

## Santosh Kumar Bose Majumdar Vs Sm. Kanika Alias Mamata

**Court:** Calcutta High Court

**Date of Decision:** Aug. 31, 1955

**Acts Referred:** Civil Procedure Code, 1908 (CPC) – Order 3 Rule 2, Order 3 Rule 4, Order 3 Rule 4(2)

**Citation:** (1957) 2 ILR (Cal) 542

**Hon'ble Judges:** R.P. Mookerjee, J; J.P. Mitter, J

**Bench:** Division Bench

**Advocate:** Manindra Nath Ghose, for the Appellant; Jnanendra Mohan De and Rohini Kanta Ghose, Binayah Nath Banerjee, for Bar Association and Apurbadhan Mookerjee, Amicus curiae, for the Respondent

### Judgement

1. In the two appeals (F.As. 187 and 197 of 1952) the Respondent Rajlakshmi had entered appearance through Shri J.M. De, Advocate. An

application was filed by the said Respondent for determining the Vakalatnamas in favour of the said Advocate purporting to be an application

under Sub-rule (2) of Rule 4 of Order III of the Code of Civil Procedure.

2. The Petitioner states that there had been certain proceedings between the said Advocate and the Petitioner's husband Ramaprasad Choudhury.

She therefore found it inconvenient to give instructions to the Advocate through her husband.

3. She had also recently engaged another Advocate Shri Rohini Kanta Ghose. According to the Respondent-Petitioner the original Advocate Shri

De had already been paid his dues but the latter maintained that his fees were still due. The new Advocate Shri Ghose intimated verbally to the

Court his inability to appear for the client unless the dues of Shri De were paid.

4. When these matters were brought to our notice we directed that the application filed by the Respondent for determining the Vakalatnamas filed

in favour of Shri De along with the letter addressed by the Respondent to the Registrar would be heard. In the circumstances of this case the said

Respondent should be represented by an independent Advocate. Notice was accordingly issued by the Court to the Respondent to the effect that

if she were not in a position to make any separate arrangement for her representation during the hearing of the present application it would be

possible to avail of the services of a senior Advocate of this Court who had at the request of the Court intimated his willingness to appear as

amicus curiae. The Respondent not having made other arrangement Mr. Apurbadhan Mookerjee assisted the Court on behalf of the Respondent-

Petitioner during the hearing of the appeal and that at the request of the Court.

5. On behalf of the Bar Association Mr. Binayak Nath Banerjee had been heard as the matter affected the profession.

6. The questions which we have to decide now will have to be indicated. It may be stated at the very outset that Shri De the original Advocate

intimated to the Court that he was not, in view of the difficulties experienced by the Respondent, willing to represent her any further in the pending

appeals. He, however, stated that the proceedings to which reference has been made by the Petitioner were not started by him personally.

Proceedings referred to were initiated on behalf of a limited concern in which the Advocate was one of the Board of Directors. He prayed for

direction by the Court that his dues might be ascertained and directed to be paid by the Respondent.

7. The new Advocate Shri R.K. Ghose had intimated that when he was engaged he had been told by the client's representative that the dues of

Shri De had been cleared but in view of what has transpired he was not willing to continue to represent the said Respondent if the dues that might

be found due to Shri De were not paid.

8. The principal question therefore which falls to be decided is that while considering the application by a party to determine the Vakalatnamas in

favour of an Advocate can the Court proceed to determine the dues of such an Advocate from the client. If the Court can enter into that question

is it competent for this Court to ascertain the dues and to provide means for the realisation of the same. After deciding this question we shall take

up the prayer made by the new Advocate Shri R.K. Ghose, for determining his Vakalatnama.

9. The relevant provisions as contained in the CPC are to be found in Rule 4 of Order 3 of the Code. Sub-rule (2) of Rule 4 provides that after a

lawyer is appointed by a document in writing every such appointment shall be filed in Court and shall be deemed to be in force until determined

with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader

dies, or until all proceedings in the suit are ended so far as regards the clients.

10. The "pleader" referred to in Rule 4 above includes all persons who are entitled to appear and plead and includes an Advocate or an Attorney.

The pleader combines in himself the duties performed in England or in the Original Jurisdiction of this Court by a Barrister and Attorney inasmuch

as he can both plead and act.

11. Chapter v. of the Appellate Side Rules of the High Court dealing with General Rules of Procedure provides for the procedure to be followed

when an Advocate intends to retire from a case or a party desires to cancel a Vakalatnama filed in favour of a lawyer. The relevant rules are Rules

69 to 71 in Chapter v. of the Appellate Side Rules.

