
(1992) 12 BOM CK 0014

In the Bombay High Court

Case No : Arbitration Petition No. 210 of 1989 in Award No. 66 of 1989

Oil and Natural Gas Commission

APPELLANT

Vs

Offshore Enterprises Inc.

RESPONDENT

Date of Decision : 18-12-1992

Acts Referred:

Advocates Act, 1961 — Section 31, 34(1), 49

Bar Council of India Rules, 1975 — Rule 10, 13, 9

Bombay High Court Rules — Rule 13, 9

Civil Procedure Code, 1908 (CPC) — Order 19 Rule 2, Order 3 Rule 2, Order 3 Rule 4

Citation : AIR 1993 Bom 217 : (1993) 2 BomCR 618 : (1993) 95 BOMLR 396 : (1993) 1 MhLj 243

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : I.M. Chagla and D.J. Khambata, instructed by B. Munim and Co. and G.E. Vahanvati and P.A. Savant, instructed by Gagrath and Co., for Incorporated Law Society, A.P. Shah, for the Appellant;

Judgement

1. While hearing Arbitration Petition No. 210 of 1989, I found that Shri Atul Munim and Shri Pramod Dalai, Partners of Messrs. Bachubhai Munim and Co., a firm of Advocates, had filed their own affidavits as Constituted Attorney of the Respondent Messrs. Offshore Enterprises Inc., while Messrs Bachubhai Munim and Co. were also on record of the proceedings in their professional capacity as advocates for the Respondent. I have come across several such cases where power of attorney is obtained by one or other partner of the Advocates' firm/ Solicitors' firm from a non-resident client and the Advocates' firm acts for that party in a professional capacity. While delivering my judgment dated 20th and 23rd April 1992 I observed as under :--

"In case of foreign clients, a practice appears to have grown up to the effect that the Advocate on record acts both as a Constituted Attorney of the client as well as an advocate on record. Time has reached when it shall have to be considered as to whether this practice is in accordance with law and as to whether an

Advocate can be permitted to combine the role of a Constituted Attorney of a suitor and that of an Advocate/Solicitor on record of the same case. Since a doubtful practice of this kind has grown up in this Court for many years, this aspect shall have to be examined after issue of notice to the Bar Council of Maharashtra and the Incorporated Law Society. This can be done separately although the occasion for examining the question arises in this petition."

2. In this background, I formulated the following questions for consideration of this Court in this respect.

(i) Whether an Advocate is entitled to act as Constituted Attorney of a party with authorisation to sign the pleadings and affidavits on behalf of the suitor as well as to act and plead for the party concerned in the same litigation?

(ii) Whether the existing practice followed by firm of Advocates/Solicitors/Attorneys particularly in case of non-resident clients as aforesaid is in conformity with law and the recognised rules of professional ethics?

(iii) Any other question which may be incidental to the question Nos. 1 and 2?

The Bar Council of Maharashtra and Goa. The Bombay Incorporated Law Society of Bombay and parties to the main proceeding waived notice of hearing in respect of the questions formulated by the Court as aforesaid. Shri Ajit P. Shah, made detailed submissions on behalf of Bar Council of Maharashtra and Goa on the question referred to hereinabove. The Bar Council of Maharashtra and Goa has filed its written submissions in the matter. Shri G. E. Vahanvati made detailed submissions on behalf of Bombay Incorporated Law Society. The Law Society has filed written submissions on the above referred questions of importance. Shri D. J. Khambata counsel of this Court instructed by Messrs Bachubhai Munim and Co. made submissions on behalf of Respondents in this petition and also filed written submissions on behalf of the Respondents in the main proceedings. The Court is well assisted on the subject of considerable importance to the legal profession, the members of the public and this Court.

3. It is necessary to refer to some of the relevant provisions of the CPC before discussing the contentions urged by the learned counsel at the Bar. A party may appear in a suit or other legal proceeding in person or by recognised agent or by "pleader". The word "pleader" used in the Code is wide enough to mean and include Advocate and legal practitioners of all categories. Order III Rule 2(a) of the CPC provides that the recognised agents of parties by whom such appearances, applications and acts may be made or done are:--

"persons holding powers-of-attorney authorising them to make and do such appearances, applications and acts on behalf of such parties;"

Order III Rule 2(a) of the CPC is amended in its applicability to the State of Maharashtra by notification No. 3236 dated 27th November 1936 issued by the High Court of Bombay. Order III Rule 2(a) of the CPC as amended reads as under:--

"2(a). Persons holding on behalf of such parties either (a) a general power of attorney, or (ii) in the case of proceedings in the High Court of Bombay an Attorney of such High Court or an Advocate, in the case of proceedings in any district any such Attorney or any Advocate or a Pleader to whom a sanad for that district has been issued, holding the requisite special power of attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorising them or him to make and do such appearances, applications and acts on behalf of such parties."

