

INTERNATIONAL JOURNAL OF LEGAL ENFORCEMENT

ISSN: 2582 8894|UIA: AA1003/2020



Volume 1 Issue 2

|June 2021|

Website: www.internationaljournaloflegaleenforcement-ijle.com

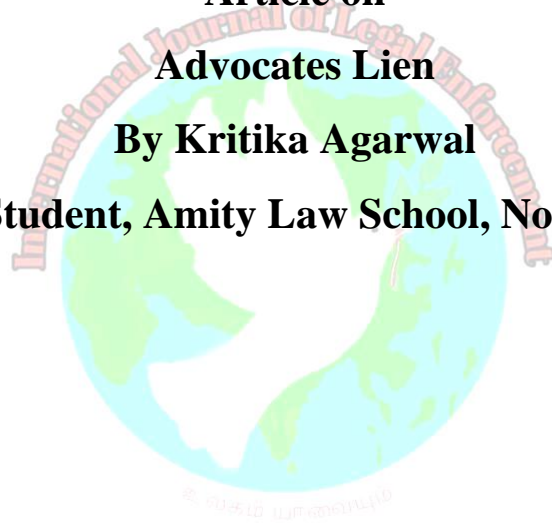
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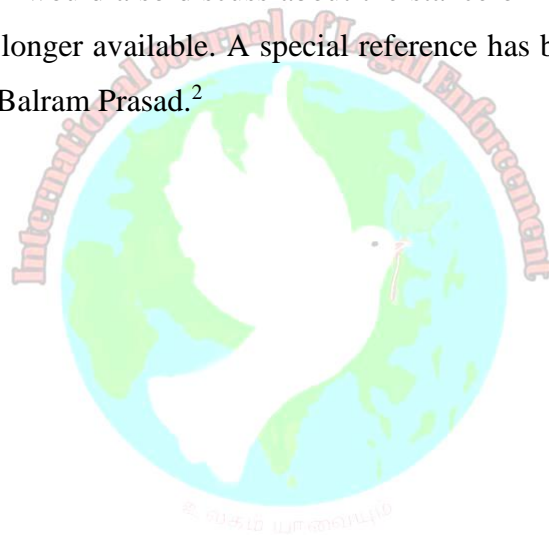
Article on
Advocates Lien
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Abstract

Lien in its basic sense means the right to retain the property of the debtor until debtor has discharged his liability. Similarly Advocate's lien is the right of a lawyer to hold the property whether movable or immovable of his/her client until the fees has been settled for the legal aid, advice and representation provided. This is special remedy available to only a special class that is, the advocates when their dues are remain unpaid, they can resort to this mean to settle their claim against client.

However, in India, this remedy is no longer available¹. The research focuses on various aspects of Advocate's lien in India while comparing it with the laws of UK and United States. The paper would also discuss about the stance of Advocates lien in India and the reason why it is no longer available. A special reference has been given to the landmark case of R.D Saxena vs. Balram Prasad.²



¹ Priyansha Corrie, "Advocates lien: A Critical Review", Available at- <https://papers.ssrn.com/>

² AIR (2000) SC 2912

CHAPTER- 1

INTRODUCTION

“Lawyers have their duties as citizens, but they also have special duties as lawyers. Their obligations go far deeper than earning a living as specialists in law. They have a continuing responsibility to uphold the fundamental principle of justice from which the law cannot depart.” – Robert Kennedy³

Unlike any other profession, there has to be utmost care, trust and precaution in the relationship of a client and his lawyer. Whatever happens between them, must stay between them. In reality the services offered by any advocate towards its client is on contractual basis and both the parties- Advocate and Client have the right to withdraw from the contract but consent of the other party is necessary. In this paper we are going to talk about “Does the Advocate have the right to lien against his/her client...if not, then what is the consequence if the act is committed.”

