IN RE ARTHENAYAKE, ATTORNEY-AT-LAW

SUPREME COURT.
ATUKORALE, J., L. H. DE ALWIS, J. AND SENEVIRATNE, J.
S.C. RULE No. 1 OF 1986.
SEPTEMBER 26, OCTOBER 15, 22, AND NOVEMBER 5, 6 AND 7, 1986.

Rule–Malpractice–Failure to aver jurisdiction–Failing to appear–Failing to take sufficient interest in ensuring service of summons–Unduly delaying taking of steps to revoke proxy–Making accusations and allegations against client and using language unbecoming of an attorney-at-law and a gentleman in correspondence with client–S. 42(2) and s. 42(3) of Judicature Act No. 2 of 1978–Failure to submit observations to complaint on being called upon by the Supreme Court–Rule 80(3).

Mr. A. C. Alles, a former Supreme Court Judge complained to the Supreme Court that R. N. J. Arthenayake Attorney-at-Law (referred to as the respondent) whom he (Mr. Alles) had retained to institute and prosecute proceedings for infringement of copyright in the District Court of Mount Lavinia against nine defendants had committed professional malpractices in the institution and conduct of the said proceedings in that–

(*a*) in the plaint filed (in Sinhala) the respondent had failed to ensure the inclusion of the pleading averring jurisdiction which had been set out in the English draft of the plaint prepared by counsel.

(*b*) the respondent had failed to appear in court on behalf of Mr. Alles, more specifically on 30th July, 1984 when the case was called and failed to take sufficient interest in having summons served on the defendants.

(*c*) the respondent acted in a manner detrimental and/or prejudicial to Mr. Alles in the matter of instituting and prosecuting the action and unduly delayed steps for the revocation of the proxy granted by Mr. Alles to him.

(*d*) while being his registered attorney the respondent made accusations and allegations against Mr. Alles and engaged in correspondence with him in language unbecoming of an attorney-at-law and a gentleman.

Held–

(1) The omission to aver jurisdiction in the plaint though unintentional was due to utter negligence.

(2) Although the Court made an erroneous order calling for an affidavit which was unnecessary where a permanent injunction was being prayed for there was an overriding duty to court cast on the registered attorney to ensure that the order was corrected. The resultant delay of over two months to obtain an order to issue summons was due to lack of prudence and diligence on the part of the respondent.

(3) The respondent had neglected to appear for Mr. Alles on 30.7.1984 and his explanation for his failure is unconvincing and unacceptable.

(4) The respondent had unduly delayed the steps for revocation of his proxy.

(5) In his correspondence with Mr. Alles the respondent had indulged in language unbecoming of an attorney-at-law and a gentleman. The respondent's allegation of dishonesty on the part of Mr. Alles was demonstrably baseless and made recklessly and irresponsibly.

(6) The respondent's failure to file his observations on being called upon by the Supreme Court even after obtaining extensions of time, shows he did not have respect and regard for the Supreme Court.

(7) Every negligent act on the part of an attorney-at-law, would not amount to a malpractice within the meaning of s. 42(2) of the Judicature Act but the conduct and negligence of the respondent amount to professional misconduct and malpractice within the meaning of s. 42 of the Judicature Act.

Apart from its statutory powers the Supreme Court has inherent power to deal with delinquent attorneys-at-law.

Professional misconduct which is improper or deplorable or reprehensible when judged in relation to accepted standards of propriety and competence amounts to malpractice.

Cases referred to:

(1) *Re Edwin Beven–(1897) 3 NLR 67.*
(2) *Re Siman Appu's Plaint–(1900) 4 NLR 127.*
(3) *In re a Proctor–(1933) 36 NLR 9.*
(4) *Solicitor-General v. Jayawickrema–(952) 53 NLR 320.*
(5) *In re S. Dharmalingam–(1968) 76 NLR 94.*
(6) *In re a Proctor–(1943) 44 NLR 558.*
(7) *Re a Solicitor–[1972] 2 All ER 811.*
(8) *Re M–[1930] NZLR 285.*
(9) *In the matter of a Proctor of the Supreme Court and in the matter of section 19 of the Courts Ordinance, 1889–(1928) 30 NLR 65.*
(10) *Brenden v. Spire–[1938] IKB 176.*
(11) *In re Moonesinghe–(1917) 4 CWR 370.*

K. M. M. B. Kulatunge, P.C. Solicitor-General with *Miss M. N. B. Fernando, S.C.* for Attorney-General.

Eric Amerasinghe, P.C. with *I. G. N. de Seneviratne, W. P. Gunatilaka, S.J. Mohideen* and *Miss D. Guniyangoda* for the Bar Association of Sri Lanka.

A. C. Gooneratne, Q.C. with *P. A. D. Samarasekera, P.C. K. Shanmugalingam, J. E. P. Deraniyagala* and *Upali Gooneratne* for the respondent.

Cur. adv. vult.

December 18, 1986.

ATUKORALE, J.

This inquiry arises out of a Rule issued on the respondent, an attorney-at-law, in terms of s. 42(3) of the Judicature Act, No. 2 of 1978, in the exercise of the disciplinary powers conferred on this court by virtue of s. 42(2) thereof. The Rule states:

"WHEREAS a complaint has been laid with this Court by MR. ANTHONY CHRISTOPHER ALLES of No. 8, Cambridge Terrace, Colombo 7, supported by his affidavit dated 18th July 1985 that MR. R. N. J. ARTHENAYAKE, Attorney-at-Law and Notary Public, has committed certain acts of malpractice.

AND WHEREAS his complaint discloses that:–

(*a*) You were the registered Attorney-at-Law of the said Mr. Anthony Christopher Alles, the Plaintiff in D.C. Mount Lavinia Case No. 325/Spl.;

(*b*) In or about June 1983 you were entrusted with a draft plaint in English prepared by Mr. A. Mahendrarajah, P.C. for the purpose of instituting the above mentioned action;

(*c*) You were required by law to tender to court the plaint in the Sinhala language. You subscribed and filed a plaint in Sinhala as so required but omitting the averment setting out the jurisdiction of the court to hear and determine the action which appeared as paragraph one (1) in the English draft plaint which had been prepared by Mr. Mahendrarajah P.C. and was entrusted to you for the purpose of filing action;

(*d*) You acted in a manner detrimental and/or prejudicial to your client the said Mr. Anthony Christopher Alles in instituting action No. 325/Spl. D.C. Mount Lavinia without complying with the requirement of the law and the instructions of Senior Counsel to set out the jurisdiction of the court to hear and determine the action;

(*e*) You being the registered Attorney of the said Mr. Anthony Christopher Alles the Plaintiff in D.C. Mount Lavinia Case No. 325/Spl. failed to appear on his behalf in court, more specifically on the 30th day of July 1984 when the said case was called in open court; You also failed to take a sufficient interest in having summons served on the defendants;

(*f*) You having acted in a manner detrimental and/or prejudicial to your client in so instituting and prosecuting the said action did unduly delay the steps for the revocation of the proxy granted to you by the said Mr. Anthony Christopher Alles;

(*g*) Whilst being the registered Attorney of the said Mr. Anthony Christopher Alles the Plaintiff in D.C. Mount Lavinia Case No. 325/Spl. you did make accusations and allegations against your said client and engage in correspondence with him in language unbecoming of an Attorney-at-Law and a gentleman.

AND WHEREAS the written complaint lodged with this Court was forwarded to you on or about the 22nd of July 1985 calling for your observations and you requested time till 30th September 1985 to file your observations;

AND WHEREAS you were informed that you were granted time to forward your observations by 30th September 1985 and that no further time will be allowed;

AND WHEREAS you have failed without sufficient excuse to file your observations as so directed and have thereby shown scant respect to this Court;

AND WHEREAS the said complaint laid by the said Mr. Anthony Christopher Alles and your subsequent conduct discloses that you have committed acts of malpractice falling within the ambit of s.42(2) of the Judicature Act No. 2 of 1978;

AND WHEREAS this Court has decided that proceedings for suspension or removal should be taken against you under s.42(2) of the Judicature Act No. 2 of 1978 read with the Supreme Court Rules 1978;

THESE ARE THEREFORE to command you in terms of s.42(3) of the Judicature Act No. 2 of 1978 to appear before this Court at Hulftsdorp, Colombo in person on the 7th day of July 1986 at 10 o'clock in the forenoon and show cause why you should not be suspended from practice or removed from office of Attorney-at-Law of the Supreme Court of the Democratic Socialist Republic of Sri Lanka in terms of s.42(2) of the Judicature Act aforesaid....."

Accompanying the Rule was a list of witnesses and documents.

