

**In Re: M.B. Chothia**

**In Re: M.B. Chothia**

**SooperKanoon Citation :** [sooperkanoon.com/327767](http://sooperkanoon.com/327767)

**Court :** Mumbai

**Decided On :** Dec-07-1906

**Reported in :** (1907)9BOMLR38

**Judge :** Chandavarkar, J.

**Appeal No. :** Original Civil Suit No. 787 of 1904

**Appellant :** In Re: M.B. Chothia

**Judgement :**

**Chandavarkar, J.**

1. There are two questions raised by the notice of motion dated the 6th of October last, of Thucker Sursing Mathuradas, defendant in Suit No. 787 of 1904. By that notice the defendant sought to restrain Mr. Manchershaw Bomanjee Chothia, a solicitor of this Court, from acting as the plaintiffs solicitor and utilising, for the purposes of the execution proceedings in that suit, the information which he had obtained from the defendant during his employment as the defendant's solicitor previously in the suit itself. The two questions are; (1) whether Mr. Chothia is liable to pay the costs of and incidental to the notice of motion; and (2) whether, having acted as the defendant's attorney up to the date of the decree in the suit and obtained information in connection with the suit from the defendant in the course of employment as his attorney, he has used that information as plaintiff's attorney for the purpose of the execution of the decree against the defendant.

2. Mr. Lowndes for the defendant moved before me on Friday the 30th of November last for an order making the notice of motion absolute. The motion was supported by an affidavit of the defendant, which contained the charge of professional misconduct against Mr. Chothia, involved in the second question above stated. As Mr. Chothia did not appear to oppose, though he had notice I made the notice of motion absolute. Mr. Lowndes asked for an order directing Mr. Chothia to pay the costs of and incidental to the, notice. I declined to make any such order without hearing Mr. Chothia's explanation as to the allegation in defendant's affidavit that he (Mr. Chothia) had utilised for the purposes of the execution proceedings the information which he had obtained from the defendant in the course of his employment as the defendant's attorney. Accordingly I directed that Mr. Chothia should be asked to appear before me at 3-30 P.M. He appeared and gave some explanation. Mr. Lowndes then asked for permission to put some questions to Mr. Chothia and the latter expressed his willingness to answer them. After Mr. Lowndes had asked him some questions in the nature of cross-examination, it was thought desirable that the inquiry into the allegation of professional misconduct should be more formal and regular and that I should pass my order on both the questions above stated after such inquiry.

3. The inquiry has lasted two days and has been conducted by me with the object of finding whether there, is a prima fade ease against Mr. Chothia for a report by me to the learned Chief Justice and Judges of this Court for an investigation under our disciplinary jurisdiction.

4. The question of Mr. Chothia's liability for the costs of and incidental to the notice of motion and of the professional misconduct charged against him has arisen under the following circumstances.

5. Khema Khushal & Co., plaintiffs in Suit No. 787 of 1904, filed the suit against the defendant Surging on the 16th of November 1904 to recover a certain sum on a promissory note alleged to have been passed by the defendant. It was filed as a summary suit and Messrs. Mirza and Mirza appeared as the plaintiffs' attorneys.

6. On the 5th of December 1904, the defendant, appearing through Messrs. Mull a and Mulla as his solicitors, obtained leave from the Court to defend on depositing

Rs. 1000 as security for the plaintiffs' costs etc.

7. On the 15th of December 1904, Mr. Chothia obtained the necessary order from the Court for a change of the defendant's attorneys and for his appointment as their attorney.

8. On the 9th of January 1905, Mr. Chothia, having personally given an undertaking to the Court to pay to the plaintiffs' attorneys, Messrs. Mirza and Mirza, on the same day Rs. 1000 in part payment of the plaintiffs' claim in the suit and personally holding himself responsible for all the costs of the plaintiffs therein as well as their costs as defendants in Suit No. 834 of 1904 instituted by the defendant against them, the Court, on the consent of the parties, passed an order directing the Prothonotary to forthwith pay to Messrs. Mirza and Mirza Rs. 1000 deposited by the defendant as security on the third of December 1904 (see Ex. M).

9. On the 20th of January 1905, the defendant executed an agreement to mortgage seven properties of his to Mr. Chothia's father for Rs. 20,000. This agreement (Ex. 4) was prepared by Mr. Chothia.

10. On the 21st of January 1905, upon consent given by both the plaintiff and the defendant through their respective counsel, the Court passed an order (Ex. 0) that if the plaintiffs' claim as well as costs of the suit were not satisfied before Friday the 27th of January, a decree be passed for the full amount of the plaintiffs' claim and costs.

