LAURENTIUS VAN KESSEL, THROUGH HIS ATTORNEY JAYAWICRAMA v. SHOBHA SAMARATUNGA AND ANOTHER, ATTORNEYS-AT-LAW

SUPREME COURT
PERERA, J.
BANDARANAYAKE, J. AND
EDUSSURIYA, J.
SC RULE NO. 6/99 (D)
FEBRUARY 26 AND 27, 2001
MARCH 05, 13, 19 AND 28, 2001
MAY 25, 2001

Attorney-at-law – Misappropriation of money entrusted for specific purposes – Deceipt and / or malpractice – Section 42 of the Judicature Act, No. 2 of 1978.

The complainant, a German national, sought the services of the two respondents Attorneys-at-law, *inter alia*, to purchase lands in Sri Lanka. The complainant established contact with the respondents with the help of one Indralal Perera who had been working with him in Abu Dhabi. The 1st respondent was at the material time in 1990-1991 an Attorney-at-law of about 3 years' experience working as a junior under the 2nd respondent, an Attorney-at-law who had been practising from about 1969. The respondents located two lands. They represented that the price of the first land would be Rs. 880,000 and the second land with a house would cost Rs. 725,000. The complainant also selected a quantity of antique furniture priced at Rs. 215,000 according to the seller.

Pursuant to the said arrangement it was agreed that the complainant should remit funds for encashment by the 1st respondent at Deutsche Bank in Colombo to finance the contemplated purchases. Accordingly, between January and May, 1991, the complainant remitted a sum of DM 98,000 which the 1st respondent encashed. This amount was approximately Rs. 2,500,000. Those monies were admittedly handed over to the 2nd respondent by the 1st respondent.

The first land was sold by the owner to Indralal Perera for a sum of Rs, 320,000 only, paid by the 2nd respondent, on a deed attested by the 1st respondent. Regarding the second land, its price was in fact Rs. 525,000 and not Rs. 725,000. The respondents paid two advances of Rs. 25,000 and Rs. 75,000 for that land but nothing more, with the result that the complainant had to pay a sum of

Rs. 450,000 to complete the purchase having had to forfeit the advance of Rs. 215,000 for antique furniture which sum the complainant himself paid to the owner Nandasena before purchasing the same.

In the result, the 2nd respondent failed to make due payments of monies provided by the complainant and received by the 2nd respondent for specific purposes and failed to render a true and proper account of the monies remitted by the complainant.

A Rule was issued against the respondents in terms of section 42 (2) of the Judicature Act, No. 2 of 1978 on the grounds of deceit / and or malpractice.

Held:

(1) The charges against the 1st respondent had not been made out to the satisfaction of the Court. But, the 2nd respondent is guilty of deceit and malpractice under section 42 of the Judicature Act.

(2) If the conduct of the attorney-at-law is also criminal in character, as in this case, the Attorney-at-law will be disenrolled even though there is no conviction.

Cases referred to :

1. *Dematagodage Don Harry Wilbert* – (1989) 2 SRI LR 18.
2. *Re Donald Dissanayake* – Rule 3/79 SC minutes of 31st October, 1980.
3. *Re Rasanathan Nadesan* – Rule 2/87 SC minutes of 20th May, 1988.
4. *Chandrartilake v. Moonesinghe* – (1992) 2 SRI LR 303.
5. In the matter of an application for readmittance as a Proctor – (1925) 39 NLR 517 at 518.
6. *Re Fernando* – (1959) 63 NLR 233 at 235.

Rule under section 42 (2) of the Judicature Act, No. 2 of 1978 against an attorney-at-law of the Supreme Court.

Aloy Rathnayake, PC with *A. S. M. Perera*, PC and *N. Ananda* for 1st respondent.

Mohan Peiris with Nuwanthi Dias for 2nd respondent.

S. K. Gamalath, Senior State Counsel with *U. Egalaheva*, State Counsel for Attorney-General.

Rohan Sahabandu for the Bar Association of Sri Lanka.

Cur. adv. vult.

June 20, 2001

SHIRANI A. BANDARANAYAKE, J.