12. Rule 69 provides that when a client fails to pay the estimated costs for preparing briefs to enable the Advocate to conduct the case properly

the Advocate after notice to such party or his agent or by leave of the Court may withdraw from the case.

13. Rule 70 further provides that an Advocate may for any other sufficient cause and after notice to his client as may enable him to appoint another

Advocate by leave of the Court, and not otherwise, and on such terms as the Court may order as to refunding any fees he may have received

withdraw from the further conduct of the case.

14. Rule 71 contains the relevant provisions when a party desires to cancel a Vakalatnama already filed in Court. Such a party must file a duly

stamped and verified application for the orders of the Court unless the Advocate who accepted the Vakalatnama signifies his willingness to retire

from the case, in which case the application need not be verified.

15. The present application for determining the appointment of the original Advocate comes under Rule 71 of Chapter v. of the Appellate Side

Rules read with Rule 2 of Order III of the Code of Civil Procedure. The lawyer has signified his willingness to retire but subject to the question of

his arrear fees being settled.

16. Rule 70 provides that when an Advocate intends to withdraw from further conduct of the case by leave of the Court, the Court may order the

refund of any fees he may have received; such fees are presumably for the work to be done and not yet concluded. There is no provision in

Rule 71 about the accounting of fees due. It has been contended on behalf of the Petitioner by Mr. Mookerjee appearing as amicus curiae that a

clear distinction is made under the rules between a case when the Advocate intends to withdraw from further conduct of the case and when a party

desires to cancel the Vakalatnama filed by him in Court. The Court has. no power to consider the question of the fees paid or payable to the

Advocate in the latter case. This in our view is not the correct position.

17. The powers of the Court are to be determined not merely with reference to the rules contained in Chapter v. of the Appellate Side Rules. The

relevant statutory provisions are as contained in Rule 4(2) of Order III of the Code of Civil Procedure. The rules framed by the High Court cannot

and have not in any way circumscribed the jurisdiction of the court as envisaged in the Code. Sub-rule (2) of Rule 4 specifically provides that the

Vakalatnama filed in Court can only be determined with the leave of the Court. When a prayer is made for the cancellation of the power the Court

has to consider the same judicially and in conformity with the rules of Justice and Equity.

18. We shall in the first instance proceed to consider the implications of the provisions contained in Sub-rule (2) of Rule 4 of Order III of the Code

of Civil Procedure.

19. While interpreting the provisions contained in Rule 4 of Order III of the CPC it has been held that the appointment of a lawyer can be

determined by the client or by the lawyer but in every case it can be done only with the leave of the court, and if it is not determined then the

appointment continues and the pleader is entitled to all his costs till the final termination of the proceedings in the suit (Atul Chandra Ghose v.

Lakshman Chandra Sen ILR (1909) Cal. 609, Babui Radhika Debi v. Ramasray Prosad Chowdhuri ILR (1930) Pat. 865).

20. In the case of a change of Attorney a Division Bench of this Court considered that even though Rule 4 of Order III of the CPC does not make

any direct reference to a change of Attorney or to the payment of costs incurred by him previous to his discharge, the practice that had always

been followed in this Court that no order for change is made unless provision is made for payment of costs of the Attorney should be followed No

such provision is to be made when the Attorney has by his own conduct or misconduct discharged himself Pankaj Kumar Ghose v. Sudhir K.

Sikdar (1933) 37 C.W.N. 998).

21. Reliance was placed on Nagendra Chandra Ghose v. Gereender Chandra Ghose (1858) BMR. 340 being a decision by a Bench of three

Judges of the Supreme Court at Calcutta. The party was directed to pay the taxed costs of the solicitor.

22. The same principle was applied by another Division Bench of this Court in Mohanlal Sewlal, a Firm Vs. Probodh Krishna Shome, in the case

of a pleader. Whether the lawyer is a pleader and an advocate or a solicitor, if the provisions of Rule 4 of Order III of the CPC are attracted, the

Court is entitled to make suitable provisions for the payment of sums due to the outgoing pleader in respect of services rendered by him and in

respect of the costs incurred by him on behalf of his client.

23. The principles enunciated by the Patna Court in Babui Radhika Debi v. Ramasray Prasad Choudhury (Supra) was followed.

The question however as to the steps if any that may be taken by the Court to enforce the client to pay the lawyer's fees due has not been uniform.

