# ALLAHABAD HIGH COURT

Nihal Chand Shastri

Vs.

Dilawar Khan

(Mukerji, Ag. C.J)

10.03.1933

## JUDGMENT

**Mukerji, Ag. C.J**

1. These two revisions have arisen out of a Small Cause Court Suit No. 5247 of 1930 instituted by Mr. Nihal Chand Shastri against two defendants, Masood Ahmad Khan and Dilawar Khan alias Dilawar for recovery of L 340. The plaintiff's case was that defendant 2, Dilawar had a criminal case against him in a Magistrate's Court at Muzaffarnagar, where the plaintiff was then practising as an advocate of the High Court. Masood Ahmad Khan was the plaintiff's clerk. Dilawar Khan wanted the plaintiff to go to Allahabad and to file an application for transfer of the criminal case from Muzaffarnagar and agreed to pay L 50 a day for the period during which the plaintiff would be away from Muzaffarnagar. As Dilawar Khan had no money to pay down, Masood Ahmad Khan, the plaintiff's clerk stood surety for him. The plaintiff carried out his part of the contract, but was not paid. The plaintiff accordingly brought the suit. The learned Judge of the Small Cause Court decreed the suit for L 250 only, being the principal amount claimed, but dismissed the suit with respect to interest. The claim for interest was disallowed, because there was no stipulation to pay any.

2. Civil Revision No. 1 of 1932, has been filed by Masood Ahmad Khan and Mr. Nihal Chand has filed Civil Revision No. 173 of 1932. Dilawar Khan has evidently submitted to the decree. In his petition of revision, Masood Ahmad Khan contended that a certain letter of 30th November 1930, written by the plaintiff to him should have been admitted into evidence, and that in view of that letter the plaintiff's claims as against the applicant should have been dismissed. In his petition of revision the plaintiff contended that he was entitled to interest under Section 73, Contract Act. The two petitions came up before the Hon'ble the Chief Justice, and apparently before him the point was taken orally that the plaintiff being a Barrister enrolled in England was not entitled to maintain a suit for his fees. The learned Chief Justice accordingly referred the case to two Judges. This matter came before the learned Chief Justice and one of us, and they thought that the matter should go before a Full Bench. The three Judges before whom the Full Bench

case came thought it desirable that the case should go before five Judges, as some doubt was entertained about the correctness of a previous Full Bench decision, viz., C. *Ross Alston v. Pitamber Das*[1]

[1](1908) 25 All 509

3. The case has now been argued fully before the Full Bench, and the Full Bench had had the advantage of hearing Mr. Khwaja and Mr. Malik as representing the Bar Library and Dr. Katju as representing the Advocates' Association. Before we proceed to decide the most important question as to whether an advocate who is a Barrister of England can maintain his suit for his fees, I think the other questions involved in the two revisions should be decided. On the question of the compromise, it appears that although Mr. Nihal Chand gave a note to Masood Ahmad Khan that he would not be liable in the case, but the note was given subject to certain conditions which have not been fulfilled. Masood Ahmad Khan did not file the letter before the Court till the last moment when he found that the case was being decided against him. I am therefore of opinion that the decree against Masood Ahmad Khan was a right one on the merits. As regards the right of the plaintiff to recover interest, I do not think that we should allow any interest in this case, because although the suit is based on a contract, there is no evidence that on account of non-payment of the plaintiff's fees, he actually suffered a loss. I would therefore dismiss the plaintiff's petition in revision.

4. Now I proceed to consider the point raised by Masood Ahmad Khan orally, namely, the suit itself is not maintainable, the plaintiff being a Barrister of England. We have to consider the question only with respect to Barristers who have been enrolled in this. Court, for we are not aware of the circumstances under which Barristers of England are permitted to practise in other High Courts or in Courts subordinate to those High Courts. My opinion, therefore must be taken as confined to the conditions prevailing in this Court and Courts, subordinate to this Court. This Court under its powers conferred on it by the Letters Patent is entitled to enroll advocates for practicing in this Court and Courts subordinate to it, vide Clause 7 which runs as follows:

> And we do hereby authorize and empower the said High Court of Judicature at Allahabad to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court shall deem meet....

5. The High Court framed certain rules laying down the qualifications needed for enrolment of advocates. The rules now in force are to be found in Chap. 15 of the Rules of the Court. They are rules made by the Bar Council since the Bar Councils Act, came into force, and they have been approved by the High Court. Under Rule 1 of these rules any Barrister of England...and any graduate of law of any University mentioned in the schedule, who in each case has further gone through a course of training for one year...may present an application for his admission to-the roll of advocates of the Court.

