PIYADASA
v.
KURUKULASURIYA, ATTORNEY-AT-LAW

SUPREME COURT.
FERNANDO, J.,
DHEERARATNE, J. AND
WADUGODAPITIYA, J.
RULE 7/95 (D).
JUNE 17, 18 AND 21, 1996.

Attorney-at-Law – Malpractice – Judicature Act, Section 41 – Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules, 1988.

Piyadasa who was the defendant in a rent and ejectment case retained the respondent Attorney-at-Law in an appeal before the Court of Appeal. The Respondent failed to enter his appearance, give free dates and keep track of the case. Consequently, the appeal was decided against Piyadasa, who was unrepresented. Thereafter, the respondent failed to return the client's file of documents despite many letters and reminders by the client calling for the file.

Held:

The respondent is guilty of malpractice.

Case referred to:

Daniel v. Chandradeva [1994] 2 Sri L.R. 1.

PROCEEDINGS on Rule Nisi to remove Attorney-at-Law from roll of Attorneys-at-Law.

Aloy Ratnayake, P.C., with *Siva Narendran* for respondent.

C. Motilal Nehru, P.C. with *M. D. Silva* and *Ms. Joseph* for the Bar Association of Sri Lanka.

Kolitha Dharmawardena, D.S.G. in support of the Rule.

Cur. adv. vult.

July 22, 1996.
FERNANDO, J.

A Rule was issued on the respondent, who had been admitted and enrolled as an Attorney-at-Law in 1962, asking him to show cause why he should not be removed from the office of an Attorney-at-Law of the Supreme Court, or suspended from practice, on account of

malpractice falling within the ambit of section 42(1) of the Judicature Act, No. 2 of 1978, in that –

(a) in November 1985 he had been retained by one Piyadasa in Court of Appeal Case No. CA/LA 101/85, which was an application for leave to appeal against an order made in favour of Piyadasa, who was the defendant in District Court Tangalle Case No. 860/RE;

(b) he had been paid Rs. 4,200 by Piyadasa as fees for his appearances, for the preparation of objections, and for Counsel for argument;

(c) he had filed the objections, together with his proxy, and also made arrangements for Counsel to appear for Piyadasa on certain dates;

(d) however, he failed to arrange for any appearance for Piyadasa, or to attend Court himself, on 26.7.90, 13.11.90, 9.1.91, 4.9.91, 27.11.91, 18.9.92, 30.10.92 and 24.11.92, whilst the appellant was represented on all those dates;

(e) because of that default, the appeal was decided against Piyadasa, who was unrepresented; and

(f) thereafter he failed to reply to any of the letters sent to him by Piyadasa or to return Piyadasa's papers relating to the case;

and thereby acted in a manner detrimental and/or prejudicial to his client Piyadasa.

The respondent said that he had cause to show, and the matter was taken up for inquiry on 17th, 18th and 21st June 1996. In support of the Rule, the complainant, Piyadasa, and the Registrars of the Supreme Court and the Court of Appeal, gave evidence. The respondent gave evidence on his own behalf.

The evidence led established – and, indeed, the respondent admitted – the truth of the matters set out in (a), (b), (c) and (f) above, and that the appeal had been decided on 24.11.92 with Piyadasa being absent and unrepresented.

DEFAULT IN APPEARANCE

The disputed question of fact was whether the respondent failed to appear, or to arrange for an appearance, for Piyadasa on all or any of the dates set out in (d), and if so whether it was that default which resulted in the adverse decision of the Court of Appeal. It is not disputed that the plaintiff-appellant in CA/LA 101/85 did not obtain a variation of the order appealed against.

