

(1955) 10 BOM CK 0021

In the Bombay High Court

Case No : O.C.J. Appeal No. 29 of 1955 and Suit No. 1025 of 1948

Kantilal Amarchand Shah

APPELLANT

Vs

Itmadi Hassanali Jeewabhoy

RESPONDENT

Date of Decision : 13-10-1955

Acts Referred:

Citation : (1956) 58 BOMLR 272

Hon'ble Judges : M.C. Chagla, C.J.;Tendolkar, J

Bench : Division Bench

Judgement

M.C. Chagla, C.J.—Although this appeal raises a very short" question of construction as to the authority to be obtained by an attorney under Rule 568, it also raises a very important question with regard to the duties and responsibilities of attorneys and also the duties and responsibilities of counsel.

2. A suit was filed, being suit No. 1925 of 1948, by two members of Shia Ismaili community against 14 trustees appointed for the management of His Highness the Aga Khan Diamond Jubilee Trust. The suit was for the removal of the trustees on the ground that they had mismanaged the trust fund which amounted to Rs. 24,00,000, and the main charge against the trustees was that they had allowed this amount to remain deposited in a bank called the Associated Banking Corporation Limited, which was ultimately wound up. Defendant No. 14, the respondent, was one of the trustees and the appellant, Mr. Kantilal, acted as his attorney. The defences of all the trustees were common and the brunt of the defence was borne by defendants Nos. 1 to 11 who were the leading trustees and leading members of the community. The only defence which defendant No. 14 took up, which was not common to the other defendants, was that he wrote to the trustees at a particular point of time and told them not to keep the moneys in the Associated Banking Corporation but to remove the moneys and keep them in different banks. On January 17, 1952, Mr. Kantilal delivered the briefs to Mr. H.H. Dalai and his junior Mr. S.A. Desai. Both were blank briefs and Mr. Kantilal's case is that in December 1951 he and his client had agreed that he

would brief these two counsel, that they would charge 60 G. Ms. and 58 G.Ms. respectively and that his client agreed to his briefing these two counsel.

3. We would like to make some observations on the delivering of blank briefs to counsel. It is the duty of the solicitor to assess the work that counsel has to do in a particular case. It is also his duty to assess what are the reasonable and proper fees that counsel should charge for a particular brief, and having assessed that he should mark the fees on the brief. It is then for the counsel either to accept that brief on seeing what work the brief would involve or to reject it. But it is entirely contrary to the traditions of the Bar and of the solicitors' profession to make it a matter of course to deliver blank briefs with the possibility of unlimited abuse. We readily grant that there may be cases when the matter may be so heavy and so complicated that it would be difficult to say what would be the proper fees, and a solicitor may trust counsel after looking into the brief to mark proper fees which he thinks the work justifies. But these are unusual cases, and even in these cases the counsel should mark briefs before the case starts. There are cases where the stake involved is very large, where fees are of little consequence and where the solicitor may leave it to the sense of duty and fairness of counsel to mark the proper fee. But in this case no explanation has been given as to why blank briefs had been offered to Mr. Dalai and Mr. Desai when according to Mr. Kantilal himself he had told his client in December 1951 that the fees that would be charged by Mr. Dalai and Mr. Desai would be 60 G.Ms. and 58 G.Ms. We do not understand why in the first place the solicitor tendered blank briefs to counsel and in the second place why counsel accepted blank briefs. There again Mr. Kantilal says that both Mr. Dalai and Mr. Desai were told that they would be paid 60 G.Ms. and 58 G.Ms. respectively and there was no dispute as to the fees that they would charge. Mr. Kantilal also did something unusual in this case, and that was to brief a third counsel Mr. Shanghavi. Mr. Shanghavi had been enrolled only three months at the Bar when this third brief was given to him. Mr. Kantilal's explanation in his evidence is that he gave a third brief to Mr. Shanghavi with the knowledge and consent of his client, because he thought that the case was such that the services of a third counsel were necessary.

