

In Re: an Advocate

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Court : Kolkata

Decided On : Jul-30-1934

Reported in : AIR1935Cal484,157Ind.Cas.374

Appellant : In Re: an Advocate

Judgement :

Costello, J.

1. On 29th December 1933, a complaint was made to the Court under Section 10, Bar Councils Act, by Mr. J.C. Galstaun concerning the conduct of an advocate whom he had instructed to file an appeal against a decision of the Additional District Judge, Alipore, which had been given on 10th September 1932, in an appeal in a suit brought by Raja Janaki Nath Roy against Mr. Galstaun, in the Court of the first Subordinate Judge, 24-Parganas at Alipore, the suit having terminated on 13th December 1930, in favour of the plaintiff. The matter of the complaint was referred to by this Court for inquiry to the Bar Council under the provisions of Section 10, Sub-section (2), Bar Councils Act, 1926, and the case was duly inquired into by a committee of the Bar Council, that is to say, by a tribunal constituted under the provisions of Section 11, sub-S.-(2), Bar Councils Act. The findings of the tribunal were forwarded to the Court through the Bar Council in accordance with the provisions of Section 12, Sub-section (2). The matter has now come before us under the provisions of Sub-section (3), Section 12.

2. It is to be observed at the outset that by Sub-section (1), Section 10, the High Court may reprimand, suspend, or remove from practice any advocate of the High Court whom it finds guilty of professional or other misconduct. The question which we have to determine therefore is whether upon the the findings of the tribunal there was any such professional or other misconduct on the part of the advocate against whom the complaint was made as would require us to take action under Section 10, Sub-section (1). It is necessary, I think, that I should refer to the facts which constituted the complaint made by Mr. Galstaun against the advocate concerned. It appears that Mr. Galstaun obtained certified copies of the judgment of the Additional Judge at Alipore and the decree made by him on 27th September 1932, and that the last date for presenting an appeal from that judgment was 30th January 1933 or thereabout. Mr. Galstaun handed over the certified copies of the judgment and decree and all other relevant papers in connexion with his case to the advocate whose conduct we are now considering, and instructed that advocate to draw up grounds of appeal without delay. On 19th October 1932, Mr. Galstaun wrote to the advocate saying that if he had the grounds of appeal made out, he would like to see them. Subsequently the advocate did show the grounds of appeal to Mr. Galstaun, and thereupon he received from Mr. Galstaun on 21st October 1932, a sum of Rs. 20 and on 2nd November 1932, a further sum of Rs. 220, and at the same time Mr. Galstaun executed a proper form of vakalatnama empowering the advocate to act on his behalf. According to Mr. Galstaun's statement, and no doubt it is perfectly accurate, the advocate thereupon undertook to file the appeal in due time.

3. Nothing more was heard by Mr. Galstaun in the matter prior to 24th January 1933, on which date whilst writing to the advocate with regard to other legal matters which Mr. Galstaun had entrusted to his charge, he inquired about the appeal in the following words: What about the appeal in Janakinath Roy's case?' He seems to have underlined the words 'about the appeal.' To that question no reply was received, and on 2nd March 1933, Mr. Galstaun wrote to the advocate a letter at the end of which he said again: When is Janakinath Roy's appeal coming up?' On 9th March 1933, the advocate wrote a letter to Mr. Galstaun referring by implication to the various other legal matters but remaining silent as to the question of Mr. Galstaun's appeal in Janakinath Roy's case. Accordingly on 20th

April 1933, Mr. Galstaun again wrote to the advocate and in that letter he put the heading *Myself v. Janakinath Roy*, and said:

Are you arranging to put this appeal on the board? Please see that this is done immediately after the vacation.

4. But again no reply was forthcoming. Mr. Galstaun wrote again on the 1st May a letter in which he once more said *When is Janakinath Roy's appeal going on.* At long last in reply to that letter the advocate did condescend to give an answer to Mr. Galstaun's repeated enquiries. The reply was in these words:

I shall let you know about the position of Janakinath Roy's appeal case as soon as I shall be able to attend Court after recovery.

