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MR. JOHN D'SOUZA

v.

EDWARD ANI

DECEMBER 17, 1993

B

[S. RATNAVEL PANDIAN AND P.B. SAWANT, JJ.]

Advocates Act, 1961—Section 35—Advocate found guilty of not returning will be drafted by him and kept in his safe custody despite written requests held, guilty of professional misconduct.

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Advocates Act, 1961—Disciplinary proceeding—Burden of proof—Position reiterated that person making the charge of misconduct has the burden of proving it.

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Legal Profession—Advocate and Client—Client giving documents for safe custody gives them on trust—Advocate duty bound to return them on demand.

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The Respondent made a complaint of professional misconduct to the Karnataka State Bar Council alleging that the Appellant, an Advocate who had drafted the will of his late mother-in-law and had kept it in his safe custody after entering it in his register of wills and giving a receipt had not returned the will in spite of written requests. It was further alleged that when the new lawyer for the testatrix requested the Appellant for the will he denied having it, and thereafter the testatrix was obliged to make another will.

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The State Bar Council exonerated the Appellant but on appeal by the Respondent, the Bar Council of India held the Appellant guilty of professional misconduct and awarded him the punishment of suspension from practice for one year. The appellant thereupon preferred the present appeal.

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Dismissing the appeal, this Court

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HELD :1. In a disciplinary proceeding of this nature the rule is that the charging party has the burden of proving the charge of misconduct of the Respondent. [1022-F]

2. On an overall evaluation of the facts and circumstances of the case, the Respondent had proved that the Appellant had not returned the will though demands were made first by the testatrix, then by her new lawyer and then by the Respondent who held a power of attorney from her and was the executor appointed under the second will. [1022-F-H]

3. The conduct of the Appellant in not returning the will even on demand is unworthy of an advocate belonging to a noble profession. The Appellant had no right to withhold the will. On the other hand he was bound in duty to return the said will when demanded because the instrument was entrusted to his custody by the testatrix only on trust. [1022-H, 1023-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3206 (NM) of 1993.

From the Judgment and Order dated 4.6.90 of the Disciplinary Committee of the Bar Council of India in D.C. Appeal No. 24 of 1990.

Ram Jethamalani, Ms. Lata Krishnamurthi, Amani Sahu Paul D' Souza for the Appellant.

Edward Ani, Respondent-in-person.

The Judgment of the Court was delivered by

S. RATNAVEL PANDIAN, J. The appellant who is an Advocate in Bangalore practising since 1942 was proceeded against for professional misconduct on the basis of a complaint dated 7th November, 1986 lodged by the respondent, Mr. Edward Ani with the Karnataka State Bar Council (Bangalore) under Section 35 of the Advocates Act alleging that the appellant with whom a Will dated 1.7.1968 executed by his mother-in-law, Mrs. Mary Raymond was entrusted for safe custody against receipt dated 5th July, 1968 bearing serial no. 576 in his register of Wills (marked as Ex.P1) refused to return that Will in spite of two letters dated 4.1.1982 and 15.4.1986 demanding the appellant to hand over the Will kept in his custody and that the appellant thereby has committed professional misconduct.

The synoptical resumption of the case which had given rise to this appeal may be briefly stated :

One, Mr. N.E. Raymond and his wife, Mrs. Mary Raymond were the

A clients of the appellatant. Mrs. mary Raymond during her life time got her Will drafted by the appellatant and entrusted the same after execution with the appellatant in respect of which the appellatant had given a receipt dated 5.7.1968 vide Ex. P.1. The fact that the Will has been deposited with the appellatant is supported by an entry in the register of Wills maintained by the appellatant. The executrix had appointed her husband as the executor.

B Her husband, N.E. Raymond died in the year 1974. Mrs. Mary Raymond changed her lawyer, the appellatant herein and engaged one Mr. George DaCosta as her advocate. According to the respondent, who is none other than the son-in-law of Mrs. Mary Raymond and who claims to be the legal representative of her estate that when Mr. George DaCosta requested the

C appellatant in 1978 to let him have his client's Will, the appellatant denied having it. Thereafter, Mrs. Mary Raymond was obliged to make another Will prepared by Mr. George DaCosta on 24.6.78.

It is the case of the respondent that he wrote two letters to the appellatant of which one dated 4th January 1982 was sent on behalf of Mrs.

D Mary Raymond under Certificate of Posting from Manchester (U.K.) marked as Ex. P.6 and another letter dated 15th April 1986 by himself under Registered post with A/D marked as Ex. P.8. Both the letters were addressed to the appellatant requesting him to return the Will dated 1.7.68. But the appellatant did not reply to both the letters and kept conspicuous

E silence.

