

**(1938) 06 CAL CK 0002**  
**In the Calcutta High Court**  
**Case No : Suit No. 510 of 1937**

Sarat Chandra Mukhopadhyaya

APPELLANT

Vs

Sadasiva Mitter and Others

RESPONDENT

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**Date of Decision :** 24-06-1938

**Acts Referred:**

**Citation :** (1938) 06 CAL CK 0002

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### **Judgement**

Panckridge, J.—The short point of construction raised by this originating summons is not altogether easy to decide. The testator, Gopal Chandra Sinha, died on April 13th, 1926. He left a Will dated March 2nd, 1919, and two codicils dated November 2nd, 1920, and March 16th, 1924.

2. Since March, 1922, Mr. Sarat Chandra Mukerjee, an Advocate of this Court, had been employed by the testator as his "retained pleader." What this means is that the testator paid Mr. Mukherjee a monthly salary, in consideration of which Mr. Mukerjee transacted his non-contentious legal business. When employed in litigation he was entitled to charge fees on the prescribed scale.

3. By cl. 9 of the second codicil the testator modified the directions given by the Will as to the executors. After dealing with this matter the clause proceeds:

My present legal advisor Sreejukta Babu Sarat Chandra Mukhopadhyaya, Vakil, High Court, shall remain engaged as legal advisor and pleader after my death for protection of the interests of and for the benefit of the estate and so long as he will remain engaged on business he shall get retainers and fees as fixed at present.

4. At the time of the testator's death his estate consisted of immovable property in Calcutta and zamindari property in the Mofussil, and also of movable property.

5. Probate of the Will and codicils was granted in due course. The executors continued to employ Mr. Mukerjee in the same manner and on the same terms as the testator had done until March 28th, 1934, when they addressed the following letter to him through their solicitors:

Dear Sir,

In the goods of Gopal Ch. Singha

deceased.

In view of the present financial condition of the estate and particularly in view of the fact that the executors have got no work in which your help may be necessary, the executors think that they should dispense with your services from the 1st of Baisakh next.

Please take "notice that on and from the 1st of Baisakh next the executors will not pay the monthly remuneration which they have been paying you so long.

Yours faithfully,

K.K. Dutt & Co.

6. Mr. Mukerjee has taken out this summons and asks for the determination of the following questions:

(1) Whether the effect of cl. 9 of the codicil is the creation of a trust in favour of the applicant.

(2) Whether the applicant is entitled to the monthly allowance of Rs. 125 and other fees in terms of cl. 9 of the codicil, dated March 16th, 1924, and whether the executors are justified under the said clause in stopping the payment of the allowance to the applicant.

(3) Whether the executors were justified in serving the notice dated March 28th, 1934, on the applicant.

(4) Whether the executors should be directed to pay to the applicant his arrears of allowances for three years amounting to Rs. 4,500.

(5) Whether the applicant is entitled to get any compensation for not being allowed to act on behalf of the estate in different legal proceedings relating to the estate.

7. Mr. Mukerjee's contention is that the executors are bound to employ him as "retained pleader" of the estate on the old terms at least until the estate is fully administered, or until he has ceased to practise his profession.

8. The executors say that the codicil creates no trust in his favour, which he can enforce against the estate, and without prejudice to this submission they say that as the zamindari property has been sold, the protection of the estate no longer necessitates the services of a "retained pleader," and that for him to continue to be employed in that capacity would not be for the benefit of the estate.

9. Unless the language of the codicil confers some right on Mr. Mukerjee of the nature suggested, it will not be necessary to consider the precise extent of his

right, having regard to the present stage of administration.

10. The codicil is in the Bengali language, and it is therefore not surprising that on the question of construction the guidance to be obtained from the English authorities is comparatively meagre.

11. The case most favourable to Mr. Mukerjee's contentions is *Williams v. Corbet* [1837] 8 Sim. 349: C9 E.R. 138.

12. There, the testator, by a codicil, appointed the Plaintiff (who was a Barrister) to be the auditor of the accounts of his estates during the execution of the trusts of his Will, and he directed his trustees to pay to the Plaintiff such annual remuneration as it was usual for an auditor to receive; and, in case the Plaintiff or any subsequent auditor should refuse to accept such office, or become incapable or unwilling to exercise the duties thereof, he requested his trustees to appoint a Barrister of known judgment and integrity to be the auditor of his said accounts, and directed them to allow such auditor such remuneration as aforesaid, and to submit their accounts, once in every year, to the auditor for the time being.