6. The older rules more or less on similar lines. The rules and the Clause 7, Letters Patant, show

that a Barrister of England as a Barrister has no right to practise in the High Court or in any Court subordinate to the High Court. Certain qualifications of different kinds are laid down for admission as advocates, and the fact that a candidate is a Barrister of England is one kind of qualification for enrolment. When a-person who has taken the law degree of Allahabad University is enrolled as an advocate, he becomes as much an advocate of the Allahabad High Court as a Barrister of England. The Rules of the High Court make no distinction, between the two persons with different qualifications. Before the Bar Councils-Act was passed and was acted upon, the Barristers from England were admitted on the roll of the High Court as advocate, while the Indian Graduates of law were admitted as vakils. Later on certain eminent vakils were given the status of advocates and, thereupon, they became as much advocates as Barristers from England enrolled in the Allahabad High Court. In all these cases the right of a Barrister to appear in the High Court or in the Courts subordinate to the High Court arose from his enrolment as an advocate and not otherwise.

7. Having been enrolled as an advocate, the Barrister or the Graduate at Law of the Indian University acquires certain privileges and the privilege is to appear, plead or act in any suit or appeal, vide Rule 10 of the High Court Rules in Chap. 15, p. 100. It is common ground that a barrister in England as such is not entitled to act. He can only plead. It follows from the Rules of the High Court of Allahabad that the disability of a Barrister-at-law to act in England disappears on his being enrolled as an advocate of the High. Court. A Barrister-at-law in England not being entitled to act is not allowed to have a lien on any litigant's papers or money, but a Barrister, who is an advocate of the High Court of Allahabad., may have such a lien. This is re-cognized by Rule 14, Chap. 15, (p. 101) of the High Court Rules. Rule 15 of the same Chapter at p. 102, lays down that an Advocate' (including a Barrister-Advocate) is entitled to appear, plead and act in any Court Subordinate to the High Court. In the province of Agra there are no Solicitors, and a Barrister-Advocate practising in the High Court or in any Subordinate Court is entitled to see his clients and to settle his fees. This he cannot do in England.

8. From what has been said, it follows that the peculiar position of a Barrister-at-law in England disappears in the Province of Agra on his being admitted as an Advocate of the High Court. He combines in himself the capacities of a Barrister and Solicitor of England. He is as much subject to the disciplinary jurisdiction of the High Court as a non-Barrister-Advocate, while a Barrister of England while practicing there is not an officer of the Court and in the case of misconduct, his case is referred to the Benchers of the Inn to which he belongs. In England a Barrister cannot act, cannot receive a client or receive instructions from him except through a Solicitor. But this disability does not exist in him in the Province of Agra, if he has been enrolled as an advocate.

9. Cases have been cited before us where in Crown Colonies of England, barristers have combined in them the duties of a barrister, pure and simple, and the duties of a solicitor. It is not necessary to quote these cases. The question now arises whether in these circumstances a barrister-advocate should not have the privilege of suing his client for his fees. It is the peculiar

rule of England that a barrister can neither sue for his fees nor can be sued in damages for not attending to his duties or performing them negligently. This disability or privilege does not extend to solicitors, though they are permitted not only to act but also to plead in certain inferior Courts in England.

10. Now let us consider the reasons urged as to why a barrister-advocate practicing in the Province of Agra is not to have a privilege of suing Ms client for his fees. Various reasons have been advanced, and we shall have to consider them one by one. The first reason urged is that a barrister of England who comes out to these parts and practices on enrolment as an advocate carries with him the traditions of English bar and by those traditions he is incapable of entering into a contract as to fees with a client. This is a mere assertion and has no substantial ground for support behind it. The barrister in England is not permitted to see his client or to settle his fees with him, not because lie suffers from any disability to make a contract like a minor, but because there has been a usage to that effect. This is peculiar to England and is based on nothing more than a usage. In Halsbury's Laws of England (Edn.2, Vol. 2) Article 698 deals with the subject "Counsel and Client." It says:

> The usage and etiquette of the profession of a Barrister require that in all but some exceptional cases counsel should not undertake any professional work as regards which the relation of counsel and client can arise except on the instructions of a solicitor. There is no rule of law to prevent a litigant from instructing counsel directly or to prevent counsel so instructed from appearing on behalf of the litigant; but a judicial opinion has been expressed that it is expedient in the interests of suitors and for the satisfactory administration of justice to adhere to the usage which requires that counsel should not accept a brief in a civil suit from any one but a solicitor. The exact scope of the usage is not very clearly defined, but it extends to all civil contentious business, and to all criminal business except what is known as a "dock defence" or the conduct of a poor prisoner's defence at assizes or sessions if no solicitor is allocated.

