R.D. Saxena vs Balram Prasad Sharma on 22 August, 2000

Author: K.T. Thomas

Bench: K.T. Thomas

PETITIONER:
R.D. SAXENA

Vs.

RESPONDENT:
BALRAM PRASAD SHARMA

DATE OF JUDGMENT: 22/08/2000

BENCH:
K.T. Thomas

JUDGMENT:

THOMAS, J.

L...I...T.....T.....T.....T.....T.....T.....T..J The main issue posed in this appeal has sequential importance for members of the legal profession. The issue is this: Has the advocate a lien for his fees on the litigation papers entrusted to him by his client? In this case the Bar Council of India, without deciding the above crucial issue, has chosen to impose punishment on a delinquent advocate debarring him from practicing for a period of 18 months and a fine of Rs.1000/-. The advocate concerned was further directed to return all the case bundles which he got from his client respondent without any delay. This appeal is filed by the said advocate under Section 38 of the Advocates Act, 1961.

As the question involved in this appeal has topical importance for the legal profession we heard learned counsel at length. To appreciate the contentions we would present the factual backdrop as under:

> Appellant, now a septuagenarian, has been practicing as an advocate mostly in the courts at Bhopal, after enrolling himself as a legal practitioner with the State Bar Council of Madha Pradesh. According to him, he was appointed as legal advisor to the Madhya Pradesh State Co- operative Bank Ltd. (Bank, for short) in 1990 and the Bank continued to retain him in that capacity during the succeeding years. He was also engaged by the said Bank to conduct cases in which the Bank was a party. However, the said retainership did not last long. On 17.7.1993 the Bank terminated

the retainership of the appellant and requested him to return all the case files relating to the Bank. Instead of returning the files the appellant forwarded a consolidated bill to the Bank showing an amount of Rs.97,100/- as the balance payable by the Bank towards the legal remuneration to which he is entitled. He informed the Bank that the files would be returned only after setting his dues.

Correspondence went on between the appellant and the Bank regarding the amount, if any, payable to the appellant as the balance due to him. Respondent Bank disclaimed any liability outstanding from them to the appellant. The dispute remained unresolved and the case bundles never passed from appellants hands. As the cases were pending the Bank was anxious to have the files for continuing the proceedings before the courts/tribunals concerned. At the same time the Bank was not disposed to capitulate to the terms dictated by the appellant which they regarded as grossly unreasonable. A complaint was hence filed by the Managing Director of the Bank, before the State Bar Council (Madhya Pradesh) on 3.2.1994. It was alleged in the complaint that appellant is guilty of professional misconduct by not returning the files to his client.

In the reply which the appellant submitted before the Bar Council he admitted that the files were not returned but claimed that he has a right to retain such files by exercising his right of lien and offered to return the files as soon as payment is made to him.

The complaint was then forwarded to the Disciplinary Committee of the District Bar Council. The State Bar Council failed to dispose of the complaint even after the expiry of one year. So under Section 36-B of the Advocates Act the proceedings stood transferred to the Bar Council of India. After holding inquiry the Disciplinary Committee of the Bar Council of India reached the conclusion that appellant is guilty of professional misconduct. The Disciplinary Committee has stated the following in the impugned order:

On the basis of the complaint as well as the documents available on record we are of the opinion that the Respondent is guilty of professional misconduct and thereby he is liable for punishment. The complainant is a public institution. It was the duty of the Respondent to return the briefs to the Bank and also to appear before the committee to revert his allegations made in application dated 8.11.95. No such attempt was made by him.

In this appeal learned counsel for the appellant contended that the failure of the Bar Council of India to consider the singular defence set up by the appellant i.e. he has a lien over the files for his unpaid fees due to him, has resulted in miscarriage of justice. The Bank contended that there was no fee payable to the appellant and the amount shown by him was on account of inflating the fees. Alternatively, the respondent contended that an advocate cannot retain the files after the client

terminated his engagement and that there is no lien on such files.

