
**IN RE UPALI WIJESURIYA AN
ATTORNEY-AT-LAW**

SUPREME COURT,

SAMARAKOON, C. J., SAMARAWICKREMA, J. AND WANASUNDERA, J.

RULE NO. 2 OF 1980

FEBRUARY 3, 1981.

Attorney-at-law - Suspension - Malpractice.

The respondent Attorney-at-law failed to appear before a disciplinary Committee first of the Law Society and later of the Bar Association to explain his failure to file and prosecute a suit for which he had received money and articles of value from an aged client. The respondent had taken undue and unfair advantage of an aged widow and sought to enrich himself at her expense. He had been evasive and indifferent in the matter of explaining his conduct to the Disciplinary Committee. The public are entitled to expect honesty and fair dealing from a lawyer.

The respondent should be suspended from the roll of attorneys for a period of five years, for professional misconduct.

Rule issued on attorney-at-law

A. A. de Silva for respondent

A. C. Gunaratne Q.C. for the Bar Association.

Sarath Silva Deputy Solicitor-General with S. Marsoof
State Counsel for Attorney-General.

Cur. adv. vult.

February 21, 1981

WANASUNDERA, J.

The respondent, who is an attorney-at-law, has been called upon to show cause why he should not be suspended or removed from office on the ground of deceit or malpractice. The charge against him is that while practising as an attorney at Panadura, he has from time to time obtained various sums of money and articles of a total value of about Rs. 8,000 from his client, Mrs. C. W. Gunawardena, who is the complainant in this matter. These monies and articles had been given by the complainant to the respondent in his professional capacity in connection with the filing of a partition action. The respondent had neither filed the proposed action nor returned her money.

This complaint came up for inquiry in 1970 and 1971 before a Committee of the Law Society. In the first instance, the Committee wrote to the respondent and called for his observations. In his reply, dated 14th May 1970, the respondent stated:

"Police have started investigations on a charge of criminal breach of trust and my statement is due to be recorded shortly. In the circumstances I humbly request you to lay by the above petition till the police investigations are over. I am making a detailed statement to the C.I.D. for careful checking."

On 1st December 1970, the Committee again wrote to the respondent inquiring whether a criminal prosecution had been instituted against him. Since there was no response to this letter, on 2nd January 1971, the Committee sent a further reminder to the respondent. On 13th January 1971, the respondent replied stating that after due inquiries the police had dropped the matter.

The complaint which had been laid by was then taken up for inquiry by the Committee, but the respondent was not present at the hearing. It recorded the statement of Mrs. Gunawardena, a widow, 80 years of age. She was interested in getting some redress and wanted the Society to request the respondent to return the monies and articles taken from her, or pay their equivalent value in money. The Committee made the following order:

"The proctor has not given us any explanation. He is also not present. We would call upon him to give his explanation to this serious complaint as soon as a copy of this order is received by him. If he gives his explanation a further inquiry into this matter will be held on Wednesday the 7th June 1972 at 3.30 p.m. If he fails to give his explanation within ten days upon receipt of copy of this order we will be compelled to refer this matter to his Lordship the Chief Justice for necessary action.

Copies of this order to be sent to the complainant, as well as to Mr. Upali Wijesuriya at the following addresses:

1. Mr Upali Wijesuriya, Proctor S.C. & N. P., Panadura.
2. Mr Upali Wijesuriya, Proctor S.C. & N. P., Colombo 12.
3. Mr Upali Wijesuriya, Proctor S.C. & N. P., 24, Kaviraja Mawatha, Morawinna, Panadura.

It will be observed that the respondent had been given an opportunity of purging his default, and copies of the order had been sent to no less than three addresses. Having regard to the seriousness of the charge against the respondent, the committee has acted very fairly and with great patience and consideration towards the respondent.