The evidence shows that Piyadasa retained the respondent in November 1985; that Piyadasa promptly paid him the full fee of Rs. 4,200/- called for by his letter dated 15.11.85; that letter stated that Rs. 1,050/- was for appearances by him on the notice returnable date (14.11.85), and the date for filing objections (4.12.85), and that the balance was for the preparation of objections and Counsel's fee for the argument; that the respondent filed his proxy, but did not take any steps to retain Counsel for the argument; that he neither entered his appearance by filling and tendering an appearance slip intended for that purpose, nor gave his free dates, to the registry in accordance with the practice of the Court of Appeal; and that he did not check the relevant appeal register maintained by the Court of Appeal or the monthly lists of pending appeals exhibited and available for inspection in the Court of Appeal registry. The journal entries in CA/LA 101/85, show that after Piyadasa's affidavit was filed on 13.1.86, the Court of Appeal registry took no steps to list the matter for over four years, until 26.7.90. It is not clear how it came to be listed on that day, and for what purpose: whether for hearing, or to fix a date for hearing; however, the respondent did not appear, and the Court fixed it for hearing on 11.10.90; inexplicably, it was next listed for 20.9.90, on which date the Court again fixed it for 11.10.90. On that day, Attorney-at-Law L. Hirimutugoda, appeared for Piyadasa, and the Court ordered that the case be listed "in due course on a date convenient to Counsel". The case was next listed on 13.11.90, and the respondent neither appeared nor arranged for any one else to appear; and the Court granted leave to appeal. That was an *ex parte* order, adverse to Piyadasa. The Court called for the original record from the District Court of Tangalle. Twice thereafter the case was listed even though the record had not been received – on 3.12.90, when Attorney-at-Law Hirimutugoda appeared, and

on 9.1.91, when no one appeared. On 9.1.91 too the Court ordered the matter "to be listed for argument on a date convenient to Counsel". Thereafter the record was received, and the matter came up on 4.9.91; again the respondent did not appear, and the Court directed listing "on a date suitable to Counsel". Despite three such orders, there is not even a suggestion by the respondent, or on his behalf, that either Attorney-at-Law Hirimutugoda or he informed the registry of any convenient dates at any time.

After 4.9.91, the case next came up on 27.11.91, in the respondent's absence; the Court directed that notice be issued on Piyadasa and his registered Attorney, naming the respondent, and again ordered listing "on a date convenient to Counsel". Two months later, although Piyadasa's address as given in the caption was "9, Sanghamitta Mawatha, Kandy, and presently of 9/1, Medaketiya Road, Tangalle", notice was sent by registered post to the Kandy address and not to Tangalle; and no notice was sent to the respondent. Thereafter the case came up on 18.9.92 and 30.10.92, the respondent being absent. On 30.10.92, the Court fixed the matter for 24.11.92, and directed that notice be sent to Piyadasa; again, notice was sent by registered post to the Kandy address. (Both notices were not returned). On 24.11.92 , the respondent did not appear, and the Court allowed the appeal, and sent the case back to the District Court of Tangalle. The respondent took no steps to file an application for relisting or for leave to appeal to the Supreme Court.

There has been a series of lapses by officials of the Court of Appeal registry, of a kind which inevitably adds to the delays, inconvenience and cost of litigation. In those circumstances, the failure of the respondent to appear on 26.7.90, 20.9.90, 3.12.90 and 9.1.91, cannot be regarded as culpable.

However, had the respondent entered his appearance and given his free dates, in all probability the case would have been listed on a date suitable to him; and if it was not, that would have been a sufficient ground for re-listing. There would have been no defaults on 13.11.90, 4.9.91, 27.11.91, 18.9.92, 30.10.92. and 24.11. 92. Despite avoidable lapses by the registry officials, it was thus the respondent who was principally responsible for those defaults, which resulted in

adverse orders being made on 13.11.90 and 24.11.92. His evidence indicated that he was awaiting some intimation from the Court of Appeal, but the practice of the Court clearly did not entitle a party or his Attorney-at-Law to any such notice. Nor can this Court treat his responsibility as any less simply because he retained Attorney-at-Law Hirimutugoda, for it is the respondent's position that Attorney-at-Law Hirimutugoda was only asked to appear on 11.10.90 and 3.12.90 and, thereafter, "to have an eye on the appeal list" – not that he was retained to argue the case. As the registered Attorney, it remained the respondent's responsibility to deal with the case (see *Daniel v. Chandradeva*).

