KERALA HIGH COURT

Chengan Souri Nayakam

Vs

A.N. Menon

Civil Revn. Petn. No. 871 of 1965

(K.K. Mathew, T.S. Krishnamoorthy Iyer and V. Balkrishna Eradi, JJ.)

26.10.1967

JUDGMENT

Mathew, J.

1. (For himself and on behalf of Eradi, J.) :- This Civil Revision Petition arises from an order of the court below dismissing an application filed by the defendant in O. S. No. 468 of 1962 on the file of the Sub Court, Falghat, for setting aside the decree passed in the case on the basis of a statement by his counsel that the suit may be decreed in terms of the plaint.

2. The respondent, who was appointed as Receiver in a partition suit, had filed that suit against the revision petitioner for realization of arrears of rent due from 1133 under an oral lease. The defendant denied the terms of the oral lease as set out in the plaint and contended that the annual money portion of the rent was only ₹ 41 and not ₹ 171 as claimed in the plaint, and that arrears of rent due upto 1137 have been discharged.

3. On 11-12-1964 counsel for the defendant endorsed on the back of the plaint that the suit may be decreed as prayed for.

4. On the basis of the endorsement the court passed the decree.

5. The defendant thereafter filed an application on 11-1-1965 for setting aside the decree for the reason that counsel had no authority to make the endorsement, that the suit must therefore be deemed to be pending, and that the court must proceed with the trial of the suit and pass a decree after evaluating his contentions on their merits. This application was dismissed by the court. The court said that counsel must be deemed to have authority to make the endorsement, that the court is concerned only with representations made by counsel in court, that work in court would become impossible if in every case when a representation is made by counsel the court should be obliged to probe into the question whether the representation is made with authority; and dismissed the petition.

6. The Revision Petition was referred to a Full Bench as an important question of law regarding

the authority of counsel engaged in a case is involved.

7. In *Sourendra Nath v. Tarubala Dasi*[1], Privy Council said that an Advocate in India has inherent authority to enter into a compromise on behalf of his client and that the compromise so entered into would be binding on him. Lord Atkin in delivering the judgement of the Board said :-

> "Their Lordships regard the power to compromise a suit as inherent in the position of an advocate in India. The considerations which have led to this implied power being established in the advocates of England, Scotland and Ireland, apply in equal measure to India. It is a power deemed to exist because its existence is necessary to effectuate the relations between advocate and client, to make possible the duties imposed upon the advocate by his acceptance of the cause of his client".

He then stated the reason why such an authority should be implied. This is what he said :

> "He must in the interests of his client be in the position, hour by hour, almost minute by minute, to advance this argument, to withdraw that; he must make the final decision whether evidence is to be given or not on any question of fact; skill in advocacy is largely the result of discrimination. These powers in themselves almost amount to powers of compromise; one point is given up that another may prevail. But in addition to those duties, there is from time to time thrown upon the advocate, the responsible task of deciding whether in the course of a case he shall accept an offer made to him, or on his part shall make an offer on his client's behalf to receive or pay something less than the full claim or the full possible liability. Often the decision must be made at once."

The implied authority is an actual authority and not an appendage to his office or dignity added by the court to the status of the advocate. The implied authority can always be countermanded by the client and if in a particular case it is found that the implied authority has been expressly limited, then counsel has only that authority as limited by the client. No advocate has got actual authority to settle a case against the express instructions of his client.

8. In *Sheonandan Prasad v. Hakim Abdul*[2], the question again arose whether a legal practitioner has got implied authority to compromise a suit. The Privy Council said :-

> "..... counsel in India have the same implied authority to compromise an action as have counsel in the English Courts. But if such authority is invoked to support an agreement of compromise the circumstances must be carefully examined." In *Govindammal v. Marimuthu Maistry*[3], Ramaswamy, J. has made a review of all the relevant cases on the subject and arrived at the conclusion that counsel in India has inherent implied authority to

[1] AIR 1930 P.C. 158 at p. 161
[2] AIR 1935 PC 119 at p. 121
[3] AIR 1959 Mad 7

> enter into a compromise. He then said :"But in the present state of the clientele world and

> the position in which the Bar now finds itself and in the face of divided judicial authority and absence of statutory backing, prudence dictates that unless express power is given in the vakalat itself to enter into compromise, in accordance with the general practice obtaining, a special vakalat should be filed or the specific consent of the party to enter into the compromise should be obtained". In *Jiwibai v. Ramkumar*[4], a Full Bench of the Nagpur High Court following the decisions of the Privy Council held that counsel in India has an Inherent implied authority to compromise the case in which he is engaged.

9. Then, the question for consideration is whether the fact that counsel is appointed under a written authority would make any difference in the matter. In AIR 1930 PC 158 Lord Atkin made the following qualification;

> "Where the legal representative in Court of a client derives his authority from an express written authority, such as a vakalatnama, different considerations may well arise, and in such cases their Lordships express no opinion as to the existence of any implied authority of the kind under discussion."

