Andhra High Court
Damordardass Agarwal And Ors. vs R. Badrilal And Ors. on 8 April, 1986
Equivalent citations: AIR 1987 AP 254
Author: P Kodandaramayya
Bench: P Kodandaramayya, U Waghray
JUDGMENT P. Kodandaramayya, J.

1. This batch of revision petitions are referred by one of us (Kodandaramayya, J.) as they raise important questions relating to legal profession.

2. Broadly two questions arise for our consideration :

(1) The scope of enquiry to be made by the Court under O. 3 R. 4, C.P.C., while granting leave to terminate the appointment of an advocate previously made.

(2) Whether an advocate had lien over the papers of his client entrusted to him during the pendency of a case for payment of his fees.

3. We have issued notices to the Andhra Pradesh High Court Advocates Association and the A.P. State Bar Council. They were represented by counsel Sarvasri P. S. Murthy and v. Raghunadha Reddy respectively. Sri V.L.N.G.K. Murthy assisted the court as amicus curiae. We place on record our appreciation of their assistance for deciding these cases.

4. The facts leading to the reference may be stated :

The petitioner is the plaintiff in all the eleven suits out of which these revision petitions arose. Separate applications are filed in each suit under O. 3 R. 4(2), C.P.C., and R. 20-A, Civil Rules of Practice, seeking leave of the court to engage another advocate to conduct these cases. In the said applications respondent 1 is the party-defendant and respondent 2 is the counsel whose appointment is sought to be terminated and he ranks last in the list of respondents where there are more than one defendant. It is averred in the affidavits filed in support of these petitions that respondent 2 is appearing in these suits for the plaintiff and he is not regularly attending the court and hence the plaintiff has to pay day costs to the other side and the plaintiff requested the counsel to return his files. When the advocate tried to assault the petitioner and his brother, a criminal complaint was made. Even then he did not return the files. Subsequently notice was issued to the counsel demanding return of the files but respondent 2 did not return the files and hence these petitions.

5-6. Counter affidavits were filed by the advocate denying the allegations and stating that he was regularly attending to the cases and the plaintiff did not attend the court and he has to seek adjournments number of times and the petitioner's brother threatened him to assault and take away the files using force and hence he had to seek the help of the Police and also lodged a complaint in the police station, and he also replied to the notice issued to him stating that he was prepared to work until the completion of the cases and he should withdraw the notice dated 5-2-83, and he has

no objection for the plaintiff engaging another counsel if the fee is paid but claimed lien on the files till the fee is paid.

7. No evidence was adduced in support of these contentions. It is urged before the court below that the plaintiff did not withdraw the notice issued by him and as the notice was not withdrawn the question of respondent attending to the case does not arise and it is further contended that the petitioner must produce the receipts of payment of fee before he could seek permission to change the counsel. On behalf of the petitioner-plaintiff it is contended that the entire fee was paid to the respondent and hence he is bound to deliver the papers and give consent and it is further urged that even though the fee is paid respondent 2 is not giving his consent to engage another advocate. In view of these contentions the court below held that the permission to engage a counsel can be accorded subject to the following terms :

1. The plaintiff shall deposit R2's fee in the suit into the court on or before 26-3-1984.

2. If the petitioner deposited the suit fee on or before the said date he shall be entitled to engage a counsel of his choice and also to return of the suit records from the possession of R. 2.

3. R2 shall return the records within 15 days from the date of deposit.

4. If the petitioner fails to deposit the fee on or before the said date he forfeits leave to engage another advocate.

5. The 2nd respondent shall file a suit to establish his right to the fee before 26-4-1984. If he fails to file a suit by that date and inform the same to this court by the said date the plaintiff shall be entitled to withdraw the amount. If a suit is filed the amount deposited shall be dealt with in accordance with the result of the suit.

8. Though these petitions are disposed of in two batches, nine petitions by I Assistant Judge, City Civil Court, Secunderabad, and two petitions by Third Assistant Judge, City Civil Court, Secunderabad the orders are identical. Against these orders these revision petitions are filed by the plaintiff.

9. It appears a total number of 60 cases were entrusted to the respondent-advocate. We are now concerned only with these eleven cases.

10. Sri M. N. Narasimhareddy, the learned counsel for the petitioner, urged that the impugned orders are vitiated by errors of jurisdiction as the courts below have no jurisdiction to direct the deposit of the amount as the contention of the plaintiff is that the entire amount was paid and the summary jurisdiction under O. 3, R. 4, C.P.C., does not empower the court to pass the impugned orders directing the deposit and that the advocate has no right of lien in respect of the papers entrusted to him by the client unlike the case of solicitor or attorney. This was refuted by Sri G. Sriramarao stating that the advocate has got lien over the papers entrusted by the client and such protection is necessary and further the court under O. 3, R. 4, C.P.C., has got full power to make the

adjudication and pass appropriate orders to safeguard the interests of both the client and the advocate. Hence we have to examine the two questions referred above.