11. It will be noticed that the rule is based on an usage and ettiquette and on them alone. No doubt attempt has been made from time to time to find out the reason of the rule, but no satisfactory reason has ever been found. In the well-known case of *Kennedy v. Brown*[2]Earle, C.J., supported the rule on the ground of public policy. Lord Watson in the case of the *Queen v. Doutre*[3] sitting in the Privy Council and delivering judgment of a Board which was constituted by such eminent lawyers as himself, Sir Barnes Peacock, Sir Robert P. Collier, Sir Richard Couch and Sir Arthur Hob-house, remarked (at p. 751) that the decision might be supported by usage and the peculiar constitution of the English bar without attempting to rest it upon general consideration of public policy. It will therefore be seen that the real ground of the rule is usage and the peculiar constitution of the English bar. Where these considerations do not exist, there can be no reason why an advocate should be under any disability to see his client, contract for fee and realize it by a suit.

12. A barrister practicing in these Provinces breaks all the rules that are peculiar to a barrister of England. He-takes full advantage of the privilege granted to him by the rules of the High Court. He sees his client, settles his fees and acts for him. He can do none of these in England while practicing as barrister, yet it is said that he carries with him his disability to sue his client in case of his fees not, being paid. We were told in the course of the argument that in the Allahabad High Court there were at least three members of the English bar practicing as advocates that do not sign any petition on behalf of their clients and thus do not "act," but these gentlemen must be under the necessity of seeing their clients directly and receiving instructions from them. The necessity arises from the mere fact that there are no solicitors through whom they can receive instructions. Even if there had been three out of say two dozen gentlemen who practice as barrister-advocates in the High^ Court itself (and there are so many in the districts), the fact that they try to keep up to the traditions of the English bar will not make any difference. As I have pointed out, they do not practice as barristers but as advocates and the rules permit them to see their client settle their fees and to act for them. The argument therefore that the barrister-

[2](1863) 13 C B (ns) 677 [3](1884) 9 A.G. 745

advocates carry their traditions of the English bar with them will not hold water.

13. The next argument that was advanced was that an agreement to plead as a part from an agreement to act could not constitute a contract because the subject-matter was such as made a contract impossible. The argument is advanced in this way. A client may have engaged a counsel to represent his case before a Court and the client expects that the counsel will show the best fight possible. The counsel on-studying the brief finds that there is no case for his client to be put forward, and then it will be his duty to tell the Court frankly that his client has no case. Assuming" that the professional duty of a counsel required him to behave in the way mentioned, it does not follow that he commits a breach of the contract which he has entered into with his client. The incidents of the contract, it must be taken carries with it the possibility of counsel telling the Court that his client has no case which can be seriously argued. If the argument that the engagement of a counsel by a client cannot amount to a contract were correct, then the same view. would hold good in the case of solicitors in England when they plead, and it would hold good throughout the rest of the world. When a counsel demands a fee which he thinks he ought to get for the duty he undertakes to do, and the client agrees to pay it, there is surely a contract and also a valid contract. I cannot see anything which may induce me to hold that the engagement cannot amount to a contract. There is a proposal for work and there is the consideration and there is an acceptance.

14. It was argued that under Section 11, Contract Act, there can be no contract of fees by a barrister because of the law to which he is subject, namely, the professional usages of the bar in England. This argument only begs the question. How a usage of England can be said to be the rule of law to which a barrister practising in these parts of the country is subject is difficult to see. The law mentioned in Section 11 is the law of the land, unless for some reason, which must be

substantiated some other law should apply. I have already shown that the conditions under which a barrister-advocate practises in the Provinces of Agra are wide apart from the conditions under which a barrister practises in England. The argument based on Section 11, Contract Act, will therefore not do. It was pointed out that even if a barrister-advocate made a special contract with his client that the latter would not be sued for fees, such a contract would be void under Section 28, Contract Act. In reply to this it was argued that Section 28 would be inapplicable because of the usage of trade mentioned in Section 1, Contract Act. But the barrister's profession cannot be called a trade, and I fear that the exception contained in Section 1, Contract Act, has no application.

15. Lastly, it was urged that in India all the cases that have been decided for the last 60 years or so have uniformly held that a barrister practicing in India cannot be sued for the refund of fees and that any receipt that he grants for fees received is exempt from stamp duty, because- what is paid to him is not a "consideration" for his services but is only an "honorarium." This argument, no doubt, would be very strong indeed, but none of the cases cited have considered the position in the way it has been put before us. In some of these cases there are no cogent reasons offered for the decision and others merely follow the previous decisions. I shall consider a few of these cases. The oldest case is of *Smith v. Ganeshee Lal*[3] This is one of the best considered judgments and yet does not carry convicviction to the mind. Smith a barrister-advocate sued for his fees. In negativing his

[3](1811) 3 N.W.P. 83

right of action, it was pointed out that the barrister-advocate had been given a higher rank than the other classes of practitioners, and the law of the land did not give him specifically a right to sue the client for fees. It being pointed out that the barrister was enrolled as an advocate and acted for his client it was said, that the Court would rule that he could not divest himself of his character and capacity as advocate and that the lower grade of pleader would be merged in the higher one of advocate. This is hardly a sound argument. It might have been pointed out on the same lines that the higher grade of advocate was pulled down to the lower grade of pleader.