The idea of lien has been prevailing since Roman period to Napoleon reign. Lien can be defined as a legal right of the creditor for claiming interest in any property/good of the owner⁴. Lien could be either voluntary or consensual. It is basically the right retained by the creditor till his/her dues are not cleared. It also gives right to creditor to sell the property in lien if his interests are not cleared. **Section 170 and section 171 of the Indian Contract Act⁵**, talks about particular and general lien respectively.

Definition of Advocate's Lien is on the same lining and thus it the right which an advocate possesses if after or during the court proceeding, he has not been paid for his services rendered. He has the right to hold the client's property or any other asset until his dues are not cleared. And here if client refuses or is unable to pay the fees and then advocate also refuses to return the case papers he has in his possession until the dues are clear will amount to Advocate's lien over the papers. The notion of Advocates lien which is known today, was for the first time recognized in the case of **Cohen v. Goldberger⁶** – wherein a dispute arose between the existing partners of a partnership firm and the previous partners of the firm, But the clients of the advocate were not able to pay the fees and then according to

³ www.pininterest.com

⁴ Article on Lien, Available at- <https://corporatefinanceinstitute.com/>

⁵ The Indian Contract Act, 1872, Available at- <http://uputd.gov.in/site/writereaddata/siteContent/indian-contract-act-1872.pdf>

⁶ 109 Ohio State 22 (1923)

the rules of equity court stated that the attorney's fees must be paid out of the judgment obtained in the case.⁷ In this case the court recognised the skill of that an advocates puts while working on the case and winning an argument. However, In India this right or remedy is not available i.e. an advocate cannot establish his right of lien over the property of his/her client even if his fees is unpaid. It is believed that law is a very noble profession and one can't allow advocates to opt such practices just to realise back certain sum of money. Lawyers for clearing the dues should go for some other resorts but this method of illegally keeping the papers or any other property. Even India being a common law country this right is not available here, but other common law as well as civil law countries provide their advocates with the right to lien. Advocates in these countries enjoy the lien over their client's papers if their fees is not paid and client wants to switch to some other advocate for the further proceeding. No contract could make the right to Advocate's lien in India as valid.

Chapter 2

STANCE IN INTERNATIONAL ARENA

Generally in both common law countries and civil law countries protect the right of Advocate's Lien. They recognise two types of lien-

- General Lien- In this type of lien the attorneys are allowed to retain his client's papers, or any other property which he might obtain legally and by being within the professional capacity and not otherwise.
- Special Lien- The advocate is provided with the right to obtain charge over the judgment or any other award received by his client in the course of the proceeding, mostly if the decree is related to some cost connected with the case is taken as lien.⁸

Now, stance in different countries would be discussed.

⁷ Cohen v Goldberger, 109 Ohio State 22 (1923)

⁸ George v. Walton, 306, 43 N. E. 515 (1942).

1. United Kingdom

The solicitor in England enjoys the same rights as that of an attorney in India, India was colony of United Kingdom and that is the reason that we have similar laws. But now the situation has changed over time as earlier in India also right of advocate lien was available but now advocates can no longer enjoy this right while in UK, a solicitor has been provided with the same.

Three types of liens are available in United Kingdom⁹ and they mentioned as follows:

i. **A common law lien over property –**

This type of lien is not a general lien but a particular type of lien wherein the dues between the advocate and client can only be extended to the property which is recovered during the course of the proceeding. Advocate in this lien have the right to ask the court to attach the personal property of his client which is obtained in the judgment in court as a recovery. But under this advocate does not have the right to sell the property for recovery of his fees, he/she can only retain it.

ii. **Passive or Retaining Lien –**

Under this, a right to retain the property of client is given to the advocate but the right is limited to only properties which is in his possession and not otherwise. He has the right to keep the property with him till his fees is not paid, it is also called as general lien. This lien is considered to be most beneficial as here in the dispute of non-payment of fees is resolved without any cost or resorting to litigation against the client. The advocate before retaining the property is needed to inform the same court where the dispute was being dealt, by writing an application. And only after receiving the permission he should proceed if he/she establishes control without court order, it would be considered as violation.