The matter had then for some inexplicable reason gone into abeyance, but was revived in 1977 at the importunity of the complainant. A second Committee of the Bar Association proceeded to hold an inquiry and in the course of those proceedings it was discovered that an order had already been made by an earlier Committee. Consequently, the second Committee decided that the earlier decision of 1972 should be submitted to the Chief Justice for necessary action. The present Rule is based on that earlier decision.

Turning to the facts of the case, it would appear that the complainant Mrs Gunawardena and her daughter, who was also residing in a portion of the mother's residence, were not getting on well with each other. The respondent had been advising the complainant in these disputes. He had suggested criminal proceedings in the Magistrate's Court against the daughter and received various sums of money from the complainant for this purpose. He had done some work in this connection and proceedings against the daughter had been instituted in the Magistrate's Court. In consequence the daughter had agreed to vacate the premises and live elsewhere. Those results had encouraged the complainant to rely more and more on the respondent. The respondent had thereupon moved into occupation of that portion of the premises which had been occupied by the daughter and begun to live there without paying rent.

Since title to the premises in question was in both the complainant and her daughter, the respondent advised the complainant that a partition action should be filed to have the premises divided. The complainant states that from time to time she had paid various sums of money to the respondent for this purpose, and sometimes when she did not have ready cash the respondent removed certain articles belonging to her in lieu of money. In all she had paid about Rs. 4,578/10 in cash and the value of the goods removed by the respondent is about Rs. 3,100/- making a total of about Rs. 7,678/10. The partition case has not been filed up to date, nor has the respondent chosen to return this sum of money.

The respondent has sought to explain his failure to file the partition case. He states that after he had carried out several "searches" in the Land Registry and prepared the necessary papers and was ready to institute the action, the complainant's daughter had forestalled him and filed a *rei vindicatio* action in the District Court of Colombo in respect of the same premises, naming both the complainant and the respondent as defendants. The respondent states that since the plaint had alleged that the respondent himself was in unlawful occupation of the premises, he did not think it was proper for him to handle the proposed partition action. The respondent had informed the complainant accordingly and even vacated the portion of the complainant's premises he was residing in, for which he says he paid a rent of Rs. 25/-, although the complainant was not willing to accept it in view of the professional services rendered by him.

As regards the monies received by him, he has stated that he had received about Rs. 400 to Rs. 500 in respect of the proposed partition action and had also received about Rs. 900 in respect of the criminal prosecutions. The respondent also admits that the complainant gifted him a coffee grinder worth about Rs. 175 in gratitude for his services in the criminal cases.

As against these statements, which are not supported by documents, except some documents which show that he may have done some work in connection with the proposed partition case, we find a number of documents produced by the complainant containing a record of monies expended by her on this litigation. These accounts, though appearing in scraps of paper, are however of a detailed nature and are the kind of material we can expect from an old lady in straitened circumstances who is unduly pre-occupied with her expenses. Some of the payments made are for such items as survey fees, stamp fees, summons, batta, counsel's fees and for other legal documents. These accounts fairly substantiate the allegations made by her against the respondent.

At one stage, counsel for the respondent in the course of his address submitted that if the respondent was accountable to the complainant in any sum, he could have adjusted the matter with the complainant, but unfortunately he has not been given an opportunity of doing so, as he has had no notice of the disciplinary inquiries against him. The report of the Disciplinary Committee which is before us indicates that the Committee has accepted the complainant's version of the matter, including the statement of

expenses produced by her, in the absence of the respondent who failed to furnish an explanation.

Whatever be the amount involved, if there were any monies of the complainant which the respondent was not entitled to retain, it was his duty as a professional man to have promptly returned it to his client whether or not he had knowledge of those disciplinary inquiries. Nearly ten years have elapsed since then and with such amounts still unpaid to an old widow, the respondent has failed to show what we can consider a genuine desire to make redress. We are therefore unable to accept his explanation.

The main submission of counsel who appeared for the respondent was that the respondent was unaware of the proceedings before the Disciplinary Committee and had he such knowledge he could have defended himself and showed that the complaint was unjustified.

