PERERA
v.
GOMES,
ATTORNEY-AT-LAW

SUPREME COURT
G. P. S. DE SILVA, CJ.,
RAMANATHAN, J.
SHIRANI BANDARANAYAKE, J.
S.C. RULE NO. 8/95 (D)
FEBRUARY 11, 1997, MARCH 11, 1997,
MAY 26, 1997, JUNE 11, 1997, JULY 22, 1997,
AND JULY 30, 1997

Professional misconduct of Attorney-at-law – Rule 61 of the Supreme Court (Code of Etiquette for Attorneys-at-law) Rules 1988.

Held:

It was not proper for the respondent (Attorney-at-law) to instill a belief in the complaint that the amount paid (Rs. 5,000) was sufficient for the case he had filed. It was also not proper for the respondents to accept a case against the very person who had introduced the client to him. It was also not at all proper for an Attorney-at-law, to have kept the money with him, after handing over the case to another lawyer. The respondent should have returned the money to the complainant. The respondent has thereby failed to discharge his professional obligations and acted in a manner unworthy of an Attorney-at-law and committed a breach of rule 61 of the Supreme Court (Code of Etiquette for Attorneys-at-law) rules 1988.

Two other charges of intentionally, wilfully and fraudulently cheating the client and of disgraceful and dishonourable conduct were held not proved.

Obiter:

It was not proper for the respondent to have acted as an Attorney-at-law or Notary Public in a transaction between the complainant and his daughter (ie daughter of the Attorney-at-laws/Notary Public).

In the matter of rule in terms of section 42 (2) of the Judicature Act, No. 2 of 1978.

Kolitha Dharmawardena, DSG with S. Rajaratnam, SC for the Attorney-General.

E. D. Wickramanayake with *Miss Anandi Cooray* for BASL.

K. M. P. Rajaratne for respondent.

Cur. adv. vult.

August 28, 1997

SHIRANI A. BANDARANAYAKE, J.

Mr. D. J. Perera, who was about 85 years old in 1993, complained that he paid Rs. 5,000 to Mr. Gomes, an Attorney-at-law (respondent) on 23.11.1990 to institute action against Sampath Property Trades. Mr. Gomes had issued a receipt in respect of this payment. After a while Mr. Gomes had told Mr. Perera, that as he knew the company in question quite well, he would arrange for another lawyer known to him to deal with the case. Since 1990 Mr. Gomes was appearing for Mr. Perera in four (4) of his cases at the District Court of Polonnaruwa. Mr. Perera was paying Mr. Gomes Rs. 2,500 per day for this purpose. On one occasion when Mr. Gomes came to Polonnaruwa he had informed Mr. Perera that he had entrusted the Sampath Property Trades matter to Mr. H. D. Tissa Gunawardene, Attorney-at-law, Gampaha. Further Mr. Gomes had said on that occasion that he would bear all Mr. Gunawardene's expenses. However when the Gampaha case had reached the stage of execution of writ, Mr. Perera found that Mr. Gomes had not paid Mr. Gunawardene and Mr. Perera had to pay him Rs. 3,700 on different occasions.

It was the case for the complainant that, on one occasion when Mr. Gomes came to Polonnaruwa to appear in the District Court, he had made a request for 10 perches from a land situated at Gonahena, Kadawatha, belonging to Mr. Perera. When Mr. Perera agreed Mr. Gomes had stated that the 10 perches was not sufficient and asked for 20 perches. At this time Mr. Perera had blocked out the land to give it to his three (3) children and there was a 23 perch block remaining. If the value of a perch was Rs. 7,500 this block would have been about Rs. 172,500. However, as Mr. Gomes had taken a keen interest in his affairs and Mr. Gomes appeared to be very close and sincere towards Mr. Perera, he agreed to give this block of land as a gift to Mr. Gomes. Accordingly, Mr. Gomes had obtained Mr. Perera's signature on 19.12.1991 on 4 printed forms of deeds of gift. On the same day Mr. Gomes had given a letter to Mr. Perera informing the latter that he (Mr. Gomes) will appear free of charge

