UNDUGODAGE
v.
RASANATHAN

SUPREME COURT
ATUKORALE, J.
H. A. G. DE SILVA J. AND JAMEEL, J.
S.C. RULE NO. 1 OF 1987.
JANUARY 16, 17 AND FEBRUARY 3, 1989

Attorney-at-law – Rule to show cause against suspension or removal – Judicature Act, Section 42(2) – Misappropriation of money paid by a co-mortgagor in a mortgage suit – Finding of Disciplinary Committee of Bar Association and District Judge.

It was alleged that the respondent attorney-at-law had:

(1) Received a sum of Rs. 30,000/- in settlement of the balance principal sum on the decree but not paid it to the complainant.

(2) Borrowed Rs. 12,000/- on a promissory note from the complainant while she was his client and improperly appropriated the same to his use.

The Disciplinary Committee of the Bar Association inquired into the first allegation. The District Judge too made findings on the question of payments in satisfaction of the decree. The findings were adverse to the respondent attorney-at-law. The Disciplinary Committee did not inquire into the second allegation.

Held:

1. The court is under a duty to examine and determine the issue untrammelled by the finding of the learned Distict Judge.

2. The significance of a letter by the respondent informing the co-mortgagor that interest amounting to Rs. 10,000/- was due which refutes his claim to have paid Rs. 30,000/- on a receipt earlier in date to this letter was not considered by the Disciplinary Committee.

The District Judge misdirected himself in regard to this letter. This letter proves there was no misappropriation.

3. The second allegation had not been inquired into by the Disciplinary Committee and the respondent had no opportunity of establishing that he appropriated the loan as fees with the consent of the complainant in which event it would be very doubtful whether his conduct could be deemed to be improper.

Per Atukorale, J.

"We .... were, very regretfully, denied on this occasion that assistance from the Bar Association of Sri Lanka which we would normally expect in a proceeding of this nature initiated at its own instance and which has, in the past, unerringly been extended to us and which we have always appreciated and valued so much. It is indeed unfortunate that the Bar Association was, except at one sitting, unrepresented before us and we were thereby deprived of the benefit of its views and submissions."

"Upon those facts as they stand, it would doubtless appear to be most improper for an attorney-at-law who has obtained from his client a sum of money as a loan to appropriate the same unilaterally as against fees alleged to be due to him for rendering professional services. Such conduct on the part of an attorney-at-law would, to say the least, constitute the clearest instance of a malpractice within the meaning of S. 42(2) of the Judicature Act. It may suffice to warrant his removal from office altogether".

RULE against attorney-at-law under S. 42(2) of the Judicature Act, No. 2 of 1978.

Rohan Jayatilleke, Deputy Solicitor-General with *Ananda Kasturiaratchi*, State Counsel in support of the Rule

M. Kanagaratnam with *G. Kumaralingam*, *R. Kadiravelpillai* and *Miss. N.A. Jayawickrema* for the respondent.

Desmond Fernando for the Bar Association.

Cur. adv. vult.

March 23, 1989.

ATUKORALE, J.

A Rule has been issued on the respondent under s. 42(3) of the Judicature Act, No. 2 of 1978, to show cause why he should not be suspended from practice or removed from the office of an attorney-at-law of the Supreme Court in terms of S.42(2) thereof. It has originated in consequence of a written complaint by way of an affidavit made on 21.8.1984 by Mrs. Genevieve Clotilda Undugodage *nee* de Silva (hereinafter referred to as the complainant) to the Chief

Justice containing solely an allegation of misappropriation of monies totalling 'around Rs. 70,000/- to Rs. 80,000/- or more' said to have been received by the respondent from the defendants in action No. 10884/MB of the District Court of Colombo and 'proved to have been misappropriated' by the respondent. On the directions of the Chief Justice a preliminary inquiry into this complaint was held in terms of S.43(1) of the aforesaid Act by a disciplinary committee (hereinafter referred to as the committee) of the Bar Association of Sri Lanka. After inquiry the committee in its report of 12.11.1986 held, inter alia, that the respondent had, on stamped receipts C7, C8 and C10 (not C9 as mistakenly stated in the report) signed by him, acknowledged receipt of 3 sums of Rs. 20,000/-, Rs. 20,000/- plus one year's interest (Rs. 3600/-) and Rs. 20,000/- respectively, out of which he had failed to reimburse the last two sums to his client, the complainant. Hence the committee recommended that appropriate action be taken against the respondent under s. 42 of the said Act. Upon a consideration of this report this court directed the Rule to be issued on the respondent.