The complainant, Laurentius Van Kessel, a German national and an Engineer by profession, was working in the United Arab Emirates in 1990. There he had met one Indralal Perera, a Sri Lankan, who was working with him in Abu Dhabi. By 1990, Van Kessel had worked for a period of over 4 1/2 years in Abu Dhabi and had known Indralal Perera throughout that period. The complainant developed an interest in Sri Lanka and visited the country for the first time on 14. 02. 1990. He left Sri Lanka on 23. 02. 1990, but returned again for a brief holiday with his wife on 22. 12. 1990. The purpose of the second visit was two-fold : firstly, to spend his annual vacation in a country he liked most and secondly to "look for land" with a view to purchasing. For the latter purpose, Indralal Perera had introduced the 1st respondent, Shoba Samaratunga, who was a sister of Indralal Perera's fiancee. Through the 1st respondent, the complainant met Patrick Wickramasinghe, the 2nd respondent, while the complainant was staying at Ocean Beach Hotel, Dodanduwa. The complainant requested the 1st and 2nd respondents to look into the possibility of locating a land for him to purchase.

The 1st and 2nd respondents, had shown several lands in Dodanduwa area to the complainant and finally he had settled on a land in extent one acre and nine point two-five perches (hereinafter referred to as the 1st land). The 2nd respondent informed the complainant that the purchase price of the land would be Rs. 880,000. On a request made by the complaiant, the 1st and 2nd respondents had located a 2nd land with a house adjacent to the aforesaid first land. The purchase price of this land, which was 1/2 acre in extent, was given to the complainant as Rs. 725,000. The complainant was aware that as a foreigner, he had to pay 100% of the vlaue of the land as taxes to the Department of Inland Revenue. The complainant had also selected and reserved a few items of antique furniture from

a dealer by the name, M. Nandasena and had wanted the 1st respondent to make the payment to him.

In order to make the payments for the aforementioned transactions, the complainant agreed to remit money to Sri Lanka. The 2nd respondent had advised the complainant to give a letter of authorisation to the 1st respondent to withdraw the money from the complainant's account. The letter of authorisation was given on 02. 01. 1991. During the period 02. 01. 1991 to 03. 05. 1991, the complainant had remitted a total sum of 98,000 Deutsche Marks to his account at the Deustche Bank branch in Colombo.

The complainant had, however, received information from Nandasena, the antique dealer, that he had not received any money since August, 1991. The complainant then became suspicious as the 1st respondent had requested a further sum of Rs. 250,000 and decided to come to Sri Lanka in September, 1991. On that occasion he had met Indralal Perera and the 1st respondent and discovered that although the money had been paid to the 1st respondent, the registration of the land had not been effected and that no payment had been made to the Department of Inland Revenue as a non-resident, to purchase a land in Sri Lanka. In respect of the 2nd land, the owner had received only Rs. 25,000 and the antique dealer's amount had not been settled.

When the complainant questioned the 1st respondent why she did not utilise the money sent by him for the specific purposes, the 1st respondent informed him that she had to hand over the money to the 2nd respondent as he was "her boss". Though the 1st respondent, with the support of her father, had also endeavoured to settle the outstanding matters before December, 1991, even by the end of December, 1991, only an additional down payment of Rs. 75,000 had been paid to the owners of the 2nd land and therefore the complainant had made a complaint to the Criminal Investigation Department. Simultaneously, he had complained to the Supreme Court informing

that "the culprits are still carrying on their profession" and adding that "they still can do more harm to credulous people and the reputation of this country".

The observations of the 1st and 2nd respondents were called for and they failed to satisfactorily explain their conduct to this Court. Therefore, on 15. 07. 1999, a Rule was issued directing both respondents to show cause why they should not be suspended from practice or be removed from the office of Attorneys-at-law of the Supreme Court for acts of deceit and / or malpractice they had committed in terms of section 42 (2) of the Judicature Act, No 2 of 1978.

The complainant, Swarnalatha de Silva, one of the owners of the 1st land, M. Nandasena, the antique dealer, R. A. M. Rajakaruna, the owner of the 2nd land and the two respondents gave evidence at the present inquiry.

The Rule issued on each of the respondents stated as follows :

(*a*) you did receive money from the complainant for the purchase of two properties and some antique furniture; and

(*b*) you did purchase only one property with the said money; and

(*c*) you have failed and neglected to render a true and proper account in respect of a sum of Rs. 2,580,676/90 remitted by the complainant; and

(*d*) you have thereby caused pecuniary loss to the complainant.