16. The next case is a Stamp 'Reference (1886) 9 Mad 140 (F.B). The judgment consists of six lines and states as a broad fact that 'a barrister's fee for services in litigation is a gratuity or an "honorarium." No reasons whatsoever are given. Although this is a decision of a Full Bench, with all respect, I am not able to subscribe to the view expressed therein, at least in this part of the country, and in the circumstances under which a barrister-advocate practices have something more than a mere statement of the law would be necessary. The next case is a Stamp Reference (1894) 16 All 132. It is again a very short judgment and merely quotes the Madras case cited above and remarks as follows:

> In our opinion this is a sound interpretation of the law of the Stamp Act on the point and the decision receives highest confirmation from the ruling of Knight, Bruce and Turner L.JJ. in *In re Beavan*[4]

17. The English ruling quoted has no application to the circumstances under which a Barrister practises as an Advocate of the High Court of Allahabad. The most important case is that of *Alston v. Pitambar Das*[5] This was the case which deals with the question at some length, but unfortunately the considerations now present before us were never fully laid before the Full Bench which decided the case. The facts hriefly were these: A counsel was sued for refund of the fees received by him on the ground that he did not keep his engagement. The defence set up was two fold, one of these being that no suit could be maintained against the defendant. The suit was decreed by the District Judge on appeal and thereupon an application for revision was filed before this Court. In the very beginning of his judgment, Stanley, C.J., remarks as follows:

> The applicant is an English Barrister-at-law who by virtue of his call to the English Bar has been enrolled as an Advocate of the High Court of North-Western Provinces.

18. If his Lordships implied that the defendant, from the mere fact of being an English Barrister, was entitled, as a matter of right, to practise in the North-Western Provinces (as United Provinces was then called), the statement is rather wide. As I have already pointed out, it was for this High Court to lay down the qualifications of persons who are desirous of being enrolled as Advocates of the High Court. If the High Court laid down as one of the qualifications for enrolment that a candidate who had been called to the English Bar would be eligible for enrolment as an Advocate of the High Court, it did not fellow that the barrister from England had a right to practise as such in the High Court or in Courts subordinate to it. Where his Lordship Stanley, C.J., started giving his reasons for the

[4](1854) 23 L.J. Ch 536

[5](1903) 25 All 509

decision that the defendant could not be sued, he quoted the case of *Kennedy v. Brown*[6] already mentioned, and pointed out what the law in England was (Then) at p. 517, he asked himself the question

:

> Does this rule apply to an English or Irish Barrister practicing as an advocate in these Provinces.

The answer given was as follows:

> The qualification for the admission of the applicant as an advocate of this High Court was the fact that he had been called to the Bar in England and was an English Barrister.

19. With all respect the reason stated was no doubt accurate, but it did not amount to this that an English barrister practices in these Provinces by virtue of his being an English barrister. His Lordship then asked himself the further question, whether the inability to contract in respect of fees attaching to the status of an English barrister by immemorial usage of the bar disappeared on his practicing in India. In answer to some of the arguments now advanced before us and also

advanced before his Lordship, Stanley, Chief Justice quotes certain Madras cases and previous Allahabad cases and felt-satisfied that the answer to the question must be in the negative. His Lordsship's strongest support seems to have derived from the case of the *Queen v. Doutre* [7]decided by their Lordships of the Privy Council. Dr. Katju has strongly urged that this case did not support the conclusion of Stanley Chief Justice, but on the contrary supported the opposite view, to support which it had been cited by the learned Counsel for the plaintiff, Pitambar Das. I have carefully studied the decision in *Queen v. Doutre*[8] and I find nothing in it which supports the view that an English barrister practising in India, who, being entitled to see his client settles his fees, acts and pleads for him is entitled to rely on the English tradition and refuse to submit himself to the liability of refunding t he fees, if he failed to keep his engagement. The sentences quoted and underlined in Alstons case were sentences which merely explained the case and' did not constitute a decision on the merits. As a matter of fact in that case the Advocate had sued for his fees and his claim was upheld by the Privy Council.

20. Let us examine the case of the *Queen v. Doutre*[9] at close quarters. This was a case in which the plaintiff, being a member of the Quebec Bar in Canada, was engaged by the Minister of the Justice, of the Colony to represent it at an arbitration which was being held in Nova Scotia. The Minister of Justice had asked the plaintiff if he would accept a brief for the Colony and he had agreed. Doutre studied the brief, prepared the case and took part in the pleading. He was paid a certain amount of money but he claimed more on the ground that although his fees had not been set tied he had worked enough to deserve more remuneration than he had been paid. The defense set up was that although by the law of Quebec the plaintiff was entitled to succeed in his claim, he was not entitled to succeed because by the law of Ontario, the province in which Ottawa, the seat of the Government, was situated, and by the law of Nova Scotia, where the Counsel pleaded the case of the Colony, he was not entitled to bring his suit, and therefore the suit was not