According to the respondent the Rule was served on him on 22.6.1986. He appeared in Court on 7.7.1986 in response to the rule and through his counsel tendered to Court an apology for his failure to submit his observations to the complaint of Mr. Alles (hereinafter referred to as the complainant) when he was required to do so by the Registrar of this Court upon the direction of his Lordship the Chief Justice. He also requested for a date to show cause. The Court then fixed the matter for hearing on 26.9.1986 and directed the respondent to comply with rule 80(3) of the Supreme Court Rules, 1978, on or before 12.9.1986 which required him, if he intended to rely on evidence, to file a list of witnesses and documents on or before the date fixed by Court but not less than seven days before the date of hearing with seven copies thereof to be furnished to Court and one copy to be served on the Attorney-General. The respondent failed to comply with the direction of Court and/or rule 80(3). By his letter of 25.9.1986 addressed to the Registrar of this Court the respondent forwarded his affidavit together with certain annexures which apparently the Registrar declined to accept as the hearing was fixed for the next day. On 26.9.1986 the respondent's counsel moved to tender this affidavit of the respondent together with the annexures and craved the indulgence of Court to accept the same. As there were no

objections from either the learned Solicitor-General or learned counsel representing the Bar Association of Sri Lanka and in view of the serious nature of the present proceedings and of the consequences that may flow therefrom to the respondent, the affidavit and the annexures were, as a matter of indulgence, received and accepted by us although there was no explanation for the respondent's failure to comply with the direction and/or the rule aforesaid.

In his affidavit the respondent, by way of showing cause against the Rule issued on him, stated, inter alia, as follows:–

"1. I am the affirmant abovenamed.

2. I appeared before Your Lordships' Court on 7th July 1986 upon the notice served on me on 22nd June 1986 (Sunday) by a Process Server and I was represented by Mr. K. Shanmugalingam, Attorney-at-Law, and obtained a date to show cause.

3. I tendered an apology through my Counsel to Your Lordships' Court for my failure to comply and my failure to reply does not mean that I have no respect to Your Lordships' Court.

4. I have from time to time requested for further time as I was awaiting several documents which would be in my favour and had I complied immediately I would not have had the advantage and/or the benefit of the said documents and the documents are:–

   (*a*) the written submissions of the Counsel for the Plaintiff (Mr. A. C. Alles) in District Court of Mt. Lavinia Case No. 325/SPL filed herewith marked "A" (a copy of the said document "A" was sent by me to the Registrar of the Supreme Court about one month ago).

   (*b*) the Order of the learned District Judge in District Court of Mt. Lavinia Case No. 325/Spl. dated 4th July 1986 delivered after the receipt of written submissions of Counsel for the Plaintiff and the Defendant.The said Order is filed herewith marked "B".....(the said Order of the learned Disrtict Judge was delivered three days prior to the date to show cause–7th July, 1986).

5. I submit that the Draft Plaint in English was translated into Sinhala by a person who usually translates all legal documents from English to Sinhala and Sinhala to English and in whom I have always found the translations to be reliable and accurate at all times.

6. I compared the translation with the English Draft Plaint in respect of the relevant paragraphs considered necessary and embodying the cause of action and such other causes but presumed that the Jurisdiction Paragraph would be automatically in order.

7. A copy of the Sinhala Plaint and the Draft English Plaint were left by me at the residence of the Complainant several days prior to the institution of the action.

8. I did not hear from the complainant thereafter in respect of the plaint or any complaint that there is a problem in respect of the jurisdiction paragraph

9. It is stated in the affidavit of the complainant at paragraph 20 that the omission was discovered only on the date of trial.

10. I admit that the omission was an oversight and not due to any wilful negligence or any malpractice and I have not acted in any manner detrimental and/or prejudicial to the plaintiff in the aforesaid action.

11. I have not delayed in the service of summons but the subject clerk did not issue summons as there was no affidavit attached to the plaint and the summons to the defendants were issued only after Mr. A. C. Gooneratne Q.C. appeared before the learned District Judge in Chambers and explained to the learned District Judge that an affidavit is not necessary in this case. Vide proceedings of 18.10.83.....

12. I issued summons on the Defendants thereafter and the Fiscal Process Server, Balapitiya, in his report dated 24th July 1984 stated that the 1,2,5,8 & 9th Defendants are in Haputale, the 3rd Defendant is in Saudi Arabia, 4th Defendant is in Kalutara, 6th Defendant is in Ja-ela and the 7th Defendant is in Kollupitiya and on my examining the record subsequently that the Fiscal Report was missing from the Court Record and I requested Mr. A. C. Alles to bring this matter to the Notice of the authorities. He showed no such interest.

13. I was not present in Courts on the 30th July 1984 when the case was called but I did make arrangements with Mrs. Ranjani Keragala, Attorney-at-Law, to appear in my case but when she was to mark her appearance she found Mr. Earle R. de Zoysa Attorney-at-Law appearing in my case and the said Mrs. Keragala did not enter an appearance as it would have embarrassed Mr.De Zoysa. Mrs. Keragala till recently looked after my Roll Work in that Court and attended to all matters in connection with my legal works.

14. It is admitted by the complainant I was present in Courts on the 27th August 1984. Vide complainant's document marked "8".

15. I did not authorize and/or consent to Mr. Earle R. De Soysa, Attorney-at-Law appearing for the plaintiff in the said case and he had not obtained my consent to do so. Vide my letter dated 2.10.84 to Mr. Alles marked "E". I have sent a written complaint to the then President of the Bar Association of Sri Lanka (Mr. Herman J. C. Perera, Attorney-at-Law about this conduct and I have not received even an acknowledgment to this day).

16. I sent a motion to revoke my proxy to the complainant and drew his attention to it thereafter as he has failed to comply and thereafter I received a registered letter from the complainant without any contents therein but he all along was of the view that he did sign and return the revocation. I sent the carbon copy of the motion to revoke the proxy which was in my file thereafter. The complainant's conduct did surprise me and I was compelled to refer to him as an untruthful person.

17. The complaint made by Mr. A. C. Alles dated 8th July 1985 is contradicted by the written submissions tendered to court as his Counsel refers to a judgment of a Divisional Bench of three Judges in *Hassan v. Peiris (34 NLR 238)* and states that "in this case the plaintiff relies on the residence of the 10th defendant within the local limits of the jurisdiction of this court to give it jurisdiction" (vide page 3 of the plaintiff's written submissions). The complainant Mr. A. C. Alles by his affidavit dated 4th August 1986 states–

'I am not responsible for the statements contained in the written submissions of my Counsel'.

Complainant's document marked "L".

It is untenable that a plaintiff who is an Attorney-at-Law and a former Supreme Court Judge would have not associated himself with his counsel in the preparation of the written submissions. He has now decided not to associate himself with the written submissions as I have sent him a letter to sue him for damages as the written submissions contradict the averments in his affidavit to Your Lordships' Court.

18. I further submit that in the Order of the learned District Judge dated 4th July 1986 it is stated at page 1:

"Plaintiff states that in the English version of the plaint it is stated that the 10th defendant is residing within the jurisdiction of this Court and that due to an oversight it is not stated in the Sinhala version."

It is further stated in the said Order:

"I am satisfied that the averments duly stated in the English version have been inadvertently omitted from the Sinhala version. In paragraph one of the English version jurisdiction is clearly stated. Therefore I allow the plaint in Sinhala to be amended."

19. I have not acted in any manner detrimental and/or prejudicial to the plaintiff in instituting action No. 325/SPL in the District Court of Mount Lavinia and I have not committed acts of malpractice and have not conducted myself in a manner unbecoming of an Attorney-at-Law and a gentleman and have not acted in a manner so as not to respect Your Lordships' Court and I therefore state that action under section 42(2) of the Judicature Act No. 2 of 1978 read with the Supreme Court Rules 1978 should not be taken against me."

On a perusal of the respondent's affidavit showing cause against the Rule issued on him, it is quite clear that he has not only denied the charges laid against him therein but also has sought to justify his conduct, the subject matter of the Rule, and even attempted to

apportion on the complainant a part of the blame for certain acts of omission on his part. It therefore becomes necessary to set out in some detail the salient facts (which do not appear to be controverted) relied upon as constituting acts of malpractice upon which the Rule is founded.

The complainant retained the services of the respondent and duly appointed him to act on his behalf for the purpose of instituting and prosecuting action No. 325/Spl against the defendants in the District Court of Mt. Lavinia. In June 1983 a plaint drafted in English by Mr. Mahendrarajah, P.C. was given to him for the purpose of filing the action. The respondent on 5.8.1983 filed in courts a Sinhala plaint subscribed by him together with a copy of the English draft plaint which was not subscribed by him. On 6.8.1983 he informed the complainant that he had instituted action on the plaint drafted by Mr. Mahendrarajah – vide document 7. The Sinhala plaint, however, did not contain the averment relating to jurisdiction which was the first averment in the draft English plaint.