Section 171 of the Indian Contract Act, 1872¹⁰ is in conformity with this lien. Basic aim of it is that it extends to any document or property which is in the possession of the solicitor while he was dealing the case of the client, and he was given the sanction

⁹ *Damodar v. Morgan & Co* AIR 1934 Cal 341, 343

¹⁰ The Indian Contract Act 1872, <http://uputd.gov.in/site/writereaddata/siteContent/indian-contract-act-1872.pdf>

by the client itself to possess it¹¹. The following mentioned instruments can be kept in the retaining lien by the advocate-

- Bill of Exchange- Negotiable Instrument,
- Cheques- Negotiable Instrument,
- Insurance Policy,
- Any Document about Shares,
- Letters of patent,
- Any monetary sum,
- Money/cash in the client's account.¹²

But the right of lien does not extend to- Client's Original will, any document which is reserving life interest, any document related to the court records, or any other document which a solicitor cannot possess in his own capacity. Further, an advocate/ solicitor cannot establish any type of lien over any such document which were submitted to him under some special agreement and that agreement does not contain any clause related to same.

iii. **Statutory Lien-**

When a charge over some property arises by virtue of some legislature laid down by the parliament and which discusses the matter between both the parties. According to section 73 of the Solicitor Act, 1974- solicitor have been provided with the right to apply the court for preserving his right over the property involved in the proceeding to which he is the appointed solicitor.

Discussion about the Statutory Lien was done in the case of *Clifford Harris & Co v. Solland & Ors*¹³ - court talked about the lien in common parlance, also discussed about different types of lien and also in strict sense when a lien could be claimed of the property in the possession and when not. If Solicitor during the course accepts and other security, it would imply that he has waived of his right over the papers of clients. It is considered to be a duty of the solicitor that before expressing the lien, an express notice of the same must be served to the client.

¹¹ *Sheffield v. Eden* (1878) 10 ChD 291

¹² *Solicitor's rights*, Halsbury's laws of England Vol 44 (1), 4th edn. Para 244

¹³ 2005 WL 401734

2. United States

The stance in United States could be explained by mere one expression- "*Legal Profession is a learned profession, not a mere money getting trade, but expenses must be met.*"¹⁴

In the United States of America, there is existence of general lien which is known as possessory lien here which give the right over legal documents that are in possession of attorney. Here Attorney have the same powers as that of an advocate in India, of course some difference is there. The basic aim of retaining lien or general lien is to induce the client to clear of the debts through embarrassment and worry.¹⁵ The Attorney can protect his fees against his client by charging lien over the judgment or any award he has recovered.¹⁶

Almost every state is of the view that retaining lien is not unscrupulous and every attorney must be provided with it so that they are able to perform their duties diligently. Superseding the concept of common law lien, some countries have made separate provisions for the engraftment of retaining lien and recognises it in the interest of advocates. Drafting of statutes were done to provide suitable compensation for the non-payment of his fees for his services. Any kind of lien cannot jeopardise the interest of clients every state should kept that as the main objective while providing the rights to solicitors.

Where there exists no legislature, the right could be claimed solely on the basis of an agreement and not otherwise. And so, United States also recognises the lien which is created through an agreement between client and advocate but their no provision as to the compulsory formation of the agreement. Payment of fees can be made through the passing of the judgment. If the attorney remains unpaid then he won't be able to provide the services and the objective of the profession would be defeated.

3. Canada-

Following the footprints of traditions of common law, legislation in Canada find resemblance with the laws of United Kingdom. The act of Canada is parallel to the Solicitor's Act, 1974 of England. The *Rules of Professional Conduct* for the Advocates in Canada, states that discharging the lawyer from his duty in the case without paying the fees leads to the lien,

¹⁴ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 250 (1943)

¹⁵ Zach Elsner, *Rethinking Attorney Liens: Why Washington Attorneys are forced into "involuntary" pro bono*, 27 SEATTLE U. L. REV. 827, 832 (2004)

¹⁶ Britton, *Attorneys' Retaining Liens*, 6 J. LEGAL PROFESSION 263 (1981).

and his interests must be satisfied, the point of difference here is that- before the enforcement due regard must be paid to the position of the client and if his position is bigoted then no right would arise.