11. We shall take up the question of 'lien' over the papers entrusted to the counsel.

12. Sri V. Raghunatha Reddy, appearing for the Bar Council, drew our attention to R. 31(ii)(d) framed under Ss. 9 and 15, Bar Councils Act, 38 of 1926 by the Andhra Pradesh Bar Council with the previous sanction of the High Court of Andhra Pradesh, which reads as follows :

"An advocate, appearing for his client in any case who has not been paid his fee in full, as stipulated by the client, may retain the client's papers in that case until the fee has been fully paid,"

and it is stated that after Advocates Act, 25 of 1961, came into force, new rules were framed but no corresponding rule was found in the rules framed under S. 49(1)(c) of the said Act in respect of the rules relating to the Standards of Professional Conduct and Etiquette. Sri V. R. Reddy, Member of the Central Bar Council, has placed before us certain proceedings of the Tamil Nadu Bar Council and also Maharashtra Bar Council proposing to include a rule providing for lien. It is stated from the Bar that the A.P. State Bar Council also proposed amendment of the rules on the lines recommended by Tamil Nadu Bar Council.

13. On the other hand, the learned counsel for the respondent contended that the power of lien is a common law right and it cannot be taken away unless there is a prohibition under any law and hence a mere omission in rules framed by the Bar Council is not decisive. It is also argued that under S. 171, Contract Act, a general lien is provided to attorneys in the absence of a contract to the contrary and in view of the fact that the institutions of attorneys, and solicitors, and other categories of practitioners were abolished and the advocates are the only recognised class of persons entitled to practice law, the said provision shall be construed to apply to advocates.

14. It is necessary in this connection to briefly notice both the legislative history and the judicial pronouncements on this question.

15. It is to be noticed that under Cls. 9 and 10, Letters Patent, or charter granted by the Crown of England under which the High Courts of Allahabad, Bombay, Calcutta and Madras were constituted, those courts were given power to admit advocates, vakils and attorneys and also make rules for qualifications of those practitioners. The legal Practitioners Act, XVIII of 1879, is the first of its kind in this country to consolidate and amend the law relating to legal practitioners. 'Legal practitioner' is defined to mean : "an advocate, vakil or attorney of any High Court, a pleader, mukhtar or revenue agent". Section 4 of the Act recognises the right of the legal practitioners to practise law in the High Court in which they were enrolled and also in the courts subordinate to the said High Court.

After the Bar Councils Act, 38 of 1926, came into force, S. 4, Legal Practitioners Act, was suitably amended, and as per S. 41 of the Act the other High Courts, which are not established by Royal Charter, are also empowered to admit persons as legal practitioners. Simultaneously with the coming into force of the Bar Councils act, the Legal Practitioners (Fees) Act, XXI of 1926, was

passed recognising the right of the legal practitioner to sue for fees and also liability of the legal practitioners to be sued for negligence. It is significant to note that S. 4 of the said Act recognises not only the right to sue for fees but also recognises the principle that if no such fee has been settled, a fee computed in accordance with the law for the time being in force in regard to the computation of the costs to be awarded to a party in respect of the fee of his legal practitioner.

It is also necessary to notice that S. 27, Legal Practitioners Act, recognises the power of the High Court to fix and regulate the fees payable by any party in respect of the fees of his adversary's advocate. Now, these provisions are replaced by the Advocates Act, 25 of 1961, whereunder the rule making power was given to the State Bar Council, Central Bar Council, Central Government and also to the High Courts. The scheme of the Advocates Act is so framed that its provisions came into force on different dates as per the notifications to be issued and the existing law embodied in the local enactments and the Bar Councils Act, Letters Patent of the several High Courts shall stand repealed as envisaged in S. 50 of the Act on different dates.

So far as the Legal Practitioners Act and the Legal Practitioners (Fees) Act are concerned, they shall stand repealed only when the entire Act comes into force and such notification bringing the entire Act into force is not made and hence the High Court has to make the necessary rules under S. 27, Legal Practitioners Act, 1879. Hence, as per notification dated 19-1-1967, the High Court of Andhra Pradesh framed Rules under S. 27, Legal Practitioners Act. While framing new rules as per the above notification, Rules 30 to 57, Legal Practitioners Fees Rules, alone contained in Part B were repealed keeping in tact previous Rr. 58 to 63 framed on 5-12-1958. They relate to the enforcement of the bill of costs by summary procedure by the orders of the Registrar. It is necessary to note those rules and they read thus :

"58. Where a dispute arises between the advocate on record and his client as to the fees and charges payable to the advocate, either of them may apply to the Registrar to tax the bill, who may, after giving reasonable notice to the other party, tax the same or refer the applicant to a suit;

Provided also that the Registrar may, in his discretion, refer any such matter for determination by the court.

59. An application made by the advocate shall be accompanied by copy of the bill sought to be taxed.

60. The taxation shall be made, as far as may be, in accordance with the rules regulating the taxation of costs between party and party.

61. The Registrar shall not, in any such proceeding, recognise any agreement that may be set up regarding the fees payable in (to?) the advocate by his client unless the same has been recorded in writing.

