

(1956) 04 MAD CK 0052
In the Madras High Court
Case No : A.A.O. No. 226 of 1954

S.T.K. Sundara Chettiar

APPELLANT

Vs

V.K. M. Kothandarama Chettiar and others

RESPONDENT

Date of Decision : 07-04-1956

Acts Referred:

Citation : AIR 1958 Mad 122

Hon'ble Judges : Ramaswami, J

Bench : Single Bench

Advocate : S. Ramachandra Iyer, for the Appellant; S.V. Rama Iyengar, for the Respondent

Final Decision : Allowed

Judgement

Ramaswami, J.—This is an appeal preferred against the order of the learned Subordinate Judge of Vellore in I. A. No. 187 of 1953 in A. S.

No. 106. of 1952.

2. The short facts are : The appellant Sundaram Chettiar preferred an appeal in the pauper form from the final decree passed by the learned

District Munsif of Vellore in O. S. No. 358 of 1947. He had engaged an advocate for prosecuting the appeal. On the date of final hearing, 25-2-

1953, the appellant's vakil reported no instructions. The appellant was called and he was absent. Therefore the appeal was dismissed with a

direction to the appellant to pay the court-fee due to the Government as the appeal was filed in the pauper form.

Thereafter, this appellant had filed an application I. A. 187 of 1953 supported by an affidavit that he had engaged his vakil to get on with the

appeal and communicate to him the result of the appeal and that therefore there

was no necessity for his appearance in Court or give further instructions to his vakil; that even if his (appellant's) presence was considered necessary, he could not have been present on the date of hearing for the reasons stated in his affidavit viz., that he was not able to move about due to disease of the heart and lungs and that his advocate had not also intimated to him the date of final hearing. The learned Subordinate Judge came to the conclusion that the appellant deliberately failed to instruct his vakil to get on with the appeal and that he was intent on dragging on the proceedings and harassing the other side and dismissed the application. Hence this appeal.

3. This appeal raises two points viz., (a) on merits and (b) a general principle whether an advocate can report no instructions without giving

sufficient previous notice to his client of his intention to do so that unless his fees were paid in full, he would retire from the engagement.

4. Point (a) : On the merits there are no difficulties because, firstly, there is nothing on record to show that the advocate intimated to the client in

time the date of hearing of the appeal and his intention to report no instructions and retire from the case so that the client could make other

arrangements; and secondly, the presence of the client in an appeal on the final date of hearing is not necessary at all and in fact would be unusual.

There was no reason why when this client was fighting" tooth and nail the final, decree, he should have failed to make other arrangements for

prosecuting the appeal, if the proposed retirement of his advocate had been intimated to him in time.

The conclusion of the learned Subordinate Judge that the appellant deliberately failed to instruct his advocate to get on with the appeal and that he

was intent on dragging on the proceedings and harassing the other side seems to be thoroughly unwarranted. Therefore, on the merits I have not

the slightest hesitation in setting aside the order of the lower Court and allowing the application I. A. 187 of 1953. The appeal A. S. No. 106 of

1952 will be restored to file and disposed of by the present Subordinate Judge of Vellore according to law.

5. Point (b) : In regard to the question who there an advocate after receiving a portion of the fee at the time of the engagement can retire from the

engagement and report no instructions because the full fee has not been paid by

the time the case comes up for its disposal, there are two schools of thought.

6. Justice P. R. Sundara Aiyar in his Professional Ethics states at pages 268-271:

I would mention just one other matter before I pass away from this subject. The position of the vakil, as I have already observed, is not the same as that of the barrister. The relationship of agent and principal exists in a far higher degree between the vakil and his client than between the barrister and his client. A barrister cannot be sued for failing to appear in a case or even for negligence in the conduct of it. The vakil undoubtedly may be, just as a solicitor may be in England, and, it would of course both be improper and illegal for any vakil to enter into any contract that he should not be liable for negligence.