Learned President's Counsel, on behalf of the Bar Association, submitted that these defaults did not amount to malpractice, because the case had been in "cold storage" in the Court of Appeal for over four years, and had thereafter been listed contrary to Court orders. In those circumstances, he argued, the respondent's lapse, if any, did not warrant any disciplinary action.

This contention ignores the facts. The defaults on six dates – namely 13.11.90, 4.9.91, 27.11.91, 18.9.92, 30.10.92, and 24.11.92 – are not attributable to lapses by the registry officials. What is even more serious is that this contention wholly fails to take account of the duty of diligence imposed on anyone who decides to practice in the Court of Appeal (and, indeed, in any Court) to familiarize himself, and comply, with the established practice and procedure of that Court. The respondent had been in practice for about 25 years when these defaults occurred. The fact that he appeared mainly in the Magistrate's Court is no excuse: he should not have agreed to accept the brief unless he could have attended to it with due diligence. He had a clear option – either to shoulder all the responsibilities which flowed from the proxy in his favour (see *Chandradeva*, at 11) or to retain Counsel and relieve himself of some part of that burden. He did not choose the second alternative even though his client had entrusted to him the full amount nominated by him (in his very first letter of 15.11.85) as Counsel's fee for argument. Unless and until some Counsel was retained, therefore, he was obliged to enter his appearance, give free dates, and keep track of the case; he was not justified in waiting for notices from the Court and reminders from his client.

The respondent was therefore in default of his basic obligation to exercise due diligence, now expressly recognised in Rules 10 and 15 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules, 1988.

Learned President's Counsel, on behalf of the respondent, referred to certain other matters, as having an exculpatory or mitigatory effect. First, he urged that the respondent had expressed reluctance to accept the brief, because he did not usually appear in the Court of Appeal and also because he preferred not to appear for clients from his own area. However, it was never suggested to Piyadasa in cross-examination that any such reluctance had been indicated. This does not mitigate his responsibility.

Second, he contended that Piyadasa was himself guilty of defaults and delays. Three matters were urged: not meeting the respondent prior to 4.12.85 to sign his affidavit, not responding to a letter sent by the respondent when the respondent felt that senior counsel should be retained, and not contacting the respondent despite two notices from Court. Although the respondent wrote to Piyadasa on 15.11.85, referring to the preparation of the objections, he made no mention of preparing or signing an affidavit and Piyadasa says that the respondent did not ask him to come to Colombo to sign an affidavit. In any event, this had no bearing on the ultimate judgment of the Court of Appeal. Although the respondent did testify that he had decided to retain senior counsel after the District Court record had been called for, all he said was that he had written to Piyadasa to come and meet him – but not that he told him why. Further, it was not suggested to Piyadasa that any such letter had been sent; and the respondent claimed that he neither kept a copy, nor made a note in his file about it. Not only is the respondent's version unacceptable, but any such letter was quite unnecessary because he had already received the nominated fee for counsel, and should have retained one. As for the notices, there is no reason to doubt Piyadasa's explanation that he did not receive the notices sent by Court to his former Kandy address, because by 1991 those premises had been forcibly seized by the Bank.

Thirdly, learned President's Counsel relied on the respondent's evidence that he had thought the appeal would be over in three or

four months; that after about 18 months Piyadasa met him, whereupon he told Piyadasa not to worry about the case; and that he offered to get an order expediting the case, but that Piyadasa wanted it dragged out as long as possible. Piyadasa's evidence was that on three occasions before 24.11.92 he had met the respondent in Colombo, and inquired about the case; the respondent had reassured him, saying that he need not come for the case, that the respondent had done everything necessary for the case, and that he had nothing to fear. He denied the suggestion that he wanted the case dragged on, and, as pointed out later in this judgment, the respondent failed to reply to Piyadasa's letter of 12.12.93. But even if the respondent is believed, that would have made no difference to his obligation to appear at the hearing, particularly as he admitted telling Piyadasa not to worry about the case.