In Mohanlal Sewlal v. Probodh Krishna (Supra) it was directed that out of the compensation money, which was lying in the court of the client, who

had applied for the discharge of the lawyer, Rs. 1,700 be retained in court pending the property of the bill submitted by the lawyer or of the

additional expenses incurred being decided in appropriate proceedings. If within three months no such proceedings were filed by the lawyer the

amount in deposit would be paid back to the client.

24. In *Pankaj Kumar Ghose v. Sudhir K. Sikdar* (Supra) the order of the change of Attorney was made subject to the condition that his taxed

costs were paid. The Attorney was to lodge his bill within ten days from the date of the order and if he did not do so the change of the Attorney

would be made without any direction for payment.

25. In *Babui Radhika Debi v. Ramasray Prasad Choudhury* (Supra) the court assessed the amount of bill submitted and declared what was due to

the lawyer. The order of discharge was made conditional upon the fees determined by the court being paid by the party. It is worthy of note that

after the said order had been made the client applied for leave to withdraw her application to cancel the Vakalatnama. Even on the altered position

the Petitioner was directed to deposit the amount previously assessed by the Court and further directions were given.

26. In a more recent case such a matter came up before another Division Bench of the Court (G.N. Das and S.C. Lahiri, JJ.) (in the matter of

*Bitton Debi v. Gouri Sankar Shaw* Unreported F.A. 69 of 1950). The client having filed an application for the discharge of the Advocate. The

latter was willing to withdraw provided the amount of fees earned by him for items of work already done as also for costs incurred by him were

paid by the client. There was also a further dispute between the client and the lawyer as to the papers still in the custody of the latter, Both as

regards the fees as also the custody of papers the parties agreed to abide by the decision of the President of the Bar Association of this Court, This

Court thereupon directed the client to deposit in Court the amount claimed by the Advocate, to be kept in deposit pending further orders by the

Court. The President of the Bar Association was permitted to have access to the records of the case with a view to settle the dispute. On the

deposit being made the Advocate in question would be discharged from acting in the matter. This order was passed on January 18, 1951. The

President gave his decision in the form of an award which came up before another Bench of which one of us was a party. On April 20, 1951, the,

Court accepted the award and out of the amount in deposit, the amount found due by the President of the Association was allowed to be

withdrawn by the lawyer. The balance was paid back to the client. The papers as were found to be in the custody of the lawyer were filed in Court

and made over to the new Advocate appointed by the client.

27. It is clear that when a lawyer is to be discharged either on his own application or on the prayer of the client questions not only relating to the

amount paid or payable to or by the lawyer as also the return of papers in the custody of the lawyer have to be decided. While passing the order

for determining the Vakalatnama the Court is bound to take into consideration of relevant points before the final order is passed.

28. The provisions made in Sub-rule (2) of Rule 4 of Order III of the CPC therefore require an order from the Court before the Vakalatnama

already filed can be determined.

29. Rule 71 of Chapter v. of the Appellate Side Rules of this Court must therefore be read with the provisions contained in Rule 4(2) of Order III

of the Code. The Court has jurisdiction and is duty bound to determine the points of disputes between the lawyer and the client with regard to the

accounts between them.

30. In the instant case now before us there is a dispute between the two. At the earlier stage of these proceedings we had been informed that a

reference had been made to one of the leaders of the profession and a certain amount had been suggested by him as the amount of legitimate dues

of the lawyer from the client. Such opinion however had been expressed without the client being represented.

31. We accordingly direct that the prayer made by the client to determine the Vakalatnama in favour of Shri J.M. De, Advocate, will be allowed

on the client paying the fees and charges if any due from the client. This Court will fix the amount after hearing the party. We further direct that a

notice be sent from the Court to the Respondent intimating that the Court will determine on December 5, 1955, whether any amount is due by the

Advocate Shri De after hearing such representation as may be made by the client. This matter will be on that day before the Bench for further

direction.

32. It now remains for us to consider whether the verbal prayer made by Shri Rohini Kanta Ghose, Advocate, for leave to withdraw from the case

can be entertained. In the circumstances of this case we do not think that such leave on an oral application should be allowed, particularly when the

client as in her subsequent letter to the Court claims that she had paid his dues for the hearing of the matter which is now before the Court. If any

written application is filed by the Advocate as required under the rules it will have to be considered after hearing the client and that also on

condition whether any portion of the fees paid to him should be refunded before he can be discharged.

33. We are thankful to Mr. Mookerjee and Mr. Banerjee for the assistance rendered to the Court in this matter.