The second will executed in 1978 was probated on 21.2.1984 after the death of Mrs. Mary Raymond on 29.10.1983.

On being aggrieved at the conduct of the appellatant in not replying to his letters and returning the Will kept in his custody, the respondent

F filed a complaint dated 7.11.1986 before the Karnataka Bar Council. By a resolution No. 110 of 1987 on 12.7.1987, the State Council rejected that complaint holding that there was no *prima facie* case made out. The respondent preferred a revision before the Bar Council of India which by

G its Order dated 20.11.1988 set aside the Order of the State Bar Council and allowed the revision holding that there existed prime facie case of misconduct against the respondent (Advocate) and remitted the matter to the Disciplinary Committee of the State Council.

Pursuant to the order of the Bar Council of India, the parties

H appeared before the Disciplinary Committee of the State Bar Council. The

appellant filed his reply on 3.7.1989 to which the respondent filed his rejoinder on 12.8.1989. The Disciplinary Committee of the State Bar Council by its order dated 7.6.1990 again held that the respondent was not guilty of professional or other misconduct within the meaning of section 35 of the Advocates Act, 1961 as alleged by the appellant.

Again being dissatisfied with the said order of the Disciplinary Committee, the appellant preferred an appeal before the Disciplinary Committee of the Bar Council of India which by its order 4.6.1993, disagreed with the findings of the State Bar Council and allowed the appeal by setting aside the order dated 7.6.1990 and held that "the complainant (the present appellant), has succeeded in proving that the respondent committed professional misconduct and is hereby liable under Section 35 of the Advocates Act, 1961". The Disciplinary Committee further suspended the appellant herein from practice for a period of one year.

The appellant filed a stay petition No. 24/1993 under Section 14(2) of the Advocates Act before the Disciplinary Committee of the Bar Council of India praying to stay the operation of its order dated 4.6.1993 suspending him from practice, so as to enable him to prefer an appeal before this Court. The Disciplinary Committee of the Bar Council of India vide its order dated 23.6.1993 suspended the impugned order for one month from the date of communication of the order.

The present appeal has been preferred by the appellant along with an application for stay. When the matter was mentioned on 20. 7.193, this Court stayed the operation of the impugned Order.

Mr. Ram Jethamalani, the learned senior counsel appearing for the appellant after taking us through the relevant documents assailed the impugned findings contending that the respondent has not substantiated the allegations that Mr. DaCosta requested the appellant to let him have the Will of Mrs. Mary Raymond entrusted to him and that the appellant denied of having it. On the other hand, the letter dated 1.5.1990 written by Mr. George DaCosta to the Chairman, Disciplinary Committee of Karnataka Bar Council stating, "I should like to clarify my own position and to emphasize and state very clearly that at no time did I make any request of John D'Souza for the return of her 1968 Will nor did she require it. There was, therefore, no question arising for Mr. John D'Souza having denied being in possession of it. Mr. John D'Souza made no such denial

A " unambiguously falsifies the allegations of the respondent.

According to Mr. Jethamalani, the Will in question had been revoked and returned on 13.1.1982 presumably to Mrs. Mary Raymond who was then alive. That fact is supported by an endorsement made by the appellant's wife in the register of Wills and that even assuming that the Will had not been returned, the appellant cannot be said to have committed any breach of trust by retaining the revoked will which after its revocation had become a mere scrap-paper; that the appellant cannot even by imagination said to have entertained any dishonesty or oblique motive or gained any pecuniary profit by keeping the revoked Will which had become *res nullius* and indisputably was a worthless paper having no value.

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In passing, Mr. Jethamalani stated that his client though admits of having received the second letter (Ex. P-8) disputes the demand of Will by his alleged first letter dated 4.1.1982 and adds that the respondent has not proved the charges by examining Mr. DaCosta.

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The respondent appearing in person took much pains to sustain the findings of the Disciplinary Committee of the Bar Council of India submitting *inter-alia*, that the appellant who kept the Will in his custody was in the nature of a Trustee and as such he was entitled to return the Will on demand and that the question of oblique motive or private gain has no relevance. As neither the testatrix, Mrs. Mary Raymond nor the respondent being the legal representative of the estate of the testatrix had abandoned the Will which was their property, it cannot be said that Will had become *res nullius*. He asserts that the appellant should have received the first letter of atleast deemed to have received that letter (Ex.P-6) which had been posted from Manchester (U.K.) Under Certificate of Posting (Ex. P-6A).

