

(1994) 07 BOM CK 0031

In the Bombay High Court

Case No : Criminal Writ Petition No. 64 of 1992

Sadat Mirkhan Dalmirkhan

APPELLANT

Vs

Joint Civil Judge, Senior Division and Others

RESPONDENT

Date of Decision : 27-07-1994

Acts Referred:

Advocates Act, 1961 — Section 34(1)
Advocates Rules, 1961 — Rule 9(2), 9(4)

Citation : (1995) 3 BomCR 437 : (1995) 97 BOMLR 806 : (1995) 1 MhLj 194

Hon'ble Judges : R.M. Lodha, J;M.B. Ghodeswar, J

Bench : Division Bench

Advocate : C.G. Madhkolkar, for the Appellant; D.N. Kukday, A.G.P., for the Respondent

Judgement

M.B. Ghodeswar, J.—The petitioner Sadat Mirkhan has filed this petition under article 226 of the Constitution of India, challenging the order dated 10-1-1992, passed below Exhibit 94, by the Joint Civil Judge, Senior Division, Yavatmal in Criminal Case No. 120 of 1986.

2. Shortly stated, the facts are that on the complaint of Civil Judge, Junior Division, Pusa, a Criminal Case No. 120 of 1986 was registered u/s 193 of the Indian Penal Code against the petitioner. In Civil Suit No. 20 of 1972, Shri Mirza, Advocate represented the plaintiff. The petitioner-defendant filed his written statement and in view of para. 14 of the written statement, Shri Mirza, Advocate filed an affidavit that the averments in para 14 of the written statement are false and that the complainant Judge alleged in the complaint:

"The circumstances of the case demonstrate and lead to an irresistible inference that the evidence so far pertaining to the so-called advice given by Shri Mirza is intentionally false and is given with an oblique motive."

The complainant further alleged that :

"Not only the evidence is false, but the statement contained in paragraph 14 of

the written statement of the petitioner is a false verification punishable u/s 191 of the Indian Penal Code."

This complaint case was transferred to the Court of Joint Civil Judge, Senior Division and Judicial Magistrate, First Class, Yavatmal. Shri F.Z. Ahmad, advocate of Pusad is defending the petitioner in this complaint case. The Special Prosecutor for complainant filed an application (Exhibit 94) for determination of Vakalatnama of Shri F.Z. Ahmad, Advocate for accused on the ground that Shri Ahmad, advocate has been examined as a witness for prosecution in this case and he gave evidence on material facts and in view of this position Shri Ahmad cannot continue as advocate for accused to cross-examine the witnesses of prosecution.

3. The reply to this application is filed on behalf of the accused which is at Exhibit 95, contending that the Court has no power to examine or debar the counsel from appearing and conducting the case and the power rests with the Bar Council only. The trial Court has referred to Rule 13 of the Rules framed by the Bar Council of India :

"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 he being engaged in a 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."

After referring to the decision reported in AIR 1971 Mys 184, S.R. Chanaverappa v. B. Prakash, to the effect that if he is a witness in regard to a material fact and still persists in retaining both the capacities, that of a witness as well as counsel, his attitude may amount to misconduct in which event the Court can step in and remedy the situation by determining the Vakalatnama in his favour and, therefore, allowed (Exh. 94) determining the Vakalatnama of Shri F.Z. Ahmad, advocate. The petitioner, relying on rule 13 of the rules framed by the Bar Council of India, has submitted that in such a case the advocate has a discretion and that discretion has to be exercised without jeopardising his client's interest and therefore raised a question that the trial Court cannot determine the Vakalatnama of an advocate without even ascertaining his will or whether he wants to withdraw his power or retire from the case in exercise of his discretion under rule 13 and whether such withdrawal of power or retirement from the case will jeopardise the interests of the petitioner. Further, relying on rules 15 and 16 of the Bar Council of India, it is submitted that the trial Court does not have a power under rule 13 of the rules to determine the Vakalatnama.

4. The Respondent No. 3, Shri F.Z. Ahmad has filed his return stating that the trial Court was wrong in ordering the termination of his power without making enquiry from him.