In the case of **Mertin Mechanical Contractors Ltd. v. Big H. Construction Inc**¹⁷. – the whole concept of lien was explained by the court. The aim of enshrining this concept was to prevent the “*lawyer shopping*” without the prior consent of previous lawyer. This process of shopping a lawyer must be prohibited for maintaining the dignity of profession.

CHAPTER-3

EVOLUTION OF LAW IN INDIA

In India, there is no clarity about the provisions on Advocate’s lien. Many legal jurists are of the opinion that the concept of lien has been expressed in our legislatures in complete disparity and nothing is clear about it. It could be said that the provisions lack accuracy and are not even complete. The act providing the law on lien is itself lucid and needs amendments. The major laws in India have been completed by borrowing from here and there, there is not even a single statute which could be kept away from the process of revision or review. Jurists believe that if the law would have been drafted by keeping in mind Indian scenario the situation of our judiciary would have been different.

Alike ment of the words – ‘Advocate’ & ‘Attorney’

Section 171 of the Indian Contract Act talks about the ‘right of lien’ – wherein it is mentioned about ‘Attorney Lien’, now the question which arises here is that whether the usage of word Attorney is in same as that of an Advocate, the act is totally silent on this fact. The status was explained in the case of ***P. Krishnamachariar v. The Official Assignee of Madras***¹⁸- it was held that lien is not available to advocates in India but is only provided to solicitors and Attorneys, Advocates are outside the purview of the above mentioned provision. The judgment for the case in 1932, and since then the scenario has completely changed.

Furthermore, in the Advocate’s Act, 1961 originally the dual system was established – Advocates and Attorneys, which was prevalent in the areas of Bombay and Calcutta High

¹⁷ [2001] O.J. No. 1319 (Ont. S.C.J.)

¹⁸ AIR 1932 Mad 256

Court¹⁹. But it was the discretion of these high courts, if they want to go with this system or not. Later from January 1, 1977 the provision were deleted and now no separate class of lawyers exist except for 'Advocates'. Since the dual system was quite prevalent for a long time, still it could be seen in the practice.²⁰ The Advocates Act, recognises only one set of practitioners and that is- **Advocates**. The same question came for discussion in the case of *Lalchand Ramchand v. Pyare Dasrath Chamar and Anr*²¹ the court held that Section 171 of Contract Act²², 1872, uses the word Attorney but advocate also fall under the same ambit. For practical purposes, there is no difference in the rights and duties of Attorney, solicitor, or an Advocate, they all are different names to one profession. In general sense, we can say that just like solicitor is permitted to conduct litigation but not to plead just like an advocate is allowed to conduct legal aid. Some duties might differ but the main aim remains same.

Does an advocate have a lien over client's documents which are in his possession?

The stance followed by the Indian courts in respect to Advocate's lien differed from case to case, prior to R.D Saxena case²³. In earlier cases, the courts were of the view that an advocate can establish his right of lien over the property which he had recovered in the impugned case and not otherwise²⁴. In the case of *Tyabji Dayabhai & Co. v. Jetha Devji & Co.*²⁵ wherein it was held that an attorney has the right to lien on money of his client. An advocate has been provided with the right to lien over the judgment which is proceeded by his hard work to the case. But the court has only allowed particular lien related to the fees and he cannot establish general lien over the papers and documents.

In the case of *Narayandas, Sunderlal v. Narayandas Harbhagat*,²⁶ it was stated by the court that attorney can establish lien over the clients documents but once he is discharge himself from it he is bound to hand over all the papers to the newly appointed solicitor and also losses the right same is the case of English law. Yet in another case the professional misconduct was discussed by the court, the court held that retaining clients paper if the fees is

¹⁹ S.31 of the Act. The High Courts of Bombay and Calcutta were authorized to admit Attorneys and exercise over them power of removal and suspension from practice for reasonable cause.