4. It is with some difficulty that we have been able to retain the system in this High Court where two counsel are allowed on taxation, and the reason for allowing two counsel is that it helps the administration of justice and Courts are not held up because one counsel is absent. But the very reason for briefing two counsel is that one or the other must be available to the client. If neither can attend, then the junior must return the brief in good time so that somebody else should be briefed in his place. We are surprised and even shocked to learn, so Mr. Kantilal tells us, that the practice has been growing at the Bar or amongst solicitors even in heavy matters where handsome fees are marked that two counsel are not considered enough but third counsel is briefed so that if both are absent the third would be available. We can understand a case where a third counsel is necessary to take notes or to find out authorities, or again when the

stake is very large and the matter is of the utmost importance or complication or complexity that a third counsel may be briefed. We can also understand a case where a retainer has been given and the solicitor briefs a third counsel. None of these factors are present in this case, and we are not at all satisfied with Mr. Kantilal's explanation for his briefing the third counsel, a very junior at the Bar, who had just stepped into the profession. Mr. Kantilal's client had a more interesting explanation to give as to why a third counsel was briefed, but we discard the explanation. Even accepting Mr. Kantilal's testimony to be correct, we do not for a moment accept his excuse that this was such a difficult case that a third counsel was necessary to be briefed.

5. Proceeding with the story of the case, as we have pointed out, the briefs were delivered on January 17, 1952. The case reached hearing on January 23, 1952, and on that date Mr. Kantilal obtained from his client a letter of authority. Now, Rule 568 of the High Court Rules provides:

Where the Attorney has incurred unusual costs on behalf of his client, such costs shall not be allowed to him unless the client has expressly instructed the Attorney in writing to incur them.

Therefore when an attorney claims costs which would ordinarily be disallowed on taxation either between party and party or attorney and client, he would only be allowed those costs provided in respect of those costs he has obtained an authority from his client which must be in writing. All costs which are not allowed as between party and party and attorney and client are unusual costs, because the Taxing Master has no authority to tax any costs which go beyond or outside the ambit of party and party or attorney and client taxation. The Taxing Master has, therefore, to be satisfied that heavy costs which would not ordinarily be allowed on taxation are justified by a written authority obtained by the attorney. Inasmuch as the solicitor had marked 60 G.Ms, and 58 G.Ms, to two counsel and had briefed a third counsel he realised that he would not be allowed these costs on taxation unless he obtained a written authority from his client and, therefore, on January 23, 1952, he obtained a written authority from his client in the following terms:

In the above suit I authorise you to engage as many counsel as you think necessary for the conduct of the above suit and to pay them their proper fees which are required by them though they may not be otherwise allowed on taxation. We also hereby authorise you to take opinion of the counsel and to engage counsel at the hearing of the suit or any application including the Chamber Summons, Notice, etc., and agree to pay for the same.

6. It appears that the case of Mr. Kantilal is that on the following day, i.e. on January 24, 1952, Mr. Zaiwalla, the attorney of the plaintiff came to see him with his own client and by reason of the intervention of Mr. Zaiwalla he was persuaded to prevail upon Mr. Dalai and Mr. Desai to reduce their fees from 60 G.M.s and 58 G.M.s to 40 G.M.s and 38 G.M.s. Therefore he agreed to pay these two counsel

the fees of 40 G.M.s and 38 G.M.s. The suit went on for a fairly long time, there were 70 hours taken for the hearing, and Mr. Kantilal paid these two senior counsel 40 G.M.s and 38 G.M.s as brief fees and paid as refresher 38 G.M.s and 36 G.M.s. In the bill that Mr. Kantilal brought against his client he claimed these fees as proper permissible fees on taxation inasmuch as he had paid them to the two counsel. As far as this bill of the solicitor is concerned no question arises in this appeal with regard to the fees paid to the third counsel. What Mr. Dastur, the Taxing Master, did was that he allowed the brief fees of 40 G.M.s and 38 G.M.s and reduced the refresher from 38 G.M.s and 36 G.M.s to 22 G.M.s and 20 G.M.s. Against this decision Mr. Kantilal went in review before Mr. Vaidya and on reviewing Mr. Vaidya upheld the decision of the Taxing Master. Then Mr. Kantilal took out a Chamber Summons before Mr. Justice Desai for setting aside the judgment of the Taxing Master. That Chamber Summons was dismissed by Mr. Justice Desai and Mr. Kantilal has now come in appeal, and the only question that we have to consider is the proper construction of the letter of authority which has been set out above in the judgment.

