Privy Council Appeal No. 39 of 1955

Maharaj Krishan Bhandari - - - - - - - - *Appellant*

v.

The Advocates Committee - - - - - - - - *Respondents*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH OCTOBER, 1956

Present at the Hearing:

VISCOUNT SIMONDS
LORD OAKSEY
LORD TUCKER
MR. L. M. D. DE SILVA

[*Delivered by* LORD TUCKER]

The appellant is an advocate and partner in the firm of Bhandari & Bhandari practising in Nairobi. He was found guilty of professional misconduct by the Supreme Court of Kenya on consideration of a report and findings by the Advocates Committee, a body established by the Advocates Ordinance for the purpose, inter alia, of considering and reporting upon charges of misconduct against advocates. His appeal to the Court of Appeal for Eastern Africa was dismissed and he now appeals by special leave of that Court to Her Majesty in Council.

The facts and circumstances giving rise to the charge against the appellant made to the Committee by the Acting Registrar of the Supreme Court as a result of a memorandum by Mr. Justice Hooper are very fully set out in the report of the Committee and in the judgment of the Supreme Court and it will suffice for present purposes to give them in outline and to refer later to the more essential details.

In the month of June, 1954, the appellant's firm, during his absence on holiday in England, filed a declaratory suit No. 675 of 1954 in the Supreme Court of Kenya against the Attorney-General and the Principal Immigration Officer on behalf of Mrs. Shantaben w/o J. K. Patel and her husband Mr. J. K. Patel seeking a declaration that Mrs. Shantaben was not a prohibited immigrant within the meaning of Section 5 of the Immigration (Control) Ordinance, 1948, and that her presence in the Colony was lawful under a Valid Temporary Employment Pass still current and unrevoked and consequently she was not subject to a Deportation Order made by the Acting Governor under Section 9 of the said Ordinance.

On his return from England the appellant conducted this suit before His Honour Acting Justice Cram. It was dismissed on 18th November, 1954. The learned Judge held that the suit which was brought under the Petitions of Right Ordinance, was incompetent and must be dismissed, but he added that he proposed to do what both parties apparently

desired, i.e., to consider the case on its merits, the Crown " mistakenly, or otherwise, having waived all objections to procedure ". He held that the Temporary Employment Pass relied upon by the plaintiff dated 6th November, 1951, had expired by course of law on her failure to observe her statutory duty in July, 1953, to report to the Immigration Officer that she had left the employment for which the pass had been issued, and that thereafter her presence in the Colony was unlawful and consequently the deportation order dated 10th April, 1954, validly made. He embodied a declaration to this effect in his judgment.

It should perhaps here be stated that on leaving her employment in July, 1953, Mrs. Shantaben had married Mr. Patel, a permanent resident in the Colony, and he had thereupon applied on her behalf to the Immigration Officer for a Dependant Pass. On 24th October, 1953, the application appears to have been approved by the Immigration Officer but this decision was rescinded on 5th November, 1953, and no Dependant Pass was ever issued. Nothing turns on this.

On 29th November, 1954, the appellant gave notice of appeal from the judgment of Acting-Justice Cram. On the same day Mrs. Shantaben swore an affidavit, which had been drafted for her by the appellant, in support of a notice of motion for a writ of certiorari to quash the deportation order or alternatively for mandamus to the Immigration Officer to issue a Dependant Pass. This was the procedure which Acting-Justice Cram had suggested in that part of his judgment which was dealing solely with the procedural aspect as being in his view appropriate.

This affidavit, drafted by the appellant, contained no mention of the proceedings before Acting-Justice Cram or of the notice of appeal from his judgment, but contained the following statements:—

> " I entered Kenya Colony on 16th July 1951 on a Valid Temporary Employment Pass No. 3146 dated 7.5.51 . . . which said pass is still valid and current and has been valid and current at all material times. The said pass has yet not been cancelled. I enclose the said Temporary Employment Pass and is marked ' A '."

After reference to the Deportation Order of 10th April, 1954, the affidavit in paragraph 10 stated:—

> " I am informed by my advocates and I verily believe that the said order is not valid as I am neither a prohibited immigrant nor my presence in the Colony is unlawful."

On 8th December, 1954, the appellant appeared before Mr. Justice Hooper in chambers to apply for a rule nisi when a question was raised as to whether or not service of the affidavit and notice of motion on the Attorney-General and the Immigration Officer was required and the matter stood over. Later in the day the appellant was informed that the application was ex parte and service not required and he attended again on 10th December.

