

Pandurang Dattatraya Khandekar

Vs

Bar Council of Maharashtra, Bombay and Others

Civil Appeal No. 720 (NCM) of 1976

(A. P. Sen, J.)

20.10.1983

JUDGMENT

A. P. SEN, J. -

1. The disciplinary proceedings out of which this appeal under Section 38 of the Advocates Act, 1961 ('Act' for short) has arisen were initiated on a complaint made by a group of 12 advocates practising in the two courts of Sub-Divisional Magistrates in Collectorate of Poona alleging various acts of professional misconduct against the appellant P. D. Khandekar and one A. N. Agavane. The proceedings stood transferred to the Bar Council of India under Section 36-B of the Act. The Disciplinary Committee of the Bar Council of India by its order dated April 23, 1976 held both the appellant and A. N. Agavane guilty of professional misconduct and directed that the appellant be suspended for a period of four months from June 1, 1976 and Agavane for a period of two months there-from. This Court by its order dated September 24, 1976 admitted the appeal and stayed the operation of the suspension of order.

2. First as to the facts. The complainants alleged various acts of professional misconduct against the appellant and Agavane. According to them, the appellant and Agavane sometimes impersonated as other advocates for whom the briefs were meant and at times they directly approached the clients and adopted questionable methods charging exorbitant fees. The State Bar Council referred to four specific charges relating to them, two of impersonation as A. D. Ghospurkar and N. L. Thatte and depriving these gentlemen of the briefs meant for them. The State Bar Council held that these two charges have not been substantiated and the disciplinary Committee of the Bar Council of India has not gone into them. Both the Disciplinary Committee of the Bar Council of India and the State Bar Council however found the appellant and Agavane to be guilty of giving improper legal advice and held the charge of professional misconduct proved, but having regard to the fact that they were junior members of the bar, the Disciplinary Committee has taken a lenient view and passed the sentence indicated above. In dealing with the question of punishment to be imposed on them, the Disciplinary Committee observes :

We take into consideration the age of the advocates, the families they have to maintain, the environments in which they practice and the standard which is maintained in such an environment is not very high as the 'Bar Association rules' certify toutism and provide for toutism which could be unthinkable anywhere else.

3. The gravamen of the charge against the appellant and Agavane relates to the giving of improper legal advice on two specific counts, namely : (1) on January 7, 1974 the appellant and Agavane are alleged to have got the remarriage of a couple S. B. Potdar and Smt. Leelawati Dhavale performed

although their divorce was not legal. The accusation is that the appellant and Agavane induced Potdar and Smt. Dhavale to part with Rs. 100 towards their professional fee on the faith of an assurance that the affidavit sworn by them before the Sub-Divisional Magistrate, Poona to the effect that they had divorced their respective spouses and had got married at Poona on January 7, 1974 as per Hindu rites would be sufficient proof of their marriage (2) On February 22, 1974 the appellant and Agavane drew up an affidavit containing a recital that Smt. Sonubai Girju Valekar of Loni Bhapkar, Tehsil Baramati, District Poona had made a gift of her lands to her grand-daughter Smt. Mangala Ramesh Ghorpade. The charge is that she had met all the lawyers except these two and all of them advised her to give the market value of the land intended to be gifted and pay ad valorem stamp duty thereon indicating the amount of stamp duty and the registration charges payable, but these two lawyers told her that she should not unnecessarily spend a large amount over the stamp duty and registration charges and they would instead have the work done within an amount of Rs. 50 which was finally settled at Rs. 45. The charges leveled against the appellant and Agavane are serious enough and if true in a case like the present, the punishment has to be deterrent, but the question still remains whether the charges have been proved.

4. The appellant virtually pleads that the case against him is a frame-up. As to the incident of January 7, 1974, the appellant pleads that the affidavit sworn by Potdar and Smt. Dhavale was prepared on their instructions as they represented that they had divorced their respective spouses and expressed that they wanted to marry each other on that very day and leave Poona. His case is that they represented that the priest was insisting upon an affidavit as regards their divorce as a precaution before performing their marriage and therefore they wanted to swear an affidavit to that effect. Regarding the incident of February 22, 1974, there was a complete denial that the appellant drew up an affidavit containing a recital that Smt. Sonubai had made a gift of her lands to her grand-daughter Smt. Mangala which he handed over to her on receipt of Rs. 45 as his professional fee.