5. Apparently nothing more was heard from the advocate in the course of the next ten days; so on the 12th May Mr. Galstaun again wrote to the advocate a letter which was headed *'Re. Janakinath,'* and in that letter he said:

I met Charu a few days ago in the High Court and I asked him about the appeal. Will you kindly let me know if it has been filed and what proceedings you are taking in the matter? This thing has been lying in your hands for a very long time and evidently neglected.

6. Now, that was a perfectly definite letter, and it contained inferentially a charge of neglect against the advocate. Even to that he did not reply. So Mr. Galstaun wrote a further letter on the 17th May which was also headed *'Re Janakinath Roy'* and said:

I wrote to you on the 12th but have had no reply. I understand Charu is leaving for England tomorrow. Will you please meet me tomorrow morning at 8-30 to discuss the matter?

7. That letter produced a reply in the shape of a letter dated 17th May 1933, in which the advocate said that he would see Mr. Galstaun on the Saturday ensuing, that is to say on 20th May 1933. That appointment was kept, and the advocate saw Mr. Galstaun on 20th May. Then for the first time the advocate disclosed the

fact that the appeal had never been filed at all, and that the moneys which the advocate had received for the necessary charges together with the papers were still in the hands of the advocate. Thereupon Mr. Galstaun demanded of the advocate that he should return all the papers and the money. Apparently he only got back certain of the papers in answer to that request but none of the money. Thereupon Mr. Galstaun applied to this Court for an extension of time for the filing of the appeal which had become barred so long before in the month of January. In para. 7 of his complaint which is really the indictment against, the advocate, he said:

I have been very materially prejudiced and I shall have to suffer considerable loss and damage by my appeal not having been filed in time by the said advocate on account of his grossly negligent conduct in not filing the appeal in time and fraudulently suppressing the fact for about six months in spite of the repeated inquiries by me till a very distant date when the appeal was time-barred by limitation even though he was furnished with costs and all necessary papers.

Then in para. 8 the complainant said: The aforesaid advocate is guilty of unprofessional conduct and gross misconduct and is also liable for the damages that I have sustained.

8. It is to be seen therefore that the form of complaint which was lodged against this advocate contained in effect four charges: (1) that he was grossly negligent, (2) that he fraudulently suppressed the facts, (3) that he had been guilty of unprofessional conduct, (I suppose this is really comprehended within the other two) and (4) that he was guilty of gross misconduct. Evidence was given before the tribunal by the complainant and also by the advocate concerned. But prior thereto or rather in connexion with the enquiry the advocate had put in a written statement in which, to all intents and purposes, he admitted the facts of the case as to the chronological history of the matter. But he put forward the excuses by way of defence that he had omitted to attend to Mr. Galstaun's business or to file this particular appeal in time by reason of the illness of his children, they having suffered from typhoid fever for about three months from the month of January 1932 onwards and also by reason of his own ill health in the month of December

and January and again from the month of April onwards. He denied that he had any intention to defraud or to cause any loss or damage. Then at the end of para. 9 of his written statement he said:

He was and is always ready to return to Mr. Galstaun the money he had received from him on account of costs.

9. The tribunal in its findings says that the broad facts are not in dispute, and those facts are set out in some detail. The actual findings are contained in para. 5 and subsequent paragraphs. In para. 5 the tribunal said:

We have not the slightest hesitation in finding that the advocate concerned was guilty of gross negligence in the performance of his duties as an advocate and that he had no justification for not filing the appeal within time. We are not at all satisfied with the excuses put forward by the advocate and do not accept them.

10. That means that the tribunal found that the advocate was guilty of the first of the four charges which I have enumerated. There is also, it is to be observed, an addendum put forward by the tribunal itself which is not directly referable to any of these specific charges made by the complainant, because the tribunal says that it was not satisfied with the explanation put forward by the advocate, and that is, in my opinion, tantamount to saying that the advocate himself had put forward excuses which were false in order to account for the negligence of which he admitted that he was guilty. Then in para. 6 the tribunal says:

As regards the charge of misappropriation, we find that such charge has not been established.