[6](1963) 13 C.B. (n.s) 677
[7](1884) 9 A.C. 745
[8](1884) 9 A.C. 745
[9](1884) 9 A.C. 745

maintainable. The Privy Council pointed out that the defense was not good, for it could not be said that the contract had been made in Ottawa nor could it be said that Nova Scotia was the locus solutions. Then their Lordships pointed out that the question of remuneration was to be settled by the rule prevailing at the place where the counsel ordinarily practices. At p. 752 their Lordships said,

> The right of the respondent to sue for remuneration does not appear to them to depend either upon the law of the place where the employment was given (Ottawa), or upon the law of the locality within which it was to be performed (Nova Scotia). When an advocate or other skilled practitioner is, by law and the custom of his profession, entitled to claim and recover payment for his professional work, those who engage his services must, in the absence of any stipulation to the contrary, express or implied, be, held to have employed him upon the usual terms according to which such services are rendered.

21. Their Lordships meant to say and did say that the plaintiff, Doutre, practiced usually in Quebec, and at Quebec he could recover the fees for his services if the Government of Canada employed him. It employed him on the terms on which an ordinary client at Quebec would engage him for his work at the place. This is the entire decision of the' case. In this part of India, an English Barrister does not ordinarily practice in England. He cannot rely on English practice. As to the argument that an English barrister could not sue for recovery of his fees, their Lordships remarked (at p. 571) as follows:

> Even if these considerations were admitted, their Lordships entertain serious doubts whether, in an English colony where the Common law of England is in force, they could have any application to the case of a lawyer who is not a mere advocate or pleader, and who combines in his own person the various functions which are exercised by legal practitioners of every class in England, ail of whom, the Bar alone excepted, can recover their fees by an action at law.

22. This expression of opinion on the part of their Lordships of the Privy Council is not without material bearing in the case before us. Here in the United Provinces, as in Canada, the practitioner is not only an advocate or pleader but is also a solicitor. Their Lordships remarked that in such circumstances, even if the common law of England had been in force in Canada it was difficult for their Lordships to see how the considerations which prevailed in England and which prevented an English barrister practising in England from suing for his fees could be applied to an advocate who was not only a pure advocate but also combined in himself the functions of a solicitor. This remark entirely demolishes the case of *Smith v. Guneshee Lal* [10]With all respect, I am of opinion that the case of the *Queen v. Doutre*[11] does not support the view taken by the Full Bench in the case of *Alston v. Pitambar Das* [12]

23. Lastly it was argued that for the last 60 or 70 years [the earliest case ;seems to be that of *Smith v. Guneshee Lal* [13]the Courts have held that a barrister of England practising in

[10](1811) 3 N.W.P. 83 [12](1903) 25 All 509
[11](1884) 9 A.C. 745 [13](1811) 3 N.W.P. 83

India as an Advocate of the High Court is incapable of suing or
being sued for his fees, and therefore we ought to uphold that decision. Ordinarily even a wrong proposition of law, if it has long been accepted by the community, may be accepted as a "communis error" but the point of law involved is so important that I find myself unable to uphold it on the ground of uniformity in decision alone. If the traditions of the English Bar had been kept up by the Barristers of England practising in India in all or most respects, there would have been some ground for upholding the contention that the error once committed should be perpetuated. But in. several respects the 'traditions of the English Bar are being broken, how then, can it be executed that only in the case of suits for recovery of fees or for refund of fees, the tradition of the English bar should be maintained. As I have more than once pointed out, in the

Provine of Agra, because of the absence of solicitors, a Barrister sees his clients, receives instructions from him, settles his fees, ;and acts for him. All these are permitted by the Rules of the Court which has approved him as a suitable practitioner before it and in the Subordinate Courts. None of these acts are permissible by the traditions of the Bar in England. How can then it be expected that only in respect of recovery of fees and liability to refund fees the tradition of the English Bar is to be upheld by the Courts. I have already pointed out that in England a barrister is not an officer of the Court and is not amenable to its jurisdiction, (vide Article 692, Halsbury's Laws of England, Vol. 2, Edn.2). But in the High Court of Allahabad a barrister-advocate is as much subject to the disciplinary jurisdiction of the High Court as any other class of practitioners. In the circumstances I find it extremely difficult to hold that a barrister is not entitled to sue for his fees for acting and pleading as in this case. The Legal Practitioners Fees Act (Act 21 of 1926) has been relied upon as a last resort on behalf of the English bar as implying that where a barrister-advocate agrees only to plead and not to act, he can neither sue for his fees nor be sued for a refund of his fees. The Legal Practitioners Fees Act of 1926 draws a distinction between acting and pleading and lays down the rule that where a legal practitioner agrees to act, whether in a civil or in a criminal case he can sue for recovery of fees due to him and is liable to be sued for negligence. It is to be noted that the expression "legal practitioner" used in the Act applies to advocates also whether, they be barrister-advocates or nonbarrister-advocates. The definition is the same as in the Legal Practitioners Act of 1879. If the inference be drawn from the Legal Practitioners Act that a legal practitioner who agrees only to plead and not to act for a client cannot sue for his fees, then the disability attaches not only to a barrister-advocate but also to a mukhtar and a pleader and a revenue agent. In that case, the special privilege claimed on behalf of an English barrister practising in these Provinces disappears and he stands on the same level as the smallest practitioner, a mukhtar and a revenue agent.