We would first examine whether an advocate has lien on the files entrusted to him by the client. Learned counsel for the appellant endeavoured to base his contention on Section 171 of the Indian Contract Act which reads thus:

Bankers, factors, wharfingers, attorneys of a High Court and policy- brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

Files containing copies of the records (perhaps some original documents also) cannot be equated with the goods referred to in the section. The advocate keeping the files cannot amount to goods bailed. The word bailment is defined in Section 148 of the Contract Act as the delivery of goods by one person to another for some purpose, upon a contract that they shall be returned or otherwise disposed of according to the directions of the person delivering them, when the purpose is accomplished. In the case of litigation papers in the hands of the advocate there is neither delivery of goods nor any contract that they shall be returned or otherwise disposed of. That apart, the word goods mentioned in Section 171 is to be understood in the sense in which that word is defined in the Sale of Goods Act. It must be remembered that Chapter-VII of the Contract Act, comprising sections 76 to 123, had been wholly replaced by the Sales of Goods Act, 1930. The word goods is defined in Section 2(7) of the Sales of Goods Act as every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached, to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Thus understood goods to fall within the purview of Section 171 of the Contract Act should have marketability and the person to whom it is bailed should be in a position to dispose it of in consideration of money. In other words the goods referred to in Section 171 of the Contract Act are saleable goods. There is no scope for converting the case files into money, nor can they be sold to any third party. Hence, the reliance placed on Section 171 of the Contract Act has no merit.

In England the solicitor had a right to retain any deed, paper or chattel which has come into his possession during the course of his employment. It was the position in common law and it later recognized as the solicitors right under Solicitors Act, 1860. In Halsburys Laws of England, it is stated thus (vide paragraph 226 in volume 44): 226. Solicitors rights. At common law a solicitor has two rights which are termed liens. The first is a right to retain property already in his possession until he is paid costs due to him in his professional capacity, and the second is a right to ask the court to direct that personal property recovered under a judgment obtained by his

exertions stand as security for his costs of such recovery. In addition, a solicitor has by statute a right to apply to the court for a charging order on property recovered or preserved through his instrumentality in respect of his taxed costs of the suit, matter or proceeding prosecuted or defended by him.

Before India attained independence different High Courts in India had adopted different views regarding the question whether an advocate has a lien over the litigation files kept with him. In P. Krishnamachariar vs. The Official Assignee of Madras, (AIR 1932 Madras 256) a Division Bench held that an advocate could not have such a lien unless there was an express agreement to the contrary. The Division Bench has distinguished an earlier decision of the Bombay High Court in Tyabji Dayabhai & Co. vs. Jetha Devji & Co. (AIR 1927 Bombay 542) wherein the English law relating to the solicitors lien was followed. Subsequently, a Full Bench of the Madras High Court in 1943 followed the decision of the Division Bench. A Full Bench of the Patna High Court in In re B.N. Advocate in the matter of Misc. Judl. Case No.18/33 (AIR 1933 Pat 571) held the view that an advocate could not claim a right to retain the certified copy of the judgment obtained by him on the premise that an appeal was to be filed against it. Of course the Bench said that if the client had specifically instructed him to do so it is open to him to keep it.

After independence the position would have continued until the enactment of the Advocates Act 1961 which has repealed a host of enactments including Indian Bar Council Act. When the new Bar Council of India came into existence it framed Rules called the Bar Council of India Rules as empowered by the Advocates Act. Such Rules contain provision specifically prohibiting an advocate from adjusting the fees payable to him by a client against his own personal liability to the client. As a rule an Advocate shall not do anything whereby he abuses or takes advantage of the confidence reposed in him by his client,(vide Rule

24). In this context a reference can be made to Rules 28 and 29 which are extracted below:

28. After the termination of the proceeding, the Advocate shall be at liberty to appropriate towards the settled fee due to him, any sum remaining unexpended out of the amount paid or sent to him for expenses, or any amount that has come into his hands in that proceeding.

29. Where the fee has been left unsettled, the Advocate shall be entitled to deduct, out of any moneys of the client remaining in his hands, at the termination of the proceeding for which he had been engaged, the fee payable under the rules of the Court, in force for the time being, or by then settled and the balance, if any, shall be refunded to the client.

Thus, even after providing a right for an advocate to deduct the fees out of any money of the client remaining in his hand at the termination of the proceeding for which the advocate was engaged, it is important to notice that no lien is provided on the litigation files kept with him. In the conditions prevailing in India with lots of illiterate people among the litigant public it may not be advisable also to permit the counsel to retain the case bundle for the fees claimed by him. Any such lien if permitted would become susceptible to great abuses and exploitation.

There is yet another reason which dissuades us from giving approval to any such lien. We are sure that nobody would dispute the proposition that the cause in a court/tribunal is far more important for all concerned than the right of the legal practitioner for his remuneration in respect of the services rendered for espousing the cause on behalf of the litigant. If a need arises for the litigant to change his counsel pendente lite, that which is more important should have its even course flowed unimpeded. Retention of records for the unpaid remuneration of the advocate would impede such course and the cause pending judicial disposal would be badly impaired. If a medical practitioner is allowed a legal right to withhold the papers relating to the treatment of his patient which he thus far administered to him for securing the unpaid bill, that would lead to dangerous consequences for the uncured patient who is wanting to change his doctor. Perhaps the said illustration may be an over-statement as a necessary corollary for approving the lien claimed by the legal practitioner. Yet the illustration is not too far-fetched. No professional can be given the right to withhold the returnable records relating to the work done by him with his clients matter on the strength of any claim for unpaid remuneration. The alternative is that the professional concerned can resort to other legal remedies for such unpaid remuneration.

