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Court : Kolkata

Decided On : Feb-19-1924

Reported in : AIR1924Cal753

Appellant : Romesh Ch. Basu

Respondent : Jadab Ch. Mitra and ors.

Judgement :

Sanderson, C.J.

1. This is an appeal by the defendant from the judgment of my learned brother Mr. Justice Page.
2. The defendant had acted as attorney for the plaintiffs in a suit in the High-Court in which the present plaintiffs were defendants. The present Plaintiffs succeeded in the suit, and in the appeal which was filed by the plaintiffs in that suit.
3. This suit was brought by the plaintiffs to recover two sums of Rs. 245-10-3 and Rs. 3,837-1-0. The first of these sums was alleged to be the balance, due to the plaintiffs from the defendant, in respect of payments made by the plaintiffs to the defendant on account of costs after deducting the amount allowed on taxation.
4. The second amount was part of a sum of Rs. 4,237-1-0, the taxed costs of the previous suit as between party and party which was paid by the plaintiffs in the previous suit to the defendant under an order of the Court as a condition for a stay

of execution pending the determination of the appeal.

5. In respect of this amount it was alleged that the defendant had paid the plaintiffs, a sum of Rs. 400, leaving a balance of Rs. 3,837-1-0 due to the plaintiffs.

6. The defendant paid into Court the sum of Rs. 1,724-2-3 which he alleged was all that was due to the plaintiffs.

7. The defendant's defence was as follows:

2. That for the proper conduct of the said suit and appeal, this defendant engaged various Counsel to represent his said clients therein and he agreed to pay them, certain fees under the express authority of his said clients and after duly informing them that the whole of such fees could not be allowed upon taxation, but this defendant owing to his close relationship with the said clients did not take any written authority from them for the payment of the said fees to Counsel.

3. That thereafter this defendant paid various fees to Counsel under such verbal authority of his said clients as aforesaid, and included the same in his bills of costs as will appear from such bills when produced, but the Taxing Officer of this Honourable Court disallowed a portion of the said fees so paid, on the ground of absence of written authority from the said clients in that behalf.

4. That this defendant at the request and under the instructions of his said client also expended on their behalf in the said suit and appeal various other sums of money, and did certain work for them in respect of a mortgage and reconveyance which was reasonably worth Rs. 290-14-0, but the defendant did not include the said sums so expended and the costs of the said work so done in his said bills, of costs, as under the taxation rules of this Honourable Court it is not the practice to do so.

6. That after giving credit to the plaintiffs for the various sums received from them as shown in the said annexure B, to the plaint there became due to this defendant a sum of Rs. 2,512-14-9 in respect of the balance of account with the plaintiffs.

8. That the said appeal was dismissed with costs on the 17th of July, 1918, and this defendant submits that thereupon the said fund of Rs. 4,237-1-0 in his hands became subject to a lien in his favour in respect of the balance of Rs. 2,512-14-9 then due to him by the plaintiffs.

9. That this defendant retained the said sum of Rs. 2,512-14-9 so due to him as aforesaid out of the said fund of Rs. 4,237-1-0 leaving a balance of Rs. 1,724-2-3 in his hands payable to the plaintiffs.

8. The question at the trial, however, was limited to a sum of Rs. 1,700 or 100 gold mohurs in respect of fees paid by the defendant to Counsel, which were disallowed on taxation as between attorney and client. This sum was made up of fees paid to Counsel in respect of the suit to the extent of 72 gold mohurs or Rs. 1,224 and fees in respect of the appeal to the extent of 28 gold mohurs or Rs. 476.

9. There is no doubt, in my¹ opinion, that the special fees, which were paid to Counsel, were arranged by the defendant with the Counsel on the express instructions of the plaintiffs that the plaintiffs were informed by the defendant that they would not be allowed on taxation, that in spite of such information the plaintiffs instructed the defendant to pay the fees to Counsel.

10. Further, I am satisfied, that with the possible exception of a small sum of about Rs. 200 the fees were paid by the defendant out of money provided by the plaintiffs for the express purpose of the payment of the fees to Counsel. On the evidence it is possible that the above mentioned sum of about Rs. 200 was paid out of money provided by the plaintiffs for that purpose, and it is such a small sum that it may be taken for the purpose of this case that the whole of the Rs. 1,700 which is in dispute, was paid out of money provided by the plaintiffs for the purpose of paying the specially arranged counsel's fees.