11. The comment one would make upon that is that there is no direct charge of misappropriation in the original complaint lodged by Mr. Galstaun, and it can only be extracted from that complaint by reference to the paragraph in which Mr. Galstaun said that he asked or demanded for the return of the money but he had not recovered it. It is to be emphasized for our present purpose that the tribunal did nevertheless say that there was no misappropriation. As regards what I have called the second charge 'fraudulently suppressing the facts', the tribunal said:

The charge of fraudulent suppression was made against the advocate but has not been persisted in.

12. Then in the final paragraph the tribunal said:

Although we find that the advocate concerned was guilty of gross negligence, we are by no means satisfied that the complainant himself was not to blame partially for his appeal having become time-barred, as all the correspondence and the activities of the complainant seems to have come into existence after the appeal had become time-barred.

13. I feel impelled to remark in connexion with that comment of the tribunal that I am entirely at a loss to understand what the members of the tribunal had in their minds in making such a comment, because in my opinion it is no part of the duty of a client to frequent the office of his solicitor, or the residence of his advocate, if the advocate has no office, for the purpose of keeping him up to the mark, or if I may use the common-place expression, i.e. for the purpose of seeing that he is doing the work which he has undertaken to do and for which necessary funds have been provided. In my opinion Mr. Galstaun had a right to expect when he had given the Vakalatnama, necessary instructions and papers, and had provided the advocate with funds for the purpose, that he could put the matter out of his mind and to rest content that he could rely on the advocate to do what he was instructed to do. The tribunal had not in terms dealt with the charges which I have described as the third and fourth charges, that is to say, the charges of professional misconduct and gross misconduct. Presumably however they were disposing of those charges by saying that there had been no misappropriation. To sum up the whole matter, the finding of the tribunal comes to this: that there was gross negligence on the part of the advocate, but there was no misappropriation of the funds entrusted to him for the purpose of the work he had been instructed to do. In these circumstances it would be difficult if not impossible for us on the material at present before us to take any action under Section (10), sub-8. (1). The learned advocate who has appeared on behalf of the respondent in these proceedings has drawn our attention to *In re A Vakil*, 1926 Mad 568), the headnote of which is that mere negligence unaccompanied by any moral delinquency on the part of a legal

practitioner in the exercise of his profession does not amount to professional misconduct. The decision in that case was based upon the decision in England in a matter which is reported in *In re G. Mayor Cooke (a solicitor)* (1889) 33. In the Madras case, the learned Chief Justice said that

Negligence by itself is not professional misconduct: into that offence there must enter the element of moral delinquency. Of that there is no suggestion here, and we are therefore able to say that there is no case to investigate, and that no reflexion adverse to his professional honour rests upon Mr. M.

14. With that decision I entirely agree. But I would point out in the present case that it is not at all certain that it could be said with strict accuracy that there is really a finding that there was no moral delinquency seeing that the tribunal had said that they were not at all satisfied with the excuses put forward by the advocate and did not accept them. To say that one does not accept excuses put forward may be merely an euphemistic method of saying that they were of opinion that the person concerned was not telling the truth. One would have thought that if a professional man does not tell the truth in connexion with a matter which he has undertaken to carry through on behalf of a client, that is conduct which might easily be said to involve moral delinquency. In my opinion it is not in the best interest of the legal profession as a whole or of any member of it (other than the person accused) that there should be any lax or loose standard of professional conduct. I hope it is the case that advocates of this Court who are not members of the English Bar desire to set for themselves and adhere to the same standards of professional conduct as those which a member of the Bar ought to set for himself. What that standard should be was indicated by the Lord Chief Justice of England in *Seymour v. Butterworth* (1862) 3 F & F 372 at p. 381, where the learned Lord Chief Justice says:

Mr. Seymour did not occupy the position of a private individual, nor was it as a private individual that his conduct was made the matter of inquiry. Mr. Seymour was a barrister, and, as such, was subject to the domestic forum of the benchers. It was beyond dispute that if the conduct of a member of an Inn of Court was such as to be unworthy of a gentleman, he was within the jurisdiction of the benchers of

his Inn. In the same way as officers of the army were subject to investigation when charges were made against them of conduct unbecoming officers and gentlemen, barristers were subject to the jurisdiction of the benchers if their conduct was unbecoming the profession and unbecoming gentlemen.