7. Before we deal with the letter of authority, we would like to lay down certain general principles which should guide the solicitors in taking such letters from their clients. It must not be forgotten that a solicitor primarily acts in the interest of his client and he is there to protect his interest. If the dual system in Bombay has any justification at all, it is this that the solicitors constitute a class not only of able and competent lawyers but of responsible lawyers, and therefore when an attorney is dealing with a client, who is a layman and very often illiterate or semi-literate, it is his duty to point out to his client what are the risks in the litigation, what he is likely to get if he succeeds, and what he is likely to pay if he fails; and therefore Rule 568 requires that the attorney should set out in proper detail what are the unusual costs which he is asking his client to incur in his behalf. In the first place a responsible attorney, unless it is absolutely necessary, should not incur unusual costs, because he knows that these costs he can never get from the other side even if his client succeeds. But if he has to incur unusual costs, the letter of authority must be clear and precise. The attorney must tell the client of the unusual costs and also roughly what amount he would be involved in if these costs are to be incurred.

8. Looking at the letter of authority from this point of view, in our opinion the letter of authority obtained by Mr. Kantilal is not a proper letter of authority at all. It does not satisfy any one of the tests we have laid down for a proper letter of authority. In the first place it is extra-ordinary that although the briefs were tendered on January 17, 1952, and although according to Mr. Kantilal the fees were agreed upon and the letter of authority was taken on January 23, 1952, it is difficult to understand why the fees which the client had agreed to pay according to Mr. Kantilal should not have been mentioned in the letter of authority. Mr. Kantilal has given a rather naive explanation that although Mr. Dalai and Mr. Desai had agreed to charge 60 G.M.s and 58 G.M.s they might not be available and the brief might have to be tendered to some other counsel. 60

G.M.s and 58 G.M.S even by the modern standard of the Bar are by no means fees to be neglected or ignored, and if the client had authorised Mr. Kantilal not to spend more than 60 G.M.s and 58 G.M.s for the payment of counsel's fees, if Mr. Dalai or Mr. Desai were not available, it is difficult to believe that the Bar is so poor or rather so rich that no other counsel would have been available to accept 60 G.M.s and 58 G.M.s to conduct this wonderful litigation on behalf of defendant No. 14. If as Mr. Kantilal says some counsel might have been available who might have charged less fees, well, all the better for the client, and if it had turned out that he had to go to some counsel who wanted higher than 60 G.M.s or 58 G.M.s, there was no difficulty in getting another letter of authority from the client. The explanation given by Mr. Kantilal for not mentioning the fees is an explanation which we cannot accept.

9. When we turn to the language of the authority, what the client has authorised his solicitor to pay his counsel are not unusual or extra-ordinary fees but proper fees. Mr. Kantilal's contention is that under this letter of authority he could have marked any fees to counsel and that the fees marked by their very nature had to be unusual fees. We find it difficult to equate the expressions "unusual" and "proper". "Proper" involves a certain standard by which counsel judges his responsibility and his duty, and the solicitor made it quite clear to his client that he would only give fees to counsel which under the circumstances of the case and looking to the nature of the litigation could be considered proper fees and not unreasonable or unusual fees. Therefore, in our opinion, this letter of authority was not a letter of authority at all for the marking of unusual fees to counsel.

10. Mr. Kantilal has then relied on the fact that the letter of authority expressly states that he was authorised to mark the fees on counsel's briefs though they may not be otherwise allowed on taxation, Now, as is well-known, taxation is of two kinds, party and party and attorney and client, and the fee given to a counsel may not be allowed party and party and yet may be allowed attorney and client. This letter of authority does not make it clear that the solicitor was authorised to mark fees which would not be allowed between attorney and client. It can be easily understood that a client may agree to pay fees to counsel all of which he may not get from the other side, yet he may say "" You must not mark more fees than the Taxing Master might allow as reasonable fees on attorney client basis."" Therefore to suggest that by using the expression "which may not be otherwise allowed on taxation" the attorney got the authority to pay any fees however unreasonable, however unusual and even though they may not be allowed on attorney client taxation, is to suggest a construction upon this letter of authority which its plain and natural language cannot bear.