Admittedly the complainant was the plaintiff in the aforesaid action which was filed on her behalf by the respondent against the defendants (the co-mortgagors) on 10.8.1967 putting the mortgage bond C1 dated 27.9.1964 in suit for the recovery of the principal sum of Rs. 50,000/- and arrears of interest in a sum of Rs. 4500/-; decree was entered in favour of the complainant on 16.6.1969 ordering the defendants to pay her the principal sum with interest thereon at 9% per annum from 1.6.1969 till payment in full; the order to sell was, in terms of the decree, not to issue for a period of 3 years unless there was default in payment of interest for 2 months in which event the complainant was entitled to obtain order to sell without notice; another bond (C2 dated 11.6.1969 – a few days prior to the entering of the decree) was executed by the defendants for a sum of Rs. 11,000/- being the arrears of interest then due on the original bond C1; according to receipt C7 dated 11.9.1973 stamped and signed by the respondent the amount then due in the said action was Rs. 30,000/- with interest payable from 12.9.1973 at 12% and the respondent had received and paid to the complainant's attorney (Mendis) a sum of Rs. 20,000/- out of the capital sum decreed in the said action.

In its report the committee points out, quite rightly, that the crux of the complaint against the respondent is that although the balance

capital sum of Rs. 30,000/- with interest thereon had been paid to the respondent by Asoka Madanayake, the son of the co-mortgagors, the same had not been paid over by him to the complainant. The committee found as a fact that upon document C8 (which it held was a receipt) the respondent has acknowledged payment to him by Asoka Madanayake of a sum of Rs. 20,000/- and interest for a period of one year. It rejected the respondent's version that C8 was a letter issued by him at the request of Asoka Madanayake to enable him to obtain a loan from the State Mortgage Bank or other institution and held that it was issued by him because he received payment of the amounts specified therein. The committee in the penultimate paragraph of its report concludes:

> "In the result, we are more than convinced that C7, C8 and C9 were receipts for payments made to the respondent and which the respondent had not reimbursed the complainant. It is regretted that the respondent should have resorted to this conduct at this stage of his career."

The written complaint made to the Chief Justice by the complainant was referred to the respondent for his observations. In his observations he states that in or about the year 1976 a sum of Rs. 30,000/- and interest from 1976 were due to the complainant. He applied for an order to sell, notice of which was ordered to issue on the defendants. They filed no objections but got the matter fixed for inquiry. At the inquiry Asoka Madanayake, the son of the defendants, appeared and produced 4 letters before the learned District Judge. The respondent proceeds to state that he gave evidence that no money was paid to him and that the full sum of Rs. 30,000/- and interest was due from the defendants. The learned District Judge, however, disbelieved his evidence. He states that he then appealed against this order but by some misfortune he had overlooked to file a petition of appeal within 60 days as a result of which the appeal was dismissed. He reiterates that he never received the said Rs. 30,000/- from the defendants or from Asoka Madanayake. In the affidavit filed in response to the Rule issued on him he states that Asoka Madanayake, taking advantage of an erroneous finding of the learned District Judge and a technical defect in the processing of the appeal resulting in its rejection as well as the view expressed obiter by the Court of Appeal that it is not disposed to interfere with the finding of the learned District Judge, has deceived the complainant into believing that he had paid to the respondent the monies due to her.

The respondent referring to the findings of the disciplinary committee states inter alia, that it had signally failed to consider his defence and to study or analyse the accounting relevant to the matter in issue.

A perusal of the order of the learned District Judge shows that the defendants in support of their claim that the full amount due on the decree was paid to the respondent, whilst not adducing any evidence, produced 4 documents, namely C7, C8, C9 and C10, all of which were admittedly signed by the respondent – C7 and C10 being so signed on a stamp and C8 bearing an additional signature of his on a stamp on a side. In his order the learned Judge states that the respondent in his evidence admitted that C7 was issued by him correctly and that as stated therein a sum of Rs. 30,000/- being the balance amount (or rather, as conceded before us, the balance principal) due on the decree together with interest at 12% per annum from 11.9.1973 was outstanding as on the date of C7, i.e. as on 11.9.1973. Referring to C8 the learned District Judge rejects the evidence of the respondent that it is not a receipt for the payment of money but is only a letter issued to Asoka Madanayake at his request to be submitted to the State Mortgage Bank confirming the payment already made (as evidenced by C7) of a sum of Rs. 20,000/- and interest for one year. Referring to C9 dated 24.4.1976 signed by the respondent in which he states that the arrears of interest amount to Rs. 10,000/- and requests Asoka Madanayake to settle the same early, the learned Judge observes that it cannot be treated as a document relating to payment or non-payment of money. Referring to C10 dated 8.5.1976 in which the respondent states that the capital paid is only Rs. 20,000/- and requests Asoka Madanayake to make note of the same, the learned Judge again rejects the evidence of the respondent that it is a letter given to Asoka Madanayake for the purpose of making an application to the State Mortgage Bank. He holds that at the time that C10 was issued the balance (capital and interest) outstanding was not more than Rs. 20,000/- and that since it has been signed on a stamp by the respondent it must be accepted as a receipt for the entire sum then due. Hence the learned Judge concludes that on C7, C8 and C10 the defendants have paid the respondent the full amount due on the decree and directed that satisfaction of decree be entered. It seems to me that this conclusion is based primarily upon the view formed by the learned Judge that C7, C8 and C10 are all stamped documents signed by the respondent and as such they cannot but be construed