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According to the respondent, the facts and circumstances of the case have amply proved that the appellant had platenly violated the relationship of the client and the attorney created under law and betrayed the trust and confidence reposed by the respondent in him.

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Both parties in support of their respective plea cited certain decisions which we do not recapitulate here as we have decided to dispose of the matter purely on the facts of the case.

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However, it may be mentioned that Mr. Ram Jethamalani in his reply

has given up the argument that the document had become *res nullius* but reiterated his stand on the other grounds. A

Though the State Bar Council has found that the conduct of the appellant has not amounted to "misconduct much less a professional misconduct to punish the respondent" and that "he has not proved any 'Mens Rea'" on the part of the appellant in withholding the Will and given too much emphasis on the point of delay and the strained relationship between the parties, observed : B

"However we hope the respondent will be hereafter careful in dealing with this type of matters." C

The Disciplinary Committee of the Bar Council of India after examining the matter in detail disapproved the findings of the State Bar Council holding thus :

"The Disciplinary Committee of the State Bar Council gave too much emphasis on the point of delay in filing the complaint. It also referred to some strained relations between the parties. We are not inclined to agree with these findings. A mere delay or strained relations between the parties per-se would not make a complaint false. These are the points which should put us on grounds while appreciating the contentions raised on behalf of either side. But in a case in which most of the facts are admitted there is little to do except holding that non return of the property of the complainant does not amount to professional misconduct on the part of the Advocate. The respondent tried to submit that Will had been returned but no convincing evidence to that effect was produced." D E F

On the basis of the above findings, the impugned Order was passed. The fact that Mr. George DaCosta requested the appellant to hand over the Will cannot be said to be an after-thought and invented only at the time of filing the complaint. Even in Ex. P- 6, it is mentioned that "Mr. George DaCosta requested the appellant to hand over the Will of Mrs. Mary Raymond prepared in 1968 and held in his safe custody and that it was understood that the appellant denied that the Will was in his custody". In the second letter dated 15.4.1986 marked as Ex.P-8 which has been admittedly received by the appellant, the facts of demand made by Mr. DaCosta H

- A** to return the Will and the appellant having denied of it are made mention of. In addition, the respondent has stated that he wrote a letter on 4.1.1982 to which there was no reply. The only document on which the appellant attempts to substantiate his case that there was no such demand as well as denial by him is the letter dated 1.5.1990 sent by Mr. DaCosta to the State Bar Council. This letter has been sent only after the proceedings before the State Bar Council had been completed but, of course, before the Order was passed. However, the Order of the State Bar Council did not have any reference to this letter, obviously for the reason that this document was not produced before the proceedings were over. Though Mr. Jethamalani has insisted that this letter was filed only on consent, the very fact that the letter did not come into existence earlier to 1.5.1990 and that Mr. Dacosta was not examined, demands not to place much reliance on this letter, especially in the teeth of the avernments found in Ex. P-6 and Ex. P-8. As pointed out by the Bar Council of India, there was no convincing evidence that the appellant had returned the Will. As pleaded by the respondent, the Will though revoked was the property of Mrs. Mary Raymond and on her death had become his property and that the said document was not abandoned by either of them.

- E** It is disheartening to note that the documentary evidence and the circumstances wearing the case leave an irresistible inference that the entry dated 13.1.1982 in the register of Wills should have been manipulated as if the document had been returned.

- F** No doubt, in a disciplinary proceeding of this nature, the rule is that the charging party has the burden of proving the charge of misconduct of the respondent. On an overall evaluation of the facts and circumstances of the case we hold that the respondent has proved that the appellant had not returned the Will. It has to be remembered, in this connection, that his earlier stand was that he did not have the Will. He changed the position later and came out the case that he had returned it in 1982 and for this purpose he relied upon an endorsement made by his wife in his register of documents. We are left with the irresistible conclusion, in the circumstances, that he had not returned the Will though demands were made first by the testatrix, then by her new lawyer and by the respondent who was also holding the power of attorney from the testatrix when he wrote the first letter and was the executor appointed under the second Will. The conduct
- H** of the appellant in not returning the Will even on demand is unworthy of

an advocate belonging to a noble profession. The appellant has no right to withhold the Will. On the other hand, he was bound in duty to return the said will when demanded because the instrument was entrusted to his custody by the testatrix, Mrs. Mary Raymond only on trust. A

Under these circumstances, we do not find any reason much less compelling reason to interfere with the impugned Order of the Disciplinary Committee of the Bar Council of India. B

The Appeal is accordingly dismissed and the stay granted by this Court shall vacated. No. costs.

R.R.

Appeal dismissed.