15. That indicates a high standard of conduct and professional ethics but it is one which we should wish, and I am sure every one would wish, members of all branches of the legal profession to endeavour to conform to. We are however not now dealing with the matter upon that basis because as I have stated the Tribunal has gone no further than to find gross negligence on the part of this particular advocate. There is no finding of misappropriation. Since these proceedings opened, however, we have had put before us by Mr. Galstaun, the complainant, what purports to be the copy of a letter dated 28th July 1933, delivered to the advocate for which he holds a receipt signed by the advocate's own hand in the peon book which was used at the time this letter was sent. Now, in this letter Mr. Galstaun says:

Referring to my previous correspondence, will you kindly refund me the Rs. 240 which was paid to you as costs and stamp duty for filing the appeal against Raja Janakinath Roy and others and which you failed to do. Unless I receive the amount in the course of three days, I shall bring the matter to the notice of the Chief Justice.

16. To that letter no reply was received, so we are told. The importance of it is that had this letter been put in evidence before the Tribunal at the time of the proceedings before them on 29th May 1934, it might have had some influence upon their decision on the question as to whether or not it could rightly be said that there had been no misappropriation and professional misconduct on the part of the advocate. Mr. Bhattacharyya has said all that was possible to be said on behalf of the advocate. He has told us that the advocate actually tendered to Mr. Galstaun the money received from him and that Mr. Galstaun declined to take it back. Apparently there was some evidence to that effect before the Tribunal. One cannot overlook the fact however that in the written statement which this advocate put forward there is no suggestion at all that he had ever tendered the money to Mr.

Galstaun. On the contrary, he merely says in the passage to which I have already referred that he was and is always ready to return to Mr. Galstaun the money which he had received on account of costs. To be 'ready to return' is quite different thing from tendering a sum of money. It is not quite clear why the complainant did not put before the Tribunal the letter of 28th July 1933, referred to above, and give evidence concerning the circumstances in which it was sent. Mr. Galstaun said that the reason why he did not is because the question was never raised as to whether or not the money had been returned or was likely to be returned. We are of opinion that this letter if it was sent in the manner described by Mr. Galstaun was of such material importance that we think the Tribunal ought to hold a further inquiry into this case. We shall, accordingly, refer the case back to the Tribunal through the Bar Council under the provisions of Section 12, Sub-section 4, Bar Councils Act of 1926, with a direction that the Tribunal shall hold a further enquiry in the light of the observations which I have made.

Lort-Williams, J.

17. I agree that this matter should be sent back to the Tribunal for further enquiry. But, mere negligence, however gross, cannot amount to misconduct, professional or otherwise. As was stated by Lord Esher, M.R., in *In re G. Mayor Cooke (a solicitor)* (1889) 33 Sol J 397:

The motion was made against a Solicitor for such misconduct in his profession as would call upon the Court either to strike him off the rolls or deal with him by way of punishment in some other manner.... But when such a motion was made asking the Court to exercise penal jurisdiction over a Solicitor, it was not sufficient to show that his conduct was such as to support an action for negligence or want of skill. In order to support such a motion as the present it must be shewn that he had done something dishonourable to him as a man and dishonourable in his profession. A Solicitor was bound to act with the utmost honour on behalf of his client.

18. In view of the fact that the Tribunal seem to have given as their reason for finding the charge of misappropriation not established, that they did not believe that the complainant ever asked for the return of his monies, the letter produced by

Mr. Galstaun to-day is material and important, and ought to be considered by the Tribunal.

Henderson, J.

19. I also agree that this case should be sent back for further enquiry. The Tribunal have found that the advocate was guilty of negligence. It is not very clear whether they have considered that he has been guilty of suppressing the truth, although that was practically admitted before us. I will merely say that I am clearly of opinion that negligence accompanied by the suppression of truth or by deliberate misrepresentation would be misconduct.

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