11. On the 31st of January 1905, an ex parte decree was passed against the defendant for Rs. 3809.

12. The plaintiffs, through their attorneys, Messrs. Mirza and Mirza, made two applications for execution of that decree. The first was on the 13th of February 1905, praying for attachment of the defendant's moveable property. The second was on the 27th of February 1905, praying for attachment of the defendant's interest in four immovable properties specified in the application.

13. Apparently these applications were not successful.

14. While this was the state of things, Mr. Chothia wrote a letter (Ex. 7) on the 28th of April 1905, informing the defendant that as the latter had not complied with his repeated requests for instructions and funds, he was going to apply to the Prothonotary for an order of discharge from the conduct of this case on defendant's behalf.

15. Mr. Chothia has admitted in his evidence given before me that when he wrote this letter to the defendant, he had agreed with the plaintiffs to act as their attorney and that he had not informed the defendant of the agreement, because he did not think he was bound to inform him.

16. On the same day, i. e. the 28th of April 1905, Mr. Chothia obtained from the plaintiff's a power of attorney appointing him as their attorney.

17. On the 2nd of May 1905, Messrs. Mirza and Mirza, who were still the plaintiffs' attorneys, wrote (see Ex. P) to Mr. Chothia complaining that, though he had given a personal undertaking to the Court as defendant's attorney to pay to them Rs. 1000, on the 9th of January 1905, he had not paid the sum and calling upon him to fulfil the undertaking. Mr. Chothia replied that on that day-the 2nd of May-he had paid the amount of Rs. 1000 to the plaintiffs.

18. On the 3rd of May 1905, Mr. Chothia obtained an order discharging him as the defendant's solicitor and appointing him plaintiffs' attorney in the place of Messrs. Mirza and Mirza.

19. Having become plaintiffs' attorney, Mr. Chothia made, on the 17th of May 1901, an application (Ex. T) for the attachment of seven immovable properties of the defendant in execution of the ex parte decree of the 31st of January.

20. The defendant's complaint is that for the purposes of this application for attachment, Mr. Chothia utilised the information which he had obtained from the defendant as defendant's solicitor for preparing the agreement of mortgage (Ex. 4) between the defendant and Mr. Chothia's father.

21. Mr. Chothia's defence is that he obtained the information for the purposes of the application from the Sub-Registrar's records and the Collector's books and that

if the agreement of mortgage was utilised at all, it was utilised by his clerk Hatte without his authority.

22. Dealing first with the second of the two questions stated by me at the outset as arising in this proceeding, I agree with Mr. Inverarity that as this preliminary inquiry relates to a matter of a punitive character, I must exclude from consideration anything stated before me by Mr. Chothia in answer to Mr. Lowndes on Friday the 30th instant. Mr. Chothia did not know then what the charge against him was; he was not represented by counsel and it is only fair that no statement made by him under those circumstances should be used to his prejudice.

23. Upon the materials placed before me at the more regular inquiry I have held, I have no doubt that the agreement of mortgage (Ex.4) was used for the purposes of the application for execution (Ex. T). There are coincidences between the two which point most clearly to that conclusion. The schedule to the agreement specifies seven properties; so does the schedule to the application for execution; the descriptions in both correspond word for word in most particulars and in that respect one is an exact copy of the other.

24. It is not denied by Mr. Inverarity that the agreement was used for the purposes of the application, but the case put forward on behalf of Mr. Ohothia is that the latter first obtained information about the defendant's properties from the Sub-Registrar's records and the Collector's books, that Mr. Chothia's clerk, having taken a search in the Sub-Registrar's office, merely compared the particulars obtained at that search with the particulars in the agreement, Ex. 4; and as both were found to tally, the agreement was utilised, but that substantially the application was based on information obtained from the Sub-Registrar's book and the Collector's records. It is contended that, in so using the information contained in the agreement, Mr. Chothia did nothing amounting to professional misconduct.

25. Mr. Chothia has affirmed that the plaintiffs having informed him that the defendant had incumbered his property several times and that Marwaris had refused on that account to lend him moneys, he (Mr. Chothia) thought that he should take a search of the Sub-Registrar's book with a view to find out what immovea-ble properties the defendant owned which could be attached in

execution of the plaintiffs' decree.