²⁰ PROF M.P. JAIN, OUTLINES OF INDIAN LEGAL AND CONSTITUTIONAL HISTORY, (Wadhwa, Nagpur, 6th Edition, 2006) p. 474

²¹ AIR 1971 MP 245

²² <http://uputd.gov.in/site/writereaddata/siteContent/indian-contract-act-1872.pdf>

²³ AIR 2000 SC 3049

²⁴ Rajendar Lal v. Ram Krishna Gupta, AIR 1952 Him Pra 11, 14

²⁵ AIR 1927 Bom 542

²⁶ AIR 1932 Bom 363

either not paid fully or partly is not a misconduct and a right of Advocate.²⁷ In the case of *Lalchand Ramchand v. Pyare Dasrath Chamar*²⁸ it was held that, according to Section 171 no lien could be established by the advocate as it is against the basic aim of the contract.

With all this discussion it could be deciphered that there was too much variance and finally the issue was settled in the case of *R.D Saxena v. Balram Prasad*²⁹ - and it was stated that advocates have no right of lien over the documents given to him by his client during the course of the case.

CHAPTER-4

CRITICAL ANALYSIS OF R.D SAXENA CASE

The relationship between the client and advocate is of utmost trust, but sometimes disputes arises and client changes his advocate. And if then advocate refuses to return the files the issue of Advocates lien starts- this whole issue was dealt by the Apex court in the impugned case of R.D Saxena.

Wherein, Mr. R.D Saxena, an advocate practicing in Bhopal was chosen by the Madhya Pradesh State Co-op Bank as their advisor in legal matters. Eventually after passing of 2-3 years some issue arise between them and bank decided to end their relationship. Then, due to unsettled balance between them he refused to return the files until settled. Later a complaint was filed to Madhya Pradesh State Bar Council which was ultimately transferred to Bar Council of India for deciding of the issue of advocate lien. In the proceeding he was held guilty of misconduct. He then appealed to the Supreme Court and where it was observed that only goods could be bailed as security under section 171³⁰.

Furthermore, Supreme Court interpreted various definitions and held that no advocate could be allowed for bailment of files.

Now, some reasons are listed below as to why case files cannot be considered as valid lien:

1. On plain reading of section 171 of the Indian Contract Act, 1872³¹ it could be adopted that case files and documents cannot be referred to as ‘goods’. On interpreting goods

²⁷ A.K. Bijili Sahib v. Dadhamia Bhalambai-A1R 1936 Mad 48

²⁸ AIR 1971 MP 245

²⁹ AIR 2000 SC 3049

³⁰ The Indian Contract Act 1872, Available at- <http://uputd.gov.in/site/writereaddata/siteContent/indian-contract-act-1872.pdf>

³¹ Ibid

it could be concluded that it should have marketability but these case files do not have the same.

2. According to **Art. 22(1)**³², every person have been provided with the right under the constitution to choose his/her lawyer. And it is the legal as well as moral right of an advocate to return everything he has in his possession back to the client.
3. There is also no mention of lien in the Bar Council Rules. If advocate wants remuneration of unpaid amount he should resort to other ways like by filling case in the court of law.
4. Lastly, it was also stated that upholding of case files in the possession is a professional misconduct and it should be avoided. It is the duty of an advocate to provide legal aid to all. Even if client is unable to pay the fees the reasoning for the same must be known before.

The opinion put forth by the court in the case is quite distorted and is not acceptable, even on agreeing the fact that being a lawyer one must provide free justice to all but ultimately it is also profession. It is like opening a Pandora box since lien could be easiest remedy instead of unnecessary filling litigations. A brief discussion have been done on the reasoning given by the court.

