In Re: a Pleader

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Court : Chennai

Decided On : Dec-15-1947

Reported in : AIR1948Mad273; (1948)1MLJ170

Appellant : In Re: a Pleader

Judgement :

Frederick William Gentle, C.J.

1. This case comes before the Court under Section 15 of the Legal Practitioners Act upon the finding expressed by the learned District Judge of Madura after holding an inquiry into a complaint against a pleader of pro-fessional misconduct. The relevant provisions of that Act are found in Section 13 which provides as follows:

The High Court may also, after such inquiry as it thinks fit, suspend or dismiss any pleader or mukhtar holding a certificate as aforesaid.

* * *(b) who is guilty of fraudulent or grossly improper conduct in the discharge of his professional duty.

2. The pleader was engaged by clients to propound a will as the last testament of a deceased person. He filed a vakalat, together with the necessary papers and documents seeking grant of probate. In regard to the will the pleader was not an attesting witness, but, according to his own statement contained in his counter-affidavit affirmed on 28th July, 1947, he had drafted the will and was present at the

time it was executed by the testatrix and signed by several attesting witnesses.

3. A caveat was entered and, after the proceedings were treated as a testamentary suit, a written statement was filed by the caveator which alleged that the will was not executed or was not executed in due form and that the person propounding it, together with those who prepared it, were conspiring together to obtain, improperly, a grant of probate of an instrument which purported to dispose of her property. It was clearly manifested, when the written statement had been filed and had been received by the pleader, that he was a necessary and essential witness of execution. Of that there is no doubt. In paragraph 5 of his affidavit he states as follows:

As desired by the testatrix, I was also present when the will was duly executed by the testatrix and attested by witnesses. So that my evidence besides being relevant was absolutely necessary in a contested case especially.

4. He knew, therefore, prior to the hearing or trial of the testamentary suit, that he was a necessary witness and, as he describes it, one who was absolutely necessary; The clearly realised that he would be called as a witness in support of the parties propounding the will.

5. The pleader did not cancel his vakalat. He continued, together with another pleader who was his senior, to act as counsel on behalf of the propounders of the will and he appeared at the trial, together with the other pleader, as counsel. When the time arrived for him to do so, the pleader left his position in Court at the seat reserved for counsel, entered the witness box, gave evidence of due execution and, thereafter, immediately returned and assumed his position and place as counsel. Indeed, in regard to one witness, at least, subsequently called by the other party, the pleader cross-examined that witness.

6. In paragraph 6 of his affidavit the pleader states that he did not conduct the trial; it was in the complete charge of Mr. R.V. Srinivasa Iyer. Later, he states, that in effect he had practically retired from the suit. The paragraph concludes, that he was advised that ' there is no invariable rule that a lawyer appearing in the case can give evidence only after he withdraws his vakalat.' In the argument before us,

learned Counsel, appearing on behalf of the pleader, sought to place some reliance upon the submission that, since other counsel was engaged who was in charge, the circumstances were different to what they would have been had the pleader appeared alone on behalf of his clients, for whom he gave evidence. That argument cannot be accepted, and, unhesitatingly, is rejected.

7. It was contended on behalf of the pleader that, whilst his conduct was improper inasmuch as the pleader should have cancelled his vakalat before he gave evidence, nevertheless there is no moral turpitude in the course which the pleader followed. It was added, in that connection, that the omission to cancel the vakalat was simply in the nature of oversight and, to adopt the words of the learned Counsel, it never struck the pleader that he should have cancelled the vakalat before he turned himself into a witness.

8. In the present instance, the necessity for the pleader to give evidence did not arise out of some unexpected course which the trial took and which was not apparent previously. Here, clearly, the pleader was fully aware, as he himself says in his affidavit, before the trial that he was an essential and necessary witness. Neverthe-less, he continued as counsel right to the end of the trial and the judgment inter-rupted only by a temporary cessation of acting in his professional capacity while he was testifying in the witness box. It is beyond doubt that the pleader should have cancelled his vakalat and ceased his professional connection with the case immediately he had perused the written statement and was then aware that his evidence was essential and that he would have to be a witness at the trial. His conduct in giving evidence without cancelling the vakalat and continuing to act in an active capacity as counsel was improper.

9. The question which arises in the present instance is whether that conduct amounts to professional misconduct, that is to say, whether it comes within the words in Clause (b) of Section 13 of the Legal Practitioners Act and was grossly improper conduct in the discharge of his professional duty.