5. The grounds raised in the petition are based on the rules framed by Bar Council of India. The most important question for consideration is whether a

Criminal Court is empowered to determine the Vakalatnama of an advocate. The provisions of Advocates Act, 1961 and the rules framed by the Bar Council of India are in respect of the misconduct of the advocates and punishment therefore. According to section 34(1) of Advocates Act, 1961, the High Court is empowered to make rules laying down the conditions subject to which an advocate shall be permitted to practise in the High Court and the courts subordinate thereto. The High Court of Judicature at Bombay has framed rules u/s 34(1) of the Advocates Act, 1961 which are reproduced in Chapter XXVIII of the Criminal Manual. Rule 9 is relevant which reads as under :

"9. (1) x x x x x x x

(2) In criminal cases, the appointment of an advocate shall be deemed to be in force until determined with the leave of the Court by writing signed by the client or the advocate, as the case may be, and filed in Court or until the client or the advocates dies, or until all proceedings in the case are ended so far as regards the client."

Sub-rule (3) is in respect of deeming provisions of proceedings in the case. Sub-rule (4) which is also relevant is extracted below :

"(4) When an advocate who has filed a Vakalatnama for a party wishes to withdraw his appearance, he shall serve a written notice of his intention to do so on his at least seven days in advance of the case coming up for hearing before the Court. Leave of the Court to withdraw appearance may also be applied for if the client has instructed the advocate to that effect. The advocate shall file a note in writing requesting the Court for permission to withdraw appearance and shall also file along with the Note the letter of the client instructing him to withdraw his appearance or a copy of the intimation given to the client as above together with its written acknowledgment by the client. The Court, if it is satisfied that no inconvenience is likely to be caused to the Court or the client, may permit the advocate to withdraw his appearance and while permitting the advocate to do so may also impose such terms and conditions as it may deem proper either in public interest or in the interest of the parties."

The learned counsel for the petitioner has placed strong reliance on sub-rule (4), but this sub-rule is in respect of withdrawal of the appearance. Sub-rule (2) of rule 9, in clear terms, gives power to Court to determine the appointment of an advocate.

6. The respondents have relied on the decision in the case of Emperor v. Dadu Rama Surde, AIR 1939 Bom 150, wherein it is observed --

"The question whether the Court has jurisdiction to forbid an advocate to appear in a particular case involves the consideration of conflicting principles. On the one hand, an accused person is entitled to select the advocate whom he desires to appear for him, and certainly the prosecution cannot fetter that choice merely by serving a subpoena on the advocate to appear as a witness. On the other hand,

the Court is bound to see that the due administration of justice is not in any way embarrassed. Generally, if an advocate is called as a witness by the other side, it can safely be left to the good sense of the advocate to determine whether he can continue to appear as an advocate, or whether by so doing he will embarrass the Court or the client. If a Court comes to the conclusion that a trial will be embarrassed by the appearance of an advocate, who has been called as a witness by the other side, and if, notwithstanding the Court's expression of its opinion, the advocate refuses to withdraw, in my opinion in such a case the Court has inherent jurisdiction to require the advocate to withdraw. An advocate cannot cross-examine himself, not can he usefully address the Court as to the credibility of his own testimony, and a Court may well feel that justice will not be done if the advocate continues to appear."

7. It is, therefore, clear that the trial Court has power to determine the appointment of an advocate. But before exercising this power, the Court has to give opportunity to the advocate and make enquiry into the matter. On Exhibit 94, the reply (Exh.95) is filed by the petitioner. The respondent No. 3 was not asked to give his say and no enquiry is conducted in this matter. From the perusal of the record, it does not appear that the learned trial Court has given a reasonable opportunity to respondent No. 3. Therefore, the impugned order violates the principles of natural justice and required to be quashed and set aside.

8. In the result, the petitioner, is partly allowed. The impugned order is quashed and set aside and the case is remanded to trial Court for enquiry afresh with a direction to give reasonable opportunity to respondent No. 3 and complete the enquiry within six months. Parties to appear before the trial Court on 24th August, 1994. The record be sent immediately to trial Court.