24. From the mere fact that the Legal Practitioners Fees Act confines its provisions to acting, it does not follow that it lays down the law that any legal practitioner who made a contract with a client to plead only is to be put on the same position as a barrister practising in England. No attempt need be made to state why the Legal Practitioners Fees Act is silent as to the case of a contract to plead only, though it is not difficult to guess the reasons for this omission. By the omission the legislature left the law as uncodified as it was before the passing of the Act of 1926 and did nothing more. In the case before us the plaintiff agreed both to act and to plead. It we had been obliged to hold that so far as the contract of pleading went, the plaintiff was incapable of suing, it would have been necessary perhaps to remit an issue to apportion the stipulated fee between acting and pleading, or possibly the whole suit would have been dismissed. But in the view that I take of the case, there is no bar, in law as prevailing in the Province of Agra, to prevent the plaintiff from recovering his fees so far as it was to be paid even for pleading for defendant 2. In the result, I would hold that although the plaintiff is an English barrister enrolled by the High Court of Allahabad as an advocate, he is under no disability to sue his client for professional services done by acting and pleading for him. I would dismiss both the revisions with costs.

**King, J.**

25. I agree to the conclusions arrived at by the Hon'ble Ag. C.J., but, as I view the problem from a slightly different standpont, I think it better to state my reasons. The main question is whether a barrister-advocate can sue for his fees. The plaintiff is enrolled as an advocate of this High Court. He has also been called to the bar in England, and may therefore be called a "barrister-advocate" for the sake of brevity. He entered into an agreement with a client. He promised to render certain professional services, namely, to appear before the High Court and to present and advocate an application for the transfer of a criminal case pending in a Magistrate's Court. The client promised to pay for these services at a certain rate. Prima facie this was a perfectly valid contract. The plaintiff performed his part of the contract but his client failed to pay the stipulated fees. Hence this suit for compensation for breach of contract.

26. We first have to see what law is applicable to the facts of the case. In so far as the plaintiff's agreement was to act for his client, i. e., to sign and present the application on his client's behalf, the case is governed by the Legal Practioners Fees Act, 1926. The plaintiff was an advocate. Under Section 3 of that Act an advocate who agrees to act for a client may by private agreement settle with his client the fees to be paid for his professional services. Under Section 4 the advocate is expressly entitled to institute legal proceedings for the recovery of any fee due to him under the agreement. The Act applies to every advocate and I think it is clear that no exception can be made in the case of an advocate who happens also to be a barrister. As the Act expressly defines the right of a legal practitioner including an advocate, to sue for his fees in certain cases, we are bound to give effect to its provisions if it is applicable notwithstanding any custom or rule of law to the contrary. It is contended for the defendants that the Act applies only to acting in civil proceedings and not in criminal proceedings. The contention is based upon two points. Firstly, that no clear distinction is recognized by the legislature between "acting" and "pleading" in criminal proceedings. This is true, but I do not think the argument is conclusive. The words "act" and "plead" can be given their ordinary meaning with reference to criminal proceedings also. If the plaintiff had agreed only to sign and present the application for transfer I think he might be held to have agreed to "act" only and not "plead." The second point is that Section 4 of the Act gives a rule for computing the fee (when it has not been fixed by agreement) and the rule applies only to> civil proceedings. There is some force in this argument. It is strange that the Act should not make some provision for criminal proceedings, such as stating that the legal practitioner may sue for a fair fee, to be fixed by the Court with regard to all the circumstances of the case. On the other hand, it is argued that the language of the Act is wide enough to apply to criminal proceedings also, and that if the legislature had intended to restrict its scope: to civil proceedings their intention would have been more clearly expressed.

27. To my mind, this argument is more, convincing and I would hold that Act 21 of 1926 governs the case, in so far as the agreement was to act and not to plead, although the question is

not free from doubt. Fortunately the point is not of vital importance in the present case. The plaintiff undoubtedly agreed not merely to act but also to plead, i. e., to persuade the High Court to grant the application. Act 21 of 1926 certainly does not establish the plaintiff's right to sue upon his agreement to plead and if that. point were decided against him it would be a difficult matter to decide what proportion of Ms fee was recoverable as being the fee for "acting" only. We next have to see what law is applicable to the agreement in so far as it was an agreement to plead. It may even be conceded, for the sake of argument, that Act 21 of _1926 does not apply to "acting" in criminal proceedings and we must then consider what law applies to the agreement as a whole, leaving that Act altogether out of consideration.

