

Askaran Choutmal Vs. the E.i.Ry. Co.

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Court : Kolkata

Decided On : Jan-02-1925

Reported in : (1925)ILR52Cal386

Judge : Page, J.

Appellant : Askaran Choutmal

Respondent : The E.i.Ry. Co.

Advocate for Def. : Mr. S. K. Gupta

Advocate for Pet/Ap. : Mr. A. K. Hoy

Judgement :

Page, J.

1. This motion raises a question of general interest and importance relating to the authority of counsel to compromise a suit. The material facts are simple and can readily be ascertained. The suit out of which this motion arises was brought to recover a sum of Rs. 3,117-13 as damages for the non-delivery of a consignment of ghee which the defendant company had accepted for transportation. On the 11th November 1924 the suit was in the list for hearing, but was adjourned by consent. On the 20th or 21st November, Mr. A. K. Hoy, counsel for the plaintiff, and Mr. S. K. Gupta, counsel for the defendant, in the presence of Mr. Sushil Sen,

solicitor for the plaintiff, held a meeting in the Bar Library for the purpose of negotiating a settlement of the suit. Mr. Gupta suggested that the cLalm should be settled for Rs. 1,500; Mr. Roy asked for Rs. 2,000, and eventually it was agreed that a decree should be passed for Rs. 1,750 in full settlement of the plaintiff's cLalm and costs. On the 24th November Mr. Sen requested Mr. Gupta to move the Court that the terms of settlement be recorded, and a decree passed in accordance therewith. Mr. Gupta expressed his willingness to do so. Late in the afternoon on the 24th November, however, Messrs. Morgan & Co., solicitors for the defendant company, received a letter from the defendant refusing to agree to a settlement, and expressing a desire that the suit should be fought out. On the 25th November Mr. Gupta informed Mr. Sen in court that the defendant was not willing to accept the proposed terms of settlement. On the 3rd December the plaintiff launched this motion that the settlement be-recorded, and a decree passed in accordance therewith. I am satisfied on the affidavits---indeed it is not disputed---that Mr. Gupta agreed to the above terms of settlement with Mr. Roy. Mr. Satish Chandra Bose, an assistant in Messrs. Morgan & Co.'s office, however, stated in an affidavit (paragraph 5) that 'Mr. Gupta suggested Rs. 1,500, Mr. Roy suggested Rs. 2,000: then Mr. Sushil Ben suggested Rs. 1,750, upon which Mr. Gupta kept quiet. Mr. Gupta did not exclude the possibility of the matter being reopened should clients-think otherwise, but he did not make it clear, but as is usual in such matters there was always a mental reservation of reference to clients.' On the 27th November 1924 Messrs. Morgan & Co. writing to Messrs. Dutt & Sen, solicitors for the plaintiff, stated that 'it was no doubt tacitly agreed between counsel? 'that the suit should be settled on the terms men 'tioned but there was always a reservation of 'reference to clients'. Admittedly Mr. Gupta did not communicate either to Mr. Roy or to Mr. Sen 'the mental reservation' which Mr. S. C. Bose stated was in Mr. Gupta's mind. On the contrary Mr. Gupta appeared to be giving his consent unreservedly to the proposed settlement, and, in my opinion, the sanctity of contracts would be greatly imperilled if the Court were to permit a person, acting under no mistake of fact and no misapprehension as to his capacity to contract, and who to all intent and appearance had entered into a contract, subsequently to resile therefrom by unfolding a mental reservation of the existence of which no mention had been made at the time when the contract was entered into. To hold