26. The evidence shows that on the: 5th of May, 1905 Mr. Chothia applied to the Sub-Registrar for permission to search his records. (See the precipe Ex. I). Certain notes taken at the search on the 6th of May have been put in and Mr. Chothia affirms that these were taken by his clerk Hatte. These notes are produced from the custody of Messrs. Kanga and Patel, to whom Mr. Chothia says they were delivered a month ago and there is no reason to doubt their genuineness. What appears from these notes, Ex. 2, is this. The Registrar's book disclosed the fact that the defendant owned eight immoveable properties. The clerk who made the search took short notes of the description of seven of the properties because that description in the Sub-Registrar's book tallied substantially with their description in the agreement (Ex. 4), but he copied out in express terms from the Sub-Registrar's book the description of the eighth property which was not included in the agreement (Ex. 4). The clerk's notes, Ex. 2, make specific reference to the said agreement in two places; and Mr. Chothia admits that when he read the notes, after the clerk had brought them to him, he made on the margin at each of these places a mark of interrogation. A second search was taken in the Sub-Registrar's office on the 13th of May 1901. It is also in evidence that, as to four of the seven properties specified in the schedule to the application for execution, Mr. Chothia applied to the Collector on the 8th of May for a certified abstract of those properties (see Ex. A 8). Those certificates, which are dated the 10th of May 1905, are annexed to the application for execution (Ex. T)'.

27. From this evidence it is clear that the draft (Ex. 5) of the application for execution (Ex. T) was not prepared until the 10th of May, that at that time information had been obtained from the Sub-Registrar's book and the Collector's records. Further there is the circumstance that though in many respects the schedule to the application for execution (Ex. T) is a word for word copy of the agreement (Ex. 4) there are differences between the two which ought not to be lost sight of. In the agreement, the property firstly described is stated to contain 556 square yards, the same number that is mentioned in Ex. 6, which is a copy of the mortgage of the 4th of March 1905 in the Sub Registrar's book, whereas in the application the same property is described as containing 544  $\frac{7}{9}$  square yards.

The agreement leaves blank the square yards of the property thirdly described but in the application it is mentioned as 98 square yards. There are other differences, which I need not mention in detail here, but it is sufficient to say that the application for execution does not proceed wholly upon the agreement. The question is, whether, as contended by the learned Advocate-General for the defendant, Mr. Chothia utilised the agreement as the groundwork of the application for execution and had the search in the Sub-Registrar's office made for the mere purpose of finding whether the properties of which he had derived all his knowledge from the agreement (Ex. 4) were incumbered by the defendant, or whether, as contended by Mr. Inverarity, Mr. Chothia first obtained all his information from the Sub-Registrar's book and the Collector's records and finding subsequently that that information tallied in most particulars with the contents of the agreement (Ex. 4) used the latter for the purposes of the application. Upon the evidence before me, I am unable to say that it is a necessary inference from it that Mr. Chothia got his information for the application from the agreement first and then used the search in the Sub-Registrar's office merely as a cloak to shield himself from any imputation of breach of faith towards his former client, the defendant. It is no doubt a circumstance against Mr. Chothia that both in the application (Ex. T) and in the agreement (Ex. 4) seven properties are specified, whereas the Registrar's book shows that the defendant had an eighth property. The reasons which Mr. Chothia has given in cross-examination as to why this eighth property was omitted from the application for execution, if he proceeded in the preparation of that application, on information obtained at the search in the Sub-Registrar's office, are not quite satisfactory to my mind. He says that it was omitted because the Sub-Registrar's book did not give either its square yards or Collector's numbers and that these it was necessary to state for its identification in the application for execution. But the property is identified in the book by its Municipal number; it is a dwelling house. To that Mr. Chothia's reply is: 'all the same it may have a compound,' but he has had to admit that he does not know whether it has a compound. Mr. Chothia states that whatever use his clerk made of the agreement for the purposes of the application for execution was without his authority; but the clerk's notes, Ex. 2, show that therein he made a distinct reference to the agreement and that Mr. Chothia has made by his own hand marks

of interrogation there on the margin. The absence of the eighth property from the application (Ex. T), the correspondences between the scheduled agreement (Ex. 4) and the application and the reference to the agreement in two places in the notes (Ex. 2), taken at the search in the Sub-Registrar's office, are circumstances which do raise a suspicion against Mr. Ohothia; but, on the other hand, the search taken in the Sub-Registrar's office, the certificates obtained from the Collector, the points of correspondence there are between the schedule to the application and the Sub-Registrar's book and the fact that the clerk has copied out in extenso in his notes, (Ex. 2) the description of the eighth property from Exhibit 6 which is in the Sub-Registrar's book, make it reasonably doubtful whether Mr. Chothia used the information contained in the agreement (Ex. 4) without and before obtaining it from the Sub-Registrar's book.