5. The Disciplinary Committee has recorded a finding that it did not consider that the conduct of the appellant and Agavane amounted to cheating their clients, and that both were guilty of giving improper legal advice, but these were not cases of a bona fide mistake of a lawyer. With respect to the first charge, it held that they had misled their clients Potdar and Smt. Dhavale that the affidavit sworn by them before the Sub-Divisional Magistrate and the certificate of marriage issued by him would make them legally married according to Hindu rites although no marriage was ever performed. As regards the second charge, the Disciplinary Committee held them to be guilty of not giving proper legal advice to their client Smt. Sonubai. It observed that if the gift deed could not be executed because Smt. Sonubai had no sufficient funds to bear the cost of stamp duty and registration charges payable, the affidavit was no substitute for that as it would hardly be evidence of a gift. It further observed that it was unfortunate that the appellant and Agavane did not advise Smt. Sonubai also to execute a will contemporaneously in favour of her grand-daughter Smt. Mangala because if the affidavit were supplemented by an unregistered will, nothing would be wrong. It proceeded upon the view that the affidavit could be taken as evidence that Smt. Sonubai had handed over position of her property to her grand-daughter Smt. Mangala and if she later possessed it for 12 years she would acquire title by prescription and although the will may not be a deed of gift, it would be the nearest approach to it.

6. In an appeal under Section 38 of the Act this Court would not, as a general rule, interfere with the concurrent finding of fact by the Disciplinary Committee of the Bar Council of India and the State Bar Council unless the finding is based on no evidence or it proceeds on mere conjectures and surmises. Finding in such disciplinary proceedings must be sustained by a higher degree of proof

than that required in civil suits, yet falling short of the proof required to sustain a conviction in a criminal prosecution. There should be convincing preponderance of evidence.

7. It is argued that the finding as to professional misconduct on the part of the appellant and Agavane reached by the Disciplinary Committee was not based on any legal evidence but proceeds on mere conjectures and surmises. The case against the appellant and Agavane rests upon professional misconduct and not any other conduct. The question is whether there was any evidence upon which the Disciplinary Committee could reasonably find that they have been guilty of 'professional misconduct' within the meaning of subsection (1) of Section 35 of the Act. The test of what constitutes "grossly improper conduct in the discharge of professional duties; has been laid down in many cases. In the case of *In re A Solicitor Ex parte the Law Society* ((1912) 1 KB 302 : 105 LT 874), Darling, J. adopted the definition of "infamous conduct in a professional respect on the part of a medical man in *Allinson v. General Council of Medical Education and Registration* ((1894) 1 QB 750), applied to professional misconduct on the part of a Solicitor, and observed :

If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General medical Council to say that he has been guilty of 'infamous conduct in a professional respect'.

The Privy Council approved of the definition in *Garage Frier Grahame v. Attorney-General*. Fiji (AIR 1936 PC 224 : 163 IC 434) and this Court in *In the matter of P. An Advocate* ((1964) 1 SCR 697 : AIR 1963 SC 1313 : 1963 (2) Cri LJ 341) has followed the same. The narrow question that remains for consideration now is whether the finding of the Disciplinary Committee as to professional misconduct on the part of the appellant can be legally sustained. The test to be applied in all such cases is whether the proved misconduct of the advocate is such that he must be regarded as unworthy to remain a member of the honorable profession to which he has been admitted, and unfit to be entrusted with the responsible duties that an advocate is called upon to perform. The Judicial Committee of the Privy Council in *A, a pleader v. Judges of High Court of Madras* (AIR 1930 PC 144 : 123 IC 184) laid down that charges of professional misconduct must be clearly proved and should not be inferred from mere ground for suspicion, however reasonable, or what may be error of judgment of indiscretion.

8. There is a world of difference between the giving of improper legal advice and the giving of wrong legal advice, 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. In *re a Vakil* (ILR (1925) 49 Mad 523 (FB). Reported at AIR 1926 Mad 568 as *In re Munuswami Naidu*), Coutts Trotter, C.J. followed the decision *In re G. Mayor Cooke* ((1889) 33 Sol Jour 397) and 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.

The decision was followed by the Calcutta High Court *In re An Advocate* (ILR (1935) 62 Cal 158 : AIR 1935 Cal 484 : 36 Cri LJ 1130) and by the Allahabad High Court *In the matter of An Advocate of Agra* (ILR 1940 All 386. Reported at AIR 1940 All 289 : 41 Cri LJ 620 as *In re Prem Narain*)

and by this Court In the matter of P. An Advocate ((1964) 1 SCR 697 : AIR 1963 SC 1313 : 1963 (2) Cri LJ 341).