On 02nd January, 1991, the complainant had authorised the 1st respondent to purchase the 1st land on his behalf and had made arrangements to transfer the money from his Bank, so that the 1st respondent could withdraw the money in his absence. The agreement entered into between the complainant and 1st respondent reads thus :

"I, the undersigned, Laurentius Antonius Maria Van Kessel of AM Meilwale 15, 8520, Evlangess, Germany and presently of Ocean Beach Club, Dodanduwa, have on this 2nd day of January, 1991, authorised Miss S. R. A. S. P. K. Samaratunga, Attorney-at-law and Notary Public of No. 341, Galle Road, Mount Lavinia, to purchase on my behalf the land depicted in plan No. 2180 bearing Lot No. 10 in extent one acre and nought nine decimal and five perches at or for the price of rupees eight hundred and eighty thousand (Rs. 880,000).

I further authorise Miss S. R. A. S. P. K. Samaratunga to withdraw monies from the Deutsche Bank in Colombo and make the necessary payments for the purchase of the said land and obtain a Deed of Transfer in my favour and to attend to all matters connected with the said purchase." (*vide* P6)

The complainant, as agreed upon, had sent the following amounts to his Bank in Colombo :

02. 01. 1991	–	DM 18,000
18. 01. 1991	–	DM 30,000
07. 02. 1991	–	DM 19,000
22. 04. 1991	–	DM 15,000
03. 05. 1991	–	DM 16,000
Total	–	DM 98,000 (*vide* P3, P4, P5 and P6)

This amount is approximately equivalent to Rs. 2,500,000. The 1st respondent admitted that the money sent by the complainant set out above was withdrawn by her on the authority given to her by the latter and the total amount was handed over to the 2nd respondent. The 2nd respondent in the course of his evidence at this inquiry admitted the receipt of this money from the 1st respondent.

Witness Swarnalatha de Silva, in her evidence stated that the land referred to as the 1st land belonged to her mother, sister and herself. This particular land was situated at Ratgama although they were presently residing at Kottawa. She emphasised the fact that after the death of her father, they had lost interest in this land. The 2nd respondent had visited her at Kottawa with her uncle, one Norman Mendis, in 1990 and had given her an advance of Rs. 25,000 for the purchase of the said land. The land was sold to Indralal Perera and the deed was attested by the 1st respondent. She admitted that they could well have sold the land for Rs. 320,000. This money was paid to her by the 2nd respondent. With regard to the 2nd land, it transpired that the total amount that had to be paid was Rs. 525,000 and not Rs. 725,000 as was mentioned to the complainant. Initially, a deposit of Rs. 25,000 was paid to the owner and the 1st and 2nd respondents had paid a further sum of Rs. 75,000. However, until the complainant met Rajakaruna, the owner of the 2nd land, he had not got any further payment and the owner had, in fact, thought on a subsequent occasion that the complainant had lost interest in the purchase of the land. Later the complainant had paid the balance sum of Rs. 450,000, to Rajakaruna, which included an additional sum of Rs. 25,000 for the delay in paying the full purchase price.

For the antique furniture selected by the complainant, a sum of Rs. 215,000 was to be paid to Nandasena and this was to be paid by the 1st respondent, Nandasena, in his evidence substantiated the position that the 1st respondent had not paid him any money, although the complainant had instructed her to do so and had demanded from the latter, the amount due. The antique dealer conceded that later the complainant had paid this amount to him.

Therefore, upon the evidence of the 1st respondent it is clear that the complainant had transferred the money to his Bank in Colombo and had granted authorisation to her to withdraw the money from the said account. Her position was that the 2nd respondent, with whom she was working and who was her senior (partner), wanted her to

handover the money to him whenever it was credited and encashed. Out of this whole transaction, the 1st respondent was paid only Rs. 50,000 and that was a payment on account of Notarial fees.

It was the evidence of the 1st respondent that in or around June, 1991, at a time when the full amount of money was taken by the 2nd respondent, she had proceeded to Dodanduwa on her own, and paid an advance to the owner of the 2nd land. The material placed before this Court clearly demonstrated that the 1st respondent had worked under the directions of the 2nd respondent and was under severe pressure from him. At the time of this transaction, the 2nd respondent had just started her work as an Attorney-at-law and had only 3 years of experience. It was a common ground that she was totally dependent on the 2nd respondent. The correspondence between the father of the 1st respondent and the complainant indicate that even an attempt was made to sell a property belonging to the 1st respondent's family, in order to settle the monies taken from the complainant. In fact, a letter sent by the complainant to the 2nd respondent discloses that the complainant had taken notice of the fact that the 1st respondent is not solely responsible for the misuse of his money. The aforesaid letter stated that :

> ". . . I decided to check into the matter myself. As a result I found out that you personally requested from Miss Shoba to handover the money transferred by me, with the argument that you wanted to take care of it personally . . . Until now Miss Shoba solely had to bear all the problems in connection with the contract she has with me. I hope that it is not your style to misuse the loyalty of your employer/partner and that you will not ignore : one cannot go on with the normal way of life, while destroying the name and future of another family." [emphasis added].