11. There is no doubt that the defendant paid the specially-arranged counsel's fees and in many instances from day to day as the fees became due.

12. Under these circumstances it is difficult to understand how the plaintiffs can bring themselves to claim the sum of Rs. 1,700 from the defendant, especially

having regard to the fact that it is not disputed that the defendant served them well as their attorney and that they were successful in the litigation in which they were involved.

13. The question, however, is whether, the plaintiffs having paid the sum in question to the defendant for the express purpose of his paying the specially-arranged Counsel's fees with full knowledge that they would not be allowed on taxation, and the defendant having used the money for that purpose and having paid the Counsel's fees the plaintiffs are entitled to recover the balance of such fees, which was not allowed on taxation between attorney and client.

14. It was contended on behalf of the defendant that under the above mentioned circumstances the plaintiffs had no cause of action in respect of the Rs. 1,700 : on the other hand, it was contended that as the fees constituting the sum of Rs. 1,700 had been disallowed on taxation as between attorney and client, the defendant was liable to repay the sum to the plaintiffs.

15. I do not consider it necessary to -refer to the rules in Chap. 36 in detail.

16. I desire however to draw attention to Chap. 36, Rule 14 which provides that in all cases of taxation as between party and party, the bill shall be lodged for taxation as between party and party and also as between attorney and client.

17. The result is, that whenever a bill is Carried on for the purpose of taxation as between party and party, there must be not only a taxation as between party and party, but also a taxation as between attorney and client.

18. The scheme of the rules seems to be that the taxation, so provided for, should be final and conclusive, subject to an application or reference to the Court or a Judge not only as between the parties to the litigation, but also as between the attorney and client.

19. If, therefore, the attorney or client is dissatisfied with the taxation, he should adopt the procedure which is laid down by the rules and make an application to the Judge. This procedure would apply whether the application is for a review of the taxation in respect of certain items, or for an order under Rule 32 of Chap. 36

for an allowance of fees to Counsel higher or other than the fees set out in the table embodied in that rule.

20. That course was not adopted in this case by the attorney.

21. It may be surmised not unreasonably that the defendant, may have considered that it would not be necessary for him to do so, in view of the fact that he had funds of the plaintiffs in his hands, that he had paid the specially arranged fees to Counsel on the express instruction of his clients, who are relations of his, and who had full knowledge that the fees would not be allowed on taxation, and he might not unreasonably anticipate that his clients under such circumstances would not claim the money representing such fees from him.

22. It may, however be, that the attorney did not appreciate fully the effect of the rules relating to Counsel fees, and the result of their being disallowed on taxation, even though he had paid them on the express instructions of his clients.

23. Whatever the reason may be, it is clear that the defendant did not adopt the proper procedure and the question arises whether he is entitled to any relief in respect of this matter.

24. The defendant alleged that in this case he was entitled to make the necessary application to the Court even after the suit had been brought.

25. The circumstances of this case appear to be so special, and the claim of the plaintiffs is so entirely devoid of merits, that in my judgment, in order that justice should be done between the parties and that the taxation rules should be complied with, the Court should exercise the jurisdiction vested in it, by Chap. 36, Rule 32, even though a considerable time has elapsed and the attorney did not follow the prescribed procedure.

26. In my judgment, therefore, the defendant's bill should be remitted to the Taxing Officer with a direction that the Taxing Officer shall allow as between attorney and client the sum of Rs. 1,700 in respect of the fees paid by the defendant to Counsel, which are represented by that sum.

27. The defendant will then be entitled to debit the plaintiffs with that sum in his account with them.
28. The result of that will be that the plaintiffs will not be entitled to recover in this suit any more than the defendant has paid into Court.
29. In my opinion the order and decree of the learned Judge there for should be varied, and an order drawn in accordance with the direction of this Court, and a decree should be made in favour of the plaintiffs for Rs. 1,724 instead of the sum of Rs. 3,424. The order for payment to the plaintiffs of the money in Court will stand.
30. On the one hand the plaintiffs have no merits; on the other hand the defendant did not adopt the course which he should have done; and in my judgment, each party must pay his or their own costs of the suit and the appeal.
31. I desire to make it clear that what I am about to say, is not to be taken as infringing in any way upon the decision in *Section M. Dutt v. D.M. Roy* A.I.R. 1922 Cal. 402 as to the jurisdiction and discretion of the Court or a Judge being unfettered.
32. I think, however, it is desirable to emphasise with a view to the future, that when an attorney proposes or is asked by his client to mark on the brief or to pay fees to Counsel, which cannot be allowed on taxation by the Taxing Officer, he should in every case before marking or paying such fees make it clear to his client that such fees will not be allowed on taxation and he should obtain a letter signed by his client authorising or ratifying the payment of such fees : and if and when such fees are disallowed on taxation, the attorney must adopt the procedure laid down by the rules. Although the jurisdiction and discretion of the Court or a Judge may be unfettered, it would not be unreasonable for the Court or a Judge to require the production of a letter containing the consent in writing of the client to the payment of such fees, and including an acknowledgment that he has been informed that the fees would not be allowed on taxation. Unless such a course is followed in the future the attorney will run a grave risk of the payments made by him in respect of such a special fee being disallowed and becoming irrecoverable