Thus as far as our State is concerned, recognised agents must hold a General Power of Attorney and not a special Power of Attorney except to the extent permissible in the exception carved out as aforesaid. The said amended rule provides that "In case of parties non resident within the local limits of the jurisdiction of the Court a suitor can appear through a recognised agent by executing a special Power of Attorney in favour of an attorney of the High Court (meaning thereby an Advocate), in case the proceedings are filed or continued in the High Court of Bombay and in favour of any advocates or pleader in case the proceedings are filed before the District Court. Order III Rule 4 of the CPC provides that;

"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 recognised agent or by some other person duly authorised by or under a power of attorney to make such appointment."

4. With effect from 1st January 1977, special provisions for attorneys contained in Section 31 of the Advocates Act 1961 were deleted. The Advocates Act 1961 in terms provides that:

"there shall be only one class of persons entitled to practice the profession of law, namely, Advocates".

In other words rights and obligations of erstwhile Attorneys are the same as that of other advocates. The erstwhile attorneys of this Court are liable to be treated as advocates on par with other Advocates. After abolition of class of Attorneys, Order III Rule 2(a) in its applicability to State of Maharashtra ought to have been recast. I recommend that the said rule be suitably Amended. Nor however amendment of the said rule is of no practical consequence for purpose of deciding the question formulated above. Erstwhile are liable to be treated as Advocates for all purposes including interpretation and application of the above referred Rule.

5. In exercise of powers conferred on the High Court u/s 34(1) of the Advocates Act 1961, the High Court has framed rules. Rule 2 (1) of the said rules provides that:

"No advocate shall act for any person in any Court unless he has been appointed

for the purpose by such person by a vakalatnama in the form annexed to the rules and signed by such person or by his recognised agent or some other person duly authorised".

The suitor is entitled to appoint a firm of advocates as his advocates. In such case the vakalatnama is executed in favour of a firm of 7. It is well settled law that the constituted attorney of a suitor has no right of audience in Court or to cross-examine witnesses. The Constituted Attorney is merely entitled to "act" and "appear" for a party but has no right to "plead" in a Court. The expressions "act" and "appear" do not mean "right to plead" as such. It has been so held by our High Court in the case of Aswin Shambhuprasad Patel and Others Vs. National Rayon Corporation Ltd., . It is advocates. Rule 10 of the Rules framed u/s 34(1) of the Advocates Act reads as under:--

"10.(a). The appointment of a firm of Advocates may be accepted by any partner on behalf of the firm.

(b) No firm of Advocates shall be entitled to appear, act or plead in any Court unless all the partners thereof are entitled to appear, act or plead in such court."

If, a suitor appoints a firm of advocates as his, her or its advocate, it follows that the suitor has appointed all the partners of the said firm as his advocates and each one of the partners of the said firm is under an obligation to act consistently with his professional obligation arising from acceptance of the said vakalatnama. Neither of the partners of such firm of Advocates or Solicitors can act in respect of the same cause in a manner inconsistent with obligations arising from appointment of firm of Advocates a Advocates for the Cause.

6. Section 49 of the Advocates Act 1961 empowers the Bar Council of India to frame rules laying down standard of professional conducts and etiquette, the said rules are not exhaustive. Rule 9 of the said rules provide that "an advocate should not act or plead in any matter in which he is himself pecuniarily interested". Rule 13 of the said rules provides that:

"An Advocate should not accept a brief or appear in a case in which he has reason to believe that he will be a witness, and on his being engaged in the case, it becomes apparent that he is a witness on a material question of fact, he should not continue to appear as an Advocate if he can retire without jeopardising his client"s interests".

Rules framed by Bar Council of India are not exhaustive as stated in the preamble to the Rules. The Rights, privileges and obligations of Advocates are required to be spelt out inter alia from Code of Civil Procedure. Advocates Act, well recognised principles, doctrines and traditions governing the members of the Bar as well as the rules framed by the High Court and the Bar Council.

