation, on the ground that the attorneys have discharged themselves.

It appears that in September last the accountant of the attorneys had an interview with one of the defendants, when the latter promised to make a payment on account of the attorneys' costs.

The clients having failed to fulfil their promise, the attorneys on the 7th October wrote to the clients pressing them to make the payment and informing them that "otherwise we shall not be able to proceed in your matter."

On the 21st November one of the clients called on the attorneys and requested them to brief two gentlemen as counsel in the suit, but the attorneys refused unless they were put in funds by the clients to pay the fees to counsel.

Now, pausing there for one moment, it seems to me on the authorities that the conduct of the attorneys in refusing to act for the clients unless the clients put them in funds to pay the fees on the briefs to counsel was a discharge of themselves by the attorneys.

The exact point was decided by Malins V.C. in the case of *Robins v. Goldingham* (1), which case has been followed and approved both in England and in this Court: see *Basanta Kumar Mitter v. Kusum Kumar Mitter* (2); *Atul Chandra Mukerjee v. Shoshee Bhusan Mookerjee* (3).

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

(2) (1900) 4 C. W. N. 767.

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FLETCHER J.

It is said, however, that these cases are distinguishable on the ground that after the attorneys had discharged themselves the clients instructed them to instruct counsel to apply for an adjournment pending the hearing of the application for a change. If after receiving those instructions to brief counsel to apply for an adjournment the attorneys had expressed their willingness to go on with the litigation, there might have been a good deal to say on behalf of the attorneys, but even now the attorneys are not willing to go on with the litigation except on the footing that they are put in funds to pay at any rate the fees on briefs to counsel. The contract of the attorneys was an entire contract to carry on the litigation to its termination subject to their being paid.

The mere fact that the clients have expressly undertaken to put the attorneys in funds, which promise the clients have not performed, does not operate as a discharge by the clients: see *Bluck v. Lovering & Co.* (1). The demand of attorneys to be paid the amount of the fees on the briefs to be delivered to counsel was a discharge by the attorneys of themselves. But then it is said that although the clients might have accepted the discharge of the attorneys they did not in fact do so, but promised to put the attorneys in funds to carry on the litigation and therefore the discharge is by the clients. In support of that an order made by Sale J. on the 8th June 1906 in a suit No. 595 of 1904 (2) has been handed to me by the learned counsel for the attorneys. I have not been able to find any judgment of Sale J. on that application. It may be that the order in the form made by Sale J. was not opposed. But it appears clear that when an attorney refuses to proceed with the suit because the client does not put him

(1) (1886) 35 W. R. 232.

(2) Unreported.

in funds to conduct the litigation the attorney discharges himself: *Bluck v. Lovering & Co.*(1).

It makes no difference whether the promise to put the attorney in funds is made prior to or during the suit. I must, therefore, make the order for change in the form mentioned in the judgment of Ameer Ali J. in *Atool Chandra Mukerjee v. Shosee Bhusan Mukerjee* (2).

There will be no order as to the costs of this application.

Application allowed.

Attorneys for the applicants: *Manniel & Agarwalla. Leslie & Hinds* for themselves.

H. R. P.

(1) (1886) 35 W. R. 232.

(2) (1901) 6 C. W. N. 215

PRIVY COUNCIL.

SECRETARY OF STATE FOR INDIA

v.

MOMENT.

P.C.^s
1912

Nov. 29 ;
Dec. 10.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA, AT RANGOON.]

Jurisdiction of Civil Court—Right of Suit against Secretary of State for India in Council—Burma Town and Village Lands Act (Burma Act IV. of 1898), s. 41 (b)—Act taking away power of subject to sue Government to determine any right to land—Power of Lieutenant-Governor in Council to pass Act—Legislation ultra vires—India Councils Act, 1861, (24 & 25 Vict., c. 67), s. 22—Government of India Act, 1858, (21 & 22 Vict., c. 106), ss. 65, 66, 67.

^s Present: THE LORD CHANCELLOR (LORD HALDANE), LORD MACNAGHTEN, LORD ATKINSON, LORD MOULTON, SIR JOHN EDGE, AND MR. AMEER ALI.