in all his cases and would bear all the expenses in these cases. Mr. Gomes had also obtained Rs. 15,000 from Mr. Perera stating that he was short of money to construct a house in another land of his. However, Mr. Gomes had not borne the expenses, as promised, and Mr. Perera had written to Mr. Gomes on 22.02.1993 requesting him to retransfer the block of land given to him and calling for a reply within 14 days. Mr. Gomes sent his reply on 11.03.1993 stating that the deed in question is not a gift but a transfer of the said block of land to his daughter for a sum of Rs. 30,000.

The observations of Mr. Gomes was called for and he failed to satisfactorily explain his conduct to this court. Therefore on 02.06.1995 a rule was issued directing Mr. Gomes to show cause why he should not be suspended from practice or be removed from the office of Attorney-at-law of the Supreme Court for acts of deceit, malpractice and cheating he had committed (section 42 (2) of the Judicature Act).

The complainant, D. J. Perera, who is paralysed and bedridden was not in a position to give evidence. 3 witnesses were called to give evidence in support of the rule. They were the wife of the complainant, Wimala Ellapitiya, Tissa Gunawardene, Attorney-at-law and L. L. Wanigasekera, Attorney-at-law and Notary Public. The respondent, his daughter Aloma Gomes and H. A. Sahara gave evidence for the respondent. Under the rule issued on the respondent 3 charges were framed against him.

The first charge was that the respondent had failed to discharge his professional obligations and had acted in a manner unworthy of an Attorney-at-law and has committed a breach of rule 61 of the Supreme Court (Code of Etiquette for Attorneys-at-law) rules 1988. This charge was based on the following complaints:

a. on 23.11.1990, the respondent had received from the complainant a sum of Rs. 5,000 to appear and attend to all professional matters in connection with case No. 34189/M in the District Court of Gampaha, instituted by the said complainant;

b. on that occasion the respondent informed the complainant that he would not be able to appear in the said case, but undertook to retain the services of another Attorney-at-law, namely Tissa Gunawardena, Attorney-at-law of Gampaha, by using the said sum

of money already accepted by the respondent, but misappropriated the said sum of money and the complainant was therefore compelled to pay fees again to the Attorney-at-law.

It is common ground that the respondent had taken Rs. 5,000 from the complainant. Document P (8) b, dated 23.11.1990 confirms and supports this fact. The learned DSG, pointed out that after accepting the money and establishing a client-attorney relationship the respondent had drafted the plaint. Thereafter the respondent handed over the responsibility to Tissa Gunawardena. However, the respondent did not hand over the money that was given to him by the complainant to Gunawardena. Instead, the respondent had informed the complainant that he would pay for Gunawardena's services.

The respondent was of the view that he had to hand over this case to Gunawardena as he knew the defendant in this case quite well. The complainant was filing this case against Alahakoon, the person who had introduced the complainant to the respondent. I agree with the view expressed by the respondent that he could not have handled this case due to the abovementioned reason. However, in my view, the respondent should not have accepted this case from the complainant at all. If, due to the relationship he had with the complainant, the respondent had felt obliged to assist the complainant, the respondent could have introduced a lawyer to the complainant, explaining his difficulty in dealing with this particular case. After undertaking the case the respondent had accepted Rs. 5,000 from the complainant. Out of this Rs. 5,000 according to Gunawardena, he was paid only a very small sum of money. However, on the insistence of the respondent, Gunawardena had given a receipt for Rs. 1,400. The learned DSG submitted that the position of the respondent is that he had paid a total of Rs. 2,100 to Gunawardena. Mr. Rajaratne, learned counsel for the respondent, submitted that Gunawardena has stated in his evidence that he had taken Rs. 4,000 from the complainant. He had taken Rs. 2,000 out of this money for appearances and work prior to the ex parte decree and Rs. 2,000 for work in connection with the execution of the ex parte decree. Counsel submitted further that Wimala Ellapitiya in her evidence stated that Tissa Gunawardena was paid for appearances and work before the ex parte decree. Mr. Rajaratne also submitted that there was no question of execution of the ex parte decree because the defendant in this case had appeared in court and obtained permission to appear

