BOMBAY HIGH COURT

Surendra Shankar Waikar

Vs.

Laxman Shankar Waikar

Civil Revn. Appln. No. 1378 of 1958 (with C. A. No. 2318 of 1958), Spl. Civil Suit No. 28 of 1957

(Mudholkar, J.)

02.12.1958

ORDER

Mudholkar, J.

1. The relevant facts out of which this civil revision application and the civil application arise are briefly as follows. The applicant and opponent No. 1 are brothers. Opponents Nos. 2 and 3 are the sons of opponent No. 1. There were certain disputes between the applicant on the one hand and the opponents on the other with regard to joint family properties, which were referred to arbitration. During the pendency of the arbitration proceedings, the applicant made an application for grant of a succession certificate in order to enable him to withdraw a sum of Rs. 31,000 which was lying with some banks in Ahmednagar to the credit of the father of the applicant and opponent No. 1 who died on 24-5-1954. That application was granted and the succession certificate was issued in favour of the applicant. After obtaining the aforesaid succession certificate, the applicant withdrew the aforesaid amount of Rs. 31,000 from the banks after furnishing security as ordered by the Court which granted the succession certificate to him.

2. The arbitration proceedings have apparently not yet terminated. The opponents have instituted a special civil suit in the Court of the Civil Judge, Senior Division, Ahmednagar, claiming Rs. 25,992 from the applicant in respect of opponent No. 1's half share in the amounts lying with the banks and in respect of opponent No. 1's half share in the immoveable property. In that suit he also made an application for the issue of an injunction restraining the applicant from withdrawing the money lying with the banks. That application was rejected. Against the order rejecting the application, the opponents preferred Appeal from Order No. 234 of 1957 before this Court. It went up for hearing before Tendolkar J. on 16-12-1957. It would appear that the dispute between the parties was settled before him. In the course of his order concerning this settlement Tendolkar J. observed as follows :

> ".....Undoubtedly, when the Court granted the succession certificate, it enabled the respondent to withdraw the amount, and since it was making an order enabling him to withdraw the amount, it required him to give security for the one-half share of the first appellant in the said amount; but the order that the appellants had asked for before learned Civil Judge did not in any manner affect the provisions of the order for a succession certificate. Mr. Kotwal appearing for the respondent quite fairly agrees that after withdrawing the said amount his client will deduct therefrom the costs of obtaining the succession certificate and will deposit in Court one-half share of the balance within a month after wihtdrawing the amount. Having regard to this offer of the respondent made by Mr. Kotwal, it is not necessary either to disturb the order of the Civil Judge or to make any substantive order in the appeal".

The applicant has now come up to this Court for setting aside the order of Tendolkar J., alleging that Mr. Kotwal had no authority to settle the matter in the way he has done.

3. Before dealing with the aforesaid contention, it would be convenient to mention that after the order of Tendolkar J. was passed, the opponents made an application to the Court of the Civil Judge for the issue of a direction to the applicant requiring him to deposit opponent No. 1's half share in the amount withdrawn by him from the banks. This application was opposed by the applicant, but was allowed by the learned Judge. Against the order of the learned Judge allowing the application the applicant has come up in revision and that is Civil Revision Application No. 1378 of 1958.

4. It was vehemently argued by Mr. Pendse on behalf of the applicant that Advocates who have filed vakalatnamas on behalf of their clients have no power to enter into a compromise on behalf of their clients unless the vakalatnama specifically empowered them to enter into a compromise. In support of his contention he relied upon the decisions in *Saratkumari v. Amulyadhan*[1], *Sourindra Nath v. Heramba Nath*[2], and *Keshav v. Subba Manga*[3], It may be mentioned that in all these cases what the Court was called upon to consider was the power of a pleader to enter into a compromise. None of these cases dealt with the question of the power of an Advocate to compromise a suit. In *Sourendra Nath Mitra v. Tarubala Dasi*[4], it was held by their Lordships of the Privy Council that an Advocate in India, whether practising in the Presidency towns or in the mofussil, who derives his general authority for being briefed in a suit on behalf of the client, has implied authority to settle and compromise in all matters connected solely with the action in which he has received a brief (but not in matters merely collateral to the action), unless he has received express instructions to the contrary from his client. This decision of their Lordships goes against the contention advanced before me by Mr. Pendse. Mr. Pendse, however, relies upon the following passage in the judgment of their Lordships at p. 652 (of Bom LR) :

> ".....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 for 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 consideration may well arise, and in such cases their Lordships express no opinion as to the existence of any implied authority of the kind in discussion".