62. In cases where the advocate has not conducted the whole proceeding or his services have otherwise become terminated before the proceeding is over, he shall not be entitled to the full fee but only to such portion thereof as the Registrar considers reasonable :

Provided that if the Registrar considers that the termination was without just cause, he may allow the full fee.

It shall be regarded as a just cause for termination that the practitioner is not present in court either in person or by a deputy duly authorised, when the case is called.

63. When a bill has been taxed in the manner aforesaid, the Registrar, or the Court, as the case may be, may make an order directing the client or his legal representative to pay the amount so determined. Thereupon such order shall be executable under O. XXI, C.P.C. as a decree for money."

It is significant to note that power is given to the Registrar to order recovery of the fees and order passed by his is executable under O. 21, Civil P.C. as a decree for money. There is no similar provision as regards the subordinate courts are concerned. These rules are applicable only to the fees payable to the legal practitioners in the High Court.

16. We must also refer to O. 8, R. 6 (2), Civil P.C. which specially preserves the right of a pleader in respect of costs payable to him upon the amount decreed in favour of the plaintiff. No doubt, S. 171, Contract Act, specifically confines the right of the general lien to an attorney of High Court in respect of the goods bailed to him. We also notice that S. 217, Contract Act, relating to agent's right of retainer of sums received on principal's account was successfully invoked by legal practitioners in this country. In some of the States, such as Bombay, S. 30, Bombay Pleaders Act, 1920, specifically refers to the lien of an advocate in respect of his costs, both over the documents entrusted to him and also moveable property recovered or preserved by his exertions. These are the statutory provisions so far as the present question is concerned.

17. So far as the judicial pronouncements are concerned, this State which is governed by the previous law obtained in the Madras Presidency, had noticed the right of legal practitioner on these questions based on principles of Common Law in some of the decided cases. We have already noticed that the advocates, attorneys, and vakils were admitted under Cl. 9, Letters Patent. The earliest judgment of Rama v. Kunji (1886) ILR 9 Mad 375 of the year 1886 for the first time recognises the right of the legal practitioner to sue for the fee. It was ruled that the provisions of the Legal Practitioners' Act do not debar a pleader from recovering a fee from his client when no contract, in writing, was made.

In Ramaswami Chetti v. Subbu Chetti (1900) ILR 23 Mad 134 it was held that at common law the client could not change his attorney without paying his costs, and accordingly Justice Boddam observed that it would not be right in this country to adopt the old chancery practice in preference to the common law practice and hence the petition to change the counsel was dismissed unless the former attorney is satisfied with respect to the payment of his costs, within the next half an hour. In Subba Pillai v. Rama Sami Ayyar (1904) ILR 27 Mad 512 the claim of the pleader to recover a sum advanced, which was described as out-fees was held to be not sustainable in view of the provisions of the Legal Practitioners Act and without examining the question whether his taking a promissory note for advancing such money constitutes a waiver of lien under S. 217, Contract Act, it was held :

"Independently of the promissory note, the respondent is entitled to recover the out-fees advanced by him and, under S. 217, Contract Act, he is entitled to retain the same out of the sums received by him to the credit of his client."

Thus, it is seen that the lien for money due to a pleader was recognised by the Court. However, in Narayana Swamy Naidu v. Chellappalli Hanumanulu (1910) ILR 33 Mad 255 a Division Bench consisting of Benson, OCJ and Krishna Swami Ayyar, J., held that a pleader in India has no right of retainer in moneys realised by him in one cause for his dues in other causes conducted by him. It was ruled that a solicitor has no such right and a pleader in India has no larger rights and S. 217, Contract Act, does not help the defendant.

18. In Rajah V. Muthu Krishna v. W.H. Nurse (1921) ILR 44 Mad 978 : 41 Mad LJ 213 : (AIR 1921 Mad 320) a Division Bench constituting of Sir John Wallis, Chief Justice and Mr. Justice Krishnan referring to both solicitors and vakils held "they 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". The case arose this way. An appeal was filed against the order of the single Judge refusing leave to file a written statement holding that it was out of time. The defendant's vakils in that case refused either to file the written statement or give consent to another vakil being brought on record unless they were paid the amount. There was delay in obtaining the orders of consent on paying the amounts ordered by the court for such change of counsel. The application to receive the written statement was rejected on the ground of delay. An appeal was carried before the Division Bench against the said order. In that context, Wallis, C.J. observed considering the practice in England and also the rights accrued to practitioners in this country under common law :

"These cases are entirely opposed to the view that a vakil is entitled to refuse to take a necessary step in the case, because his own fees have not been paid, and at the same time refuse his consent to the transfer of the case to another vakil. It is true that on the common law side an attorney could resist a change of attorneys unless his costs were paid, by which must be understood his costs for work already done in the action, not as in the present case as agreed payment towards the general costs of the action. On the equity side, a change of solicitors was allowed without insisting on the payment of costs, and this equitable rule has been held to prevail by reason of the provisions of the Judicature Act, and is not embodied in O. 7, R. 3, Supreme Court Rules; but even the common law rule must be read in the light of the other rule already mentioned that it is the solicitor's duty to go on if put in funds to meet out of pocket expenses."