The Sinhala plaint was accepted by court which ordered, owing to a misconception of the correct legal position, that an affidavit be filed in support of the claim for a permanent injunction contained in the prayer to the plaint. No order was made at that stage for the issue of summonses on the defendants. On 18.10.1983 Mr. A. C. Gooneratne, Q.C. saw the learned judge in chambers and explained that summonses could issue without an affidavit whereupon summonses were ordered to be issued on the defendants returnable 21.11.1983. They were in fact tendered to court only on 27.2.1984 when the court directed them to be issued returnable 26.3.1984. On 26.3.1984 the 1st defendant appeared in court in response to the summons served on him. The 1st to the 9th defendants were not present and as there was no return from the fiscal relating to the service of summonses on them the court directed the case to be called on 30.9.1984. On that day the complainant was present in court but not the respondent. Finding that the respondent was absent the complainant retained the services of Mr. Earle de Zoysa, an Attorney-at-Law practising in the Mt. Lavinia courts, to watch his interests and to obtain an early date for the re-issue of summonses and to ensure that they were served on the 1st to 9th defendants. This was done by Mr. de Zoysa. Summonses were reported by the fiscal to be served personally on them and they appeared in court on

27.8.1984 on which date the respondent attended court. The complainant by his letter of 28.8.1984 (document 8) informed the respondent of this position and the steps taken by Mr. de Zoysa and that Mr. de Zoysa would continue to watch his interests and report to him the progress of the case. This letter appears to have been the primary cause of the displeasure and the differences that subsequently arose between the complainant and the respondent. The respondent took objection to the complainant's conduct in having retained the services of Mr. de Zoysa without reference to him and in the course of his reply (document 9) he stated that he had no objection to Mr. de Zoysa watching the case on behalf of the complainant but that he could extend it further by stating that the complainant would have to revoke the proxy to enable Mr. de Zoysa or any other lawyer of his choice to appear for him. He also expressed surprise that summonses had been served personally on the 1st to the 9th defendants who, according to the earlier fiscal report, had left their residences to their places of business in various parts of the country and one of whom was in Saudi Arabia. He stated that he would pursue this matter further particularly if it was the same fiscal officer who made both reports to court. He concluded by stating that he would forward the revocation papers for the complainant's signature. The next letter placed before us is document 10, a letter written by the respondent to the complainant, in which the respondent, referring to the wish expressed by the complainant in his letter of 24.9.1984 that the respondent should revoke the proxy granted to him, states, inter alia, that he would be doing so with pleasure. He also forwarded therewith the revocation papers with a request to the complainant to return the same to him duly signed to enable him to file them in court so that he would have "the satisfaction of knowing that it was done and not wait to hear about it". This letter is dated 25.10.1984. The complainant alleges that he replied to this letter by his letter of 29.10.1984 (document 12). This reply, which also, as usual, has been sent under registered post to the respondent, acknowledges receipt of the respondent's letter of 25.10.1984 and states that the complainant is returning there with the revocation papers duly signed by him and reminds the respondent that in doing so he is only giving effect to the suggestion contained in the respondent's letter (document 9)

informing him that the respondent was taking steps to forward the revocation papers for his signature. The complainant makes the following further observations:–

"1. I have no objections to your taking action with the appropriate authorities to investigate the alleged tampering with the Court Record. I agree that if these allegations are well founded it is a serious matter that needs probing and suitable action taken against the parties concerned.

2. .....

3. When you advised me that I had to pay extra stamp duty I was surprised as I had not prayed for an interim injunction in my plaint. It was I who contacted Mr. Gooneratne and requested him to make the necessary representations on my behalf to the Judge which he successfully did. Mr. Gooneratne refused to accept a fee from me.

4. I asked Mr. Earle de Zoysa to watch my interests in the case since in spite of repeated requests to you over the telephone you did not seem to take an interest in my case. You were not present in Court on July 30 and it was due to Mr. Zoysa's efforts that an early date was obtained for the re-issue of summons.

5 ....."

The next letter before us is the letter dated 27.12.1984 sent by the respondent to the complainant (document 13) in which he states, inter alia, as follows:

"I have agreed to revoke your proxy in the above case ..... You have not revoked my proxy so far ..... I would like to finalise this matter as I do not wish to act for you anymore ....."

To this the complainant replied by his letter of 2.1.1985 (document 14) stating:

"I am surprised at your letter of December 27, 1984. To your letter of October 27, 1984 which conveys the same request to that contained in your letter of December 27, I sent you a prompt reply on October 29th enclosing the revocation papers duly signed by me. A photostat copy of my letter and a copy of the registered postal receipt is enclosed for your information.

I must assume in the absence of my letter and the revocation papers being returned to me that you have duly received these documents.

If you have misplaced the revocation papers please prepare fresh papers and bring them to me personally to be signed and returned to you to be filed in Court. I cannot take the risk of communicating with you even by registered post after what has transpired which has caused me considerable annoyance and embarrassment. I shall also thank you ..... to make an appointment with me either by telephone or letter to fix a date and time for the signing of fresh revocation papers. I should like to finalise all matters with you within a week of the receipt of this letter."

The respondent replied by his letter dated 18.01.1985 (document 15):

"I acknowledge the receipt of your letter dated 2nd January 1985 without the usual salutation and the ending of a letter in the usual form. Rather surprising that a man of your education and as a man who held a high position in our Supreme Court should conduct himself in such a petty minded manner.

You further surprise me by denying the receipt of my letter dated 25th October 1984 which in particular contained the Revocation papers. That's dishonesty.

Enclosed please find another revocation with my signature therein. You can hand it over to your next Attorney-at-Law who will file the Revocation, Formal Revocation and his Proxy in the above case. I trust you will do that on receipt of this letter as it is my wish that I close this chapter with you and whilst doing so regretting that you became my client even for a short period.

Lastly, I must state that under no circumstances you should have instructed Mr. Earle R. de Zoysa, Attorney-at-Law, to appear in the above case and he should not have appeared even on a calling date without my instructions. Mr. de Zoysa has so far failed to disclose to me that he appeared for you in the above case."

Acknowledging receipt of the above letter, the complainant wrote to the respondent letter dated 28.01.1985 (document 16) which contained, *inter alia,* the following:

"A – This is the first occasion in my entire career that an allegation of dishonesty has been made against me and that too by a professional man. Your allegation is false, baseless and made with no sense of responsibility. In order that you may realise the utter falsity of your allegation I will quote from the correspondence between us in regard to your allegation that I have denied the receipt of your letter dated October 25 which contained the original revocation of the proxy. Let there be no ambiguity or quibbling on this issue–

1 – On October 29, 1984 I sent you by registered post the original of the revocation of the proxy duly signed together with a letter which commenced as follows–

'I am in receipt of your registered letter of October 25 and am returning the revocation papers duly signed by me'

You have received my letter and original revocation motion since these documents were not returned to me by post .....

2 – On January 2, 1985 I wrote to you by registered post in the following terms–

'To your letter of October 27 (this is a typing error for October 25) which conveys the same request to that contained in your letter of December 27 *I sent you a prompt reply on October 29 enclosing the revocation papers duly signed by me'.*

With my letter I sent you a photostat copy of my letter of October 29 containing again the statement referred to in (1) above. This registered letter of January 2 has been acknowledged by you in your letter of 18 January 1985.

3 – In the face of the material referred to in (1) and (2) above you have stated in the second paragraph of the present letter of January 18 as follows–

'You further surprise me by denying the receipt of my letter dated 25th October 1984 which in particular contained the revocation papers. That's dishonesty'.

When therefore you wrote your letter of January 18 you had information that I acknowledged receipt of your letter of October 25, 1984 and the original revocation notice. How can you in the face of these incontrovertible facts which I have set down in writing be surprised and make such a false, wicked and irresponsible allegation of dishonesty against me? The surprise is on my part that you have so blatantly and recklessly sought to make such a statement in writing against me. I must demand an immediate written apology from you withdrawing this false allegation. Otherwise I shall be compelled to have recourse to other measures to safeguard my honour and reputation.

B – .....

C – If I had not asked another Attorney-at-Law to watch my interests in Court I would still be looking for some of the defendants in various parts of the country and in Saudi Arabia to have the summons served on them.

I will expect a written apology from you forthwith for what you have falsely stated in the second paragraph of your letter of January 18 and I shall be more than glad to sever relations with you thereafter and consider the chapter closed. This is the first occasion in my life that I have become a litigant and my first experience of a lawyer retained by me has most distressing and only forcibly demonstrated to me the unfortunate plight which many a client suffers at the hands of some lawyers."

To this letter, which is the last in the series of correspondence between the complainant and the respondent, there was no reply. Thereafter the complainant signed a fresh proxy authorising Mr. Earle de Zoysa to act on his behalf in the case. The case was taken up for trial on 29.5.1985 when counsel for the defendants raised an objection to the jurisdiction of the court to hear and determine the action. Counsel for the complainant then moved to amend the plaint. This was objected to by counsel for the defendants and the matter was fixed for inquiry on 9.7.1985 on which date, owing to the fact that the Judge was indisposed, the inquiry was postponed for 3.9.1985. Pending this inquiry, on 19.7.1985, the complainant lodged his complaint in this Court alleging professional misconduct on the part of the respondent. His affidavit of complaint is dated 18.7.1985 and contains substantially a statement of the facts

(supported by documents including the letters referred to above) forming the basis upon which the Rule has been laid against the respondent.