Mr. Pendse argues that these observations of their Lordships would clearly show that

[1] AIR 1923 PC 13 [3]41 Bom LR 994
[2] AIR 1923 PC 98 [4]32 Bom LR 645

where an Advocate has filed a vakalatnama his powers must be deemed to be limited to matters specifically mentioned in the vakalatnama. In other words, his argument is that there is no scope for implying any powers with an Advocate who has in his favour a vakalatnama from his client who has engaged him. It seems to me that though their Lordships have stated that other considerations will have to be borne in mind while considering the question as to whether Advocates deriving their authority from a vakalatnama have an implied power to enter into a compromise, their Lordships have not expressed any opinion to the effect that where a vakalatnama exists there is no scope for implying in favour of the Counsel authority with regard to matters which are not specifically mentioned in the vakalatnama. On the basis of the decision of their Lordships it has been held by a Full Bench of the late High Court of Nagpur in *Jiwabai v. Ramkuwar*[5], that Counsel in India, whether barristers, advocates or pleaders, have inherent powers, both to compromise claims and also to refer disputes in Court to arbitration without the authority or consent of the client, unless their powers in this behalf have been expressly countermanded, and this is so whether the law requires a written authority to act or to plead or not. It is true that a Division Bench of the same High Court have in *Supaji v. Nagorao*[6], pointed out that the view taken by the Full Bench in so far as the scope of the authority of pleaders is concerned is not in accord with the decision of their Lordships of the Privy Council in AIR 1923 PC 13, and AIR 1923 PC 98. But the Division Bench has accepted as correct the view of the Full Bench to the effect that the authority of an Advocate to compromise is implicit in the appointment of the Advocate unless it is expressly countermanded by the client. I respectfully agree with the view taken in these cases and hold that Mr. Kotwal had an implied authority to enter into a compromise with respect to the matter under appeal.

5. It must, however, be borne in mind that the implied authority of an Advocate to enter into a compromise is limited to the action in which he has been engaged and does not extend to matters which are extraneous to the action or which are merely collateral to it. It is argued by Mr. Pendse that here the compromise is beyond the authority of the Counsel because it embraces a matter which is extraneous to the appeal before this Court. It seems to me that this argument is correct and must be accepted. Now, the matter which was before this Court was whether a temporary injunction should issue to the present applicant, i.e., to the respondent in the appeal, or not. No question of depositing any money was at all involved in this appeal. On the other hand, what was sought by the appellants in the appeal, i.e., the present opponents, was a restraint order against the present applicant, prohibiting him from withdrawing certain monies which were in deposit

with certain banks. The effect of the order of the High Court passed on the consent accorded by Mr. Kotwal is to make available to opponent No. 1 the amount with respect to which the opponents had sought an injunction. No doubt, under that order the applicant is only required to deposit half of the amount withdrawn by him in Court; but upon the order as it stands, if such amount is deposited by the applicant, the opponents will be at liberty to obtain permission of the Court to withdraw the amount on such terms as the Court may impose on them. In my opinion, what was agreed to by Mr. Kotwal is thus quite extraneous to the matter which was before this Court in the appeal. In *Sheonandan Prasad Singh v. Abdul Fateh Mohammad Reza*[7], their Lordships of the Privy Council observed at pages 847-8 (Bom LR) : (at-p 121 of AIR) as follows :

[5] I. L. R. 1946 Nag. 824 : AIR 1947 Nag 17 [7] 37 Bom. L. R. 845

[6] AIR 1954 Nag 250

> "But whatever may be the authority of counsel, whether actual or ostensible, it frequently happens that actions are compromised without reference to the implied authority of counsel at all. In these days communication with actual principals 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."

Then their Lordships proceeded to observe :-

> "Their Lordships, however, think it advisable to say that if the facts are as they suppose them to be, viz. that the attack on the plaintiff's title was not seriously made in the Court of Appeal, counsel's authority could not in any circumstances extend to an agreement to part with the plaintiff's rights in the property over which the mortgage was claimed which the plaintiffs were seeking to get rid of . ..." After making these observations, their Lordships quoted with approval the following observations of Pollock C. B. in *Swinfen v. Lord Chelmsford*[8]:-
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> "The other complaint made in the first count is, that the defendant agreed, on the plaintiff's behalf , that the estate should be given up and a conveyance of it be executed by the plaintiff. As to this, the plaintiff has always contended that the defendant had no authority or power to make such an agreement, that it was not binding and that the agreement was a nullity; and we are of opinion, that although a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it - such as withdrawing the record withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial - we think he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it. For instance, we think, in an action for a nuisance between the owners of adjoining land - however desirable it

> may be that litigation should cease by one of the parties purchasing the property of the other, we think the counsel have no authority to agree to such a sale and bind the parties to the suit without their consent, and certainly not contrary to their instructions, and we think such an agreement would be void."

Here if we substitute "injunction" for "nuisance", the analogy between the case decided by Pollock C. B. and the present case would also be very clear. In my opinion, therefore, though Mr. Kotwal had authority to compromise, his authority did not extend to agreeing on behalf of his client to deposit half the amount in Court.

6. For the reasons, I allow Civil Application No. 2318 of 1958 and direct that the appeal shall now be heard again. The Rule is made absolute in the civil application.

7. In view of the fact that the civil application is allowed and the appeal is ordered to be re-heard, the civil revision application (No. 1378 of 1958) has become infructuous and is accordingly dismissed.

[8](1860) 5 H. and N. 890

8. There will be no order as to costs.

9. The Appeal from Order will now be heard next week.

Order accordingly.