At the very outset of the proceedings before us, counsel sought to correct the date "1972" mentioned in the affidavits of the respondent to "1973" on the ground that it was an error. In paragraph 5 of the affidavit dated 23rd November 1980, the respondent has stated that he "left Panadura in 1973 and took up residence in Hambantota in 1973". This is repeated in the next paragraph where he states that from 1973 to 1979 he has been resident in Hambantota and Matara Districts. In a second affidavit filed on 31st December 1980, the respondent has reiterated these facts, namely, that from 1973 to 1979 he has been residing in the Hambantota and Matara Districts.

The significance of the amendment that was sought to be made, became clear as the hearing proceeded. It would be observed that the order upon which this Rule is based was made in 1972 and copies had been despatched to the respondent in that same year. If the date of the respondent's leaving Panadura could be shifted back to 1972 instead of 1973 set out in the affidavits, the respondent would be in a better position to deny the receipt of that order. If, however, the respondent had remained in Panadura till 1973, there could be little doubt that the order of the Disciplinary Committee would have been received by him and, if so, his subsequent conduct is explicable only on the basis of a deliberate decision to refrain from participating in any further proceedings.

There are a number of circumstances which appear to support the latter view. To begin with, the reference in his letter of 14th May 1970 to a pending Police inquiry and a statement being made to the C. I. D. appears to be more false than true. While Mrs Gunawardena did make a complaint to the Moratuwa Police, the matter remained at the stage of a complaint without due investigation, because she says the officer dealing with it had gone on transfer. If this is all that had happened in connection with the complaint, it would then appear that the reference to a C. I. D. investigation was misleading and was an attempt to draw a red herring across the trail of the investigations by the Disciplinary Committee.

Another significant fact is that in both the affidavits filed by him, the respondent has studiously avoided making any reference to the disciplinary proceedings that had taken place until the time he left Panadura. He has been evasive on this point and tries to slur over it. His affidavit merely states that no letters or notices addressed to him were received by him during the period he was residing in the Hambantota and Matara Districts and that some notices in respect of this matter may have been sent to Panadura long after he left Panadura. That is all he has to say about the proceedings which, to his knowledge, had been begun against him while he was still at Panadura. In any event, the respondent who has been in practice for nearly thirty five years ought to have known that the disciplinary proceedings which were laid by at his request would have been resumed sooner or later and it was his duty therefore to keep himself informed of further developments in that matter. It is also difficult to believe that the respondent would have uprooted himself so completely from Panadura in the manner he would wish us to believe without even leaving behind a forwarding address or that he would have cut himself off entirely from all contact with that place unless he had some special reasons for doing so. We are therefore unable to accept the submission that the respondent has had no notice of the disciplinary proceedings or was not given an opportunity of being heard at the inquiry against him.

On the facts established before us, we find that the respondent had taken undue and unfair advantage of an aged widow and had sought to enrich himself at her expense. The attitude of evasiveness and indifference shown by the respondent in respect of the com-

plaint and the subsequent inquiries initiated against him are deplorable and are additional factors that weigh against him. The respondent belongs to an honourable profession from which the public are entitled to expect honesty and fair dealing. We share the view of the Disciplinary Committee that the complaint against the respondent is a serious one. The degree of punishment that should be imposed in cases of this nature is always a difficult decision to make. We have taken into account the mitigating factors mentioned by counsel and are also not unmindful of the consequences that our order would have on the respondent's life and future. We however feel that we must mark our disapproval of the conduct of the the respondent in no uncertain terms and are of the view that the professional misconduct that has been disclosed in this case calls for his suspension from the roll of attorneys for a period of five years. In an interim order made on 27th October 1980, we have, pending the hearing of the Rule, suspended the respondent from practice with effect from 30th October 1980. The period of five years will be reckoned from that date.

Samarakoon, C. J. I agree

Samarawickrema, J. I agree

*Respondent suspended from
the Roll of attorneys for
five years.*