7. It is well settled law that the constituted attorney of a suitor has no right of audience in Court or to cross-examine witnesses. The Constituted Attorney is merely entitled to "act" and "appear" for a party but has no right to "plead" in a

Court. The expressions "act" and "appear" do not mean "right to plead" as such. It has been so held by our High Court in the case of Aswin Shambhuprasad Patel and Others Vs. National Rayon Corporation Ltd., . It is permissible for an Advocate to act as a "recognised agent" or a Constituted Attorney by virtue of Power of Attorney executed in his favour by a suitor and sign vakalatnama pleadings and affidavits on behalf of the donor of Power of Attorney to the extent provided in the CPC as aforesaid. In all such cases the signature of Constituted Attorney on pleadings, affidavits, vakalatnama and other documents is liable to be equated to signature of a party itself for all practical purposes. It follows that in all such cases the plaintiff or the defendant is deemed to have signed the pleading by the hand of his Constituted Attorney. The pleadings are required to be verified and declared by the signatory thereof with reference to personal knowledge of the averments made therein or on basis of information and belief. The question to be asked is as to whether an advocate who acts as Constituted Attorney of a suitor in pursuance of power of attorney from his client is entitled to combine his role of a constituted attorney with that of an advocate in the same cause simultaneously. Members of the Bar are governed by the provisions contained in the Advocates Act 1961, well known principles and doctrines recognised for generations and are rightly described as partner in Administration of justice. Advocates in their professional capacity are enjoined to act with complete impartiality and detachment and not entitled to identify themselves with the clients or the cause personally. The paramount duty of an Advocate is to assist the Court in its task of administering justice. In, the event of there being any conflict between interest and duty, the Advocate must yield in favour of his duty to assist the cause of fair and impartial justice. An Advocate is expected to be fair and reasonable towards his opponent. All these principles bind the Advocates in discharge of their professional duties. Advocates belong to noble profession of law. On the other hand, a constituted attorney is entitled to identify himself with the donor of Power of Attorney and act in the same manner as the suitor-litigant is entitled to act. An Advocate is governed not merely by written provisions of the Advocates Act 1961 but also by traditions of the Bar built up for generation during the course of administration of justice for centuries. It is provided by Order III Rule 4 of the CPC that a vakalatnama should be signed by the party or by his recognised agent in favour of the pleader. The question to be asked illustratively is as to whether the pleader acting in his capacity as constituted attorney of a litigant can sign such vakalatnama as a client in his own favour as an Advocate or in favour of the firm in which such constituted attorney himself is one of the partners. The answer is in negative. The question to be asked is as to whether the two roles can be combined? The question to be asked is as to whether it is not inherent in the scheme and the provisions of CPC and implicit in the provisions contained in Order III Rule 4 of the CPC and other connected provisions that advocate who acts or appears or pleads before the Court in a professional capacity must have a client with separate and distinct identity. The answer to these questions is obvious. For all practical purposes, the recognised agent of a suitor is on par with the suitor or client himself; an

Advocate is not, as an Advocate is an independent person with a specific role in administration of justice. In certain situations advocates are permitted to accept power of attorneys from a client for purpose of acting in a suit or matter, sign pleadings, vakalatnama and affidavits on behalf of plaintiff or defendant as case may be. An Advocate may be appointed as a Receiver in a suit or a cause. No one can object to the Advocate accepting these assignments permissible under the law. The question still remains as to whether the advocate who is holding a power of attorney from a client to act and appear in a suit or matter can also act in the professional capacity in the same proceedings at the same time. The answer to this question is of too obvious and has to be in negative. Detachment and impartiality expected of an Advocate is likely to be jeopardised when an Advocate acts in both the capacities. The risk in allowing combination of two roles is far too serious. I must therefore, construe the Code of Civil Procedures harmoniously and in a manner so as to prevent confusion, anomaly and misunderstanding. In my opinion, law does not permit the combination of two capacities in the same cause. Law prohibits such combination and rightly so.

8. It is unfortunate that a totally wrong practice has grown up in our Court where one or the other partner of a solicitors' firm signs pleadings and affidavits on behalf of a foreign client in pursuance of authorisation contained in the power of attorney and the same firm of Advocate/Solicitors acts, appears and pleads in a professional capacity. The said practice is not sanctioned by law. To my mind such a practice is opposed to law.