On 4.8.1986, after the Rule was served on the respondent, the complainant filed an additional affidavit with two annexures marked "L" and "M". Document marked "L" is a letter dated 24.5.1985 sent by the respondent to the Administrative Secretary, Bar Association of Sri Lanka, in connection with a complaint made by the complainant's son against the respondent to the Bar Association. Document "M" is a letter dated 3.6.1986 sent by the respondent to the complainant threatening to take legal action against the latter for swearing the affidavit of complaint upon which the present proceedings were initiated which, the respondent states, contains averments inconsistent with the written submissions filed in the District Court on behalf of the complainant by his registered Attorney-at-Law. This letter (M) reads as follows:

> "You had sworn an affidavit against me to the Chief Justice of the Supreme Court directly in July 1985 in respect of the Sinhala Plaint filed in the District Court of Mount Lavinia Case No. 325/SPL.
>
> You had thereafter through your Registered Attorney-at-Law in the above case filed written submissions in the above case which is different from the averments in your affidavit.
>
> I obtained a certified copy of the written submissions from Courts and tendered same to the Registrar of the Supreme Court and a photocopy of same was tendered to the Attorney-General.
>
> I have already handed over the aforesaid documents and several other documents connected thereto to my lawyers who will be sending you a letter of demand as instructed by me claiming damages against you and in the event of your failure to comply with the demand, legal proceedings will be instituted by me against you to recover damages from you."

In reference to this letter "M" the complainant, in his additional affidavit, states that his original affidavit was filed in this Court in July 1985 and that his counsel made written submissions in the District Court much later to persuade the court to allow his application for the amendment of the plaint and that he (the complainant) is not responsible for the statements contained in the written submissions of his counsel. In regard to the letter "L" the complainant, in his additional affidavit, states that it contains two false allegations made by the

respondent against him, namely, that he failed to send to the respondent the motion revoking the proxy in 1985 and that he was ready to condone a dishonest act of a court officer. The relevant passage in letter "L" reads as follows:

"In 1983 Mr. A. R. Alles informed me that his father, Mr. A. C. Alles, wanted me to file an action on his behalf against some persons for an alleged breach of copyright of his book reporting famous trials. The breach was alleged to have been committed by the producers of the film "Dadayama". Mr. Alles gave me a draft plaint which he stated was prepared by Mr. A. Mahendrarajah, Attorney-at-Law (a recently appointed President's Counsel) and that he also consulted Mr. K. N. Choksy, Attorney-at-Law (now President's Counsel). He wanted me to file the plaint in the District Court of Mt. Lavinia. It was filed as instructed and was numbered 325/Special. Summons was issued on the Defendants and the returnable date was on the 30th July 1984. The Fiscal, Balapitiya had reported that the 1st, 2nd, 5th, 8th and 9th Defendants are reported to be in Haputale, the 3rd Defendant in Saudi Arabia, the 4th Defendant in Kalutara, the 6th Defendant in Ja-ela and the 7th Defendant in Kollupitiya. I accordingly informed Mr. A. C. Alles of this by letter. Mr. A. C. Alles intimated to me by his letter dated 28th August 1984 that he had retained Mr. E. R. de Zoysa, Attorney-at-Law who is practising mainly in Mount Lavinia Courts, to watch his interests. He also informed me that Mr. E. R. de Zoysa had obtained a short date to serve summons and that he had effected service of summons. I once more checked the record and found that the Fiscal Report referred to earlier was missing from the record in the Mt. Lavinia Courts. I made an application to the District Judge, Balapitiya, and obtained a copy of the aforesaid Fiscal Report dated 24.7.1984. I thereafter wrote to the Registrar of the District Court, Mt. Lavinia on 13.12.1984 and asked him for a copy of the Fiscal Report of 24.7.1984 but was informed that there was no such report.

I thereupon informed Mr. A. C. Alles that the officers of the Court appeared to have acted dishonestly and that I intended reporting this to the District Judge and the Ministry of Justice to take appropriate action. I also indicated to Mr. Alles that I would expect him to co-operate with me in this matter to enable the true facts to be ascertained. However, in view of the attitude taken by Mr. A. C. Alles (I informed him) that I would be revoking his proxy and would no longer act for him. This was in September 1984. I sent him the motion to revoke the proxy, but he failed to return it. I thereafter sent him the carbon copy of my original revocation, and informed him that his new Attorney could file it in Court..... Mr. A. C. Alles's reaction to an Inquiry about the Fiscal Report was surprising. I could not understand his attitude as a retired Supreme Court Judge. Mr. A. R. Alles states that he had discussed this matter with his father 'who is much distressed that a member of the honourable profession should have acted in this dishonourable manner.' It seems strange that his father who was ready to condone a dishonest act of a Court Officer was talking of ethics of the profession...."

In addition to the above material, part of which, it will be observed, comprises of matter placed before this court after the date of the Rule (9.6.1986), it is also necessary to refer to the respondent's failure to submit his observations to this court upon the complaint lodged against him, though called upon to do so. On a direction by His Lordship the Chief Justice the Registrar of this court forwarded to the respondent a copy of this complaint and requested him to submit his observations thereon to His Lordship the Chief Justice within 3 weeks. This letter is dated 22.7.1985. The respondent by his reply of 3.9.1985 addressed to the Registrar informed him that the letter reached his hands only 4 days ago and requested for time till 30.9.1985 to submit his observations. The Registrar then wrote to him on 11.9.1985 stating that he has been directed by this court to grant the respondent time till 30.9.1985 and that no further time will be granted. On 21.2.1986 the respondent wrote to the Registrar enclosing a certified copy of the written submissions tendered to the District Court of Mt. Lavinia on behalf of the complainant (the plaintiff in the case) and requesting for further two weeks' time to send in his observations "in view of the contents of the written submissions". To this letter the Registrar replied stating that he has been directed by this court to draw the attention of the respondent to his letter of 11.9.1985 informing the respondent that no further time would be given to him beyond 30.9.1985 to forward his observations.

At the hearing before us learned President's Counsel for the Bar Association did not, (I think it was not necessary for him to do so) seek to make any submission or express any opinion on the correctness or otherwise of the facts as alleged in the Rule. He confined himself to one submission, namely, that the facts set out therein, even if accepted, did not constitute in law a malpractice in terms of s.42(2) of the Judicature Act, No. 2 of 1978. Learned Queen's Counsel for the respondent, too, did not appear to me to seriously canvass the facts set out in the Rule. His main contention was also that the facts disclosed in the Rule fell short of establishing any malpractice on the part of the respondent. This legal submission advanced by both counsel will be considered by me later on in the course of my order. But for a full and proper appreciation of the implications arising out of the facts alleged in the Rule I think it very necessary that I should record my findings of facts together with the reasons therefor on the material placed before us by and on behalf of the complainant as well as the respondent.

They are as follows:

(a) The respondent has admitted his omission to aver in the Sinhala plaint which is the official plaint, facts setting out the jurisdiction of the Mt. Lavinia Court to hear and determine the action, which is a positive requirement of the law – vide s.35 of the Civil Procedure Code. This omission, though unintentional, cannot be brushed aside as being due to an oversight on the part of the respondent as averred by him in his affidavit. In my view it was due to none other than his utter negligence. This is the only reasonable inference that can be drawn from his statement in the affidavit that he compared the Sinhala translation with the English draft plaint in so far as the paragraphs relating to the cause of action were concerned but did not do so in regard to the averment relating to the jurisdiction which, according to him, he presumed to be 'automatically in order'. There is in this statement an implied admission by the respondent that he failed to carry out his bounden duty as the registered attorney-at-law of the plaintiff of perusing fully and carefully, the several paragraphs in the plaint to which he had subscribed his signature and which constituted the legal foundation of the plaintiff's claim. It is not a duty that an attorney-at-law can delegate to any one else. In a matter of such grave importance it can never be open to an attorney-at-law to disown responsibility by stating that he had faith in his clerk or translator, however reliable or efficient he may have found him to be. The failure or omission to peruse diligently a legal document such as a plaint before it is filed by him in court constitutes a breach of duty which he owes not only to his client but also to court. The respondent's further statement in his affidavit that he left a copy of the Sinhala plaint at the complainant's residence several days prior to the institution of the action but that he received no complaint or information from him concerning any problem about the averment relating to jurisdiction, far from providing any excuse for his lapse, appears to me to savour of an unwarranted attempt on his part to foist the blame or part thereof on the complainant, his client.

(b) A period of about 2 months or more has lapsed between the date of the institution of the action and the order of court for the issue of summons on the defendants. The respondent in his affidavit seeks to attribute this delay to the fact that the subject

clerk did not issue summons as there was no affidavit accompanying the plaint. It may well have been that, according to the common practice, the subject clerk did make the minute and the Judge signed it thereafter. But once it is so signed it becomes the order of court. A subject clerk has no right to issue or to refuse to issue summons except in compliance with the order made by court. Thus the order made in the instant case was an order of court refusing to order the issue of summonses on the defendants upon the acceptance of the plaint for the reason that there was no affidavit accompanying the plaint. This order was clearly an erroneous one since the plaint had not prayed for an interim injunction. It was incumbent on the respondent on becoming aware of this order to have taken prompt and diligent steps to appraise the court of the correct position and to have moved for the issue of summonses. A registered attorney-at-law has an overriding duty to court to take such steps as are necessary to ensure that its orders are in compliance with correct legal procedures. In the instant case the respondent without making any attempt to ascertain for himself the correctness of the order made by court called for additional stamp duty from his client for an affidavit which was unnecessary. I accept the uncontradicted statement in the complainant's affidavit to this court that it was he who requested Mr A. C. Gooneratne, Q.C to represent matters to court on his behalf in consequence of which the court directed the issue of summonses without an affidavit. I am of opinion that the delay of over two months was due to the lack of prudence and diligence on the part of the respondent.