28. In my opinion, the law which the Courts are bound to apply is the general law of contract, enacted in the-Indian Contract Act, 1872 which extends to whole of British India. That Act does not profess to be a complete code dealing with every branch of the law relating to contracts, but it is undoubtedly an authoritative statement of the chief rules relating to the formation, ratification and discharge of all agreements enforceable by law, and the Courts of this province1 are bound to give effect to its provisions unless good cause to the contrary is shown. This observation might seem superfluous but for the astonishing fact that in the Full Bench case *Ross Alston v. Pitamber Das*[14] the question whether the Contract Act might not apply to the contract entered into in India, and to be performed in India, was not even considered. Now if the agreement in question is viewed in the light of the Contract Act I think it must be admitted that, prima facie at least it fulfils all the requirements of an agreement enforceable by law. Unless some reason can be shown for treating the agreement as void or voidable I think it imposes a legal liability upon the defendant (client).

29. It is contended for the defendant that the agreement was void because under Section 11 the plaintiff was not competent to contract, being disqualified from contracting by a law to which he is subject. The argument is that the plaintiff is a barrister of England and, as such, he is legally incapable of entering into a contract of hiring for professional services. This legal incapacity is based upon the ancient usage of the bar in England which has been recognized by judicial decisions of Courts in England and has become a rule of common law. The fact that this rule of law is in force in England cannot be questioned, but there are several reasons why it cannot be invoked for the purpose of rendering a barrister-advocate incapable of entering into a contract for hiring for professional services in this province.

30. The suggested incapacity attaches to the plaintiff as barrister, not as an advocate. The short answer is that the plaintiff did not enter into the agreement as a barrister. He agreed to appear and act and plead in the High Court. He could not have done any of these things as a barrister. The rules of this High Court are perfectly clear on that point. He could only perform his contract in his capacity as an advocate. He was therefore engaged as an

[14](1903) 25 All 509

advocate. The mere fact that he has been called to the bar in England does not even entitle him to

be enrolled as an advocate of the High Court. A barrister of England has to undergo a course of training for a year before he can apply for enrolment. Even then the High Court has absolute discretion to refuse enrolment as an advocate.. Until he has been so enrolled he is not entitled to appear, plead or act. for a client in the High Court. It. is obvious therefore that the plaintiff entered into the agreement in his capacity as an advocate and not as a. barrister. The fact that he was a, barrister is no more relevant to the contract than the fact that he was a. graduate in law, or a Hindu. It is not suggested that an advocate is incompetent to contract. As the plaintiff entered into the agreement as an advocate, the agreement cannot be void on account of the plaintiff's incompetence to contract.

31. Another answer is that rules of the Common law of England are not in force in this province, so in this. province, the plaintiff, even in his capacity as a barrister, cannot be said to be subject to any law which disqualifies him from contracting. To hold that a barrister in British India is incompetent to enter into a contract for rendering professional services would, amount to amending Section 11, Contract Act, by introducing an exception. In other words it would mean that barristers must be added (for certain purposes) to the classes of persons, like minors and lunatics, whom the legislature has declared to be incompetent to contract. A further point, upon which great stress has been laid in arguments,, is that the rule of English law, which, incapacitates a barrister from entering into a contract of hiring for professional services, applies only to a barrister practicing according to the usages and traditions of the bar in England. In this province a barrister-advocate practices under totally different conditions. For instance he takes his instructions directly from his client and settles his, fees directly with his client. No solicitor intervenes between him and his client. This departure from the usage and etiquette of the English bar is not due to any fault or carelessness on the part of the barrister-advocate, but is imposed upon him by necessity, owing to the absence of solicitor;. In short, he functions both as barrister and solicitor. For this reason the rule-of English law cannot apply to him, even if such a rule of law could be-considered to have any authority in this, province. In Doutre's case (1884) 9 A.C. 745 their Lordships expressed serious doubts. whether such a rule would be applicable to a lawyer who is not a mere advocate or pleader and who combines in his own person the various functions which are exercised by legal practitioners of every class in England even in an English, colony where the Common law of England is in force. I think it is clear that a rule of English law, based upon the peculiar usage and etiquette of the bar in England, has no application to a barrister-advocate in this province, even if the Courts of this province could recognize the authority of such a rule. As the Common law of England is not in force in this province I have, from the outset, found great difficulty in understanding why the rule in question should be held as authoritative and as even overriding the law of the land contained in the Contract Act. We cannot apply the rule mentioned as being a "usage or custom of trade," because every one admits that the profession of a barrister is not a "trade." Nor can the rule be applied as an incident of a contract not inconsistent with the provisions of the Contract Act. When a barrister-advocate settles his fee with his client there is no room for the fiction that he only renders, and professes to render, services of a purely honorary character. Moreover if it were expressly or tacitly agreed

that the barrister-advocate should not sue for his stipulated fee, or be sued for negligence in the conduct of his professional duties, such an agreement would be void under Section 28, Contract Act.