as receipts for payments made to him. The Court of Appeal, upholding a preliminary objection to the maintainability of the appeal, ruled that the appellant should have first obtained leave to appeal from that Court and that as no such leave had been obtained the appeal must be dismissed. By way of a reference to the merits of the appeal the Court observed that it is not disposed to interfere with the finding of the learned District Judge. Accordingly the appeal was dismissed.

At the hearing before us we had the advantage of the submissions of learned Deputy Solicitor-General who appeared in support of the Rule as well as of learned Counsel appearing for the respondent but were, very regretfully, denied on this occasion that assistance from the Bar Association of Sri Lanka which we would normally expect in a proceeding of this nature initiated at its own instance and which has, in the past, unerringly been extended to us and which we have always appreciated and valued so much. It is indeed unfortunate that the Bar Association was, except at one sitting, unrepresented before us and we were thereby deprived of the benefit of its views and submissions.

In pursuance of an indication given by this court to counsel on an earlier date that it proposes, in the instant case, to follow the normal practice and procedure pertaining to Rule inquiries of a similar nature to which learned counsel agreed, the hearing before us proceeded on and was confined to the evidence (both oral and documentary) recorded before the disciplinary committee. The crucial issue that arises for our determination is whether, as maintained by Asoka Madanayake and held both by the District Court and the committee, the respondent did receive from Asoka Madanayake the sum of Rs. 30,000/- referred to in C7, being the balance principal sum due on the decree. A matter which caused us some concern at the hearing and upon which we desired very much a full and complete argument related to the question as to the nature and effect of and/or the weight to be attached to the finding of the learned District Judge (which stands unreversed) that full payment has been made to the respondent in satisfaction of the decree as evidenced by C7, C8 and C10. Learned Deputy Solicitor-General submitted that the finding of the learned Judge is only of some evidentiary value and is not binding or conclusive on the issue arising for our determination. Learned counsel for the respondent seemed to take the view that the

question of payment or non-payment to the respondent is one that would arise for determination afresh in these proceedings independent of the finding of the learned Judge and that it is open to the respondent on the material before us to re-agitate the question and to show that the finding of the District Court (though final in respect of proceedings before it) is erroneous and untenable.

Considering the submissions made to us on this point by both counsel and the fact that the proceedings in the District Court are different in nature, scope and purpose from those pending before us as well as the circumstance that the Rule issued by this court has been based solely on the evidence before the committee and not upon the material placed before the learned District Judge, I am of the view that we are free and, indeed, under a duty to examine and determine this vital issue untrammelled by the finding of the learned District Judge.

Upon a careful assessement of all the material before us and a consideration of the submissions of learned counsel I have reached the conclusion that it is unsafe to hold that C8 and C10 are receipts issued by the respondent in acknowledgment of the payments alleged to have been made to him by Asoka Madanayake. C7 which is signed by the respondent on a stamp is in two parts. In the first part it acknowledges the payment by Asoka Madanayake of all amounts due on two bonds in full settlement. In the second part it states that the amount now due on case No. 10884/MB of the District Court of Colombo is Rs. 30,000/- with interest at 12% from 12.9.1973. By contrast C8 and C10, though bearing the respondent's signature on stamps, are on their face in the form of letters addressed to Asoka Madanayake informing Asoka Madanayake primarily of the capital sum paid by him. Whilst C8 informs him that he has paid Rs. 20,000/- out of the capital, C10 informs him that the capital he has paid is Rs. 20,000/- **only** which he is requested to note. Both refer to case No. 10844/MB aforesaid. Thus the contents of documents C7, C8 and C10 read together as a whole tend to support the respondent's position that out of the capital of Rs. 50,000/- due on the decree only a sum of Rs. 20,000/- has been paid.