The learned Judge, who is well conversant with both the systems of English Courts and Indian Courts in our view applied the common law rule to vakils also and there is no reason to doubt this clear authority.

19. Now we refer the dicta occurred in Krishnamachariar v. The Official Assignee of Madras (1932) ILR 55 Mad 455 : 62 Mad LJ 185 : (AIR 1932 Mad 256) relied on strongly by the petitioners, holding that an advocate cannot claim a particular lien for costs in the absence of a provision analogous to Solicitors Act, 1860. This observation was misconstrued as laying down a different rule for advocates and was also criticised by subsequent judgments stating that it requires reconsideration.

(Vide Periakaruppan v. Subbarama Ayyar) AIR 1943 Mad 190.

20. We shall notice the facts of this case and the context of observations of the learned Judges. The appellant before the learned Judges was an advocate who put forward a claim before the Official Assignee for certain money due to him from the insolvent for the work done for the insolvent in probate proceedings in respect of which the insolvent was an executor and legatee. His claim for fees was upheld but he wanted a lien on the property of the testator who bequeathed the property to the insolvent. It was held that lien against estate of the testator could not be granted because no property of the testator was vested in the official assignee by reason of executor's insolvency and hence the insolvency Court could not have made an order directing the official assignee to satisfy the claim of the advocate out of the estate of the testator. Having rejected the claim on the ground that such a lien could not be granted out of the testator's estate, the learned Judges also observed that such a lien could not be granted as there is no enactment in this court recognising a particular lien for costs which is sanctioned by the Solicitors Act, 1860.

Further, it was also observed that the appellant took a promissory note for Rs. 3,000/- as a security for his costs and hence the appellant could not claim any lien. It is seen that the appellant in that case was claiming a lien on property in the hands of a third party, analogous to the provisions of Solicitors Act in England creating such a statutory lien enforceable by a charging order and hence the learned Judges are right in holding that such a claim in the absence of such provision is not maintainable. But this dicta cannot be relied on to show that the common law right of retaining lien to an advocate is negatived. If the observation is so construed touching such right it is clearly an obiter and opposed to catena of decisions and not binding on us.

21. It is true that the rights of an attorney in India are the same as the rights of a solicitor in England excepting so far as the latter have been diminished or increased by statute. In 1860 the Solicitors Act came into force in England (23 and 24 Vic. Cap. 127) and by S. 28 of the said Act a lien upon real estate was created to the solicitor for the first time which he did not possess under common law. However, the provisions of the said Act were not treated as a brogating the rights of solicitors under common law. It is necessary to notice a passage in the first edition of Halsbury's Laws of England, Vol. 26 para 1334 which edition is nearer to the passing of Solicitors Act of 1860.

"A solicitor is entitled to three kinds of lien to protect his right to recover his costs from his client; namely :

(1) a passive or retaining lien;

(2) a common law lien on property recovered or preserved by his efforts;

(3) a statutory lien enforceable by a charging order."

There is no change in the legal position as this passage can be compared with the 4th edition of Halsbury's Laws of England at para 226, Volume 44.

"At common law a solicitor has two rights which are termed liens. The first is a right to retain property already in his possession until he is paid costs due to him in his professional capacity and the second is a right to ask the court to direct that personal property recovered under a judgment obtained by his exertions stand as security for his costs of such recovery. In addition, a solicitor has by statute a right to apply to the court for a charging order on property recovered or preserved through his instrumentality in respect of his taxed costs of the suit, matter or proceeding prosecuted or defended by him."

22. We see that in this country any legal practitioner, who combined himself the rights and obligations of solicitors and barristers in England are also allowed to enjoy the common law rights enjoyed by the solicitors in England. It is not as though the solicitors in this country enjoy these rights because of the special provision enacted in S. 171, Contract Act. It is necessary to examine the scope of S. 171, Contract Act, and its applicability to the advocates.

"S. 171. Bankers, factors, wharfingers, attorneys of a High Court and policy brokers, may in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain as a security for such balance, goods bailed to them, unless there is an express contract to that effect."

A perusal of this section indicates that it may broadly correspond to passive or retaining lien enumerated as the first type of lien in the Halsbury's Laws of England, first edition extracted above. However, two material differences can be noticed, (1) under common law the retaining lien extends only to taxable costs which include charges and expenses but this provision extends to the entire general balance of account due to the solicitor; (2) Section 171 speaks of general lien in respect of the goods bailed to the solicitor but not money as such whereas under common law the retaining lien extends to money belonging to the client in the hands of the solicitor. Compared with S. 170, Contract Act, S. 171 is a general lien in respect of amounts due to the solicitor whereas under particular lien as per S. 170 the bailee has got a lien in respect of remuneration due to him for the services rendered by him in respect of those very goods bailed.