10. In In the matter of Venkatachariar and Sivaramakrishna Deekshitar : AIR1942 Mad691 it was observed in the course of the judgment of the Full Bench delivered by Sir Lionel Leach, C.J., that,

A person who is appearing as counsel should not give evidence as a witness. If in the course of the proceedings it is discovered that he is in a position to give evidence and it is desirable that he should do so, his proper course is to retire from the case in his professional capacity.

11. There, the charges of professional misconduct which were being considered, did not include one of the like which is now before us. The charges related to other matters but it emerged during the course of the proceedings that the pleader had given evidence on behalf of his client without having terminated or cancelled his vakalat, and the observations, to which reference has been made are clearly by way of obiter dictum. Nevertheless, if I may respectfully say so, I agree entirely with what was said there.

12. A number of authorities have been cited, but in none has the question arisen whether the circumstances which arise in the present instance, amount to professional misconduct. In most of the cited cases the point which required decision was whether a witness was incompetent to give evidence by reason of his position as counsel and whether any attention ought to be paid to the evidence given. In all the authorities, the finding is that the evidence was admissible and the witness, in spite of his professional connection with the case, was not an incompetent one.

13. In Mannargan v. Emperor : (1925)49MLJ95 counsel appearing for an accused in a criminal prosecution was cited as a witness for the Grown. Thereupon, immediately he disengaged himself as counsel for the accused. His conduct in doing that was criticised but was held to have been perfectly correct. There were observations made, that, when such circumstances arose, sufficient notice should be given to the accused to enable him properly to be represented when the advocate, previously appearing for him, was becoming a Crown witness and had to retire from the case. Many of the decisions describe the conduct, of which complaint is made here, as undesirable.

14. The Bar Council of Patna and the Bar Council of Allahabad have made rules regarding the matter now under consideration. Doubtless those rules were made in consequence of the observations, in the several authorities, that the conduct of

a practitioner in giving evidence on behalf of his client, without terminating his vaka-lat, is undesirable. The general effect of the rules, made by the two Bar Councils mentioned above, is that no advocate should accept a retainer if he knows, or has reason to believe, that he is likely to be a witness other than a purely formal witness or that his own conduct is likely to be attacked in the proceeding and that, if an advocate does accept a brief or retainer in such proceedings and subsequently it comes to his knowledge that he will be, or is likely to be, a witness, he should immediately retire from the case.

15. There is no such rule contained in the rules of the Bar Council of Madras. Unquestionably the conduct of the pleader was improper and is deserving of condemnation. It is not sufficient for him to say, in answer to the charge made against him, that it escaped his notice there was necessity for him to have cancelled his vakalat and to have retired from the case. The learned District Judge expressed a finding that the pleader was more guilty of an error in the proper exercise of his discretion in not withdrawing his vakalat before he gave his evidence rather than that he was guilty of any act of professional misconduct. I am unable to subscribe fully to the reasons which the learned District Judge has given.

16. As mentioned previously, the question which requires decision now is whether the pleader's improper conduct amounted to professional misconduct so as to come within the purview of Clause (b) of Section 13 of the Act. In the absence of any authority and in the absence of any rule corresponding to those which form part of the rules of the Patna. and Allahabad Bar Councils, it seems to me that there is a doubt whether the Act is one which can be said to come within the provisions of Clause (b) of Section 13 and, if it does not, whether the pleader's conduct is such that it justifies this Court suspending or dismissing the pleader or indeed, finding him guilty of conduct justifying dismissal or suspension. Since there is that doubt, it must be exercised in the pleader's favour and for that reason the finding by the learned District Judge will be accepted.

17. I wish however to make it perfectly clear that the conduct, of which the pleader was guilty in this case was, as I have already stated, improper and in no

circumstances can it be considered that it was anything other than deserving of condemnation.

18. I desire to express one further observation. It is to suggest that the members of the Bar Council of Madras should, at the earliest possible date, give consideration to the desirability and possible necessity for making a rule, which corresponds to the rules which the Bar Councils of Patna and Allahabad have framed. It is appreciated of course that any rule which the Bar Council may make will have application to advocates alone and not to pleaders.

Rajamannar, J.

19. I agree entirely.

Yahya Ali, J.

20. I too agree.