such a person to the agreement which he had made is merely to apply the common law principle that a person's intention is to be ascertained from his acts, and the Court is not concerned to enquire what the uncommunicated mental processes may have been which at the material time were exercising his mind. I hold, therefore, that on the 21st November counsel, purporting to act on behalf of the parties, agreed to settle the suit. And upon the evidence I am further of opinion that the parties did not thereafter agree to treat the compromise so entered into as cancelled or at an end. The question which I have to determine is whether the above agreement to settle the suit is binding upon the parties. Now I am satisfied---indeed the plaintiff does not contend to the contrary---that the defendant company neither expressly authorised nor subsequently ratified the said agreement. If it had done so the question of the extent of counsel's authority would not have arisen, for the authority of Mr. Gupta and Mr. Roy to enter into the agreement would in that event have been derived from the mandate which they had received from the parties, and the fact that they happened to be counsel would have been immaterial. I have, therefore, to consider whether in the above circumstances Mr. Roy and Mr. Gupta as counsel were clothed with authority to bind their clients by the compromise which they effected. In this judgment when using the term 'counsel' I intend to refer in India to advocates entitled to practise on the Original Side of the High Court, and must not be taken to refer to vakils or attorneys, for with respect to their authority and status different considerations arise. Now the position of counsel who are retained to act in a cause on behalf of a client is not always understood. It is of the utmost importance, however, to the community at large, as well as to the legal profession, that the relation of counsel to their clients should be fully appreciated; the more so, inasmuch as 'the old order changeth giving place to new', and the roll of advocates entitled to practise on the Original Side of the High Court, which hitherto has been confined to persons entitled to practise as barristers in England or Ireland, or as members of the Faculty of Advocates in Scotland, has been enlarged so as to include under certain conditions vakils and attorneys who have not necessarily received any legal training in Great Britain or Ireland. It is essential, therefore, that the vakils and attorneys so admitted, who are bound in all respects to conform to the practice obtaining, and are subject to the same obligations and rules of

professional etiquette as advocates practising, on the Original Side of the Court, should be under no misapprehension as to the rights and obligations which attach to them as advocates of the High Court. Moreover, since the hearing of this motion my learned brother Bepin Behari Ghose J. sitting with Walmsley J. on the Appellate Side of the Court, in First Appeal No. 94 of 1924 and Miscellaneous Appeal No. 136 of 1924 passed the following observations: 'Before dealing with the matters in controversy before us I should refer to the observations of the Subordinate Judge as to the application of the rule in England regarding the authority of counsel to compromise a case without reference to his client. He appears to have held that the common law rule in England is applicable to this case, and he refers to the cases of *Strauss v. Francis* (1866) L. B. 1 Q. B. 379. and *Mathews v. Munster* (1887) L. R. 20 Q. B. D. 141. This is contested by the 'appellant. Even if this case exactly came under the 'rule in those cases I should be extremely reluctant to hold, unless compelled to do so by any binding authority, that a rule of practice in England which has its roots in different traditions and environments should be applied in this country, particularly in the moffusil where people never heard of any such practice.' After citing a passage from the judgment of Lord Halsbury L. C. in *Neale v. Gordon Lennox* [1902] A. C. 465, 469. to which 'I shall hereafter have occasion to refer, His. Lordship added: I need hardly say anything further on the point as learned Counsel for the respondent in his careful argument did not rely upon the general; authority of counsel to compromise the case.' Now, the above observations are obiter dicta, for in that case their Lordships held that in fact no concluded or valid agreement had been effected, but so opposite is. the view which B. B. Ghose J. expressed to the question which I have to determine on this motion that I feel constrained to express my opinion as to whether it is correct. With great respect I am unable to subscribe to the doctrine that the status of an advocate of the Calcutta High Court differs from that of a barrister in England. I apprehend that the: rights, privileges and obligations of an advocate of the: Calcutta High Court are, and since its foundation have-been, the same as those of counsel entitled to practise-in what is now the High Court of Justice in England. The traditions and environment in which counsel in England carry on their practice to the honour of their profession long ago were implanted in India, and have ever been the pride and mainstay of the advocates of the Calcutta