It was next submitted that the respondent's absence made no difference; that the Court of Appeal had looked at the question of notices very carefully, and had followed an unreported judgment of the Supreme Court in reaching its decision. The respondent says that he had left Colombo on 20.11.92; that he returned on 24.11.92 at 12.00 noon, and saw the appeal list in the "Daily News"; that he rushed to the Court of Appeal office to verify what had happened, and if necessary to get the case relisted; that he realised that this was not possible as Piyadasa had been twice noticed; that the next alternative was to file an application for leave to appeal to the Supreme Court, but that, having read the signed judgment of the Court of Appeal, he found that it was based on a judgment of the Supreme Court, and therefore decided not to pursue that course of action – all this within three or four days, and without any attempt to communicate with his client. He adds that he made this decision after consulting a senior lawyer.

From what has already been noted, it is clear that if the Court of Appeal had scrutinized the notices, it would have found that they had not been sent to Piyadasa's current address. Further the Court made an observation that none of the respondents were present, and that they were absent and unrepresented on several previous dates notwithstanding notices issued by the Court. But the record shows that this was mistaken; at the outset notice was sought and issued

only on the 1st respondent (Piyadasa); and on 27.11.91 notice was ordered on the 1st respondent, and not the others. It seems that the Court did not probe the issue of notices. If the Court of Appeal judgment depended on notices having been properly issued, a case might have been made for relisting on the basis that the judgment was procedurally flawed. As for the argument that the judgment was correct on the merits, and that the respondent's lapses made no difference, that would allow counsel to play the part of the Judge. On 27.11.91, the Court of Appeal referred to the (unreported) judgment of this Court, and expressed the view "that the respondent to this appeal should be heard." When the Court itself considered assistance necessary, can an Attorney-at-Law seek to excuse his default in appearance by saying that his appearance was not needed? The respondent's professional obligation was to appear, and default cannot be excused or mitigated by such speculation about the result of litigation. If he had really believed that the unreported Supreme Court judgment was conclusive, then between 27.11.91 and 24.11.92 he should have informed his client that that was his view and advised him not to contest the appeal.

Further, it is not likely that a signed copy of the Court of Appeal judgment was available so soon; the judgment of the Supreme Court which the Court of Appeal followed was then not reported. But even assuming that he was able to peruse the two judgments, and to make them available to senior counsel, yet he took the decision not to pursue the matter without any communication to and discussion with his client. Even thereafter, he did not inform his client: in answer to a leading question in evidence-in-chief, whether he had informed Piyadasa about what had happened, all he said was that he had sent a letter asking Piyadasa to come and meet him. He said that he had no copy of this letter, and in cross-examination President's Counsel did not even suggest to Piyadasa that any such letter had been sent.

The respondent said that in March 1993, quite by chance, he had met Piyadasa, and told him what had happened; he asked why, despite two notices from the Court, Piyadasa had not contacted him, but that Piyadasa seemed unconcerned. This, too, had not been

put to Piyadasa in cross-examination, and I cannot accept that evidence.

Counsel's fifth argument was that Piyadasa had suffered no damage, because he continued to remain in occupation of the premises from 1985 to 1992, and even thereafter, as the proceedings continued in the District Court. However, there was never any risk that the Court of Appeal proceedings could result in an order for Piyadasa's ejectment, and so his continuing occupation cannot mitigate the respondent's default. In fact, the respondent's defaults resulted in the alteration of a finding in his favour, and thus he did suffer some disadvantage in the subsequent District Court proceedings.

Lastly Counsel submitted that Piyadasa complained to this Court through improper motives in the mistaken belief that the respondent had acted in collusion with the other party, and also in an endeavour to extort some payment from the respondent.