28. In a case of this kind strictness of proof is required and to enable me to make a report to the learned Chief Justice and Judges I must be satisfied on the materials before me that there is a reasonable probability, if not certainty, of the charge of professional misconduct being clearly established. I am not satisfied on that head. It was argued by Mr. Inverarity, relying on Blackburn J's judgment in *Re Cutts Ex parte Ibetson* (1867) 16 L.T.N.S. 714. 'that though those things which an attorney learns from his client, or in consequence of his employment by his client, he is forbidden to disclose and any betrayal of his confidence would be visited by the Court as gross misconduct,' yet 'if he learns matters relating to his client under such circumstances that if questioned about them in a Court of Justice, he could not refuse to answer them ' he is not within the Court's Jurisdiction. That is no doubt the law but here though as between the defendant and Mr. Chothia's father Mr. Chothia could not have claimed privilege as to the information obtained by him, while acting as the solicitor of both, it would be a privileged communication which he would not be bound to disclose as between the defendant and a person not a party to the agreement (see per Westropp C.J. in *Memon Hajee v. Molvi Abdul Karim* ILR (1877) 3 Bom. 94. But the case of *In re John Holmes, In re Electric Power Company Limited* (1877) 25 W.B. 603, shows that a solicitor is not guilty of misconduct because, having changed sides, he uses for his new client information acquired from his old client, if it was open to him to obtain such information from public sources.

29. It has been argued by Mr. Inverarity that, even assuming that Mr. Chothia derived his information for the application for execution from the agreement (Ex. 4), there is no breach of professional faith, because Mr. Chothia affirms that he held the agreement in his custody not as defendant's but as his (Mr. Ohothia's) father's attorney. It is conceded on both sides that the agreement in question fell through within a month of its execution on the 21st of January 1905. If it ceased to be operative, clearly it became a document of the defendant. Mr. Chothia's father has made no claim under it. The defendant's present attorneys several times called for the agreement. Mr. Chothia was unable to send it to them because, he said, it was missing. He never alleged that he held it for his father as his father's solicitor, that the defendant had no right to it and that, therefore, the defendant was not entitled to call for the document. On the 9th of October 1906, he sent the document to the defendant's attorneys with a letter (Ex. V) in which he said he sent it to them 'for perusal.'<sup>1</sup> Whether Mr. Chothia held the agreement for the defendant or for his father is not, however, the material question. The question is whether, rightly or wrongly, he bona fide believed that the document belonged to his father. On this point too the circumstances are so evenly balanced that I am unable to draw any presumption against Mr. Chothia.

30. Lastly, it was urged for him that as the information about the properties mentioned in the schedule to the agreement (Ex. 4) was obtained from the Collector's records and communicated to Mr. Chothia by a broker named Chunilal and as the defendant denied at the time of the execution of the document that he had employed Chunilal as his broker, the information embodied in the agreement must be treated as having been obtained by Mr. Chothia from a person who had no connection with the defendant. The agreement (Ex.4) shows that the clause as to brokerage was struck out and that circumstance corroborated Mr. Chothia's statement. But, on the other hand, Mr. Chothia has mentioned Chunilal as the defendant's broker in his letter (Ex.X) of the 1st of August 1906. On this point, too, the evidence is so equivocal that I must decline to draw any inference adverse to Mr. Chothia.

31. The result, upon the whole, is that in my opinion the materials are not sufficient to make out a prima facie case for enquiry by this Court under its disciplinary

jurisdiction against Mr. Chothia.

32. On the first question, Mr. Chothia's liability to pay the costs of and incidental to the notice of motion of the 6th of October 1906 is established beyond all doubt by the correspondence between him and the defendant's solicitors. At an interview he had with the latter, on the 10th of October, he requested them not to proceed with the notice and agreed to pay to the defendant's solicitors all the costs of and incidental to it. The defendant's solicitors wrote to him a letter on the 11th of October, asking him to say in writing that he had agreed to pay the costs. Accordingly he confirmed that agreement in writing (see Ex. B). The costs not having been paid, the defendant's solicitors threatened on the 1st of November to bring on the notice. Mr. Chothia replied that he was getting the costs taxed by his clerk. On the 13th of November, the defendant's solicitors sent to Mr. Chothia a supplemental bill of costs. There was some correspondence after that until, on the 28th of November, for the first time he virtually declined to pay to the defendant's solicitors the costs he had agreed to pay, upon the ground that the defendant owed him a considerable amount. His agreement with the defendant's solicitors was unconditional and on the faith of it they had ceased for some time from bringing on the notice of motion. Instead of acting up to his promise, he put the matter off and at last tried to get out of it by alleging a case of set off. I think he must pay the costs of and incidental to the notice of motion.

33. I must now hear Counsel on the question of the costs of the inquiry into the allegations of professional misconduct made by the defendant against Mr. Chothia, which I have held not proved.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**