The course of the subsequent proceedings is contained in a memorandum and a supplementary memorandum by Mr. Justice Hooper which formed the basis of the charge against the appellant before the Advocates Committee. It was agreed at the outset of the proceedings that the facts stated in these memoranda were correct and that the learned Judge was not required to attend and give evidence subject, however, to the exclusion from the memoranda of any expressions of opinion or inferences.

The agreed facts as appearing in these memoranda are as follows:—

On 10th December before the appellant appeared before him the Judge had read the papers attached to the notice of motion and the affidavit sworn by Mrs. Shantaben and discovered it was false in that it stated that the Employment Pass attached to the application was still current and valid. (The pass showed on its face that it was only valid for 3 years from date of entry and therefore expired on 16th July, 1954.) When the appellant appeared before the Judge his attention was drawn to this and he stated it was a mistake and he would file a supplementary affidavit to correct it. The Judge asked how it was that

Mrs. Shantaben was still in the Colony since the date of the Deportation Order. The appellant stated that if the application was adjourned he would produce correspondence in his possession on this point.

On 14th December a supplementary affidavit was sworn by Mrs. Shantaben. It stated that although the Temporary Employment Pass had expired on 16th July, 1954, it was valid and current at the date of the Deportation Order which was the material time for the purposes of the application. It expressed regret for the mistake and stated that the other statements in the affidavit were true to the best of her knowledge and belief. Paragraph 4 of the supplementary affidavit was as follows:—

> "4. I made representation through my advocates to His Excellency the Governor against the making of the Deportation Order as stated in paragraph 9 of my said affidavit and to the best of my knowledge and belief His Excellency agreed to suspend the operation of the said Deportation Order to allow me to institute proceedings in this Honourable Court to establish my right to stay in the Colony."

There was still no mention of the proceedings before Acting-Justice Cram and the notice of appeal from his judgment therein.

On 15th December the appellant appeared again before Mr. Justice Hooper when he explained that he had been unable to find any correspondence on the matter but stated that if the Judge sent for the file in Civil Case 675/54 he would find the whole of the papers relating to the attitude adopted by the Governor in respect of the Deportation Order. The application was accordingly further adjourned until 17th December. Meanwhile the Judge sent for the file wherein he found and perused the judgment of Acting-Justice Cram and his declaration with regard to the invalidity of the Temporary Employment Pass and the validity of the Deportation Order, as well as the notice of appeal therefrom dated 29th November, 1954.

On 17th December the Judge asked the appellant for his explanation of these matters. The appellant stated that it was a genuine mistake and he had not intended to mislead.

In his further memorandum, which was dated 20th December, 1954, Mr. Justice Hooper stated that on his first appearance (which seems to relate to 10th December) the appellant mentioned incidentally a long judgment of Cram, J., saying Cram, J., had told him or ruled that certiorari or mandamus was the correct procedure. The Judge told him he had no time to read the judgment then. He was quite prepared at that time to accept his word in respect of this matter. He added that the appellant never at any time directly or indirectly told him that Cram, J., had proceeded with the consent of the parties to give judgment in the matter; had ruled against him on all points; that he intended to appeal against the judgment; and had in fact already filed his notice of appeal. He further stated that on 17th December he asked the appellant who had drafted the affidavit of 29th November. He replied that he supposed one of his clerks had. He then asked him whether it was not true that he had drafted it himself. The appellant then replied "Yes, I suppose I must have done so". The learned Judge then informed him he would strike out the motion and record his reasons for so doing.

These memoranda were exhibited to an affidavit by the Acting Registrar in support of his application to the Advocates Committee that the appellant be required to answer the allegations contained in the said affidavit.