and defend after the payment of Rs. 1,000 as costs to the plaintiff. Therefore there was no need to execute the ex parte decree. Mr. Rajaratne urged that it is also the evidence of Wimala Ellapitiya that Tissa Gunawardena wanted 'additional expenses' for the purpose of executing the ex parte decree. The complainant had got very angry with the respondent becuase additional expenses had not been paid by the respondent. Accordingly the submission on behalf of the respondent was that Tissa Gunawardene had misled the complainant and made him angry with the respondent.

The respondent in his evidence stated that in addition to the money given to Tissa Gunawardena, the respondent had paid stamp fees Rs. 385 and a further sum of Rs. 2,000 to senior counsel, Mr. Kotelawala for consultation and drafting the plaint. Mr. Rajaratne, submitted that this evidence was not challenged. Further it was said for the respondent that in spite of the attitude of the complainant towards the respondent, the respondent had written to the complainant a letter (8E) dated 11.03.1993 asking the complainant to see the respondent so that he could complete all future work.

Tissa Gunawardena in his evidence stated that on 09.07.1991 the respondent came and wanted him to handle a case and at that time the case was not filed. On that day the respondent had given a cash cheque for Rs. 500 to Tissa Gunawardena. The respondent had prepared the plaint. At the request of the respondent Tissa Gunawardena had given a receipt stating that he has received Rs. 1,400 from the respondent. He accepts that the complainant gave him Rs. 4,000; Rs. 2,000 for the appearances and Rs. 2,000 for execution proceedings. He clearly stated that the respondent paid him only Rs. 1,100. According to Tissa Gunawardena, he had been assisting the respondent in some other cases as well. When the respondent requested for a letter for Rs. 1,400, Tissa Gunawardena had issued this letter stating that Rs. 1,400 was paid for the services he had rendered in the 34189/M case. Five (5) cheques were produced alleging payments made to Tissa Gunawardena.

21.10.1991	–	Rs. 300	(R1)
11.03.1992	–	Rs. 300	(R2)
24.04.1992	–	Rs. 500	(R3)
30.04.1992	–	Rs. 300	(R4)
20.05.1992	–	Rs. 500	(R5)

All these cheques were cash cheques. There is no evidence to show that these cheques were paid to Tissa Gunawardena. Even if we accept the letter issued by Tissa Gunawardena, it shows that the respondent has paid him only a sum of Rs. 1,400. According to the respondent, he had paid a sum of Rs. 2,100 to Tissa Gunawardena and had not returned any money to the complainant. However, there is nothing to show that these amounts were given to Tissa Gunawardena. In these circumstances, the only acceptable evidence is in regard to the payment of Rs. 1,400 to Tissa Gunawardena. Accordingly, I hold that the respondent should have returned the balance amount to the complainant, which he has not done.

Based on the facts of this complaint, the learned DSG, has drawn our attention to a number of issues regarding the discharge of professional responsibility of an Attorney-at-law:

a. Whether it was proper for an Attorney-at-law to instill the belief in a client that Rs. 5,000 is for the costs of an entire civil case where the cause of action was over Rs. 100,000?;

b. Whether it was proper for an Attorney-at-law to accept a case against the very person who introduced the client to him. Is it proper for an Attorney-at-law to accept fees for the case against Mr. Alahakoon, draft the plaint on which the case proceeded and then to retain the fees and seek services of another Attorney-at-law to appear in court?

c. Was the respondent conducting himself professionally with regard to the case, or did he abandon his professionalism and performed as the Manager of the client's fees, representing to him that the respondent would nevertheless bear all the costs of the case for the fee of Rs. 5,000 paid to him?