9. Shri Ajit P. Shah, the learned Counsel appearing for the Bar Council of Maharashtra and Goa has invited the attention of the Court to several authorities and passages from leading text books on professional ethics and particularly a passage from page 187 of Sanjiva Row's Commentaries on Advocate's Act and Legal Practitioners Act, 5th Edition summarising with two English cases referred to therein. The relevant portions from the said book are extracted hereinafter : --

"In *New Burnswich and Canada Railway Co. v. Conybears* (sic) the Respondent was a Barrister. On the first day of hearing the leading Counsel for the Respondent suggested that the Respondent might appear at his junior in the cause. The Lord Chancellor (Lord Westbury) said :

"Certainly. But not as a party and counsel. The respondent must elect to argue in person or not. There cannot be a mixture of the two characters". (The underlining is done to supply emphasis).

On principle, the Advocate cannot act in dual capacity and cannot be a mixture of two characters. No express provision is required to be enacted in this behalf. With great respect, the implication from the scheme of the Code interpreted in light of well recognised rights and obligation of the Bar is too obvious. It is unfortunate that the wrong illegal practice referred to in opening part of this order and the questions formulated by the Court has continued so far.

10. It is not sufficient that an Advocate acts impartially. It is also necessary that

the Advocate must always appear to act impartially. The basic principle of acting impartially and mere representation of a client consistent with duty to opponent and Court keeping reasonable distance from arena of conflict would be jeopardised if the Advocate acts in professional and non-professional capacity both in the same matter and at the same time. Practices and procedures of the Court must serve the administration of justice and rule of law in keeping with its noble ideals, traditions and objectives. The Court are required to interpret various provisions of various Acts and rules in manner so as to avoid anomalies as far as possible. Shri Ajit P. Shah, the learned counsel for the Bar Council has invited attention of the Court to the fact that a constituted attorney is entitled to identify himself with the interest of his client and give instruction to the Advocate representing the client before the Court. It would be strange if the lawyer constituted attorney gives necessary instruction in the matter to himself or his co-partners. Taking an overall view of all the relevant provisions pointing out to the Court and their objectives as indicated above, I have no hesitation in accepting each of the submissions urged on behalf of Bar Council of Maharashtra and Goa and interpret the relevant provisions so as to infer prohibition of combination of two capacities by necessary implication.

11. It makes no difference that the power of attorney is executed in favour of one or other partner of the firm of the Advocate and the litigation is in fact conducted by another partner of the advocate's firm. If the vakalatnama is executed by a client in favour of firm of advocates it follows that all the partners of the said firm are engaged as Advocates by the client concerned. It makes no difference to the situation that the vakalatnama is accepted in writing only by one of partners of the firm. All the partners need not place their signatures on the vakalatnama. Each and every partner of Advocates" firm is enjoined to act in such cases in professional capacity or no other capacity. No conflicting role can be assumed by one or other partners of the same firm in respect of the same cause or the matter.

12. There is an additional facet. On close scrutiny of Order III Rule 4 of the Code and other connected provisions, I hold that an Advocate acting in professional capacity must be independent of the suitor or his constituted Attorney. Rule of professional ethics framed by the Bar Council clearly provide in terms that no one can accept a brief or appear as an advocate if he is likely to be a witness in the case. Affidavits may be filed under Order XIX Rule 2 of the Code of Civil Procedure. On several occasions Affidavits are filed, by the constituted attorney of the suitor. Pleadings can be signed and verified by a Constituted Attorney. Once the constituted attorney of a suitor files an affidavit, he can be summoned by the Court at the instance of other side or suo motu for cross-examination. The very possibility of the advocate holding power of Attorney being summoned as a witness in such cases is sufficient to infer implied prohibition on combination of two capacities. Rule 13 of the rules of Bar Council cannot be treated as exhaustive. The said rule is illustrative and does not take care of all situations. Even if an Advocate is not likely to be called as a witness, he cannot combine the

two roles as discussed above. I find considerable force in each of the submissions made by Shri Ajit P. Shah on behalf of the Bar Council of Maharashtra and Goa. I accept each of the submissions made on behalf of Bar Council. Practice prevailing in our Court in case of foreign or non-resident clients whereby the Advocates' firm acts in a professional capacity and one or two partners of the same firm obtain power of Attorney with authorisation to sign pleadings and affidavits etc. is opposed to law as aforesaid. It is not possible to put judicial imprimature on such a practice. Even if no personal affidavits are filed by the Advocate concerned in pursuance of the power of Attorney, the Advocate cannot combine the two capacities and the two roles.