9. For an advocate to act towards his client otherwise than with utmost good faith is unprofessional. When an advocate is entrusted with a brief, he is expected to follow norms of professional ethics and try to protect the interest of his client in relation to whom he occupies a position of trust. Counsel's paramount duty is to the client. When a person consults a lawyer for his advice, he relies upon his requisite experience, skill and knowledge as a lawyer and the lawyer is expected to give proper and dispassionate legal advice to the client for the protection of his interest. An advocate stands in a loco parentis towards the litigants and it therefore follows that the client is entitled to receive disinterested, sincere and honest treatment especially where the client approaches the advocate for succour in times of need. The members of the legal profession should stand free from suspicion. In the matter of An Advocate (ILR (1934) 12 Rang 110, 115. Reported at AIR 1934 Rang 33 as P. an Advocate, In the matter of), Page, C.J. in an oft-quoted passage after extolling the ideals that an advocate ought to set before him, and the ancient and noble conception of his office, observed :

From this conception of the office of an advocate it follows that the public are entitled to receive disinterested, sincere, and honest treatment and advice from the advocate to whom they repair for counsel and succour in their time of need; and it is for this reason that Lord Mansfield laid down, and the Court has always insisted, that members of the legal profession "should stand free from all suspicion".

10. Nothing should be done by any member of the legal fraternity which might tend to lessen in any degree the confidence of the public in the fidelity, honesty and integrity of the profession. For an advocate to act towards his client otherwise than with utmost good faith is unprofessional. It is against professional etiquette for a lawyer to give improper legal advice with an ulterior object. It is unworthy that an advocate should accept employment with such motive, or so long as his client has such understanding of his purpose. It is professionally improper for a member of the bar to prepare false documents or to draw pleadings knowingly that the allegations made are untrue to his knowledge. Thus the giving of improper legal advice may amount to professional misconduct. That however may not be so by the giving of wrong legal advice.

11. It appears to us that there was abundant evidence upon which the Disciplinary Committee could find the appellant and Agavane guilty of giving legal advice, but there is considerable doubt whether upon such evidence the charge of professional misconduct can be supported. In the instant case, it is not at all certain that it can be said with strict accuracy that the appellant was guilty of moral turpitude or that there was any moral delinquency on his part.

12. As to the first charge, the Disciplinary Committee has found the appellant and Agavane to be guilty of drawing up a false affidavit to the effect that Potdar and Smt. Dhavale had been married at Poona on January 7, 1974 according to Hindu rites although no such marriage was ever performed. Upon the evidence on record, it is difficult to believe that Potdar and Smt. Dhavale could be prevailed upon to swear an affidavit of the kind unless it was prepared on their instructions or that they were induced to part with Rs. 100 towards the professional fee of the appellant and Agavane on the faith of a false assurance that the affidavit would be sufficient evidence in proof of their marriage. Potdar was an overseer and had put in an advertisement inviting suitable proposals of his marriage. Smt. Dhavale held a Diploma in Education and had been working as a teacher in a primary school under the Zila Parishad, Satara. She had also advertised in the papers seeking

suitable proposals for her marriage. Both of them corresponded with each other and decided to get married and for this purpose they came to Poona on January 7, 1974 for legal advice with respect to their marriage. Incidentally, Smt. Dhavale who is a tribal woman claims to have got a divorce by customs prevalent among her tribe, whereas Potdar who was married earlier according to Hindu rites presumably got his divorce by initiating proceedings under the Hindu Marriage Act, 1955. They both approached the appellant and Agavane and wanted their legal advice and stated that they would like to get marriage an leave Poona of the same day or, in other words, they were in a hurry to get married. Ex. C-13 which inter alia states "We have today married at Poona as per Hindu rites" was drawn up by the appellant and Agavane and signed by both the parties before the Sub-Divisional Magistrate in English after reading the contents. The recital in the affidavit that they got married at Poona on January 7, 1974 according to Hindu rites must have been made on their instructions., They were both anxious to leave Poona and brought a document styled as a marriage certificate obtained under Section 5 of the Bombay Registration of Marriages Act, 1953 under which even Hindu marriages have to be registered. The document was signed by both Potdar and Smt. Dhavale and also attested by one Gangadhar Laxman Jamkhedkar who claimed to have acted as the priest and said to have solemnised the marriage. There is nothing unprofessional for an advocate to draft an affidavit on the instructions of his client.