High Court. I should decline to entertain any suggestion that in the future advocates will not foster and maintain the traditions, which hitherto have obtained in the Calcutta High Court, and I should dissociate myself from any attempt which might be made, to detract from the privileges of counsel, or to limit the authority which attaches to advocates of the High Court. In my opinion, the authority of advocates remains the same whether they appear as counsel in the High Court or in Courts subordinate thereto. The rights and obligations of counsel, in my judgment, do not vary according to the Court in which they happen to be appearing, for the authority of counsel is derived not from the fact that they are appearing in any particular Court, but from the status which they acquire on being admitted to the roll of advocates. I am of opinion that where counsel appear in Courts other than the High Court they carry with them the traditions and privileges of their profession, and the sanctions of their high calling. Now, it is not unfrequently asserted that the relation of a client to his counsel is that of a principal to an agent. In truth the relationship is of a very different nature. The authority of counsel is not in any sense incidental to a contract into which he has entered with his client. 'Barristers,' wrote Sir William Blackstone, Commentaries, Vol. 3, p. 27. 'may take upon them the protection and defence of any' suitors whether plaintiff, or defendant, who are therefore called their clients like dependants upon the ancient Roman orators. Those indeed practised gratis for honour merely or at most for the sake of gaining influence; and so likewise it is established with us that a counsel can maintain no action for his fees; which are given not as *locatio vel conductio* but as *quiddam honorarium*; not as a salary or hire but as a mere gratuity which a counsellor cannot demand 'without doing wrong to his reputation.' In *Colledge v. Horn* (1825) 3 Bing. 119, 121. Chief Justice Best said: 'I cannot allow 'that the counsel is the agent of the party.' In *Swinfen v. Lord Chelmsford* (1860) 5 H. & N. 890, 920. Chief Baron Pollock observed: 'We are of opinion that an advocate of the English Bar accepting a brief in the usual way undertakes a duty, but he does not enter into any contract or promise express or implied. Oases indeed occur where on an express promise (if he made one) he would be liable in *assumpsit*, but we think that a barrister is to be considered not as making a contract with his client, but as taking upon himself an office or duty in the proper discharge of which not merely the client, but the Court in which the duty

is to be performed, and the public at large have an interest.'

2. And later:

The conduct and control of the cause are necessarily left to counsel. If a party desires to retain the power of directing counsel how the suit should be conducted he must agree with some counsel willing so to bind himself. A counsel is not subject to an action for calling or not calling a particular witness or putting or omitting to put a particular question or for honestly taking a view of the case which may turn out to be quite erroneous. If he were so liable counsel would perform their duty under the peril of an action by every disappointed and angry client.

3. Again:

I think it right to express my own opinion that provided that an advocate acts honestly with a view to the interest of his client he is not responsible at all in an action. It seems admitted on all hands that he is not responsible for ignorance of law or any mistake in fact or for being less eloquent or less astute than he was expected to be. According to my view of the law a barrister acting with perfect good faith and with a single view to the interest of his client is not responsible for any mistake or indiscretion or error 'of judgment of any sort.' In *Strauss v. Francis* (1) (1866) L. R. 1 Q. B. 379 Mr. Justice Blackburn, as he then was, stated his view of the rule in memorable words: 'Mr. Kenealy has ventured to suggest that the retainer of counsel in a cause simply implies the exercise of his power of argument and eloquence. But counsel have far higher attributes, namely, the exercise of judgment and discretion on emergencies arising in the conduct of a cause, and a client is guided in his selection of counsel by his reputation for honour, skill, and discretion. Few counsel, I hope, would accept a brief on the unworthy terms that he is simply to be the mouthpiece of his client. Counsel, therefore, being ordinarily retained to conduct a cause without any limitation, the apparent authority with which he is clothed when he appears to conduct the cause is to do everything which, in the exercise of his discretion, he may think best for the interests of his client in the conduct of the cause; and if within the limits of this apparent authority he enters into an agreement with the opposite counsel as to the cause, on every principle this agreement should be held binding. No counsel, added Mellor J.

certainly no counsel who values his character, would condescend to accept a brief in a cause on the terms which the plaintiff's counsel seems to suggest, viz., without being allowed any discretion as to the mode of conducting the cause. And if a client were to attempt thus to fetter counsel the only course is to return the brief.