The construction placed by the learned District Judge on C10, namely, that the sum of Rs. 20,000/- mentioned therein denotes the balance capital and interest due i.e., the entire balance outstanding

on the decree, appears to me to be in the teeth of what is stated therein and therefore unacceptable. Quite apart from the fact that on the face of the document C7, C8 and C10 there is nothing to suggest that they are separate receipts, each for a capital sum of Rs. 20,000/- in which event the capital paid would exceed the capital decreed, even on the construction placed by the learned District Judge on C10 that the sum of Rs. 20,000/- specified therein constitutes the entire balance by way of capital and interest, there would have been an overpayment by Asoka Madanayake of either a sum of Rs. 4664/- as shown in the statement X1 or a sum of Rs. 5000/- as shown in the statement X2 or a sum of Rs. 4032.59 cts. as shown in the statement X3, depending on the mode the alleged payment of Rs. 20,000/- on C10 is set off. It is hardly likely that Asoka Madanayake would have paid any sum in excess of what was due on the decree. Moreover there has been no evidence placed either before the learned District Judge or the committee of the means or capacity of Asoka Madanayake to have effected the alleged payments on C8 and C10. It became very necessary to adduce such evidence particularly in view of the suggestion made to Asoka Madanayake in the course of his evidence before the committee that he was uttering a falsehood when he stated that he paid the balance capital of Rs. 30,000/-. But the most vital document in this regard is, in my view, document C9 dated 24.4.1976 written by the respondent just two weeks before C10. It is, as stated earlier, a letter sent by the respondent to Asoka Madanayake informing him that the arrears of interest in case No. 10884/MB is Rs. 10,000/- and requesting him to settle the same early. When questioned on this document Asoka Madanayake, in his evidence before the committee, admitted that the respondent calculated and showed him and that he was satisfied that the interest outstanding was about Rs. 10,000/-. This admission of Asoka Madanayake is irreconciliable with his position of having made any payments on C8 and C10. It effectively refutes his allegation of having made any payment either by way of capital or interest after 11.9.1973, the date of C7 and discredits his case altogether. Unforunately the learned District Judge does not appear to have appreciated its significance or impact on the issue before him whilst the committee, apart from a mistaken reference to C9, has totally failed to pay any attention or regard to its contents. Whilst the learned Judge has misdirected himself in regard to C9 the disciplinary committee has not even addressed its mind to it. I therefore hold that the respondent has not received any money on

documents C8 and C10. Accordingly I find that there has been no misappropriation of monies as alleged in the Rule.

The only other matter that remains for our consideration upon the submissions made to us by the learned Deputy Solicitor-General relates to the charge that the respondent having borrowed a sum of Rs. 12,000/- on promissory note C23 from the complainant whilst she was his client 'improperly appropriated' the same to his use. In her affidavit of complaint sent to the Chief Justice the complainant makes no complaint or mention of such improper conduct on the part of the respondent. Nor does she in her evidence before the committee make any reference thereto. Nor is there a consideration of the matter or a finding thereon by the committee in its report. The charge appears to have been formulated upon certain answers given by the respondent under cross-examination during the final stages of the inquiry before the committee wherein he stated that the sum was an interest-free loan obtained by him from the complainant; that for successfully reducing the assessment of the complainant's deceased husband's estate from Rs. 217,000/- to Rs. 17,000/- the complainant offered him a certain sum as fees which, except for a sum of Rs. 5,000/-, he did not receive and that the amount of the loan was set off by way of fees. Upon these facts as they stand, it would doubtless appear to be most improper for an attorney-at-law who has obtained from his client a sum of money as a loan to appropriate the same unilaterally as against fees alleged to be due to him for rendering professional services. Such conduct on the part of an attorney-at-law would, to say the least, constitute the clearest instance of a malpractice within the meaning of S.42(2) of the Judicature Act. It may suffice to warrant his removal from office altogether. It was, however, tenaciously urged by learned Counsel for the respondent that as this alleged act of misconduct on the part of the respondent did not form the subject matter of inquiry before the disciplinary committee, that as the complainant herself did not at any time make complaint to any one of such misconduct and that as the committee itself did not think it necessary to pursue this matter although it transpired during the course of its inquiry, the respondent has been gravely prejudiced with regard to this matter since he has been deprived of the opportunity of establishing that the complainant had, expressly or impliedly, consented to the arrangement of setting off the loan as part of his fees. Urging further that the material placed before us is very meagre and insufficient to substantiate this charge,

learned Counsel submitted that in the context of the special circumstances pertaining thereto no finding adverse to his client be made by us. I am in entire agreement with the submissions of learned Counsel. Until the present rule was issued on him the respondent had no intimation whatsoever that the propriety of his conduct in this regard was going to be challenged. He has, thus, had no opportunity of establishing before the committee his defence that he appropriated the loan as fees with the consent of the complainant, in which event it would be very doubtful whether his conduct could be deemed to be improper. The silence and inaction of the complainant in this respect suggest that she at least acquiesced in, if not consented to, the arrangement alleged by the respondent. As such I do not think it is proper or possible for us to reach a finding adverse to the respondent on this charge.

For the above reasons the Rule issued on the respondent is discharged.

H. A. G. de SILVA, J. – I agree.
JAMEEL, J. – I agree.

Rule discharged.