This allegation of collusion arose from Piyadasa's evidence that in September 1993 he met the respondent, and again inquired about the case, whereupon the respondent said "Oh, you are coming from Ampara, isn't it?", and undertook to send him particulars about the case within a fortnight, but failed to do so. Thereafter in November 1993, Piyadasa learned from his Attorney-at-Law at Tangalle that the record had been sent back to Tangalle, and found that the appeal had been allowed. He then wrote to the respondent on 12.12.93 referring to this (as well as the three meetings before 24.11.92) and stated that the respondent's question about Ampara gave rise to a serious suspicion. In his letter he did not state what that suspicion was, but his evidence shows that he suspected that the respondent had acted in collusion with his opponent because the plaintiff-appellant was from Ampara, while Piyadasa was from Tangalle. In that letter, Piyadasa also threatened to take legal action against the respondent for the loss he had suffered. The respondent says he did not reply to this letter because of this serious allegation of collusion. In the result, Piyadasa's version of this meeting (and of the previous meetings) was not denied by the respondent at the earliest

opportunity, but only after these proceedings commenced. While I accept Piyadasa's evidence, I must observe that even if Piyadasa was wholly unjustified in inferring collusion, that did not vitiate his complaint in other respects.

As for the allegations of extortion, learned President's Counsel suggested in cross-examination to Piyadasa that he had discussed his grievance with Mr. Ronnie de Mel and had wanted a sum of money to settle the dispute. This Piyadasa stoutly denied. The respondent neither testified that Mr. de Mel had given him any such information nor called Mr. de Mel to give evidence. I hold that none of the matters relied on by the learned President's Counsel for the Respondent excuses or mitigates his default. His failure to inform his client, and to file an application for relisting or for leave to appeal aggravates his default.

FAILURE TO RETURN PAPERS

Piyadasa further testified that he needed the file or papers (which admittedly had been handed over to the respondent in November 1985) for the purpose of the District Court proceedings. He says he first made a telephone call and left a message with a member of the respondent's household (whom he did not identify); he followed this up with a polite, reply-paid, telegram on 1.3.94, asking for an appointment to collect the file; and when there was no response, he sent a strongly worded letter dated 23.3.94 – specifically alleging collusion with his opponent, demanding the return of his file, and threatening legal action. This was copied to various officials.

On the directions of this Court, by letter dated 25.8.94 the Registrar called for the 'Respondent's observations' on that letter; on 23.9.94 the respondent asked for time "as the file relating to the subject has been misplaced" by him. He sent a reply, dated 24.10.94, which made no reference to the file, and on being reminded, he replied on 18.11.94 that the papers were with Attorney-at-Law Hirimutugoda and that when he received Piyadasa's telegram, he asked Attorney-at-Law Hirimutugoda to trace it, so that he could return it, but that so far the latter had failed to do so.

In his evidence in this Court, he said that Attorney-at-Law Hirimutugoda had returned the file to him after appearing on 3.12.90, but that he gave the file again to Attorney-at-Law Hirimutugoda after the order of 24.11.92. However, quite inconsistently, he stated that he wanted to get Piyadasa down and to ask why Piyadasa had insulted him; and that if Piyadasa had spoken cordially to him, he would have returned the file. But even when giving evidence he said he did not have the file.

I hold that the respondent wilfully refused to return the file of documents which was his client's property and which he had no right to retain, and that this constituted malpractice.

CONCLUSION

I hold that the charge of malpractice has been established beyond reasonable doubt. The Rule is therefore made absolute.

The respondent's evidence discloses other unsatisfactory features in regard to his professional work. He failed to keep a record of the disbursements made out of the fee paid to him for various purposes, and of the communications with his client. Further by his letter dated 6.12.85 he asked Piyadasa to place his signature on an affidavit, and to return it for signature thereafter by a Justice of the Peace in Colombo. Taking all the circumstances into consideration, in the interests of the administration of justice, the public, and the profession, I order that the respondent be suspended from practice until 31.12.97. The Registrar is directed to inform the Registrar-General of this order.

DHEERARATNE, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Rule made absolute,
Respondent suspended from practice.