A solicitor would not be entitled to throw up a case merely on the ground that he has not been paid the fee due to him up to date. Now In the case of a vakil the remuneration is regarded as an "entire" one for the conduct of the whole case and in my opinion the mere fact that the fees have not been paid yet would not be a ground for refusing to appear. The vakil would be liable if he had only that excuse to put forward for non-appearance. At the same time, I told you it would be very undesirable for the vakil to have to sue his client.

It would moreover be almost impossible to do so for gentlemen who are practising in the High Court with clients dispersed through several districts of the Presidency. It would be difficult in the case even if those who are practising in a District Court. Then what is to be done? The proper course in my opinion is to enter into a distinct understanding that a certain proportion of the fee should be paid at particular stages and that otherwise the vakil should not be bound to appear. I am by no means suggesting that the obligation not to appear should be availed of strictly wherever there is default committed by the client.

On the other hand, he should be treated generously in the matter and additional time allowed, whenever the client is not acting fraudulently. But at the same time, you should remember that in the absence of a contract the law will not excuse you from appearing on the mere ground that the fee has not been paid. It would be the duty of the vakil to do his duty and to sue his client to enforce his obligation; but that, as I have said, should be

avoided and therefore a distinct understanding should be arrived at.

I may observe that it is a sound rule not to demand payment of the whole fee in advance - and this not merely as a matter of consideration to the

client but as a matter of discipline to the advocate himself-because it is human nature to be influenced by money. It is impossible not to recognise

the fact that the continued flow of money acts as an additional spur to work, and do not deprive yourselves of that spur, that inducement, by

compelling the client to pay the whole of his fees at once.

The latter part of Justice Sundara Aiyar's advice psychologically sound is reinforced by the physical fact that owing to heavy and nay abnormal

court-fees now being levied and the deterioration in the economic conditions of the clientele, an advocate at least in the Madras State who insists

upon full fee being paid at the time of taking the engagement will have to take down his board (colloquially shingles) in no time. Therefore, to

enforce the principle that the fact that the fee have not been paid would not be a ground for refusing to appear, would work a great hardship and

especially so while, as Mr. Justice Sundara Aiyar himself points out, the filing of suits against clients for recovery of fees is a most unsavoury task.

See also Kally Charan v. Charapet, 2 Shome 124 (A): observations of Lord Westbury in In re, a Solicitor 4 Beng LR 29 (PC) (B), which favour a

strict view and similar to the case in Satish Chunder v. Saroda Prasad, 19 Cal LJ 432 (C).

7. The other school of thought that an advocate can retire from his engagement if his whole fees were not paid but after giving timely and clear

intimation to the client that he would be doing so, so that the client might pay either the balance of the fee or make other arrangements, is that which

is set out by Sri K. V. Krishnaswami Aiyar in his classic ""Professional Conduct and Advocacy"" at page 132 :"

You should not also decline to appear for a client who has not paid you the whole fee, without clearly notifying to him in time your attitude in the

matter; (See Rajah V. Muthu Krishna Yachendra Bahadur Vs. W.H. Nurse, , though on the question whether the contract of the advocate for

professional service and the contract of the client for remuneration are independent or otherwise, the rule which best accords with common sense,

convenience and practice is, according to the eminent lawyer, statesmen and

scholar, Sir P. S. Sivaswami Aiyar, that the contract for service is dependent on the performance of the contract for remuneration. Needless to add that this opinion is entitled to the greatest weight as that of one who cherished the highest ideals of the profession and uniformly practised them. In his lectures on Professional Ethics Mr. Justice Sundara Aiyar cites the case of *Munireddi v. K. Venkata Rao*, 23 Mad LJ 447: (AIR 1914 Mad 512) (FB) (E), as supporting his view that counsel is "not entitled to omit to conduct the case on the ground that the fee had not been paid". The case cited is, however, no authority for the position stated in such broad terms, as in the case it was found as a fact that the whole fee had been paid and that counsel nevertheless defaulted. In his judgment in that case Mr. Justice Sundara Aiyar himself says, "Having regard to this finding it is unnecessary to deal with the further question whether the non-payment of a portion of the fee would absolve the pleader from his duty to appear for the client.