4. In *Hutchinson v. Stephens* (1837) 1 Keen 659, 668. Lord Langdale M. R. remarked: 'With respect to the task, which I may be 'considered to have imposed upon counsel, I wish to observe that it arises from the confidence which long experience induces me to repose in them, and from a sense which I entertain of the truly honourable and important services which they constantly perform as ministers of justice, acting in aid of the Judge before whom they practise. No counsel supposes himself to be the mere advocate or agent of his client, to gain a victory, if he can, on a particular occasion. The zeal and the arguments of every counsel, knowing what is due to himself and his honourable profession, are qualified not only by considerations affecting his own character as a man of honour, experience, and learning, but also by considerations affecting the general interests of justice. It is to these considerations that I apply myself; and I am far from thinking that any counsel who attends here will knowingly violate, 'or silently permit to be violated, any established rule 'of the Court to promote the purposes of any client or 'refuse to afford me the assistance which I ask in these 'cases.' In *Mathews v. Munster* (1887) L.R. 20 Q.B.D. 141, 142. Lord Esher Laid down the rule as follows: This state of things raises the question of the relationship between counsel and his client, which is sometimes expressed as if it were that of agent and principal. For myself I do not adopt and never have adopted that phraseology, which seems to me to be misleading. No counsel can be advocate for any person against the will of such person, and as he cannot put himself in that position, so he cannot continue in it after his authority is withdrawn. But when the client has requested counsel to act as his advocate he has done something more, for he thereby represents to the other side that counsel is to act for him in the usual course, and he must be bound by that representation so long as it continues, so that a secret withdrawal of authority unknown to the other side would not affect the apparent authority of counsel. The request does not mean that counsel is to act in any other character than that of advocate or to do any other act than such as an

advocate usually does. The duty of counsel is to advise his client out of Court and to act for him in Court, and until his authority is withdrawn he has, with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client. And Bowen L.J. stated that counsel is clothed by his retainer with complete authority over the suit, the mode of conducting it, and all that is incident to it, and this is understood by the opposite party. It is, in my opinion, settled law that an advocate of the High Court in the course of conducting the cause is clothed with authority to compromise a suit in which he has been retained as counsel. In *Nundo Lal Bose v. Nistarini Dassi* (1900) 1 L. R. 27 Cal. 428, 438. Maclean C.J. observed that there cannot, I think, be any reasonable doubt at the present day that counsel possesses a general authority, an apparent authority, which must be taken to continue until notice be given to the other side by the client that it has been determined, to settle and compromise the suit in which he is actually retained as counsel, and in the exercise of his discretion to do that which he considers best for the interest of his client in the conduct of the particular case in which he is so retained [see also *B.N. Sen v. Chuni Lal Datt & Co.* (2) (1923) 1 L. R. 51 Cal. 385. I am farther of opinion that such a compromise would be valid and binding upon the parties even although it had been effected contrary to the express instructions of the client, unless the prohibition had previously been communicated to the other side: *Strauss v. Francis* (1866) L. R. 1 Q. B. 379., *Mathews v. Munster* (1887) L.R. 20 Q. B. D. 141., *Welsh v. Roe* [1918] 87 L. J. K. B. 520, and *Shepherd v. Robinson* [1919] 1 K. B. 474. In some cases in which the compromise of a suit has been effected by counsel in Court it has been held that the Court will not order a decree to be drawn up in accordance with the settlement, but will leave the party to enforce the agreement by filing a suit [*Green v. Crockett* (1865) 34 L. J. (N. S.) Eq. 606., and *Richardson v. Eyton* (1852) 7 De G. M. & G. 79.]. In my opinion, however, in India the Court in such cases ought not to put the parties to the expense of further litigation by bringing a separate suit upon the agreement, but in a proper case should exercise the powers which it possesses under Order XXIII, Rule 3. [See per Mathew L. J. in *Neale v. Gordon Lennox* [1902] 1 K. B. 855.] Again, there is authority to be found in support of the following propositions that until a consent order has been drawn up the party may under certain circumstances resile from an agreement to settle a suit to which he has