I am of the view that all three questions raised here are of high importance. Taking into account the circumstances of this case, it was not proper for the respondent to instill a belief in the complainant that Rs. 5,000 was sufficient for the case he had filed. It was also not proper for the respondent to accept a case against the very person who had introduced the client to him. It was also not at all proper for an Attorney-at-law, to have kept the money with him, after handing over the case to Tissa Gunawardena. The respondent should have returned the money to the complainant.

In the circumstances, I am of the view that the respondent has failed to discharge his professional obligations and had acted in a manner unworthy of an Attorney-at-law and has committed a breach of rule 61 of the Supreme Court (Code of Etiquette for Attorneys-at-law) rules 1988. I hold that charge No. 1 has been established.

The second charge was that the respondent had intentionally, wilfully and fraudulently cheated his client of his property by acting in a manner prejudicial to him. This charge is based on the following complaint:

a. The respondent had originally requested the complainant to gift to him an extent of 23 perches of land owned by the complainant in Kadawatha and subsequently executed a deed of sale bearing No. 30 dated 05.04.1992 attested by L. L. Wanigasekera, Attorney-at-law and Notary Public, Colombo, for the consideration of Rs. 30,000 in favour of the respondent's daughter, Aloma Gomes.

This charge related to a land transaction in which 23 perches situated at Gonahena, Kadawatha, was given to Aloma Gomes, the respondent's daughter. According to the respondent, this was a deed of transfer for a consideration of Rs. 30,000, where as the case for the complainant was that the block of land was given to the respondent as a gift at his request. According to Wimala Ellapitiya, this land was gifted by her husband to the respondent, on the assurance that the respondent would appear and meet all expenses of any further litigation that may arise in which the complainant is a party. This assurance is established by document P (8)a dated 19.12.1991, written and signed by the respondent.

The learned DSG submitted that the land transaction was a gift made at the request of the respondent. According to witness Wimala Ellapitiya, no money was given and the land was gifted by the complainant at the request of the respondent. The only consideration was the written promise in P (8)a. The learned DSG submitted that the contents of P (8)a admitted by the respondent, strongly corroborates this position. According to the evidence and the submissions by the learned DSG, there is a strong suggestion that no consideration actually passed between the complainant and the respondent and/or his daughter. According to the respondent and his daughter the money was paid at home and no receipt was obtained for the transaction. No other person had witnessed this transaction. However, according to the reply sent by the respondent as his observations made on the petition of the complainant, the money was given by

the respondent and not by the daughter, to the complainant. This document (P6) was shown to the respondent at the inquiry and he had ample opportunity to read and explain while giving evidence.

The Notary Public, L. L. Wanigasekera, stated that the deed was never executed before him. He was given a deed which was already signed and he later attested it on the insistence of the respondent. There are several significant facts to be noted in the transaction relating to this deed:

1. According to Wimala Ellapitiya, the respondent had taken the signatures of her husband and herself on blank printed forms on 19.12.1991. The contention was that these forms included the deed of gift of the 23-perch block of land given as a gift to the respondent. The respondent stated that in December, 1991, Wimala Ellapitiya was not living with the complainant and therefore it was not possible for this to have happened.

2. The deed of transfer is dated 05.04.1992. However, the respondent and the witnesses for him, Aloma Gomes and H. A. Sahara gave evidence to the effect that the deed was executed on 11.03.1992. They stated that the complainant, his wife, Wimala Ellapitiya and the Notary Public, L. L. Wanigasekera, were present at the time of the attestation. The Notary Public in his evidence stated that only one witness was present at the time of the attestation. He further stated that when the deed was given to him it had a date in December, 1991. He had erased that date and the new date 05.04.1992 was typed.