(c) The respondent failed to appear in court on behalf of his client on 30.7.1984 which was the date fixed for the filing of the answer of the 10th defendant and for the return of the Fiscal regarding the service of summons on the other defendants. The respondent, in his affidavit, whilst admitting that he was not present in court on that day, states that he had made arrangements with Mrs. Ranjani Keragala, Attorney-at-Law, to look after his work in that court and that when she was about to mark her appearance in the case on that date she found Mr. Earle de Zoysa already appearing in the case and she did not therefore enter an appearance as it would have embarrassed Mr. de Zoysa. This explanation of the respondent has to be

considered and evaluated in the light of all the attendant circumstances. By his letter of 28.8.1984 (document 8) the complainant informed the respondent that he retained Mr. de Zoysa to watch his interests in the case on 30.7.1984 and that he was most helpful and succeeded in getting summons served on the defendants. This letter evoked a vehement protest from the respondent who found fault with the complainant for dealing through other attorneys without reference to him and even threatened to forward the revocation papers to him. But it is very significant that in this reply (document 9) the respondent offers no explanation whatsoever for his non-appearance in court on that date. Nor is there any mention of the fact that he had requested Mrs. Keragala to appear in the case or that she was present and was ready to mark her appearance. Not even in his letter of 25.10.1984 (document 10) is there any reference to this alleged arrangement with Mrs. Keragala. In fact the only reference thereto is contained in his affidavit filed belatedly in this court on 26.9.1986. In my view the explanation adduced to this court for his failure to appear in the District Court on 30.7.1984 is unconvincing and therefore unacceptable.

(*d*) The respondent had unduly delayed the steps for the revocation of the proxy granted to him by the complainant. Although by his letter of 29.8.1984 (document 9) the respondent informed the complainant that he would forward the revocation papers for his signature, they were in fact forwarded only on 25.10.1984 (document 10). The complainant has maintained that he replied to the respondent enclosing these papers duly signed by him to enable the respondent to file them in court by his letter of 29.10.1984 – (document 12). On a reading of the respondent's letter of 18.1.1985 (document 15) it would appear that the revocation papers were not returned to him by the complainant. According to the correspondence that has passed between the parties the respondent's position appears to have been that he did not receive these revocation papers, which, according to the complainant, he forwarded to the respondent under registered cover by his letter of 29.10.1984. However in his affidavit filed in this court the respondent states that he received a registered letter from the complainant but that it was an empty letter without any contents. This, in my view, cannot but be a reference to the registered letter sent by

the complainant on 29.10.1984 addressed to the respondent. So the only question is whether it was an empty letter or not. I might mention straightaway that in the correspondence between the parties there is no reference, at any stage, by the respondent of having received by registered post from the complainant a letter without any contents in it. If he did receive such a letter it would have been extremely unlikely that the respondent would have allowed it to pass without comment, at least, in his last letter wherein he has made accusations of pettimindedness and even dishonesty against the complainant. Learned Solicitor-General described the respondent's statement in his affidavit that he received an empty letter as a half truth; in which event, it must necessarily be also a half untruth, although I did not hear him say so. Whatever that may be, I am firmly of the view that this statement in his affidavit has been made by the respondent with a view to wriggling himself out of the otherwise defenceless charge that he was solely responsible for unduly delaying the steps or the revocation of the proxy.

(*e*) The respondent as the registered attorney-at-law of the complainant has made accusations and allegations against and engaged in correspondence with his client in language which is unbecoming of an attorney-at-law and a gentleman. On this aspect of the matter it would, I think, suffice if I refer to the passages in the respondent's letter of 18.1.1985 (document 15) reproduced by me and which contains the accusations of pettimindedness and dishonesty against the complainant. It is manifest that the language employed by the respondent in those two paragraphs is unrestrained and undignified. An allegation involving moral turpitude is founded on one's belief (however honest it may be) of turpitudinous conduct on the part of another. The very fact and thought that one may be wrong in forming such a belief is of itself sufficient reason to cause one to desist from giving expression to such a belief. Such an accusation involving as it does a grave breach of moral standards and discipline on the part of another should, whenever possible, be avoided. It should never be made unreasonably or irresponsibly. No man of good repute (and this includes an attorney-at-law) should permit himself to casting moral aspersions on another, whether high or low, for which

there is no cogent and sufficient basis. The imputations made by the respondent in the instant case rest on such slender, and even baseless, grounds that I find it difficult to resist the conclusion that they were made not for the reason that the respondent saw any justification in making them but to embarrass, if not humiliate the complainant. The reference to the position the complainant once held in the Supreme Court was totally irrelevant and unwarranted. The allegation of dishonesty is demonstrably baseless. The respondent himself by his letter of 18.1.1985, in which the allegation was made, acknowledged receipt of the complainant's letter of 2.1.1985 wherein the complainant specifically stated that in response to the respondent's letter dated 25.10.1984 (mistakenly given as 27.10.1984) he sent a prompt reply on 29.10.1984 returning the revocation papers after signature. In the face of this letter of 2.1.1985 (the receipt of which the respondent acknowledged) it was preposterous for the respondent to have alleged in his letter of 18.1.1985 that the complainant was denying receipt of the respondent's letter of 25.10.1984 which contained the revocation papers for the complainant's signature. The position was clarified and put beyond any manner of doubt by the complainant in his final letter of 28.1.1985 (document 16) to which there was neither a reply nor even an acknowledgment by the respondent. I am quite satisfied that the accusation of dishonesty levelled by the respondent against his client, the complainant, was completely baseless. It has been made recklessly and irresponsibly. It was unbecoming and unworthy of the respondent as an attorney-at-law to have made such a baseless charge against the complainant, who was his client.

I might pause here for a moment to state that I have based my findings on the contents of the documents as a whole which have been read before us including the explanation made by the respondent in his belated affidavit of 25.9.1986 since it is my view that a matter of this nature has to be judged upon a consideration of all the facts and circumstances placed before us. I have, however, for this purpose, refrained from taking into consideration the contents of any document tendered to court in support of the Rule after the date of its issue.

I will now proceed to consider the consequences of the failure and/or omission on the part of the respondent to make the jurisdiction averment in the Sinhala plaint, to appear in Court on 30.07.1984 and to take steps without delay, for the revocation of the proxy granted to him. It is not denied and there is little doubt that they resulted not only in unnecessary delay and expense to the complainant but also in placing the entire claim of the complainant in real jeopardy of being dismissed. I therefore hold that in instituting and prosecuting the action in the District Court of Mount Lavinia the respondent has acted in a manner detrimental and/or prejudicial to the interests of his client, the complainant. I am thus of the view that the matters enumerated in paragraphs (*a*) to (*g*) of the Rule have been established except the allegation relating to the respondent's failure to take sufficient interest in having summons served on the defendants since it is the duty of the Fiscal to effect service of summons for which the respondent cannot be held responsible.

(*f*) The respondent has failed without sufficient cause to file his observations on the complaint that was made against him (a copy of which was forwarded to him) although he was directed to do so by the Registrar of this court upon a direction made by His Lordship the Chief Justice. By his letter of 03.09.1985 the respondent asked for and obtained further time till 30.09.1985 but yet failed to comply with the direction of this court. At that stage he adduced no reason or explanation for his failure. He remained silent until 21.02.1986 when he wrote to the Registrar enclosing a copy of the written submissions tendered on behalf of the complainant in the District Court and asking for further two weeks' time "in view of the contents of the written submissions". In his affidavit to this court he states that his failure to comply was due to the fact that he was awaiting certain documents, namely the written submissions aforementioned and the order of the learned District Judge on the application to amend the plaint, which were advantageous to him and the benefit of which he would not have had if he filed his observations earlier. These documents, in my view, bore no relevance to the observations that were called for by this court, which were in respect of the statement of specific facts (all within the knowledge of the respondent himself) contained in the complainant's affidavit to this court. The respondent was made aware that his observations were called for upon a direction made by His Lordship the Chief

Justice pertaining to a matter of his professional conduct. He could not have failed to appreciate the fact that his observations were required, without delay, to enable this court to determine whether a Rule should or should not issue against him upon the allegations made against him. In so far as this court was concerned, the matter was one of utmost importance and urgency. Although in his letter of 21.02.1986 he asked for two more weeks' time to file his observations, eventually he did not file them at all. These circumstances disclose that the respondent did not have due respect and regard for this court.