assented, and that in respect of a compromise there is a difference between a consent order which is interlocutory and one which is final. With all due deference I am unable to give my assent to either of these propositions. In my opinion, in considering whether such a settlement has been arrived at as would justify the Court in passing a decree under Order XXIII, Rule 3, the matter as to which the Court has to be satisfied is not that the order was a final order or a perfected order, but that it was an agreed order. But a litigant is not entitled *ex debito justiciar* to an order under Order XXIII, Rule 3, or to a decree in a suit brought to enforce a compromise effected by counsel, merely because the Court is satisfied that counsel in bringing about the settlement possessed authority as counsel in that behalf. The duty of the Court in such circumstances is clearly, and to my mind conclusively, Laid down by the House of Lords in *Neale v. Gordon Lennox* [1902] A. C. 465. With all due respect to Macardie J. I do not agree with him in thinking that this case 'is 'not a precedent of general application' *Welsh v. Roe* (1918) 87 L. J. K. B. 520, 522. In my opinion, all cases relating to the authority of counsel must now be read in the light of the judgment in that case. Lord Halsbury in stating what in his opinion is the duty of the Court in such circumstances took the broad and common sense view which, if I may venture to say so, is invariably to be found in the judicial utterances of that great Judge. His Lordship observed: 'My Lords, as I said, I will not go through the cases, because to 'my mind there is a higher and much more important 'principle involved. The Court is asked for its assistance, and I entirely repudiate the technical distinction between what is called an application for specific performance and an order to be made that such and such things should be done. The Court is asked for its assistance when this order is asked to be made and enforced that the trial of the cause should not go on; and to suggest to me that a Court of Justice is so far bound by the unauthorised act of learned Counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard. That condition of things seems not to have been in the contemplation of the Court of Appeal. I will only say for myself that I should absolutely repudiate any such principle. Where the contract is something which the parties are themselves by law competent to agree to, and where the contract has been made, I have nothing to say to the policy of law which prevents that contract being undone; the contract is by law final

and conclusive. But when two parties seek as part of the arrangement the intervention of a Court of Justice to say that something shall or shall not be done, although one of the parties to it is clearly not consenting to it, but has in the most distinct form said that the consent to refer, to take it from the jurisdiction of the ordinary tribunal, shall only be on certain terms, to say that any learned Counsel can so far contradict what his client has said, and act without the authority of his client as to bind the Court itself, is a proposition which I certainly will never assent to'...'But when I come to this case and consider the question of what should be the position of the other party who has acted upon the apparent authority of counsel, there are cases in which the Court undoubtedly ' in the exercise of its discretion (and that is the observation which I intended to make) might well say, 'If it is only a question of money, if it is only a question which costs will rectify, this matter can be put right by the payment of costs. That is one example. Or the position of the other party might have been totally altered; for instance, I could imagine a case to be so delayed that it made the Statute of Limitations to run so that there was no possibility of trying the action again; and other cases might be put which would raise the question of the other party being put into such a position by the unauthorised act of counsel that one might well say. This is a case in which one of the two innocent parties must suffer; then the person by the act of whose counsel (the counsel whom he is responsible for employing) the difficulty has been created must suffer: the position of the parties has been totally altered by what has taken place and therefore we cannot interfere': *Neale v. Gordon Lennox* [1902] A. C. 465. Whether or not the Court is satisfied that the suit has been adjusted by a valid agreement or compromise which the Court is bound to enforce must depend upon the circumstances of each case. See *Furnival v. Bogle* (1827) 4 Russ. 142., *Swinfen v. Swinfen* (1857) 24 Bevan 549., *Thomas v. Hewes* (1834) 2 Cr. & M. 519., *Holt v. Jesse* (1876) 3 Ch. D. 177., *Harvey v. Croydon Union Rural Sanitary Authority* (1884) 26 Ch. D. 219., *Lewis v. Lewis* (1890) 45 Ch. D. 281., *Jang Bahadur Singh v. Shankar Red* (1890) 13 All. 272., *Hickman v. Berens* [1895] 2 Ch. 638., *Wilding v. Sanderson* [1897] 2 Ch. 534., *Nando Lal Bose's case* (1900) 17 Cal. 428., *Shepherd v. Robinson* [1919] 1 K B. 474. In this case I am satisfied that Mr. Gupta when he effected the settlement of the suit with Mr. Roy was not labouring under any mistake of fact, or any misapprehension as to