The clear examples being Tailor and Goldsmith, who can retain goods entrusted to them till charges are paid. Instead of restricting the claim in respect of those goods bailed S. 171 confers a general lien in respect of enumerated category of persons including solicitor for the entire general balance of account. However, in view of the fact that it specifically refers to goods bailed to him under a contract of bailment, a contention is raised in Damodar v. Morgan and Co. AIR 1934 Cal 341 that this provision has abrogated the common law right of the retaining lien for money. However, that was negatived by Panckridge, J., who held :

"Mr. Sinha then submitted that if the passive or retaining lien had originally existed it had been taken away by S. 171, Contract Act. If this view were correct, a solicitor's general lien would only extend to property held under a contract of bailment, and would therefore not apply, in my judgment, to a fund paid to him as the result of the settlement of a suit. Whatever be the meaning of S. 171, Contract Act, I am convinced that it has not the effect of depriving attorneys of the passive or retaining lien which they possessed prior to the passing of the contract Act. I hold therefore that

attorneys are entitled to a passive or retaining lien."

The learned Judge, further held that the retaining lien in respect of money is not a general lien as in the case of other goods but it extends only to the costs incurred by the solicitor in the case.

23. Similarly in respect of second type of lien enumerated in Halsbury's Laws of England, First Edition, it was held in Ghulam Moideen v. Md. Oomer, AIR 1931 Mad 183 that a solicitor in this country had a lien on fruits of judgment recovered by his exertions. This is clearly without any reference to S. 171. No doubt, S. 217, Contract Act, is invoked for retaining the money in the hands of a legal practitioner as already noticed in Subba Pillai v. Ramasami Ayyar (1904) ILR 27 Mad 512 but the said provision is of a general application to all agents but no special rule is made in respect of legal practitioner.

Further O. 8, R. 6, C.P.C., specifically recognises the right of a lien of a pleader in respect of costs payable to him under the decree. The relevant rule is in the following terms :

"The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree."

It is significant to note this provision refers the practitioner-pleader. It is to be remembered that the Legal Practitioners Act recognises the pleader as one of the categories of legal practitioners. In the matter of the petition of Khoda Bux Khan (1888) ILR 15 Cal 638 pleaders were defined as persons "who have combined in their own persons the two duties which are performed in England by attorneys and barristers." It is also held that "the pleader and vakil combine both vocations in his own person." The said rule embodies to some extent the second rule as envisaged under the common law. The Full Bench of the Allahabad High Court in Nihal Chand v. Dilawar, AIR 1933 All 417 (FB) examined the position of a barrister enrolled himself as an advocate and held : "He combines himself the capacities of a barrister and solicitor in England and hence the disability of not suing the client does not exist in this country. "Similarly, the Full Bench of the Madras High Court held in Powers of Advocates, In re (1929) ILR 52 Mad 92 : (AIR 1928 Mad 1182) that R. 128, Insolvency Rules, prohibiting an advocate to act in insolvency jurisdiction was held to be ultra vires as he can both act and plead in all courts. A Special Bench of the Madras High Court in In Re Rajagopala Ayyangar, AIR 1942 Mad 553 held : "In this country a pleader like an advocate combines the functions of the solicitor and the barrister in England. He does the solicitor's part of the work and he pleads in court. As he fulfils both roles he must be subject to disabilities of both."

24. Further the statutory lien (third type enumerated in Halsbury's Laws of England, First Edition) enforceable by charging order as contemplated under the Solicitors Act of 1860 is not available in this country even now, except to the limited extent of recovering costs of an advocate as noticed by summary procedure under Rules 58 to 68, Legal Petitioners Fees Rules, as noticed above, and also similar provision found in Bombay High Court under Rule 1079 of the High Court's Rules on original side.

25. We have covered rather a very wider ground to show that S. 171 is not the sole repository of the rights of an Attorney or Solicitor in this country but they are allowed to enjoy common law rights dehors of S. 171. Hence other legal practitioners who discharge the functions of a solicitor in England are also allowed to enjoy the same common law rights. In fact the rights of solicitors in this country based upon common law rights were noticed in the earliest judgment of Charles Sergeant, C.J. in Devkabai v. Jeferson (1886) ILR 10 Bom 248 who held :

"It is to be borne in mind that the Solicitor's lien in the High Court of India is governed exclusively by law as it existed in English courts before the passing of 23 and 24 Vic. Cap. 127 (the Solicitors Act, 1860) by which that lien was very much extended. By that law the Solicitor had a lien for his costs on any funds or sum of money recovered for, or which became payable to, his claim in the suit."

Accordingly Marten, C.J. accepting this view held in Tyabji Dayabhai & Co. v. Jetha Deoji & Co., AIR 1927 Bom 542 that an attorney in England has a right for a lien on property recovered by him in a suit by his exertions coming under the second rule of common law enumerated from the passage in Halsbury's Laws of England. He observed thus :

"In the first place it must be clearly understood that the rights and duties of attorney are in no way part of the indigeneous law or practice in India. Their profession originated from England; it grew up under the English common law and it is clear that it was the common law which governed their rights and duties in the King's Courts established by the Supreme Court charter of 1828 to which courts our present High Court is the successor."