These comments are entitled to very great weight as they come from one who like my beloved uncle Sir P. S. Sivaswami Ayyar has equally cherished the highest ideals of the profession and uniformly practised them at the bar.

8. This position is also fortified by authority. In *Prabhu Lal v. Kumar Krishna Dutt*, 20 Cal WN 443: (AIR 1917 Cal 555) (F), it was held that a solicitor or attorney may withdraw on good grounds provided that it is incumbent upon him to give reasonable notice to the client of his intention to withdraw from the case and that the attorney would apply to be discharged from the case, which application comes on for hearing before the Court the next day, does not mean giving reasonable notice to the client. That nonpayment of necessary funds is a good ground for withdrawal is laid down in *Moheshpur Coal Co. Ltd. v. Jotindra Nath Gupta*, ILR 40 Cal 386 (G).

This is also the position taken by Lord Tenterden, in *Rowson v. Earle*, 1829 M and M 538 (H), and by Tindal, C. J., in *Lawrence v. Potts*, (1834)

6 Car and P 428 (I), and in *Vansandau v. Browne*, (1832) 9 Beng 402 (J), that an attorney was entitled to refuse to go on unless he were put in

funds provided that he gave his client sufficient notice of his intention not to go on. In AIR 1930 947 (Lahore) it was held that when the client is, for

some reason or other, putting off the settlement and payment of fee, a legal

practitioner would be well advised if he served a registered notice upon him in good time intimating to him that if the client did not settle and pay his fee he would repudiate all his responsibility as a pleader, ILR 37 Mad

238: (AIR 1914 Mad 512) (PB) (E), and In the matter of In Re: F.A. Mukhtar, explained.

In this case it is also further held that where a pleader signs a vakalatnama on the distinct understanding that a sum paid to him is really in the nature

of a part payment and that the client will settle the proper fee afterwards, and if the client fails to do so, it follows that mere acceptance of

vakalatnama cannot cast upon the pleader the duty of defending the case. In In Re: F.A. Mukhtar, , it has been held that the absence of the

necessary Remuneration does not absolve the legal adviser from his obligations to his client unless the matter is brought specifically to the notice of

the client, that this must be borne in mind by practitioner, particularly those who have the very responsible duty of appearing for very poor clients

and especially in criminal cases, that it is not right that a legal adviser should come after a lapse of time and should say it is true that he accepted

instructions from his clients but those instructions were conditional upon his receiving his remuneration and that if the client does not produce the

necessary remuneration it is the duty of the legal adviser to go back to the client and then and there repudiate the instructions. In ILR 37 Mad 238:

(AIR 1914 Mad 512) (FB) (E), a Pull Bench of this Court held that a pleader is guilty of misconduct if after receipt of full fees he wilfully neglects

to appear, and conduct a case. Per Sundara Iyer, J.

Wilful neglect to appear after receipt of full fees is worse than gross negligence and amounts to a fraudulent conduct. A plea of non-payment of

fees as excuse for non-appearance is useless in the absence of an agreement that it must be paid previously,

Per Sankaran Nair, J.:

In the absence of such an agreement or at least notice to the party in time, a vakil must appear and conduct the case though the fee or a portion

thereof remains unpaid.

In Rajah V. Muthu Krishna Yachendra Bahadur Vs. W.H. Nurse, it has been held that a vakil engaged in a suit on the original side of the High

Court is not entitled to refuse to take necessary step in the suit on the ground

that his own fees had not been paid and at the same time refuse his consent to a change of vakalat to another vakil. There are observations in this decision to the effect that it is unnecessary and undesirable that this should be done as vakils are otherwise sufficiently protected and can insist on payment of their fees in advance or rely on their lien on the client's papers and on the fruits of the litigation as well as on their right to sue for their fees. But this decision is no authority for holding that a vakil cannot retire because his full fees were not paid on the date when the case comes up for final disposal.