I have set out above in detail my findings on the facts. I shall now turn to the legal submissions of respective counsel. It is conceded that the law governing this matter is contained in the Judicature Act, No. 2 of 1978, which came into force on 02.07.1979. S. 40(1) of this Act empowers this court, in accordance with rules for the time being in force, to admit and enrol as attorneys-at-law 'persons of good repute and of competent knowledge and ability'. S.42(2) empowers this court to suspend from practice or remove from office every person admitted and enrolled as an attorney-at-law who shall be guilty of 'any deceit, malpractice, crime of offence'. The charge against the respondent is that he committed the acts enumerated in the Rule and that he is thereby guilty of a malpractice. My finding is that he has committed those acts except one. The question of law is whether the acts which the respondent has committed amount to a malpractice within the ambit of s.42(2) of the Judicature Act. It is, I think, proper to state at once that no allegation of dishonesty was made against the respondent in the conduct of his affairs with the complainant. On behalf of the Bar Association it was contended by learned President's Counsel that the word, in its context, means professional misconduct which is rooted in dishonour or moral turpitude; that malpractice constitutes the failure on the part of an attorney to practise his profession in an honourable or reputable way and that it imports or involves professional conduct of a dishonourable or turpitudinous nature. He contended that although every act of malpractice amounts to professional misconduct yet every act of professional misconduct does not amount to a malpractice. He submitted that professional misconduct not involving moral turpitude falls short of a malpractice. He further maintained that negligence per se (however serious it may be) would not amount to malpractice. He also drew our attention to s.35 of the Administration of Justice Law, No. 44 of 1973, which

immediately preceded s.42(2) of the Judicature Act, and pointed out that that section enlarged the scope of the disciplinary powers of this court to punish an attorney who was guilty of any deceit, malpractice, offence or *conduct unworthy of an attorney-at-law.* S.35, he stated, was wider than s.17 of the Courts Ordinance which preceded it and was introduced deliberately to catch up misconduct not involving moral turpitude. He submitted that as the legislature had omitted the words 'other conduct unworthy of an attorney-at-law' in s.42(2) of the Judicature Act, it was clear that the word 'malpractice' had to be given a restricted meaning so as to apply only to such misconduct where the element of mens rea was present. He further contended that the word 'deceit', being as it were the key-word, tainted or tarnished the meaning of the words following it, namely, 'malpractice, crime or offence', with the flavour of a turpitudinous nature. He concluded that in this view of the law the Rule did not disclose any malpractice on the part of the respondent. Learned Queen's Counsel for the respondent, relying on the definition of the word 'malpractice' in the Concise Oxford Dictionary (6th Edition, 1976), submitted that malpractice being the opposite of good practice connotes a 'wrong-doing' in law. It signifies an illegal or unlawful action by an attorney for his own benefit. He maintained that to constitute a malpractice, the act must be a wilful act which is contrary to law and done by an attroney in the course of his practice for his own benefit. On the other hand learned Solicitor-General, who appeared in support of the Rule and who was good enough to make available to us the benefits of his valuable research into the history of the disciplinary powers of the Supreme Court, himself relying on the definition of the work 'malpractice' contained in Black's Law Dictionary (Revised 4th Edition, 1968), maintained that malpractice means an act of professional misconduct or an unreasonable lack of skill or fidelity in the course of professional duty. He submitted that the grounds specified in s.42(2) of the Judicature Act warranting the exercise of disciplinary power are all species of misconduct, that malpractice is an act of professional misconduct and that the words 'any..... malpractice' would embrace every act of professional misconduct, whether turpitudinous or not and whether it is done wilfully or negligently. He cited several local as well as English decisions in support of his submissions. He also urged that in determining whether the respondent is guilty of malpractice or not, we should have regard to the facts and circumstances taken as a whole and not in isolation. Viewed in this light of the law and facts, he submitted that the entire

course of conduct of the respondent was most deplorable and unbecoming of an attorney. He thus maintained that the charge of malpractice had been made out against the respondent.

The Royal Charter of 1801, by Article XXIV, conferred on the Supreme Court of Judicature the authority and power 'to approve admit and enrol such and so many persons, being properly qualified according to such rules and qualifications as the said court shall for that purpose make and declare, to act both as advocates and proctors, or in either of such capacities, in the said court .... as to the said Supreme Court shall seem meet, and the said advocates and proctors, on reasonable cause to remove ....' It contained no express provision for the suspension of advocates and proctors from practice. The Royal Charter of 1833, by Article 17, authorised and empowered the Supreme Court 'to admit and enrol as advocates or proctors in the said Supreme Court, all such persons being of good repute as shall upon examination by one or more of the said Justices of the said Supreme Court, appear to be of competent knowledge and ability ....' This Charter, however, contained no express provision for either removal or suspension of advocates or proctors. The Courts Ordinance (Chap. 6, Vol. 1, L.E.), which came into force on 2.8.1890, empowered the Supreme Court to admit and enrol as advocates or proctors persons of good repute and of competent knowledge and ability. It also provided for the suspension from practice or removal from office any advocate or proctor who shall be guilty of any deceit, malpractice, crime or offence. This Ordinance was repealed by the Administration of Justice Law, No. 44 of 1973, which, as indicated above, by s.35 provided for the suspension and expulsion of attorneys who shall be guilty of any deceit, malpractice, offence or other conduct unworthy of an attorney-at-law. This Law by s.33 retained the same provisions as existed under the Courts Ordinance in regard to the admission and enrolment of attorneys. Chapter 1 of this Law which contained sections 33 and 35 was repealed by the Judicature Act which re-introduced substantially the same provisions that existed under the Courts Ordinance for the admission and enrolment of attorneys as well as for their suspension and expulsion. The legal grounds relating to the exercise of the disciplinary jurisdiction of this court being the same under the Courts Ordinance as well as the present Judicature Act, some guidance on the matter arising for our determination in this case may be obtained from decisions of the Supreme Court under the Courts Ordinance

which afford illustrations of instances of malpractice and indicate the nature and character of the misconduct which has been held to amount to malpractice.

In the case of in *Re Edwin Beven* (1) the respondent was required to show cause why he should not be suspended from practice on the charge that he has been guilty of malpractice in that he furnished to his clients books containing blank letters of demand which bore his signature and permitted them to fill in the said letters of demand the names of the debtors and the amount of claim against them and so to use them or suffer others to use them as if they actually emanated from him. He stated in defence that the practice of leaving such signed letters of demand in the hands of standing clients to be filled by them as the necessity arose was not uncommon. The Supreme Court took the view that this practice was wrong, 'reprehensible', 'improper' and 'unprofessional conduct'. He was suspended from practice for a period of three months. It is to be noted that no moral turpitude was alleged or disclosed in the conduct of the respondent which was condemned by court. In the case *Re Siman Appu's Plaint* (2) a rule was issued on a proctor to show cause why he should not be struck off the roll for improper conduct in that he countersigned a private plaint presented to the Police Court of Kegalle which had been drawn up by a petition drawer and not by himself. He explained the circumstances under which he came to countersign the complaint and stated that he was unaware that his conduct in signing a plaint drafted or drawn by any person other than the proctor countersigning was unprofessional. He was suspended from practice for a period of three months for 'unprofessional conduct' which obviously could only have been on the basis that he was guilty of malpractice, though the charge did not so specify. In the case of *In re a Proctor* (3) a proctor appropriated for his use certain monies belonging to his client. There was no evidence to show that in doing so he had any dishonest or criminal intention. His conduct appeared to be the result of great carelessness and negligence on his part of his client's interests and a failure to appreciate his duty in respect of trust funds received by him on his client's behalf. The court held that the appropriation of his client's money was 'an act of professional misconduct on his part, a malpractice within the meaning of s.17 of the Courts Ordinance'. He was suspended from practice for a period of six months. *In Solicitor-General v. Jayawickreme* (4) an advocate's professional conduct in dealing directly with a lay client without the intervention of a

proctor was held to be improper. He was held to be guilty of professional misconduct amounting to malpractice. In *In re S. Dharmalingam* (5) the respondent, a proctor, was given a sum of Rs. 75 to be deposited as survey fees in a partition action. He failed to do so and misappropriated the money. He was held to be guilty of malpractice. These decisions of the Supreme Court do not seem to support the contention advanced by learned President's Counsel for the Bar Association that there can be no malpractice unless the act of professional misconduct involves or is grounded in dishonour or turpitude. Nor do they lend support to the contention of learned Queen's Counsel for the respondent that malpractice postulates an illegal or unlawful act, a transgression of the law. I also see no justification for holding that the word 'deceit' (which learned President's Counsel labelled as the key word) taints the meaning of the words that follow it. If his contention is correct, no order of suspension or expulsion of an attorney can be made unless the crime or offence of which he is guilty involves an element of turpitude. No authority was cited in support of this proposition. On the contrary there is a decision which militates against such a proposition. In the case of *In re a Proctor* (6) a proctor was charged with and convicted of the offence of escaping from lawful custody, an offence punishable under s. 220A of the Penal Code. His detention was purely upon an order issued by the Governor under regulation 1 of the Defence (Miscellaneous No. 3) Regulations and not in consequence of a conviction on a criminal charge. The offence he committed, though criminal, did not involve any moral turpitude. He was suspended from practice for a period of two years as his conduct was considered to be most reprehensible and he, as an officer of the court, had shown a deplorable example.