3. The attestation bears several alterations and interpolations. There is an interpolation showing that consideration had passed earlier and in accordance with the Notaries Ordinance in the presence of Mr. Gomes, Attorney-at-law. The learned counsel for the respondent in his submissions states that deed P9 is a photostat copy of the second copy of L. L. Wanigasekera, which was sent to the Colombo Land Registry. X5 is the original of deed No. 30 attested by Wanigasekera and sent to the Gampaha Land Registry. The interpolations and erasure marks of X5 and P9 are similar. Wanigasekera admits that attestation was done by him. Prior to the registration the deeds were in the custody of Wanigasekera. For these reasons the learned counsel for the respondent submits that the interpolations and the erasure marks on X5 and P9 are the work of Wanigasekera who attested deed No. 30 and the respondent had nothing to do with it.

Taking into consideration the evidence that was led by the complainant and the respondent, I am of the view that there was no proof to show whether the deed was executed on 19.12.1991 or 11.03.1992 or as it appears on the deed, on 05.04.1992. I am more inclined to accept the view put to us by the complainant that the husband and wife had signed a blank form on 19.12.1991. Even to the naked eye, the faint letters of 'December' in Sinhala could be seen in two places. This word has been erased and the word 'April' in Sinhala has been typed on top of that. I would have certainly accepted this position if not for the slight doubt that was created in the mind as to whether Wimala Ellapitiya was living with the complainant during this period or not. However in my view there was no consideration given by either the respondent or his daughter for this transaction.

According to the different circumstances which had occurred in this matter, it is strange that no receipt was issued for the alleged payment of Rs. 30,000 given prior to the execution of the deed. I hold that the following matters have been proved beyond reasonable doubt:

a. The respondent gave a written undertaking that he would appear for all subsequent litigation and meet all expenses in respect of such litigation;

b. A land transaction took place between the complainant and the respondent or the complainant and the respondent's daughter. According to the deed P9, the transaction was between the complainant and the respondent's daughter. However, the transaction took place with the full knowledge of the respondent;

c. The execution of the deed and/or the attestation of the deed was carried out both by Wanigasekera and the respondent. The respondent clearly had knowledge of the execution and the attestation of the deed.

The learned DSG submitted that the attestation page of the deed itself raises many questions of propriety. On the face of the attestation, there are a number of deletions, alterations and interpolations, strongly suggestive of the fact that the deed is not what it purports to be. I am in agreement with the submission that it was anyway not proper for the respondent to have acted as an Attorney-at-law or a Notary Public, in a transaction between the complainant and his daughter.

On a consideration of all the facts and circumstances, I hold that the crucial ingredient of 'dishonesty' has not been established with the required degree of certainty. The second charge has therefore not been proved, particularly in the absence of the evidence of D. J. Perera.

The third charge is that the respondent has conducted himself in a manner which is reasonably regarded as disgraceful or dishonourable by Attorneys-at-law of good repute and competency. This charge is based on the following facts:

a. The respondent had on several occasions borrowed money from the said complainant on the undertaking and promise that he, the respondent would either repay them or appear on behalf of the said complainant in his cases and would set off those sums thus borrowed against the fees that would become due to the respondent from the said complainant.

The respondent has admitted that he had borrowed Rs. 15,000 on 26.06.1991. This is established by document P (8)c wherein he had promised to repay the money in 6 months. This has been admitted by the respondent. However, according to documents P (8)d and P (8)e, and the letter dated 13.07.1992, the respondent had failed to repay the money even after one year. The respondent in his evidence admitted that even by 13.07.1992, this money was not paid. By this time the respondent had given a firm assurance by letter to the complainant that he would appear and bear all the expenses of all future cases of the complainant (letter dated 19.12.1991). The respondent had no proof to show that he had repaid this money. It was Wimala Ellapitiya in her evidence who said that the loan of Rs. 15,000 was paid by the respondent. I hold that the third charge has not been established.

I hold that the first charge has been proved and I make order that the respondent in these proceedings, P. D. Gomes, be suspended from practice for a period of 6 months from today.

G. P. S. DE SILVA, CJ. – I agree.

RAMANATHAN, J. – I agree.

Attorney-at-law suspended for 6 months.