13. In construing the codicil the Vice-Chancellor, Sir Lancelot Shad well, observed :

Under this codicil Mr. Williams has as much right to be the auditor as any one of the devisees has to the real estates. The testator, when he directed that Mr. Williams should be employed to audit the accounts of his estates and be allowed a proper remuneration for his trouble, clearly intended to confer a benefit upon him. The trustees, therefore, were not justified in attempting to remove him.

14. On the other hand, the House of Lords in *Shaw v. Lawless* [1838] 6 cl. & F. 129 held that no trust was created in favour of the Respondent in the following circumstances :

15. A testator devised certain real estates to trustees for the use of W.S. for life, with remainders over, and he directed the residue of his personal estate to be invested in the purchase of other real estates. He gave a legacy of ?100 to B.E.L. as a token of esteem. The Will then contained this clause:

And it is also my particular desire that my said executors, whilst acting in the management of all or any of my affairs under this my will, as also my friend W.S. when he shall enter into the receipt and perception of my said rents of K.V. and K. shall continue the said B.E.L. in the receipt and management thereof and likewise shall employ and retain him in the receipt, agency, and management of the rents and issues of such other lands and premises as shall and may be purchased and settled in pursuance of the directions hereinbefore contained, at the usual fees allowed to agents, he having acted for me since I became possessed of said estates fully to my satisfaction.

16. It is true that Lord Cottenham attached considerable weight to the argument

that a construction favourable to the Respondent would be repugnant to the estates for life and in remainder created by the Will, an argument which is perhaps hardly applicable to the present case, but on the other hand it is significant that Chitty, J., in *Foster v. Elsley* L.R. 19 Ch Div. 518 (1881) on the authority of *Shaw v. Lawless* [1838] 6 Cl. & F. 129 refused to restrain the Defendant's executors from employing any person other than the Plaintiff as their solicitor, where the Will provided:

I declare that my Solicitor, William Edward Foster, shall be the Solicitor to my estate and to my said trustees in the- management and carrying out the provisions of this my will.

17. I think it may fairly be said that the Court will not construe testamentary directions of the nature we are considering as trusts enforceable at the instance of the appointee, unless the testator has indicated his intention in unambiguous language.

18. Construing el. 9 of this codicil I find myself unable to come to the conclusion that such an intention is expressed therein.

19. It is noticeable that the clause deals with the executorship and administration of the estate and that nowhere else in it can it be suggested that the testator is purporting to exercise his bounty.

20. I think that what the testator desired to effect was that Mr. Mukerjee's "engagement" should not terminate automatically on the testator's death, but that Mr. Mukerjee would continue to be in a position to protect the estate by his professional services without a fresh mandate from the executors. He did not however intend that the executors should be compelled to employ Mr. Mukerjee for an indefinite period without regard to their own wishes or the requirements of the estate.

21. It is suggested that the words "so long as he will remain engaged on business " mean " so long as he continues in the practice of his profession."

22. Now, not only is such a construction at variance with the ordinary meaning of the words in dispute, but I think it is clear that "remain engaged" must refer to the same thing in both the places where the two words are used. It follows that by " business " is meant the business of administering the estate, and not Mr. Mukerjee's " business " as a legal practitioner.

23. I think that the provision with regard to Mr. Mukerjee's remuneration was inserted not for the purpose of conferring a benefit on Mr. Mukerjee, but for the protection of executors, for it enables them to plead the testator's express authority, in case any beneficiary be minded to say that remuneration on the old scale is excessive.

24. It will be observed that in *Williams v. Corbet* [1837] 8 Sim. 349: 59 E.R. 138 the testator only contemplated the termination of the plaintiff's appointment by

his refusal to act or by his becoming incapable or unwilling to exercise his duties, that is to say, by something on his side. In this case, the testator contemplates Mr. Mukerjee's ceasing to be "engaged," which must cover all the circumstances in which the engagement of a legal practitioner can cease, including discharge by his client.

25. I accordingly answer the questions as follows:

Q. 1--In the affirmative.

Q. 2--The first part, in the negative. The second part, in the affirmative.

Q. 3--In my opinion does not arise.

Q. 4 and 5--In the negative.

26. Having regard to the fact that the language of the clause is to some extent ambiguous, I feel justified in saying that both parties may have their costs out of the estate, the costs of the executors being as between attorney and client. Costs will be as of a defended suit. Solicitors: K.P. Mustaphy for the Plaintiff; K.K. Dutt & Co. for the Defendant.