by him against his client.

33. Before parting with this case it is necessary to refer to a part of the evidence, to which our attention has been drawn; it has no bearing upon the decision of the appeal, but it raises a matter of importance.

34. It appears that the plaintiffs instructed the attorney, the defendant, to retain two leading Counsel for the suit. One of the Counsel wanted a fee of 30 gold mohurs per day and the other asked a fee of 15 gold mohurs per day.

35. It was eventually arranged that the first learned Counsel should receive a fee of 20 gold mohurs per day and the second should receive 12 gold mohurs per day, for the trial of the suit. These fees were paid by the attorney to the learned Counsel less a small deduction agreed to by the learned Counsel. When, however, the brief of the first learned Counsel was produced for taxation as between party and party, it was marked 30 gold mohurs cons 5 gms. and 17 gms. for the 2nd, 3rd, 4th, 5th, 6th and 7th days and 16 gms. for the 8th day.

36. The second learned Counsel's brief was marked 20 gms. and 3 gms. for consultation and 10 gms for each of the following; days, viz., the 2nd to the 8th.

37. The learned Counsel signed for their fees. It is to be noted that the fees appearing on the briefs were not in accordance with the fee which had been arranged with the learned Counsel and which the Counsel received.

38. After discussion of evidence on the point, the judgment proceeded:

It is evident therefore that the fees appearing on the briefs were not those arranged and actually paid to the learned Counsel, but that the fees were marked in the manner appearing on the briefs for the purpose of taxation as between party and party and with the object for getting; these fees allowed in taxation and recovering them from the Opposite Party.

39. I do not mean to suggest that the learned Counsel signed for any fees which they had not received; because-they did receive the total appearing on the briefs The figures on the briefs work out at rather more than 19 gold mohurs per day and

11 gold mohurs per day in the case of the two learned Counsel respectively. The learned Counsel, however, did not receive them in the form and manner appearing on the briefs. It was stated by learned Counsel in Court that this was a common practice, adopted for the purpose of getting the fees allowed in a party and party taxation against the unsuccessful party.

40. I desire to make it clear that such a practice cannot be recognised by the Court for a moment.

41. In our judgment such a practice is reprehensible, and not in accordance with the traditions of the profession and we wish it to be clearly understood that it must not be repeated in the future. If it as, and if it comes to the knowledge of the Court, it may be that the Court will take a serious view of the matter.

42. I should have thought that what I am about to say was so well known in the profession that no necessity would arise for referring to it.

43. The actual fees, which it has been arranged to pay to Counsel, must be marked on the Counsel's brief, and no manipulation thereof can be permitted for the purpose of taxation or otherwise.

44. Learned Counsel should sign for the fees which have been arranged and paid, and in actual form in which they were arranged and paid and no departure there from can be entertained either for the purpose of taxation or otherwise.

Richardson, J.

45. I accept with considerable hesitation the order proposed by the learned Chief Justice. An attorney is an officer of the Court and, I am disposed to regard it is an improper proceeding on his part to contest in a Court of law, whether as a plaintiff or as a defendant, the amount of a bill of costs which has been taxed by the Court's Deputy, the Taxing Officer, subject to the supervision and the orders of the Court.

46. In the present case, however, the circumstances are exceptional and as to the merits of the dispute there can be no question. That being so, and as I understand

that the case is not to be treated as a precedent, I do not press my doubts to the point of dissent.

47. I desire to say that I fully concur in the observations which have fallen from the learned Chief Justice as to the mode in which Counsel's fees should be marked on their briefs.

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