- **Classifying case papers as ‘Goods’**

According to the Section 2(7) of the Sales of Goods Act³³, 1930- a good can be any movable property but cannot be money or any other actionable claim. A very general meaning have been provided to the word, and it has been left for interpretation by the courts. But here in the case, a very narrow construal has been devoted to the word by not considering files as goods, in actual it is clearly mentioned in the section what not is a good. It is true that goods must be one which could be sold but recently through judicial decisions itself its scope has been increased.

Secondly, with giving and understanding the true intention of Advocates lien the interests of advocates could be protected as well as it would prevent lawyer shopping.

- **Paramount Solution for remitting the Advocate**

It was augmented that to receive remuneration advocate can sue the client, but it is unfeasible as ultimately it would harm the goodwill of an advocate as other clients would believe that on every petty issue he would sue them.

³² The Constitution of India, 1950

³³ The Sales of Goods Act, 1930, Available at- http://legislative.gov.in/sites/default/files/A1930-3_0.pdf

Just because there is absence of any express provision in any rule or act- denying the right is no valid solution to the problem. The practices like this hinder the process of justice. Giving rights to only one class or one party cannot be accepted.

- **No restriction to Article 22(1)**

It was held that providing the right would violate Article 22³⁴- the argument presented it totally baseless as retaining papers to recover the unpaid amount is not prohibited. Certain restriction can be accepted but completely barring is violative of right to profess profession. It is in the interest of the advocate and before moving to some other advocate all the dues must be clear.

- **Withholding Files does not amount to misconduct-**

It not a disputed fact that profession of law is a noble one and establishment of the same is done to protect public. Contending that retaining of case files by lawyer is a misconduct is not a valid stand and only minimizing the true essence of the profession.

On defining 'misconduct' under Advocates Act, 1961³⁵, the mere exercise of retaining will no way amount to misconduct. The retention is merely done as a security for realization of the unpaid fees and not otherwise.

In *Groom v. Cheesewright*³⁶, it was expressed that when a solicitor is expanding his brain and sweat in working for his client, he must be paid sufficiently for all the skill for providing justice.

The main purpose of lien is to get back the unpaid fees and if client has engaged an advocate for his work, it would be quite monstrous if he is not paid. If a lawyer is under an obligation to think in good faith of his client, client must also reciprocate the same.

Lawyer is an agent for his client and when an agent is provided the right of lien the same must be given to an advocate also. The fees is not a commission or bonus, it the amount which he is bound to receive for all the services he is rendered.

³⁴ The Constitution of India, 1950

³⁵ <https://www.indiacode.nic.in/handle/123456789/1631?locale=en>

³⁶ [1895] 1 Ch 730

CHAPTER-5

CONCLUSION & SUGGESTIONS

The law related to lien over clients' papers must be reviewed again by both the legislature and judiciary. There is need that certain rules must be drafted regarding it or if not that amendments could be made to prevailing statutes. When India is emerging as world power, securing of rights and powers to all is necessary on these issues. Being a common law country the right should be recognised and must be codified in unequivocal terms either in Advocates Act or a special statute should be drafted. The advocate right over the client's papers will not prejudice any class of the society. Certain restrictions are totally acceptable like laid down in the case of *Lucky-Goldstar International, Inc. v. International Manufacturing Sales Co.*³⁷, wherein certain guidelines was issued by the court-

- Keeping in mind the financial status of the client,
- The fees asked must also be rational,
- Client is agreeing to clear of all the debt,
- Lien should not be a method of fraud,
- Rights and interests must not prejudice.³⁸

Similarly, certain guidelines could be issued for safeguarding the interest of both the parties. The onus of proving the good intention must be casted upon to the advocate. And, the withdrawal of case must not be done due to harassment done on the part of the advocate.

On reviewing the interest of both the parties, it could be concluded that lien over papers should be allowed but of course subject to certain restrictions.

³⁷ 636 F.Supp 1059 (DC N.Ill. 1986)

³⁸ Ibid

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