13. The testimony of Smt. Dhavale shows that she accompanied by Potdar came to the Court of the Sub-Divisional Magistrate on January 7, 1974 at 2.30 p.m. The purpose of their visit is not very clear. At first, her version was that she told the appellant and Agavane that they wanted to have their marriage performed. She then added that they told these lawyers that they wanted to get their marriage registered. They both appeared before the Sub-Divisional Magistrate and verified the affidavit Ex. C-13 to be true to their personal knowledge. When confronted with the portion marked as "AA" : "We have today married at Poona as per Hindu rites", she asserted that she and Potdar had not been married according to Hindu rites at Poona on January 7, 1974 or at any time thereafter. She however states that she was living Potdar as she was under the belief that she had been married to him. The fact remains that she has also changed her surname to Smt. Potdar. It is rather improbable that a Hindu lady like Smt. Potdar would start living with a stranger as husband and wife and also adopt a new surname unless there was a marriage. Both of them were educated persons and they had the power to understand what they were doing and therefore they being the executants of the affidavit must be held bound by the recitals contained therein. The oral evidence adduced by the complainant was not sufficient to rebut the presumption arising from the recitals coupled with the other circumstances appearing.

14. The evidence with regard to the second charge, namely, that the appellant and Agavane were guilty of not giving proper legal advice to Smt. Sonubai is even less convincing. It is quite possible that this old illiterate lady aged about 90 years came to the Sub-Divisional Magistrate's Court with the purpose of executing a gift deed in favour of her grand-daughter Smt. Mangala. There is however no real or substantial evidence to connect the appellant with the affidavit. The testimony of Smt. Sonubai is wholly inconclusive as to the identity of the person who prepared the affidavit, She states in her examination-in-chief that she had entrusted the work of execution of the gift deed to two advocates and that they represented to her that the affidavit was a gift deed, but added that she would not be able to identify them because she had a weak eyesight and was also hard of hearing for the last 2/3 years and was not able to see or hear properly. She further unequivocally admitted that she never approached the appellant at any time for any work. It is difficult to support the charge of professional misconduct against the appellant on such evidence.

15. It must accordingly be held that the Disciplinary Committee of the Bar Council of India erred in

holding the appellant and Agavane guilty of professional misconduct because the evidence adduced by the complaints falls short of the required proof, but the circumstances appearing do give rise to considerable suspicion about the manner in which they have been conducting their affairs, which deflects from the norms of professional ethics.

16. May be, the complainants were not actuated from a purely altruistic motive in lodging the complaint but that does not fully exonerate the appellant and Agavane of the way they have been carrying on their activities. It appears from the order of the Disciplinary Committee that some 12 to 14 advocates practising in the two Courts of the Sub-Divisional Magistrates in the Collectorate of Poona had formed an association called the Poona Collectorate Bar Association, the purpose of which was that the entire work in the Collectorate should be pooled together. To attain that object, the complainants employed servants for collecting work from prospective clients on a percentage of fees to be given to them and the work to be distributed among the members. It further appears that the appellant and Agavane were two junior lawyers who preferred not to become members of the association, but started their practice sitting under a tree in the Court precincts. Presumably, the gentleman of the bar who were members of the association found that their activities were prejudicial to their interest because they directly got in touch with the clients and did the same kind of work with impunity by adopting similar questionable methods. We can only express the hope that these lawyers will, in future, see to it that such improprieties as those referred to do not recur.

17. The Disciplinary Committee speaks of the 'environments' in which these lawyers work, The complainants have examined four advocates to substantiate the charge against the appellant and Agavane viz. A. D. Ghospurkar, N. L. Thatte, T. S. Pariyani and V. A. Mandake. The evidence of the lawyers shows that their work mainly consists in attestation of witnesses. Their appearances in cases were few and far between. They either sit in the verandah near the stamp-vendor in front of the Sub-Registrar's office or in the Court compound with the petition-writers or typists. To illustrate this, A. D. Ghospurkar, who is an advocate of 8 years' standing, frankly admits that his main work is to identify parties who come to make affidavits before the Sub-Divisional Magistrates and that his work of conducting cases is negligible. During his 8 years at the bar, he has done near about 10 to 12 chapter cases and about 8 cases in other courts. The case presents a dismal picture of the legal profession. We mean no dis-respect to the members of the Poona Collectorate Bar. The conditions prevalent are more or less the same everywhere and it is a matter of deep concern that nothing has been done to organize the bar.