Order 3, Rule 4(1) of the Civil Procedure Code states :

> "No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent of by some other person duly authorized by or under a power-of-attorney to make such appointment".

Order 3, Rule 4 requires the appointment of a counsel to act in Court by a document in writing. The word 'act' is not anywhere defined. Is not compromise or confessing judgement an act ? If so, is it not within the authority of counsel ? The provision which requires the existence of a power in writing to 'act' draws no distinction between the various kinds of acting, and consequently we are relegated to the general powers of counsel as envisaged by the Privy Council. There is in their Lordships' opinion no distinction between the power of counsel in England, Scotland and Ireland and advocates in India who are not required to file a power. Order 3, Rule 4 makes no difference. The only requisite it lays down is a written authority of appointment. When that is given it leaves counsel so appointed free to 'act', and draws no distinction between various kinds of acting. If the legislature draws no distinction there is no justification for the court to make one.

10. The vakalat in the case did not give express authority to counsel to compromise the suit or confess judgment, but we are not satisfied that there was any express limitation on the implied power of counsel to compromise the suit or confess Judgment. We do not think that when counsel is appointed under a document the enumeration of certain powers in it would exclude the implied powers necessarily inherent in the appointment. In AIR 1947 Nagpur 17 (FB) the Court said :

[4] AIR 1947 Nag 17

> "Consider the impracticability of any other rule. It would be next to impossible for a power of attorney to envisage every contingency and to embody every act and duty which it may be necessary for counsel to perform in the conduct of a suit". We think that however exhaustive the enumeration of the powers might be in a vakalat, it would be impossible to enumerate all the powers necessary for the proper discharge of the work of counsel in Court. No human foresight would be able to anticipate the vicissitudes of a litigation and to enumerate in a document all the powers necessary for the purpose for which counsel has been engaged. Such a document, besides being prolix, can never provide for all contingencies.

11. The construction of a document appointing an agent is different from the construction of a vakalat appointing counsel. In the case of an agent the document would be construed strictly and the agent would have only such powers as are conferred expressly or by necessary implication. In the case of counsel the rule is otherwise because there we are dealing with a profession where well-known rules have crystallized through usage. It is on a par with a trade where the usage becomes an additional term of the contract, if not contrary to the general law or excluded by express agreement. In *Matthews v. Munster*[5], Lord Esher M.R. said :

> "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".'

That counsel is not a mere agent of the client would be made clear if we look at the nature of his duties and relationship with the public and the court. Counsel has a tripartite relationship; one with the public, another with the court, and the third with his client. That is a unique feature. Other professions or callings may include one or two of these relationships but no other has 'the triple duty. Counsel's duty to the public is unique in that he has to accept all work from all clients in courts in which he holds himself out as practicing, however unattractive the case or the client. Lord Denning M.R. observed in *Rondel v. Worsely*[6],

[5](1887) 20 QB 141
[6](1967) 1 QB 443 at p. 502

"A barrister cannot pick or chose his clients. He is bound to accept a brief for any man who comes before the courts. No matter how great a rascal the man may be. No matter how given to complaining. No matter how undeserving or unpopular his cause. The barrister must defend him to the end. Provided only that he is paid a proper fee, or in the case of a dock brief, a nominal fee. He must accept the brief and do all he honourably can on behalf of his client. I say "all he honourably can because his duty is not only to his client" All those who practice at the Bar have from time to time been confronted with cases civil and criminal which they would have liked to refuse, but have accepted them as burdensome duty. This is the service they do to the public. Counsel has the duty and right to speak freely and independently without fear of authority, without fear of the judges and also without fear of a stab in the back from his own client. To some extent, he is a minister of justice. In Rondel's case, (1967) 1 QB 443 Lord Denning M.R. stated :

"It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his too to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice He must not consciously misstate the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is. without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client. If they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline".

Considering the unique combination of relationships and duties, it is not strange that a Barrister in England has been held not liable for negligence in the conduct of a case.

12. *Swinfen v. Lord Chelmsford*[7], is the classical instance of a case where the court held that a Barrister is not liable to be sued in damages, even if he compromised an action which he was expressly instructed by his client not to do. Whether or not an advocate can be sued for negligence in the discharge of his duty in this country, we think, the functions and duties of an advocate are not those of an agent simpliciter, and his authority cannot be confined to specific powers which might be enumerated in the vakalat, by which he is appointed to act. This is not to say that counsel can enter into a compromise or confess -judgment against the specific instructions given by the client.

13. Although we see no reason to limit or restrict the implied authority of counsel to compromise an action or confess judgment unless expressly done so by the client, we think that both in the interest of the client and the good reputation of counsel, it is always advisable that he should get specific instructions before taking such a radical step. Lord Atkin said in AIR 1935 PC 119.