Again the rights based on common law for the solicitor is accepted by Chagla, C.J. in Basudeo Ramgovind v. Vachha & Co., affirming the order of Coyajee, J. who held following the dicta of Marten, C.J.

"There a series of English decisions were referred to and it was held that the English common law governed the rights and duties of attorneys in Bombay and that an attorney had at common law a lien for his costs over property recovered or preserved or the proceeds of any judgment obtained for the client by his exertions."

This view is further affirmed in the latest judgment of the same High Court in Matubhai Jameitram v. Custodian, Evacuee Property .

26. Thus it is seen that the solicitors's lien in High Courts in India is governed exclusively by law as it existed in English Courts before the passing of the Solicitors Act, 1860. This is not abrogated by S. 171, Contract Act. In fact, the Contract Act, 9 of 1872, does not purport to codify the entire law relating to the contracts and it also specifically preserves any usage or custom of trade or any incident of any contract not inconsistent with the provisions of the Act.

27. It is pertinent to note the property in respect of which retaining lien can be claimed. As stated in Halsbury's Laws of England, 4th Edition, Para 227 :

"The general rule is that the retaining lien extends to any deed, paper or personal chattel which has come into the solicitor's possession in the course of his employment and in his capacity as solicitor, with the client's sanction and which is the client's property.....including money in a client account."

We have already seen that S. 170, Contract Act, specifically does not refer to money. However, S. 217, which defines general right of agent to retain money of the principal, is extended to advocates also. However, that lien must be confined to the costs incurred by the practitioner in that particular case only. It is not a general lien as in the case of S. 171, Contract Act.

28. Now at this stage we must notice one limitation inherent in the right of retaining lien by the solicitor. If a solicitor discharges himself, he is not, according to English Law, entitled to the lien and the said principle is applied in this country also. It is necessary to notice a passage on this question in Fourth Edition of Halsbury's Laws of England, Vol. 44, Para 233, which is as follows :

"In the event of a change of solicitors in the course of an action, the former solicitor's retaining lien is not taken away, but his rights in respect of it may be modified according as he discharges himself or is discharged by the client. If he is discharged by the client otherwise than for misconduct, he cannot, so long as his costs are unpaid, be compelled to produce or hand over the papers, even in a divorce case. If, on the other hand, he discharges himself, he may be ordered to hand over the papers to the new solicitor, on the new solicitor undertaking to hold them without prejudice to his lien, to return them in tact after the action is over, and to allow the former solicitor access to them in the meantime, and if necessary to prosecute the proceedings in an active manner."

The earliest judgment so far as we see on this question is Basanta Kumar Mitter v. Kusum Kumar Mitter (1900) 4 Cal WN 767 wherein Sale, J. held :

"The rule is that an attorney having undertaken to act for a client is bound to continue to act for him so long as the relationship between them, of attorney and client subsists. If the client discharges him, then he has a lien on his client's papers for his costs, and he may object to a change of attorney, except upon the terms of the payment of his costs, but failing a discharge by his client it is his duty, once he has undertaken to act for a client, to proceed with the diligent prosecution of the business or matter for which he has been retained."

This is again affirmed by the same High Court in Atool Chandra Mukerjee v. Shoshee Bhusan Mukherjee, (1902) 6 Cal WN 215, wherein Ameer Ali, J., held :

"An attorney who once undertakes to conduct the conduct of a case is bound, whether the client supplies him with funds or not, to proceed with due diligence in prosecuting the case."

This is the view taken, as already noticed by us, in Rajah V. Muthu Krishna v. W. H. Nurse, (AIR 1921 Mad 320) where this principle is made applicable to vakils also, holding that they cannot refuse to take necessary steps in the case because his own fee has not been paid, and at the same time refuse him consent to the transfer of the case to another vakil.

29. Now it is necessary in this connection to bear in mind that though the right of lien relates to law of contracts, if a dispute arises between the client and the legal practitioner, the latter has to observe certain professional standards apart from his right as such under civil law. That is why the Supreme Court observed in In re 'M', an Advocate in a professional misconduct case when a right of retaining the money was sought to be enforced by the practitioner in the following terms :

"We have no doubt in our mind that the high standards of the profession demand that when the moneys of the client come into the possession of an Agent or an Advocate, otherwise than as earmarked fees, he has to treat himself as in the position of a trustee for the client in respect of the said moneys. Even if he has a lien on such moneys, it would be improper for him to retain, i.e., to appropriate the same towards his fees without the consent, express or implied, of his client or without an order of the Court. It may be that in certain circumstances he is entitled to exercise a lien, but he has to give reasonable intimation both of the fact of moneys having come into his hands and of the exercise of his lien over them until his account is settled. If there has been no prior settlement of fees he cannot constitute himself a judge in his own cause as to what would be the reasonable fee payable to him. This position of trusteeship in respect of moneys of the client in his hands is all the greater where the moneys represent the unspent balance of what was given for a specific purpose, such as for payment of printing charges, as in this case."