18. We regret to say that the complainants themselves are not free from blemish. The Disciplinary Committee of the Bar Council of India observed that the method adopted by the complainants to procure work by employing agents itself amounts to professional misconduct. It deprecates the practice that is prevalent at the Poona Collectorate Bar and observes with regard to complainants :

This means that the purpose of the Association was to appoint certain touts who would get work for their members and then the work will be distributed among the members. Touting or appointing touts is not consistent with the rules framed under the Advocates Act and such practice would be considered professional misconduct but that is exactly what the Bar Association referred to above intend to do.

We are informed that disciplinary proceedings have since been initiated against the complainants and therefore we refrain from expressing any opinion on the impropriety of their conduct.

19. The preamble to Chapter II Part VI of the rules lays down that an advocate shall at all times

comport himself in a manner befitting his status as an officer of the Court, privileged member of the community and a gentleman. Rule 36 of these rules provides that an advocate shall not solicit work or adverse, either directly or indirectly, whether by circulars, advertisements, touts, personal communications etc. It is a well recognized rule of etiquette in the legal profession that no attempt should be made to advertise oneself or solicit work directly or indirectly. In his 'Brief to Counsel, fifth edn., 1962, p. 94, the celebrated author Henry Cecil administered a word of caution :

Don't go touting for work in any circumstances. There are all sorts of ways of doing this. Don't adopt any of them. If you are going to get on, you will get on without doing that kind thing, and if you are not going to get on, the little extra work you get will not either make you successful or counteract the bad impression you will make on many people inside and outside the law.

20. We are constrained to say that the evil of touting has been in existences since ancient times and still is a growing menace, and the bar is open to the accusation of having done nothing tangible to eradicate this unmitigated evil. The persons most affected by this system are the junior lawyers as a class. Some lawyers may well expound unblushingly the doctrine of getting, on, getting honour and at last getting honest. If it is generally known that a person however honest has got on and got honour through the patronage of touts, the bar should decline to show such a man any honour or consideration whatsoever. We impress upon the Bar Council of India and the State Bar Councils that if they still take strong action to eradicate this evil, it would lead to a high standard of propriety and professional rectitude which would make it impossible for a tout to turn a penny within the precincts of the law courts.

21. Finally, it is the solemn duty of the Bar Council of India and the State Bar Councils to frame proper schemes for the training of the junior members of the bar, for entrusting work to them, and for their proper guidelines so that eventually we have a new generation of efficiently trained lawyers. It is regrettable that even after more than two decades that the Advocates Act was brought on the Statute Book, neither the Bar Council of India nor the State Bar Councils have taken any positive steps towards ameliorating the conditions of the members of the bar, particularly of the junior members. Sub-section (2) of Section 6 and 7 of the Act provide that the State Bar Councils and the Bar Council of India may constitute one or more funds in the prescribed manner for the purpose of (a) giving financial assistance to organise labour welfare schemes for the indigent, disabled or other advocates. And (b) giving legal aid or advice in accordance with the rules made in that behalf. Sub-Section (3) thereof provide that they may receive any grants, donations, gift or benefactions for the above purposes, which shall be credited to the appropriate fund or funds under those sub-sections. The Bar Council of India and the State Bar Councils hold very large funds, may be to the tune of rupees one crore and above, but no positive steps have been taken in organizing the legal profession and safeguarding the interests of lawyers in general, particularly the junior members of the bar. It is with a deep sense of anguish that one finds the legal profession in a state of total disarray and for the majority it is a continuous struggle for existence. The hardest hit are the junior members. We expect that the matter will receive the attention that it deserves.

22. In the result, the appeal partly succeeds and is allowed, The order of the Disciplinary Committee of the Bar Council of India holding the appellant and A. N. Agavane guilty of professional misconduct is set aside. The proceedings drawn against them under sub-section (1) of Section 35 of the Advocates Act, 1961 are dropped. We hope and trust that they would not by their conduct or behaviour prove themselves to be unworthy to remain as members of the great profession to which they belong.

23. There shall be no order as to costs.

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