It was the 1st respondent's evidence that she was a hapless victim in a helpless situation where she was torn between the trust reposed on her by the complainant and the necessity to comply with the

directions given to her by the 2nd respondent who was her senior in the profession with whom she was practising. She, while accepting her mistake, prayed for forgiveness having regard to the circumstances she was placed in. Her version also finds strong support in the story narrated by the complainant. She has also expressed her unqualified regret for the part she played in the transaction without any intention whatsoever to defraud the complainant.

Having regard to all the material placed before this Court in support of the charges and the admission made by the 2nd respondent in the course of his evidence at this inquiry, I hold that the charges against the 1st respondent have not been made out to the satisfaction of this Court. Therefore, I hold that the charges against the 1st respondent, Shoba Pathmakumari Samaratunga, have not been proved and I make order that the Rule issued against her in these proceedings be discharged.

Now, I propose to deal wtih the evidence adduced against the 2nd respondent at the inquiry. In the earlier part of this judgment I have set out in detail the evidence of the complainant and the testimony of the other witnesses against both respondents in respect of the charges set out in the Rule. It would be unnecessary therefore to narrate the evidence once again at this stage. The complainant was cross-examined at length by both counsel appearing for the 1st and 2nd respondents. The version of the complainant in my view has not been discredited. Having regard to the demeanour of this witness and the substance of the evidence he has given at this inquiry, he impressed me as a truthful witness.

The 2nd respondent opted to testify at this inquiry under oath. It was the 2nd respondent's position that he had commenced his practice as an Attorney-at-law in 1969 and had been working in Mount Lavinia since 1976. He stated that he had met the complainant in 1990 and that the complainant sought his services to purchase a land in Sri Lanka. The 2nd respondent admitted that in his view, dealings relating

to purchases of land would not be an appropriate function for an Attorney-at-law. However, he had taken the complainant to inspect a land at Dodanduwa. The 2nd respondent's position is that the complainant was willing to spend Rs. 1 million for the purchase of this land. The 2nd respondent met the owner and he had agreed to sell a portion of the land for Rs. 320,000. Accordingly, the purchase price of a perch was fixed for Rs. 2,000. It was the 2nd respondent's evidence that he had decided to add the cost of his professional services to the value of this land. Therefore, he had decided to quote a sum of Rs. 5,500 per perch which amounted to a total of Rs. 880,000 for the 1st land. The 2nd respondent had thus decided to increase the price of a perch of this land by Rs. 3,500 thereby appropriating this additional amount for his services. This included the services he had rendered in searching and identifying the land, the payment for his assistant who functioned as the driver and assisted him in other connected matters. The 2nd respondent contended that fixing the price of Rs. 880,000 for a land which was ultimately sold for Rs. 320,000 was proper and reasonable for two reasons : firstly, his position was that the complainant wanted to purchase a land with a price limit of Rs. 1 million and secondly, he stressed the point that if not for him, the complainant would not have been able to purchase this land in any event at that price.

The 2nd respondent further submitted that initially, the complainant had wanted to purchase the land in his name. However, when the 2nd respondent obtained the money sent by the complainant through the 1st respondent, the complainant was not in a position to make the purchase and pay the Department of Inland Revenue, the relevant amounts, due to lack of funds. The 2nd respondent admitted that the 1st respondent had given the money to him. He further admitted that after he collected the money from the 1st respondent he had given a sum of Rs. 850,000 out of those proceeds to a Chinese couple who had wanted to borrow money from him. The balance amount, according to the 2nd respondent, had been appropriated for his use. He conceded that there was no receipt obtained by him from the

Chinese couple to account for the money taken and that he cannot remember whether he had made any notes relating to this transaction in his diary which he maintained at that time. His position was that when he tried to obtain the money given to the Chinese couple, he had learnt that they had left the country. He had visited China to meet the couple unsuccessfully. The complainant informed the Court that he has his Passport in his possession to show that he had visited China. However, he had not thought it necessary to produce the entries made, if any, in his diary relating to the transactions. No records, pertaining to any of the transactions, were produced. He specifically admitted that the money which was entrusted to him by the complainant for the purposes specified by the complainant was utilised by him for a different purpose.

