
(2009) 05 BOM CK 0051
In the Bombay High Court
Case No : Writ Petition No. 725 of 2008

Mrs. Maria Alic Da Silva De Noronha E Oliveira	APPELLANT
Vs	
Prof. Maria Elsa Noronha Wolfango De Silva, (since deceased) by her legal representative, Mr. Antonio Sequeira Coutinho Pereira and Others	RESPONDENT

Date of Decision : 08-05-2009

Acts Referred:

Advocates Act, 1961 — Section 34, 49, 49(1)(c)
Civil Procedure Code, 1908 (CPC) — Order 3 Rule 2, Order 3 Rule 4
Evidence Act, 1872 — Section 126

Citation : (2009) 05 BOM CK 0051

Hon'ble Judges : R. S. Dalvi, J

Bench : Single Bench

Advocate : Iftikhar Agha, for the Appellant; V. R. Tamba, for the Respondent

Final Decision : Dismissed

Judgement

Smt. R. S. Dalvi, J.—Rule, returnable forthwith. Heard by consent. An interesting point with regard to appearance of Advocates against the party whose power of attorney the Advocates Senior held earlier upon objection of such party is the subject matter of this writ petition.

2. There were several parties in the initial suit bearing Special Civil Suit No.154/1993/B. The suit has been disposed of. An appeal therefrom is pending in this Court. Two powers of attorney were executed by two parties in favour of the Advocate who was the senior Advocate of the Advocates against whom the objection for appearance has been taken. This objection was taken pending the suit in respect of certain interim proceedings. The impugned order came to be passed on 2.8.2008 upon the objection taken to the appearance of the Advocates. It is contended on behalf of the respondents that all the orders passed in the suit come to an end when the suit is disposed of and hence, that impugned order has also come to an end. Consequently, this writ petition has

become infructuous since the writ of this Court cannot be directed against the learned Judge, who passed the said order as the records and proceedings are not before the Court and are brought before this Court in the first appeal filed against the judgment in Special Civil Suit No. 154/93.

3. Nevertheless the petitioner who was the original defendant No.6 insists upon the appearance of the same Advocate even in subsequent proceedings and hence, the Advocate on behalf of the petitioner has insisted upon an order being passed in this writ petition to settle the aspect relating to the objection to the appearance of the Advocates of the petitioner earlier as well as henceforth in the proceedings between the parties as a matter of law. The suit was filed by Professor Maria Elsa Noronha Wolfango De Silva (Elsa), since deceased. The suit was filed against inter alia one Mrs. Ricardina Noronha (Ricardina) since deceased who was the original defendant no.1 and one Mrs. Maria Alice Da Silva Noronha E Oliveira (Alice) who was original defendant No.6.

4. Elsa executed a power of attorney since as far back as 14.6.1963 in favour of the Advocate who was the senior of the Advocates, who seek to represent Alice at present. On 3.9.92 Ricardina executed a Power of Attorney in favour of the same Advocate. In 1993 the aforesaid suit was filed by Elsa inter alia against Alice. The said Advocate filed his wakalatnama inter alia for Alice and others. Elsa objected to his appearance. Elsa expired on 21.11.97. An order of injunction came to be passed in the suit. Alice inter alia challenged the order. Alice was represented by the said Advocate. Elsa and her son Antonio (who shall together be referred to as Elsa) opposed the appearance of the said Advocate. Ricardina did not challenge the appearance. Ricardina as well as Alice were the defendants in the suit represented by the same Advocate. Elsa's opposition to the appearance of the Advocate, was essentially in his capacity as her C.A. and not as the C.A. of Ricardina, or any other party. In the challenge by Elsa this Court opined that though there was not a specific bar it would be proper and appropriate that the Advocate should withdraw his appearance in the suit. This Court considered the scope of professional ethics laid down in the case of Oil and Natural Gas Commission Versus Offshore Enterprises Inc. reported in 1993 Bombay 217 (ONGC).