The legal position in England in regard to conduct of solicitors which would warrant an expulsion from office or a suspension from practice is summarised in Halsbury's Laws of England, 4th Edition, Vol. 44 at para. 297 page 222:

> "Non-statutory grounds for disciplinary proceedings generally. Where a complaint is made to the Solicitors Disciplinary Tribunal in respect of a solicitor it is customary to allege that the solicitor has been guilty of conduct unbefitting a solicitor. Apart from criminal convictions, conduct that was such as to support an action for want of skill is not, generally speaking, sufficient to constitute a ground for striking a solicitor's name off the roll or for suspending him from

practice. For this purpose his conduct must be judged by the rules and standards of his profession, and it must be shown that he has done something which would be reasonably regarded as disgraceful or dishonourable by solicitors of good repute and competency, or of having been guilty of such conduct as to render him unfit to remain a member of an honourable profession or of conduct which is inexcusable and such as to be regarded as deplorable by his fellows in the profession...."

In support of the propositions laid down in this passage several references to English decisions have been cited. It is not necessary for me to refer to them except to cite the following passage from the judgment of Lord Denning, MR in *Re a Solicitor* (7).

"On the second charge (of professional misconduct in not keeping the books in proper form) counsel for the solicitor challenges the finding of professional misconduct. Counsel has quoted cases to show that professional misconduct should only be found when the solicitor has been guilty of conduct which is disgraceful or dishonourable and is such as to be condemned by his colleagues in the profession. I do not think that definition is exhaustive. In my opinion negligence in a solicitor may amount to professional misconduct if it is inexcusable and is such as to be regarded as deplorable by his fellows in the profession. We were referred to a case in New Zealand (*Re M – 1930, NZLR 285*) (8) in which it was said that the failure of the solicitor to have his trust accounts audited amounted to professional misconduct. In that case it was argued that his failure was due merely to carelessness, and that as there had been no dishonesty it was not professional misconduct. But the Court of Appeal in New Zealand held that neglect amounts to professional misconduct. So here, the negligence of the solicitor was reprehensible."

Thus in England negligent conduct on the part of a solicitor in the practice of his profession, if inexcusable, would amount to professional misconduct so as to render him liable to disciplinary action. Whilst under our law, no doubt, every negligent act on the part of an attorney in the pursuit of his profession would not amount to malpractice within the meaning of s.42(2) of the Judicature Act, our decisions have, in considering what misconduct amounts to malpractice, given a less stringent and more liberal construction to the words 'professional misconduct' or 'unprofessional conduct' than the

English decisions. Hence I can see no reason or justification for upholding the contention of learned President's Counsel that a negligent act, whatever its character, can never constitute malpractice under our law. Without endeavouring to embark on a precise definition of the word malpractice in s.42(2) of the Judicature Act, it is my view that to warrant the exercise of the disciplinary powers of this court on the ground that an attorney is guilty of malpractice the professional misconduct complained of must be of such a character as, in the opinion of this court, could fairly and reasonably be regarded as being improper or deplorable or reprehensible when judged in relation to the accepted standards of professional propriety and competence. Adopting this as an appropriate, but not a decisive, test I hold that, in the light of my findings enumerated above, the respondent is guilty of the charge of malpractice contained in the Rule.

What remains for consideration is the measure of punishment that should be imposed on the respondent. In so far as his conduct is concerned the only mitigating circumstance appears to be the absence of any element of moral turpitude on his part. As against this, his entire course of conduct betrays a deplorable indifference in the discharge of his professional duties and obligations towards his client, in consequence of which he has jeopardised the very interests he was retained to protect. Another grave objectionable feature in his conduct is the blunt and baseless accusations he made against his own client who while protesting his innocence afforded the respondent an opportunity of making amends which the respondent failed to avail himself of. If he had done so, he would not have placed himself in the situation in which he finds himself now. Far from showing any repentance for his conduct towards his client, he has, after the present complaint was made by his client to this court, threatened him with legal action and proceeded to level a further accusation against his client of having attempted to condone the dishonest conduct of a fiscal officer in a communication which he addressed to the Bar Association over another complaint lodged against him. His failure to make compliance with the direction and the order of this court is reprehensible and deserves to be severely condemned by this court. The affidavit that he filed in this court in answer to the charge laid against him in the Rule only helped to confirm his guilt. The sole authority of admitting and enrolling persons of good repute and competency as attorneys-at-law has been and is the Supreme Court. Once so admitted and enrolled they become officers of court whom

the court holds out to the public as its officers who can safely be entrusted with their affairs. The disciplinary powers vested in the court are designed to safeguard the interests of the public and the profession and to ensure that attorneys maintain the high standards of conduct expected of them as members of an honourable profession. Suitors and other members of the public have to be protected from improper conduct of attorneys who act in flagrant breach of their professional duties and obligations. It is necessary for me to add that the apologies which the respondent, through his counsel, so lavishly bestowed on this court became quite meaningless in the absence of any explanation of the circumstances which culminated in his default to comply with directions of this court. Any person who expects this court to accept an apology which is tendered by him must necessarily satisfy this court that it is one that is worthy of acceptance by this court. Otherwise it will remain a mere empty and bare apology to which no weight or consideration can be given. Taking into account all these matters I am of the opinion that the respondent should be suspended from practising his profession as an attorney-at-law for a period of two years. Accordingly we direct that the respondent be suspended from practice for a period of two years with effect from 1st January 1987. He will also deposit in this court a sum of Rs. 1,050 as costs of this application.

L. H. DE ALWIS, J. – I agree.

SENEVIRATNE, J.

This Court has issued a Rule in terms of section 42 of the Judicature Act No. 2 of 1978 against R. N. J. Arthenayake, Attorney-at-Law and Notary Public the respondent to this Application. The Rule contains several charges to wit–paragraphs (*b*), (*c*) and (*d*), (*e*), (*f*) and (*g*). After the charge (*g*), there is a charge that the respondent on being directed by His Lordship The Chief Justice, failed without sufficient cause to file observations as so directed and has thereby showed scant respect to this Court. After the recitation of the above charges the Rule sets out that the respondent has committed acts of malpractice within the ambit of section 42(2) of the Judicature Act No. 2 of 1978. I must at the outset observe that the learned President's Counsel for the Bar Association submitted that the allegation that the respondent has shown scant respect to this Court was not one of the charges against the respondent in this Rule. This

submission is not a valid submission. On the construction of the Rule issued against the respondent the above allegation is undoubtedly one of the charges against the respondent, though it had not been given a marking as a separate paragraph. In fact his allegation is a separate paragraph, and I shall for the purpose of my order mark it as (*h*)–

> "Whereas the written complaint lodged with this Court was forwarded to you,.....you have failed without sufficient excuse to file your observations as so directed and thereby shown scant respect to this Court".

I have had the advantage of perusing the findings of Atukorale, J. and I agree with him that the charges in paragraphs numbered (*c*) to (*g*) except (*e*) in the Rule and as (*h*) by me in this order have been established.

In my judgment I will deal with two submissions made by the learned Queen's Counsel and the President's Counsel for the respondent and the Bar Association respectively to wit–

> (1) the interpretation of the term "malpractice" in section 42(1) Judicature Act No. 2 of 1978 and (2) that this Court does not have any "inherent power" to deal with attorneys-at-law.

The Rule states that the "complaint made by the said A. C. Alles and your subsequent conduct discloses that you have committed the act of *malpractice* falling within the ambit of Section 42(2) Judicature Act No. 2 of 1978".

Learned President's Counsel on behalf of the Bar Association and learned Queen's Counsel on behalf of the respondent strenuously made submissions on the construction of the term "malpractice" on which this Rule is grounded. It is sufficient for this purpose of the order to begin with reference to section 17 of the Courts Ordinance No. 1 of 1889, which sets out that an attorney-at-law "who shall be guilty of deceit, *malpractice,* crime or offence may be suspended or removed.....". The next enactment which dealt with this matter is the Administration of Justice Law No. 44 of 1973. Section 35 of this Law sets out as follows:

> "Every attorney-at-law who shall be guilty of any deceit, *malpractice,* offence or other conduct unworthy of an attorney-at-law, may be suspended or removed.....".

The Administration of Justice Law was abrogated and the present law is contained in the Judicature Act No. 2 of 1978 section 42(2), which sets out as follows:

> "An attorney-at-law who shall be guilty of any deceit, *malpractice*, crime or offence may be suspended or removed.....".

It will be seen that the term "malpractice" in respect of an attorney-at-law has been common to all these enactments dealing with professional conduct of an attorney-at-law. Both, on behalf of the Bar Association and on behalf of the respondent, it was strenuously submitted that the term "malpractice", connotes conduct involving moral turpitude, that is turpitudinous conduct. In my view the words used in the above enactments pertaining to professional conduct of attorneys-at-law must be understood in the light of the plain meaning of the words as used in the ordinary English language. If any special meaning or connotation was to be attached to these words, then these enactments would have defined in an interpretation section what was deceit, malpractice. The prefix "mal" means bad, improper, illegal action, wrongdoing. Among the meanings attached to the word "malpractice" in the Concise Oxford Dictionary (6 ED. 1976) is– "wrongdoing". A study of the decisions pertaining to the Rules issued on attorneys-at-law, both in England and in Sri Lanka show that, the term "misconduct" has been used. It will be seen that in the local enactments referred to above the term "misconduct" is not included in the relevant sections, but the decisions of the Supreme Court have always used the term "misconduct". The prefix "mis"– "means badly, wrongly, improper, unfavourable". Thus, the word misconduct will mean bad conduct, improper conduct. The ex facie meaning of the words malpractice, misconduct, do not contain the element of moral turpitude. To consider these two terms involved moral turpitude, one has to graft that connotation into these two words which do not contain the meaning moral turpitude. No authority has been cited to show that the words–malpractice, misconduct have been held, by the authorities in England or in Sri Lanka to essentially involve the element of moral turpitude.