In this case as a matter of fact the vakil wanted to make use of taking the next and necessary step in the suit for insisting upon his fee being paid

and at the same time refused his consent to a change of vakalat to another vakil. Therefore, this decision is no authority for stating that a vakil

cannot retire when his full fees have not been paid provided he gives timely and clear intimation to his client and what he proposes to do so that the

client may either pay his full fees or make other arrangements for the conduct of the litigation.

In the Full Bench decision of the Calcutta High Court Emperor Vs. Babus Rajani Kanta Bose and Another, Babus Rajani Kanta Nag and

Another, Babu Annada Charan Roy and Babu Surendra Kumar Nag, , wherein the position and duties of a legal practitioner are discussed and

with which we may fittingly close this, analysis of case law it was held per curiam that when a pleader accepts a vakalatnama in the ordinary form

he must attend court on every occasion to protect the interest of the client concerned. Any limitations on this obligation by special agreement must

be proved and the onus lies on the pleader. Nonpayment is no justification for refusal to attend.

9. Finally It is not proper either in the High Court or in the Courts below for a counsel to merely state to the Court that he has no instructions. He

should, as laid down in Lachhmi Narain Vs. Shanker Lal and Another, clearly specify what is the reason for his failing to proceed with the case. It

may be that he has not received his fees; it may be that the instructions have been withdrawn; or it may be some other reason but what the reason

is, he should clearly state it to the Court.

10. TO sum up :

(a) A pleader accepting a Vakalatnama in ordinary form must attend court on every occasion. Limitations to obligations by special agreement must

be proved by pleader. It is preferable therefore to set out on the back of the receipt issued for receiving payment at the time of the engagement a

stipulation as follows : the engagement is accepted only subject to the following conditions: (1) If the fees and out-fees due are not paid completely

I cannot attend to or appear in the case; and (ii) when fees and out-fees are due in whole or in part any payments made will be credited towards

fees first and the balance only towards out-fees. (This was the type of receipt issued by Messrs. S. Srinivasa Iyengar and K. V. Krishnaswami

Iyer). Non-payment of fees by itself would normally be no Justification for refusing to attend.

(b) The mere acceptance of a vakalatnama does not bind the pleader to appear in Court when such vakalatnama is accompanied by the special

terms as mentioned above; where a pleader signs a vakalatnama on the distinct understanding that a sum paid to him was really in the nature of part

payment of fees and the client would come and settle the proper fee afterwards, the mere acceptance of vakalatnama would not cast on the

pleader a duty to fulfil the engagement.

(c) When the client is for some reason or, other putting off settlement and payment of fee, a legal practitioner would be well-advised, if he served a

registered notice upon him in good time intimating to him that if the client did not settle and Pay his fees he would repudiate all his responsibility as a

pleader.

(d) A pleader is absolved from his. Obligations to the client when on non-payment of the whole or balance of the stipulated fees, and the terms of

which are preferably reduced into writing to avoid unpleasant controversy later, he has given timely and clear intimation to his client that he will be

repudiating his responsibility as a pleader so as to enable the client either to settle with him or make other arrangements for the conduct of the

work. A pleader will be guilty of misconduct if, in the absence of notice to the party in time, he did not appear and conduct the case though the fee

or a portion thereof remained unpaid.

(e) The reporting of no instructions must clearly specify what is the reason for the pleader failing to proceed with the case. Otherwise, the. Court,

to protect the interest of the client, would, be entitled to insist upon his conducting the case and non-compliance with such directions would be tantamount to professional misconduct and contempt of Court. The Court will and must hold the pleader to the Vakalatnama and not permit any unilateral and arbitrary denunciation.

11. In these circumstances this appeal has got to be allowed and hereby allowed. No costs.

12. I must finally thank the learned Advocate General, the Government Pleader and the Secretary of the Advocates Association Madras for the assistance given to me in the disposal of the question involved in point (b).