They further held that in respect of unspent balance the advocate has no lien either under common law or by statute. So it is seen that this question always mingles up with the question of professional conduct and it is absolutely necessary that the Bar Council must frame rules without leaving it to be determined by the Courts.

30. There are occasions where Courts have to examine whether the claim of the practitioner for retaining the papers of the client for non-payment of fee constitute professional misconduct. In Bijili Sahab v. Dadhamia Bhalambal, AIR 1936 Mad 48 Venkata Subba Rao, Officiating Chief Justice held that a pleader who retains the papers of his client because his fees were not paid in full does not act wrongly so as to commit professional misconduct. Similarly in In the matter of an Advocate, Tuticorin, AIR 1943 Mad 493 a Special Bench of the Madras High Court held that when a practitioner honestly claims a lien to retain papers till the fee is paid, he is not guilty of professional misconduct. Now under the Advocates Act, 1961, the disciplinary jurisdiction over advocates is exclusively conferred on the statutory authority which is the Bar Council of the respective States. In the absence of an indication under the statutory rules framed under the Advocates Act, the Court is bound to apply civil law applicable between an advocate and his client.

31. The result of this discussion is, -

(1) The common law right of passive and retaining lien available to a solicitor in England is accepted by Courts in India as part of the law of this country.

(2) The said common law right is not abrogated by S. 171, Contract Act.

(3) Section 171, Contract Act, enacts a special rule of lien applicable exclusively to attorneys who are also known as solicitors.

(4) The other practitioners, who discharge the functions of solicitors, are entitled to invoke the common law rights applicable to solicitors though S. 171 is inapplicable to them.

(5) The practitioner forfeits the right of retaining lien the moment he discharges himself or by his client for misconduct.

This is the answer we record to the second question.

32. We shall examine the first question. For that we must look O. 3, R. 4 sub-rule (2), C.P.C. and also R. 20-A, Civil Rules of Practice.

"Every such appointment shall be filed in Court and shall, for the purposes of sub-rule (1), be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client."

(Explanation. - Omitted) "Rule 20-A of Civil Rules of Practice : Consent for change of vakalat :- An advocate or pleader, proposing to file an appearance in a suit, appeal or other proceeding in which there is already an advocate or pleader on record, may not do so unless he produces the written consent of such advocate, or pleader or where consent of such Advocates, or pleader is refused, unless he obtains the special permission of the Court."

A perusal of these rules discloses that if a practitioner who filed vakalat on behalf of his client has not given consent, leave of the Court is necessary to terminate his appointment as an advocate in the case. Though O. 3, R. 4 is silent about the power of the Court to determine any question disputed between the parties courts have construed this provision empowering the Court to pass an appropriate order while granting leave to the client to terminate the appointment of his counsel. The enquiry is clearly summary and the Court cannot make an elaborate adjudication on seriously disputed questions of fact and law. There is consistent practice in this Court whereunder the Court is empowered to pass appropriate order directing the payment of fees to the advocate before his services as an advocate are terminated.

A Division Bench of the Madras High Court in Sundaramurthy v. Muthjah Mudaliar, AIR 1945 Mad 190 held that "in the absence of misconduct on the part of the advocate, the client is not entitled to the sanction of the Court for a change of the advocate without making a satisfactory arrangement to pay the advocate who has had charge of the case." Hence the client cannot without the leave of the Court terminate the services of his advocate. Hence even if the advocate reports no instructions at one stage, he is entitled to prosecute the proceedings at a later stage so long the Court has not passed an order terminating his services and in the absence of an order discharging an advocate the advocate is deemed to continue to represent his client.

The power of the Court to order payment of the fees to the advocate in the absence of any allegation of misconduct or any dispute about the fee payable is accepted by all High Courts except a solitary view taken in one judgment in Dharmadas v. Kachudas AIR 1933 Bom 182, wherein the learned Judge while upholding the right of the attorney to retain his client's documents till the amount is paid held that the litigant may change his attorney whenever he likes and the leave of the Court is only a matter of office convenience. We cannot agree with this view. The court is entitled to control the proceedings before it and the rule is aimed at securing an orderly appearance of counsel in the court who represent the parties. The leave of the court should not be treated as a mere formality. When a client wants to change his advocate under his mere whim, the power of the Court to grant leave on condition of payment of the fees when nothing was suggested against the advocate, is based on a wholesome rule of procedure. Hence we are of the opinion that the view of the Division Bench in Sundaramurthy's case (AIR 1945 Mad 190) which is based upon the true intendment of this provision is correct and there is no reason to depart from that practice.

33. Further even in the absence of an agreement fixing the fee the Court has got discretion to fix a reasonable fee on the principle of quantum meriut (as much as he has earned.) However the Courts have also taken the view that this summary procedure is not the proper remedy to enforce the lien when serious questions of disputed facts are raised. In Ramdoyal Serowgie v. Ramdeo ((1900) ILR 27 Cal 269) it was held that when charges of collusion or fraud are made it is not convenient that the Courts should be asked to dispose of the claim in the summary enquiry.