13. Shri D. J. Khambata appearing on behalf of the Respondent in Arbitration Petition No. 210 of 1989 submitted that the attorneys or advocates are permitted by the CPC to accept power of attorney from a non-resident client concerning a litigation before the High Court or any other Court in the State. Order III Rule 2(a) of the Code as amended is enacted for convenience of non-resident litigants submitted the learned counsel. The learned counsel submitted that no prohibition or restriction or limitation can be spelt out by mere implication on right of an advocate to act, appear or plead for a suitor in the same matter merely because he or his co-partner holds a power of Attorney from a nonresident client. The learned counsel submitted that the rules framed by the Bar Council of India cannot override the provisions contained in the Code of Civil Procedure. One of the questions to be asked is as to whether CPC expressly or impliedly prohibits an Advocate from acting in dual capacity in the same cause or matter. The learned counsel invited the attention of the Court to the judgment of Wadia, J. in the case of *The Performing Right Society Limited v. The Indian Morning Post Restaurant*. The question before the High Court was as to whether Mr. C.M. Hastley was entitled to act as recognised agent of the plaintiffs by virtue of a General Power of Attorney executed by the client in favour of M/s. Little and Co., a firm of Solicitors of which Mr. Hastley was a partner. M/s. Little and Co. were acting as attorney for the plaintiffs in that case. It was argued before the Court in this case that Order III Rule 2(a) of the CPC as amended in Bombay provided that an attorney may act for a non-resident client in pursuance of a special power of attorney from a suitor and the Attorney concerned could not therefore, act on basis of a General Power of Attorney from the client. It was held by the Court that an attorney of the High Court could sign the pleadings on behalf of the plaintiff whether authorised to do so under a special power of attorney or as under a general Power of Attorney. I have read and re-read this judgment. With respect, this judgment has no relevance for purpose of consideration of questions formulated herein. I have already observed that the Order III Rule 2, Order III Rule-4 of the CPC read with Order XIX Rule 2 of the CPC contemplated inherent and implied prohibition on combination of the two roles. To illustrate the point, it is sufficient to state that a vakalatnama cannot be signed by the Advocate power of Attorney holder on behalf of the plaintiff or defendant in his own favour. In my humble view, such peculiar mixture is forbidden by law. It follows on true

construction of the various provisions of the Code that a constituted attorney of the party cannot appoint himself or his co-partner or his own firm of Advocates as advocate on record for purpose of acting in professional capacity in the same cause or matter. An Advocate acting in a professional capacity must be totally independent and detached from his client or his recognised agent. No Advocate is entitled to circumvent this principle directly or indirectly.

14. Shri Vahanvati the learned counsel for Bombay Incorporated Law Society canvassed for a middle view if one may use the said expression and argued fairly and impartially. The learned counsel submitted that if an advocate filed affidavits in the same proceeding in his capacity as constituted attorney of the plaintiff or defendant he will not be entitled to act for that party in a professional capacity but if he merely verifies the pleadings on the basis of document and information received, the Advocate may be entitled to act in both the capacities. In my opinion the view canvassed for on behalf of Bombay Incorporated Law Society is too narrow. I am not persuaded to accept the submission of Shri Vahanvati. Mere possibility of conflict emanating from combination of two roles is sufficient to infer prohibition on combination of the two capacities as aforesaid. I have therefore, decided to accept the construction of the relevant provision of the Code as canvassed for on behalf of Bar Council.

15. In view of above I therefore, answer the questions formulated by the Court at the commencement of hearing of this proceedings as under :--

(a) An Advocate is not entitled to act in a professional capacity as well as constituted attorney of a party in the same matter or cause. An Advocate cannot combine the two roles. If a firm of Advocates is appointed as Advocates by a Suitor, none of partners of the Advocates" firm can act as recognised agent in pursuance of a power of attorney concerning the same cause.

(b) The existing practice followed by the firm of advocates/solicitors/attorneys particularly in case of non-resident clients combining the two roles is opposed to law and is required to be discontinued forthwith.

(c) The Prothonotary and Senior Master, High Court shall not accept any vakalatnama in favour of a firm of advocates where one or the other partner of the same firm also holds a power of attorney from the plaintiff or the defendant or any other suitor before the Court in the same cause.

16. I cannot part with this proceedings without expressing my gratitude to the Bar Council of Maharashtra and Goa. The Born-bay Incorporated Law Society and to all the learned counsel who have assisted the Court by their research and submissions on the subject of considerable importance to the legal profession. The Bar Council of Maharashtra and Goa and the Bombay Incorporated Law Society are required to bring the substance of this Order to the notice of their members as far as practicable.

17. Issue of certified copy is expedited.

Order accordingly.