5. The judgment in the case of ONGC (supra) lays down the parameters of professional etiquette in respect of the appearance of Advocates who are constituted attorneys of their clients. It essentially lays down that an Advocate cannot combine two roles of being a constituted attorney and of being Advocate or Attorney for the party in a legal proceeding. The concept of the bar against appearance is held to stretch not only to the Advocate but also to partners of his firm. Para. 10 of the judgment lays down the object of the rule. Sections 34 and 49 of the Advocates' Act read with Order 3 Rules 2 and 4 of the C.P.C. and Rules 9 and 13 of the Bombay High Court Rules, read with the object stated in para 10 of the judgment is to see that the Advocate does not only act impartially but also appears to act impartially with a duty to the opponent keeping a distance

between his professional and non-professional capacity in the same matter. It holds that it does not make a difference to an Advocate acting singly or as a partner of a firm since all the partners may act for given client in a legal proceeding though only one of them may sign the wakalatnama to bind the firm. This act would be in their professional capacity and no other. It is observed to be different from his act in his capacity as a constituted attorney of his client in which he is entitled to identify himself with the interest of his client as against his professional capacity in which he must refrain from doing so.

6. The O.N.G.C. case relates to the matter in dispute before this Court in the proceedings between these parties. In that case the power of attorney executed by Ricardina in favour of the said Advocate before the custodian of evacuee properties in respect of the suit properties was under consideration. It was observed that the said Advocate was also a constituted attorney of Elsa who was the respondent in that application. The Advocate was conversant with the facts and legal aspects of the disputes. Hence, it was contended that he or his associates are not entitled to appear against Elsa.

7. It was contended on behalf of the Advocate, who was a constituted attorney that mere issue of power of attorney without any appearance therein under does not prohibit the appearance of the Advocate in any other case against the person giving the power of attorney. That argument was upheld.

8. The SLP No. 8695/2000 was filed by Elsa against the said order. In the SLP Counsel on behalf of the Advocate who was the constituted attorney stated that the Advocate shall not appear in cases against Elsa. The judgment of this Court in so far as it related to the said Advocate came to be set aside after the statement was recorded. Consequently the argument above referred to, which was accepted by this Court, has not been accepted by the Supreme Court. Hence, the Advocate on behalf of Elsa contends that even upon the mere power of attorney, the Advocate cannot appear against her.

9. Elsa's main opposition, through her present representative Antonio, against the Advocates of Alice however, is not without substance considering the Order of the Supreme Court in the SLP filed by Elsa in which the part of the judgment of this Court allowing the Advocate who was a power of attorney holder in another case against his principal was set aside. The senior Advocate conceded that position.

10. Mr. Agha relies upon Rule 17 of Bar Council of India Rules governing the Advocates regarding the standards of professional conduct and etiquette. Rule 17 runs thus :

An Advocate shall not directly or indirectly commit breach of the obligations imposed u/s 126 of the Indian Evidence Act.

Section 126 of the Indian Evidence Act runs thus :

126. Professional communications. - No barrister, attorney, pleader or vakil shall

at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment :

11. The Section relates to professional communications which are confidential in nature. Hence, no Advocate is permitted except with the consent of his client, to disclose any communication made to him as such Advocate on behalf of his client. Similarly no Advocate is allowed to state the contents of any documents which he got to learn about as such Advocate or even to disclose any advice given by him to his client as such Advocate. The Section refers to communications made to the Advocate in his capacity as an Advocate. It does not relate to communications made to the Advocate in his capacity as a constituted attorney of his principal. Hence the information derived by the Advocate as constituted attorney of any party is not professional communication which can be taken to be of confidential nature u/s 126 of Indian Evidence Act.

12. Elsa in this case opposes the appearance of the Advocates who are the juniors of her constituted attorney against her on the premise that whatever information that Elsa may have passed on to her constituted attorney can be used against her indirectly by the juniors of the constituted attorney who seek to appear against her. Elsa contends that what her constituted attorney could not do directly he is seeking to do it indirectly by refraining from appearing himself, but causing his junior Advocates to appear instead. Even if that is so, such appearance of the Advocates would not constitute a breach of the obligation of such Advocates, u/s 126 of the Indian Evidence Act and consequently would not be a breach of Rule 17 of the Bar Council of India and rules framed u/s 49(1)(c) of the Advocates' Act.

13. Similarly, the judgment in ONGC's case which dealt with Rule 9 and 13 also framed u/s 49(1)(c) of the Advocate's Act would not be breached upon such appearance since in this case the Advocates appearing are not themselves peculiarly interested or would not be witnesses in the case.