the extent of his authority as counsel to compromise the suit on behalf, of the defendant company, and if this settlement had been arrived at, or had been assented to, in Court I am of opinion that the Court ought to give the seal of its authority to the arrangement, and to pass an order and decree as prayed. But it is urged on behalf of the defendant company that the apparent authority of counsel who is retained to conduct a suit to bind his client by his admissions and acts is restricted to acts and admissions coram judice or in Court, and that such acts and admissions out of Court do not bind the client unless in fact they are authorised by the client, or by his agent duly authorised in that behalf. I have been unable to discover any direct authority upon this important question, but upon principle I am of opinion that this contention which has been raised on behalf of the defendant is sound. The duty of counsel, as Lord Esher stated in *Mathews v. Munster* (1887) L. R. 20 Q. B. D. 141, is to advise his client out of court and to act for him in court. The nature of the duty which an advocate accepts by undertaking to appear for a client would seem to indicate that he is clothed with authority to bind his client only when he is in fact engaged in the actual management of the suit. (See Pollock and Maitland's *History of English Law*, Vol. I, p. 211 et seq.) It is only because he is entrusted with the actual conduct of the suit that his discretion in the management thereof is to remain unfettered. In *contestatione litis*, he is no more the agent of his client, or bound by his instructions, than the master of a vessel is the agent of the passengers whom he has undertaken to carry in his ship. Alike in the conduct of the suit and in the navigation of the vessel the person who has undertaken the duty must carry it out in reliance upon his own skill and judgment. In short, counsel's authority is commensurate with his responsibility. But when he is not appearing in Court the reason for the unfettered discretion which counsel possesses in Court no longer exists. He then advises, he does not 'act' for his client, and, in my opinion, a compromise effected by counsel out of Court, and not assented to by the client, is only binding upon the client if it is expressly authorised, or subsequently ratified by the client, or by his agent authorised in that behalf. Three cases may be referred to in this connection. In *Richardson v. Peto* (1840) 1 M. & G. 896., the defendant's counsel, having obtained a rule nisi calling upon the plaintiff to show cause why a judgment should not be entered as in case of a non-suit, the attorney for the plaintiff met the defendant's counsel in the street;

informed him that the plaintiff was unwell, and unable to give the necessary instructions for showing cause against the rule; and requested the defendant's counsel to postpone bringing on the motion to make the rule absolute, which the latter consented to do upon being informed that counsel would be instructed to oppose the rule. Tindall C. J. in giving judgment remarked: 'I think that this rule ought to be discharged. The grounds upon which this application is made are such as would place counsel in a false position, and would be very injurious for the practice of the bar. The attorney admitted to prosecute or defend representing his client throughout the case, but a counsel represents his client only when speaking for him in Court. It would confuse the relative position of the two branches of the profession if we were to hold that communication made by the counsel was to have the same effect as a communication made to or proceeding from the attorney.' In *Green v. Crockett* (1865) 34 L. J. (N. S.) Eq. 606. cogent evidence was adduced to prove that the agreement which had been effected by counsel out of Court was in fact authorised by the client. The Lord Chancellor, Lord Cranworth, however, while expressing no opinion as to whether an agreement could be enforced by a bill for specific performance, stated that the arrangement so made could not be 'treated as an agreement made in the cause or in Court.' The decision in this case as reported does not appear to be satisfactory or conclusive, for, having regard to the practice in Chancery, non constat that the Court would have granted the prayer in the petition even if the arrangement had been arrived at in Court. The judgment of Moloney J. in the Irish case of *Gethings v. Cloney* (1913) 48 Irish Law Times 55. does not carry the matter any further for the Court held that the counsel who settled the case did not purport to do so on their own authority, and that no agreement to settle the suit had in fact been concluded between the parties. Applying the rule which I have stated to the facts of this case it is common ground that the counsel who effected the settlement in the Bar Library did not assent to the arrangement coram judice, or in Court, and as the defendant company, which neither expressly authorised nor ratified the arrangement, refused to give its consent to the terms thereof, I hold that the compromise is not binding upon the parties, and I dismiss this application.

5. I make no order as to costs.