11. The next contention, and which really is the main contention in this appeal, is whether this letter of authority permitted the attorney not only to mark higher fees on the briefs of counsel but also it was an authority with regard to the payment of refreshers. It is well-settled law in England, and we here on taxation

follow the English practice, that the refresher fees of counsel stand on an entirely different footing from the fees marked. Our own Rule 586 reproduces the English practice because whatever may be the brief fee, the only fees for refresher which the Taxing Master can ordinarily allow are 10 G.M.s and 8 G.M.s. It is only when the case is of extra difficulty and importance that it is in the power of the Taxing Master to allow a higher refresher, for it does not follow that because the brief is marked 40 G.M.s and 38 G.M.s that as a matter of right counsel is entitled to refresher which is 38 G.M.s and 36 G.M.s. It is a matter of contract or understanding between counsel and solicitor. In any case a client cannot be held to have authorised unusual refresher fees merely because he authorised the solicitor to give unusual brief fees to counsel. If the solicitor wants to give to counsel refresher fees which may not be allowed on taxation, he must get from his client an express authority dealing with refreshers. Refreshers cannot be covered by a general expression on which Mr. Kantilal has relied that he was authorised to engage counsel for the conduct of the suit. Of course the authority was to brief counsel for the conduct of the suit and not for any other purpose; but that expression clearly does not cover the authority to pay refreshers to counsel, and therefore in this particular case on taxation the solicitor was not entitled to any refresher fees beyond what could be allowed on taxation in the light of Rule 586. Therefore, in our opinion, the Taxing Master when he reduced the refresher fees from 38 G.M.s and 36 G.M.s to 22 G.M.s and 20 G.M.s he was acting within his authority, and in our opinion, if anything, he erred on the generous side, because he would have been perfectly justified in allowing even less refreshers than what he has allowed on taxation.

12. Although there are cross-objections with regard to refreshers filed by the respondent, Mr. Laud who appears for him does not press the cross-objections and therefore it is unnecessary for us to consider the matter further.

13. There is one more observation which we would like to make with regard to this letter of authority. It is absolutely improper on the part of the solicitor to take from his client so wide an authority as to permit him to engage as many counsel as he thinks proper. A client must be explained, he must be told, that it is not necessary for him to brief more than two counsel. The practice of the High Court only compels him to engage two counsel. The solicitor must tell him why he needs more than two counsel, and if he needs more than two counsel, he must tell his client how many more he would require. In this case Mr. Kantilal took authority from his client to brief as many counsel as he liked, and as a matter of fact he not only briefed Mr. Sanghavi as third counsel but he tells us that he also briefed or took the opinion of Sir Jamshedji Kanga. The letter of authority on the face of it shows under what compulsion a litigant finds himself when he goes to a solicitor, in order to ask him to fight his litigation, Mr. Kantilal's client, realising the implication of "as many counsel" actually struck off the expression, but under persuasion, and Mr. Kantilal says it was very gentle persuasion, of the solicitor, he inserted the words again and initialled the alteration. The solicitor should realise that in many ways the client is very

helpless. In many litigations he is fighting for a very large stake and he is at the mercy of the solicitor and is prepared to accept his advice. But that makes the responsibility of the solicitor all the greater, and we think, and we want to say it again, that it was improper on the part of Mr. Kantilal to insist upon the client to give an authority to brief as many counsel as he liked. His client did not know what would be the number of counsel to be briefed, what would be the fees to be paid and what would be his ultimate liability. We have now altered the rules governing the dual system with the sole object that the costs should be cut down and also that a litigant should know what extra costs he will have to pay even after he has succeeded in his litigation. Solicitors should try and help to work the system in the spirit in which it originated and the spirit in which the rules now require it should be worked. The most important feature of the system today is that the solicitors should realise that they should make it perfectly clear to the clients what risks they are running in litigating and coming to this Court and taking advantage of the dual system, and all that can be done if this Rule 568 is properly followed. In our opinion in this particular case Rule 568 was not followed. We are sorry to say, but we are compelled to say, that Mr. Kantilal should not have taken this authority in the language and in the term in which it was taken.

14. The appeal, therefore, fails and must be dismissed with costs. Cross-objections dismissed. No order as to costs of the cross-objections. Liberty to the respondent's attorneys to withdraw the sum of Rs. 500 deposited. The respondent undertakes that if there is any surplus he will return it.