A litigant must have the freedom to change his advocate when he feels that the advocate engaged by him is not capable of espousing his cause efficiently or that his conduct is prejudicial to the interest involved in the lis, or for any other reason. For whatever reason, if a client does not want to continue the engagement of a particular advocate it would be a professional requirement consistent with the dignity of the profession that he should return the brief to the client. It is time to hold that such obligation is not only a legal duty but a moral imperative.

In civil cases, the appointment of an advocate by a party would be deemed to be in force until it is determined with the leave of the court, (vide order 3, Rule 4(1) of the Code of Civil Procedure). In criminal cases, every person accused of an offence has the right to consult and be defended by a legal practitioner of his choice which is now made a fundamental right under Article 22(1) of the Constitution. The said right is absolute in itself and it does not depend on other laws. In this context reference can be made to the decision of this Court in State of Madhya Pradesh vs. Shobharam and ors. (AIR 1966 SC 1910). The words of his choice in Article 22(1) indicate that the right of the accused to change an advocate whom he once engaged in the same case, cannot be whittled down by that advocate by withholding the case bundle on the premise that he has to get the fees for the services already rendered to the client.

If a party terminates the engagement of an advocate before the culmination of the proceedings that party must have the entire file with him to engage another advocate. But if the advocate who is changed midway adopts the stand that he would not return the file until the fees claimed by him is

paid, the situation perhaps may turn to dangerous proportion. There may be cases when a party has no resource to pay the huge amount claimed by the advocate as his remuneration. A party in a litigation may have a version that he has already paid the legitimate fee to the advocate. At any rate if the litigation is pending the party has the right to get the papers from the advocate whom he has changed so that the new counsel can be briefed by him effectively. In either case it is impermissible for the erstwhile counsel to retain the case bundle on the premise that fees is yet to be paid.

Even if there is no lien on the litigation papers of his client an advocate is not without remedies to realise the fee which he is legitimately entitled to. But if he has a duty to return the files to his client on being discharged the litigant too has a right to have the files returned to him, more so when the remaining part of the lis has to be fought in the court. This right of the litigant is to be read as the corresponding counterpart of the professional duty of the advocate.

Misconduct envisaged in Section 35 of the Advocates Act is not defined. The section uses the expression misconduct, professional or otherwise. The word misconduct is a relative term. It has to be considered with reference to the subject matter and the context wherein such term occurs. It literally means wrong conduct or improper conduct.

Corpus Juris Secundum, contains the following passage at page 740 (vol.7):

> Professional misconduct may consist in betraying the confidence of a client, in attempting by any means to practise a fraud or impose on or deceive the court or the adverse party or his counsel, and in fact in any conduct which tends to bring reproach on the legal profession or to alienate the favourable opinion which the public should entertain concerning it.
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> The expression professional misconduct was attempted to be defined by Darling, J., in In re A Solicitor ex parte the Law Society [(1912) 1 KB 302] in the following terms:
>
> It it is shown that an Advocate in the pursuit of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to say that he is guilty of professional misconduct.
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> In this context it is to be mentioned that the aforesaid definition secured approval by the Privy Council in George Frier Grahame vs. Attorney-General, Fiji,(1936 PC 224). We are also inclined to take that wide canvass for understanding the import of the expression misconduct in the context in which it is referred to in Section 35 of the Advocates Act.
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> We, therefore, that the refusal to return the files to the client when he demanded the same amounted to misconduct under Section 35 of the Act. Hence, the appellant in the present case is liable to punishment for such misconduct.

However, regarding the quantum of punishment we are disposed to take into account two broad aspects: (1) this court has not pronounced, so far, on the question whether advocate has a lien on the files for his fees. (2) the appellant would have bona fide believed, in the light of decisions of certain High Courts, that he did have a lien. In such circumstances it is not necessary to inflict a harsh punishment on the appellant. A reprimand would be sufficient in the interest of justice on the special facts of this case.

We, therefore, alter the punishment to one of reprimanding the appellant. However, we make it clear that if any advocate commits this type of professional misconduct in future he would be liable to such quantum of punishment as the Bar Council will determine and the lesser punishment imposed now need not be counted as a precedent.

Appeal is disposed of accordingly.