14. Mr. Agha, on behalf of Elsa has sought to stretch the said principles of Ethics to the juniors of the said Senior Advocate. The Junior Advocates now seeking to appear are shown to be from the same chamber. Elsa has produced three vakalatnamas in Special Civil Suit no.154/93 executed from time to time i.e. on 4.10.93, 29.11.2005 and 17.1.2007 in which the present Advocates seeking to appear for Alice against Elsa are shown to be from the same chamber at the same address. It is, therefore, contended on behalf of Elsa that the Senior Advocate is doing indirectly what he has conceded not to do directly. It is argued on behalf of the Alice that her Advocates are at present having a separate independent chamber.

15. The aspect for determination, therefore, is whether the Junior Advocates of a constituted attorney of a party who is an Advocate who cannot appear against that party, can appear against her. It is now settled consequent upon the order in the aforesaid SLP No.8695/2000 that the Advocate holding a power of attorney of his principal cannot appear against the principal even in any other case. It is common knowledge that various Advocates, even though not on the senior's list have a large number of juniors. In several matters juniors are made to appear inter alia when the Advocate may find it embarrassing to appear or when there is apparent conflict of interest which may demonstrate an unethical professional act. It is also common knowledge that several junior Advocates leave the chambers of their seniors to start their independent practice and have no relation or communication with their seniors soon after they are settled in practice. It may be a just matter of coincidence that the Junior Advocate files his or her appearance and seeks to appear for the client whose opponent may have executed a power of attorney in favour of his or her senior which may or may not be only a general power of attorney and under which the said Senior Advocate may or may not have derived any particular knowledge or information about the facts of the case which would become so material and acquired by the Junior Advocate as would ultimately go against the interest of the principal who executed the power of attorney.

16. Keeping in view the rule of professional conduct which prohibits direct as well as indirect breach of confidential communications it would have to be seen whether this indirect breach of the principle laid down in ONGC's case, which has been upheld in the above SLP No. 8695/2000, can be breached.

17. The preamble of Rules of the Bar Council of India for Standard of Professional Conduct and Etiquette show the noble standards which are required to be followed both in letter and spirit. If, therefore, one Advocate cannot appear against a particular person, his junior also must refrain from appearing in general except if he or she can show such total and complete distance from his or her senior as would leave no strain of doubt of his ethics against any such person. Keeping in mind the high standard of ethics which are required to be maintained by Advocates, the onus of showing that the Junior Advocate is not indirectly or even remotely connected with his or her Senior Advocate with regard to the information and knowledge about the opponent who is the principal of his or her Senior Advocate is on that Advocate and not vice-versa. It would militate against the principles of professionalism if opponents are required to show how the Junior Advocate does indirectly what the senior Advocate has refrained from doing directly.

18. It is also contended on behalf of the Alice that both Elsa and Recardina have expired. The powers of attorney came to be terminated upon their death. Hence, the opposition to the appearance of the Junior Advocate when the power of attorney of Senior Advocate would be no longer alive, cannot survive. It is rightly contended on behalf of Elsa that the powers of attorney came to be terminated in

1997 and 2001 when Elsa and Recardina expired. However, as late as on 16.10.2000, when SLP No. 8695/2000 was disposed of, this contention was not taken and the Senior Advocate nevertheless refrained from appearing against Elsa upon her objection. That aspect, therefore, is best left unagitated.

19. With regard to the appearance of the Junior Advocates of the constituted attorney of Elsa against Elsa it is seen that the Junior Advocates who now seek to appear against Elsa, having their offices at the same address of the Senior Advocate since 1993 all throughout until January 2007 cannot be stated not to have an interest or knowledge or to be even indirectly or remotely connected or concerned with or be in position to derive knowledge from the Senior Advocate who has conceded that he will not appear against Elsa even in any other case. Consequently, it is seen that the impugned order dated 2.8.2008 which has disallowed the appearance of the Junior Advocates having their offices at the same address as that of their Senior, who is shown to be having an office in the name of himself with his associates, cannot be faulted. The writ petition is accordingly, dismissed. Rule is discharged.