32. It has even been argued that an agreement between a barrister-advocate and his client for rendering professional services, should be treated as -void under Section 23 on the ground that its object is opposed to public policy. The suggestion is that if such an agreement of hiring were treated as enforceable by law then the barrister-advocate would be reduced to the position of a hired servant. I think the suggestion can hardly be taken seriously. Even in England every class of legal practitioners except barristers can sue for their fees. In this province also every class of legal practitioners, excepting the class of barrister-advocates, can undoubtedly sue for their fees. What possible objection can there be to treating barrister-advocates like other advocates in this respect? Members of other professions which are equally honourable, such as mediea) practitioners, can sue for their fees. I think it is absurd to suggest that advocates who are not barrister and medical practitioners, are reduced to the position of "hired servants" merely because they can sue for their fees and can be sued for negligence. In my opinion consideration of public policy are directly opposed to any recognition of the rule in question. If a barrister-advocate is not paid for professional services faithfully rendered it is unjust that he should be deprived of a legal remedy. Similarly if the barrister-advocate is negligent in the conduct of his professional duties it is unjust that his client should be deprived of a legal remedy. It is. unnecessary to labour the point as the policy of the legislature is apparent from the enactment of Section 28, Contract Act.

33. From whatever point of view one considers the question the answer is the same. I think it is clear that in this province a barrister-advocate can sue for his fees. With due deference to the learned Judges who decided Ross Alston's case, I think the decision was wrong. In my humble opinion they took an erroneous view in assuming that a rule of the Common law of England was applicable, and in ignoring the provisions of the Contract Act which is the law of the land, and in failing to observe that the rule is, in any case, only applicable to barristers practising according to the usage of the English bar, and not to barristers who also perform, the functions of solicitors. They also failed to appreciate the fact that a barrister-advocate in this province renders his professional services as an advocate and not as a barrister, and I think they misapplied the ruling in Doutre's case. On the other points raised in this application I am in agreement with the Hon'ble Acting Chief Justice and think it unnecessary to state my reasons separately.

**Young, J.**

34. I concur in the judgment of the Hon'ble Acting Chief Justice, and for the reasons given by him. In addition to the examples given in his judgment illustrating the complete difference between the position of a barrister practicing in England and in this Province I would add that in England it is unprofessional conduct for a member of the bar to accept any sum of money other

than the fee marked on his brief, nor can he alter the fee so marked after the litigation is ended. In this province a client who succeeds in his suit will often offer a present or shukrana to the advocate I have yet to learn that such a present is ever refused. That such a practice inlay affect the position of a barrister as understood in England--namely, that his fee is not to depend on the result of the case is easily seen.
35. The short answer to the contention that an advocate called to the English bar and practicing here carries with him the ancient traditions and customs, rights and liabilities of the English bar is that if a barrister practicing in England carried on his profession there in the same way as an advocate in this province he would certainly be disbarred by his Benchers. That he is not disbarred when practicing here is solely due to the fact that his Benchers realize the great difference between conditions in this province and those in England; for example the General Council of the bar in England has ruled that a barrister practicing in England, may without the intervention of a solicitor, advise on a case submitted to him by a Colonial Advocate practicing in Colony where the professions of barrister and solicitor are combined. The Bar Council by this ruling clearly shows that it considers such an advocate to be more solicitor than barrister. The Annual Statement of its proceedings issued by the English Bar Council, which contains, rulings on matters of etiquette affecting Barristers, is sent only to those members of the Bar who have an English address in the Law list.

36. The great difference in the status of the English Barrister and the Barrister-Advocate here is that in England there is a complete division between the two branches of the Legal Profession. An English Barrister wishing to act as a solicitor must first get himself disbarred. In my opinion it is of the utmost public importance that legal practitioners, where the two branches are combined should be subject to the ordinary law of tort and be liable to be sued for negligence. Where the two branches are separate the client is protected against a negligent or inadequate member of the Bar. No solicitor would employ such a Barrister at least no more than once. Here the instructing client is an ignorant layman who frequently does not even understand the language in which his case is argued, and whose appreciation of counsel is measured by the time he occupies in Court. I have seen no English authority on this question where the judicial pronouncement is not limited to the case of English - Barristers practising in England. It may well be that where the usage of English Barristers practising abroad is the same as that obtaining in England the same restrictions as in England might-be enforced by the Courts.

**Thom, J.**

37. I agree with the judgment of King, J., and have nothing to add.

**Niamatullah, J.**

38. I agree with the views expressed by the Hon'ble Acting Chief Justice and King, J., and have nothing to add.