There is local authority which shows that the Supreme Court has not interpreted the word "malpractice" to involve an element of moral turpitude. The case of *Solicitor-General v. Jayawickreme (supra)* (4) was an instance of a Rule issued under section 17 of the Courts

Ordinance against an Advocate, who dealt directly and accepted fees from a lay client without the intervention of a Proctor. (This is a case before the amalgamation of the then two branches of the profession by the Administration of Justice Law No. 43 of 1973.) In the Judgment of Rose, C.J. it is stated that counsel on behalf of the Bar Council which was represented informed Court that the Bar Council always assumed such conduct as was disclosed in the proceedings as professional misconduct amounting to malpractice. Rose, C.J., Nagalingam, S.P.J. and Pulle, J. agreeing held that the respondent was "guilty of professional misconduct amounting to malpractice, and has thus rendered himself liable to the penalties prescribed by section 17 of the Courts Ordinance". *In the matter of a Proctor of the Supreme Court and in the matter of section 19 of the Courts Ordinance, 1889* (9) a Rule was issued against a Proctor on the ground that he wilfully neglected to tax his bill of costs against a client, who called upon him to do so under the direction of the Supreme Court. Drieberg, J. with whom Fisher, C.J. and Jayawardene, A.J. agreed, held that the Proctor was guilty of misconduct. The headnote shows that the Rule issued under section 19 of the Courts Ordinance on the Proctor was to show cause why he should not be suspended from practice or removed from the Roll of Proctors on the ground of misconduct. As stated earlier the term "misconduct" is not one included in the relevant section of the Courts Ordinance, presently section 17. The term used in the Courts Ordinance of 1889 and the subsequent like enactments is the term "malpractice". In the case *In re Jayawickrema, (supra)* (4) the Court used the term "misconduct" and held that such misconduct amounted to malpractice, the term in the relevant section of the Courts Ordinance. In the latter case of the *Rule on a Proctor* the Court has used the term misconduct as synonymous with the term malpractice in the relevant section of the Courts Ordinance. The other striking feature of these two cases is that the facts of both cases show that no moral turpitude as such was involved, i.e. the kind of moral turpitude involved in the term "deceit", "crime" or "offence" used in the relevant sections of the three enactments referred to above. Due to these reasons I hold that the term "malpractice" in section 42(2) of the Judicature Act No. 2 of 1978 does not necessarily involve the idea of moral turpitude or turpitudinous conduct. The word "malpractice" has been used in the section in its ordinary per se meaning.

My brother Atukorale, J. cites several decisions of the Supreme Court to illustrate instances in which the Supreme Court has held lawyers to be guilty of malpractice in respect of acts which did not involve turpitudinous conduct. One such case cited is the case of – *In re S. Dharmalingam (supra)* (5). I have to disagree with the interpretation of this case by Atukorale, J. On the facts of this case the Supreme Court sums up as follows:

> "We are satisfied that the respondent has been proved to be guilty of malpractice in that he misappropriated and failed to deposit in Court a sum of Rs. 75 given to him by his client for the purpose of being so deposited as survey fees in a partition action."

The facts in the case disclose criminal misappropriation an offence under section 386 Ceylon Penal Code, and the facts also come within the terms "crime or offence" in the Courts Ordinance.

Another submission made by the learned President's counsel for the Bar Association and the learned Queen's Counsel for respondent was that this Court has no inherent power now to deal with charges in respect of professional conduct of lawyers. Such power was now a statutory power found in the Judicature Act section 42(2). It was submitted that though at one time there may have been such inherent power in the Supreme Court, at present such power is granted to the Supreme Court by the Statute, as such there is no inherent power. The position in England is that the Courts in England always acted on the premises that it had inherent power to deal with the professional conduct of the lawyers practising in the Courts. In recent times there are Statutes granting such power, in respect of Solicitors, to the Courts in England, and in respect of Barristers the Courts have delegated its power to the Inns of Court. But still the position is that the Courts in England always act on the premise that, though there are such Statutes, and power has been delegated to the Inns of Court, that the Courts in England do still enjoy such inherent power. Halsbury's Laws of England, Vol. 44 (4th Ed.) Para. 252 – Disciplinary Jurisdiction, page 1911 sets out as follows:

> "The Supreme Court possesses an inherent disciplinary jurisdiction over the Solicitors, as being its officers. Under this

jurisdiction action may be taken against a solicitor both for his own misconduct and for actions of his clerk within the scope of his authority even where the solicitor is not personally implicated.

Note 2.–The High Court, the Crown Court, and the Court of Appeal respectively, or any division or Judge of these Courts, may, subject to the provisions of the Solicitors Act of 1974, exercise, the same jurisdiction in respect of Solicitors as any one of the Superior Courts of Law or equity from which the Supreme Court was constituted might have exercised immediately before the passing of the Supreme Court of Judicature Act of 1873 (repealed) in respect of any Solicitor, Attorney, or Proctor admitted to practise there: Solicitors Act 1974 Section 50 (2)."

Halsbury-Laws of England (4th Ed.) Vol. 44–Para. 1132 sets out the position or the inherent jurisdiction of the Courts–i.e. Powers of the Court over Counsel Barristers.

It has always been taken for granted that the conventions, practice and etiquette of the Ceylon Bar was moulded on the lines of such traditions, conventions and practices of the English Bar. In matters pertaining to lawyers, considered by the Supreme Court of Sri Lanka, also as officers of the Court, the Supreme Court and the Bar Council, now Bar Association, have always resorted to the traditions, conventions and practice of the English Bar in determining such like matters. T. Nadaraja–The Legal System of Ceylon In Its Historical Setting (1972), Chapter VI–Page 228–states as follows:

"Consequently, the organisation and the convention of the legal profession, the forms and ceremonial followed in the administration of justice.....tendered to adapt themselves to the English pattern."

In the case of *Brendon v. Spiro* (10) decided in 1937 it was held that–

"A judge of the High Court, before whom an action has been filed has inherent jurisdiction to entertain an application that a solicitor

who has acted for a party who, on the alleged ground of professional misconduct, pay personally the costs ordered to be paid by that party..... ."

There is, as far as it could be ascertainable a decision of the Supreme Court dealing with the inherent power of the Supreme Court in respect of Proctors. The case of *in re Moonesinghe* (11) was an application made by a proctor struck off the Roll for professional misconduct to be readmitted to the Bar. Wood Renton, C.J. decided as follows:

"No express power of reinstatement is conferred upon us by section 19 of the Courts Ordinance. But both in England and South Africa the view has been adopted that a Court which has the right to remove the name of a solicitor from the Rolls, has also an inherent discretionary power to readmit him where he has subsequently expiated the offence of which he may have been guilty and redeemed his character."

Learned counsel for the respondent sought to submit that the basis for re-admission of a lawyer struck off from the Roll, is that it is considered as a new admission. I do not agree with this submission as it is quite clear that a lawyer once struck off from the Roll is not admitted to the Bar on the same considerations as one seeking an admission to the Bar for the first time. Before a lawyer struck off is admitted to the bar, i.e. readmitted, he must show that "he has subsequently expiated the offence of which he may have been guilty and redeemed his character." This is the golden thread of the principle running through all readmissions to the Bar of those who have been struck off. From the Charter of 1833 to the Courts Ordinance 1889 there was no statutory provision enabling the Supreme Court to deal with the professional conduct of lawyers. Can it be said that during that hiatus any lawyer could have committed acts of professional malpractice/misconduct with impunity? In that situation the Supreme Court would have undoubtedly used its inherent power to deal with such a delinquent adopting the convention of England where the Courts had such inherent power.

I must firmly state that on my part I will not readily entertain a purely legal argument to restrict the accepted powers of this Court, which

this Court has traditionally and conventionally exercised unless it is shown to me that such power has been specifically restricted by Statute Law.

It has been submitted vehemently that there is no precedence for the issue of a Rule on charges as contained in this Rule. In respect of this argument I can only console myself, and also the learned counsel with this quotation from the book "Discipline of Law"–Lord Denning, M. R. as follows:

> "What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before we shall never get anywhere. The law will stand whilst the rest of the world goes on and that will be bad for both."

Lastly I must make the observation that with the increase of the numbers of the Sri Lanka Bar there is and there will be a proliferation of the instances of professional malpractice, as such it is in the interests of the Bar itself, and that of the public, that the relevant section 42(2) Judicature Act should be amended by the addition of the words "..... or other conduct unworthy of an attorney-at-law" which words were found in the now repealed like section 35 of the Administration of Justice Law No. 44 of 1973.

I agree with my brother Atukorale, J. that the respondent is guilty of the charges of malpractice set out in the Rule issued and I agree with sentence of suspension only (for two years) as no "deceit", "crime or offence" is involved, and I also agree with the order made re costs.

The Rule is affirmed.

Rule affirmed.

Respondent suspended for two years.