"But whatever may be the authority of counsel whether actual or ostensible it frequently happens that actions are compromised without reference to the implied

[7](1860) 157 ER 1436

> authority of counsel at all. In these days communication with actual principles is much easier and quicker than in the days when the authority of counsel was first established. In their Lordships' experience both in this country and in India it constantly happens, indeed it may be said that it more often happens, that counsel do not take upon themselves to compromise a case without receiving express authority from their clients for the particular terms; and that this position in each particular case is mutually known between the parties".

In (1887) 20 QB 141 Bown L.J. observed :

> "I should be sorry to say that counsel ought not to consult his client on such a matter as a compromise of the action, but that is a point we have not got to consider, for in the present case the client was not present and cannot complain if his counsel, who was in command and had authority to do the best for his client, compromised the suit within the reasonable limits of his authority to compromise".

14. It was argued that the court has inherent power to set aside a decree based on compromise or admission when the court is satisfied that counsel who entered into the compromise or made the admission had no actual authority from the client. In support of this proposition reliance was placed upon *Neale v. Gorden Lennox,*[8] where Lord Halsbury said that there is inherent power in the court to set aside a compromise entered into by counsel, when his authority to do so was expressly taken away, but this restriction on his ostensible authority was not known to the other side. When the authority of counsel to enter into a compromise is withdrawn or limited by the client, a court will not feel obliged to enforce the compromise entered into by counsel, notwithstanding the fact that the limitation on the ostensible authority of counsel is not known to the other side. This is what Lord Atkin said in AIR 1935 PC 119 as regards the scope of the decision of the House of Lords referred to above.

> "In the first instance the authority is an actual authority implied from the employment as counsel. It may however be withdrawn or limited by the client : in such a case the actual authority is destroyed or restricted and the other party if in ignorance of the limitation could only rely upon ostensible authority. In this particular class of contract however the possibility of successfully alleging ostensible authority has been much restricted by the authorities such as 1902 AC 465 and 1919-1 KB 474 which make it plain that if in fact counsel has had his authority withdrawn or restricted the Courts will not feel bound to enforce a compromise made by him contrary to the restriction even though the lack of actual authority is known to the other party".

Here, there is no case that the implied power of counsel to compromise the case or confess judgment was limited or taken away by the client expressly, and therefore, we have to assume that counsel had implied authority to compromise the action or

[8]1902 AC 465

confess judgment. Although the vakalat in the case did not expressly authorize counsel to compromise the suit or confess judgment, we are not satisfied, there was express

prohibition in his doing so. If that be so. the decision of the House of Lords referred to above has no application here.

15. We are, therefore, of opinion that the lower court was right in dismissing the application.

16. We would dismiss the revision petition, but in the circumstances, without any order as to costs.

Krishnamoorthy Iyer, J.

17. I regret that I have to disagree from the conclusion reached by my learned brethren. I do not think it necessary to express my views on the question whether an advocate in India in whose favor a vakalath has been executed has implied authority to settle the suit and whether the power to compromise a suit is inherent in the position of an advocate in India. In AIR 1930 P.C. 158 Lord Atkin while observing that the power to a compromise suit is inherent in the position of an advocate in India stated thus : "No evil result have apparently ensured in India from the existence of this power in the instances mentioned. Their Lordships desire to confine their decision on this point to the case of advocates, whatever their qualifications, admitted as such by the respective appropriate Courts in India, who derive their general authority from being briefed in a suit on behalf of a client. Where the legal representative in Court of a client derives his authority from an express written authority, such as a vakalatnama, different considerations may well arise and in such cases their Lordships express no opinion as to the existence of any implied authority of the kind under discussion." It was agreed at the bar the implied authority of the counsel can always be countermanded by the express directions of the client. The vakalath executed by the defendant in favor of his advocates shows that the authority given is only to file the compromise petition in court. This excludes any inherent power in the advocate to settle the suit. The settlement of the suit by the defendant's counsel is therefore without the authority of their client and cannot be binding on him.

18. Further the endorsement on the plaint made on 11-12-1964 is to the following effect :

> "The suit may be decreed as prayed for. The amount paid in the suit may be credited towards plaint claim. Half the court-fee may be refunded to the plaintiff".

19. It has been signed by the advocates appearing for the plaintiff and the defendant. The counsel appearing for the defendant has confessed judgment in the suit, in terms of the plaint. The vakalath of the defendant to his counsel excludes such a power. The view taken by the court below cannot therefore be sustained. The learned counsel for the plaintiff submitted that the petition filed under Order 9, Rule 13 Civil Procedure Code is not maintainable. This question has not been considered by the learned Munsiff. The order of the learned Munsiff has not considered any of the relevant questions at all. I would therefore set aside the order of the learned Munsiff and remand the petition for fresh disposal. I would thus allow the revision petition without any order as to costs.

BY COURT

20. In view of the opinion of the majority the revision petition is dismissed, but in the circumstances without any order as to costs.
Revision petition dismissed.