The 2nd respondent had admitted that; he had misappropriated the money entrusted to him by the complainant for a very specific purpose, namely as consideration for the purchase of the aforesaid lands and payment to the antique dealer, Nandasena.

It is indeed an imperative requirement that, Attorneys-at-law must necessarily be persons of integrity and honesty. Justice Dr. A. R. B. Amerasinghe in his book titled "*Professional Ethics and Responsibilities of Lawyers*", (1993 – pg. 158) states thus :

> "Any act or default in or related to his professional practice, any professional misconduct which, though unrelated to his practice demonstrates a disregard for the standards or principles essential to the notion of fitness of an attorney, or any impropriety indicative of his failure to understand or to practise the precepts of honesty or fair dealing in relation to the Courts, fellow-practitioners, his clients or the public or any failure to meet the demanding tests imposed by law and custom by which the profession is regulated, will make an attorney amenable to the discipline of the Supreme Court."

If and when the conduct of the Attorney-at-law is criminal in nature, our Courts have taken the view that the Attorneys-at-law would be disenrolled, even though there is no conviction. Thus, in *Dematagodage Don Harry Wilbert*[1] an Attorney-at-law who had given forged documents to gain admission to the Sri Lanka Law College was disenrolled. Similarly, in *Re Donald Dissanayake*[2] and *Re Rasanathan Nadesan,*[3] the Attorney-at-law's name was struck off for misappropriation and deceit. In *Chandratilake v. Moonasinghe*[4] for breach of trust of a criminal nature and deceit, the Attorney-at-law was disenrolled.

The responsibility cast upon Attorneys-at-law, when they deal with funds belonging to a third party was described in detail by Bertram, CJ. in *the matter of an application for readmittance as a Proctor*[5]. In this case it was stated that :

> "The Proctor in question found himself in this position because when he was entrusted with funds in a fiduciary capacity he did not keep those funds separate from his own money, but used them for his own purposes with the result that when they were required they were not available. There is no principle which is more important to press upon persons entering the legal profession than a strict regard to the principles of trust accounts."

Although the nature of the testimony of the 2nd respondent under oath at this inquiry was of a fanciful nature and not worthy of consideration by this Court, we have given our careful consideration to the evidence of the 2nd respondent and all the facts and evidence before us. There can be no doubt that the 2nd respondent's participation in this particular transaction constitutes criminal offences of criminal misappropriation and or criminal breach of trust. For the aforementioned reasons, I am of the view that the 2nd respondent is guilty of all charges laid in the Rule. We are compelled, by the facts proved and those admitted by the 2nd respondent in the course of this inquiry to observe that the 2nd respondent is not a person who is fit and proper to be permitted to function as an Attorney-at-law of this Court.

The principles that should guide this Court in determining the sentence imposed on an Attorney-at-law have been discussed in several decisions of this Court. In *Re Fernando*[6] Basnayake, CJ. was of the view that :

> "The power to remove or suspend a proctor from his office is one that is meant to be exercised for the protection of the profession and the public and for the purpose of maintaining a high code of conduct among those whom this Court holds out as its officers to whom the public may entrust their affairs with confidence. If a proctor is adequately to perform the functions of his office and serve the interests of his clients, he should be able to command the confidence and respect of Judges, of his fellow practitioners and of his clients."

For the reasons aforesaid, I find the 2nd respondent guilty of deceit and malpractice under section 42 of the Judicature Act. The Rule relating to the 2nd respondent is, therefore, made absolute and we make order directing that the 2nd respondent, Patrick Prabawansha Wickramasinghe, be removed from the office of an Attorney-at-law of this Court and that his name be struck off the Roll of Attorneys-at-Law.

Registrar of this Court to take steps accordingly.

I would like to express our sincere appreciation of the assistance rendered by all Counsel.

PERERA, J. – I agree.

EDUSSURIYA, J. – I agree.

Rule against 2nd respondent made absolute and he is disenrolled.