34. Hence we hold that the enquiry under O. 3, R. 4, C.P.C., is summary and serious disputed questions of fact cannot be decided under this Rule. In the absence of any allegations of misconduct on the part of the Advocate or any dispute regarding fee due or payable, the Court is justified in ordering payment of fee or a reasonable amount of fee if the fee is not fixed when the client wants to seek the leave to terminate the services of the Advocate in the case.

35. Let us apply this legal position to the facts of this case. The petitioner stated in the affidavit that he paid the entire fee and no fee is due to the counsel. There are complaints and counter complaints to the police by party and the advocate against each other. The reply notice said to have been given by the Advocate to the notice issued by the plaintiff demanding return of the files is not placed before us. It is represented to us that the matter was already reported to the Bar Council and the statements and the evidence recorded before the Bar Council is also placed before us. However we do not refer those proceedings and we refrain to make any comment about the stated misconduct of the advocate. The Court cannot embark on the enquiry whether the plea of discharge pleaded by the client is true or not or whether the misconduct alleged by the client is made out or not.

36. Hence we are satisfied that the direction of the Court below that the plaintiff shall deposit the fee in the Court as a condition precedent for granting leave is liable to be set aside. It is true that the amount so directed to be deposited cannot be taken away by the advocate unless he succeeds in the suits filed or to be filed by him. However this direction to deposit the entire disputed amount virtually prejudges the issue and we see no warrant for such a direction.

37. So far as the lien of the advocate on the papers is concerned, we are again confronted with the same difficulty of deciding very serious questions of misconduct. We cannot say that this is a case where the advocate lost his lien as he discharged himself. On the other hand he is willing to work even though he has not received the fee, but the client issued notice stating that he should return the papers and his services are no longer required. It is one thing to say that the advocate forfeited right of lien if he is unwilling to work simply because fee has not been paid and yet another thing to say that he is bound to work even though the client prohibited him to work for the fear of losing the lien. If the advocate insists to work in spite of the request by the client not to act on his behalf, it may lead to another type of misconduct which may legitimately be laid against him.

Now we are not in a position to say that the advocate lost his right for lien on account of his misconduct. Such a complaint was already made and the same is pending enquiry before the Bar Council, the disciplinary authority. We cannot embark upon the question whether the advocate lost his right of lien because of his misconduct. We have already held that we are not in a position to decide whether the discharge pleaded by the client is true or not. Under these circumstances, considering the summary nature of enquiry under O. 3, R. 4, C.P.C. the only course open to us is to direct the respondent advocate herein to hand over the papers to any newly appointed advocate or advocates by the plaintiff on his or their undertaking to hold those papers without prejudice to the lien claimed by the respondent and return those papers to him after the action is over and also allow the advocate to have access to these papers to prosecute any proceedings meanwhile against the plaintiff in these suits.

38. In the result, the leave granted by the Court below in these cases shall stand modified deleting the direction to the plaintiff to deposit the fees into Court and giving a further direction that the advocate shall return the documents to any other advocate or advocates to be appointed by the plaintiff in these cases on his or their giving an undertaking to hold those papers on his behalf without prejudice to his lien. Further, these directions shall not prejudice the advocate in any way to establish his right to recover the fees in the suits filed or to be filed by him.

39. The Civil Revision Petitions are allowed accordingly. We make no order as to costs.

40. Before we part with these cases, we would like to make the following observation regarding right of lien of the advocate in these matters.

41. It is true that the peculiar performance of the profession cannot be understood by a layman and the indictment against this profession is from the beginning of the history. Even in 16th century, the great Poet Philosopher Shakespeare in Henry Sixth spoke through his character 'Dick the Butcher' who said : "The first thing we do, 'let us kill all the lawyers". The practitioner must be extremely careful and cautious about his dealing with his client to justify his role as a social engineer. Our experience discloses that in great majority of cases when a client expresses his desire to change his counsel the advocate who is prosecuting the case, feels offended and he readily gives away the brief without any second thoughts about the fees payable to him. Such a conduct on the part of the practitioner is undoubtedly an ideal one.

However, such ideal conduct may not be practicable or feasible for all, and at all times. Further placing such a high premium in the name of professional standards may not also be necessary in the interests of the society as a whole. Hence, it is necessary for the Bar Council, which is now the sole authority for controlling the legal profession to evolve some principles of avoiding unseemly disputes between advocate and his client and also by safeguarding the interests of the profession against unscrupulous litigant without giving any room for comment that the advocate is placed at an advantageous (position?) over the litigant public when a controversy arises between them. In view of the fact that the institution of the Solicitors is abolished, S. 171, Contract Act, may be amended deleting the word "solicitor" in the said provision, making a suitable provision in the Advocates Act of 1961 providing right of lien to the advocate defining its limits befitting the professional standards. Further it is desirable that similar rules on the lines of the Legal Practitioners Fees Rules 58 to 63 are made for the benefit of the Advocates practising in mofussil courts.

42. Petitions allowed.