The relevant provisions of the Advocates Ordinance, 1949, are as follows:—

> "Section 9 (1). Any application—
>
> (*b*) by any person to strike the name of an advocate off the Roll, or to require an advocate to answer allegations contained in an affidavit,
>
> shall be made to and heard by the Committee in accordance with rules made under the next succeeding section; Provided that where, in the opinion of the Committee an application under paragraph (*b*)

of this sub-section does not disclose any prima facie case, the Committee may refuse such application without requiring the advocate to whom the application relates to answer the allegations and without hearing the applicant;

(3) On the hearing of an application under paragraph (*b*) of sub-section (1) of this section—

(i) the Committee shall give the advocate whose conduct is the subject matter of the application an opportunity to appear before it, and shall furnish him with a copy of any affidavit made in support of the application, and shall give him an opportunity of inspecting any other relevant document not less than seven days before the date fixed for the hearing;

(ii) the Committee on the termination of the hearing shall embody their findings in the form of a report to the Court which shall be signed and filed with the Registrar, and shall be open to inspection by the advocate to whom the application relates and his advocate (if any) and also by the applicant, but shall not be open to public inspection;

(iii) if the Committee is of the opinion that a prima facie case for the application, or a prima facie case of any misconduct on the part of the advocate charged, has been made out, it shall lay a signed copy of the report before the Court, together with the evidence taken and the documents put in evidence at the hearing;

10 (3). The hearing of an application under section 9 of this Ordinance shall for the purpose of Chapter XI of the Penal Code be deemed to be a judicial proceeding.

15 (1). The Court, after considering the evidence taken by the Committee and the report and having heard the advocate for the Committee and the advocate to whom the application relates or his advocate, and after taking any further evidence, if it thinks fit to do so, may admonish the advocate to whom the application relates or may make any such order as to removing or striking his name from the Roll, as to suspending him from practice, as to payment by him of any fine not exceeding ten thousand shillings, as to the payment by any person of costs and otherwise in relation to the case as it may think fit.

(2) Any person aggrieved by a decision or the order of the Court under this section may, within 30 days of such decision or order, appeal therefrom to the Court of Appeal for Eastern Africa."

The application was duly considered by the Advocates Committee under the above provisions on 29th and 31st January, 1955. The Committee consisted of Mr. John Whyatt, Q.C., Attorney-General (Chairman), Mr. Griffith-Jones, Q.C., Solicitor-General, Mr. Mangat, Q.C., and Mr. Sarabjee.

The applicant and the present appellant were both represented by Counsel.

The case for the applicant consisted of the affidavit of the applicant together with the memoranda and other documents exhibited thereto. He also gave evidence producing all the relevant documents and records relating to the Civil Case No. 675 of 1954 and the application for the rule nisi.

For the appellant an affidavit sworn by him on 12th January, 1955, was put in and he gave oral evidence supplementing the same and was cross-examined by Counsel for the applicant and questioned by members of the Committee. In his affidavit the appellant explained the misstatement in the affidavit with regard to the expiration of the pass by the effluxion of time by saying that he honestly thought that at the material date the time limit had not expired whereas the pass which was exhibited to the affidavit showed the contrary which he had not observed. This aspect of the case, viz., the expiry by effluxion of time, was not eventually relied upon in the case against the appellant.

He further stated that he at all times honestly believed that he could pursue his remedy by way of Rule Nisi in addition to appealing against the judgment of Acting-Justice Cram and notwithstanding that judgment. He further stated that until Mr. Justice Hooper sternly questioned him on 17th December he was never given an opportunity to bring the facts before him as he had not by then been heard on the merits. He said it was always his intention to refer so far as was necessary to the proceedings and judgment in Civil Case No. 675 of 1954 and to satisfy the Judge that in spite of that case he was entitled to one or other of the writs he was asking for. He said that at no stage of the proceedings did he intend to hide or not disclose the fact that there had been previous proceedings.

The evidence of the appellant before the Committee covers just over 17 pages of the Record in the present appeal.

In the course of the hearing Counsel for the applicant formulated the charge against the present appellant as follows :—

> 1. That he in his capacity as the advocate of Mrs. Shantaben in Miscellaneous Application No. 22 of 1954 drafted, procured her to swear, and filed in Court the affidavit of 29th November, 1954, the contents of which were false to his knowledge and filed same in Court with the intention of deceiving and misleading the Court ; and deliberately and wilfully attempted to deceive and mislead the Court by such false statements in order to obtain the Orders Nisi prayed for in the said proceedings and thus had been guilty of disgraceful and dishonourable conduct inconsistent with his duty as an advocate.
>
> 2. Alternatively, that he failed to disclose to the Court matters which were most material to the above case and thus was guilty of gross negligence amounting to professional misconduct.

After an exhaustive and careful investigation in which full opportunity was given to the appellant to give his explanation this Committee, having had the great advantage of seeing and hearing the applicant give his evidence and with knowledge of the conditions under which advocates in the Colony carry on their practices, found and reported that it was fully established on the evidence that the respondent (the present appellant) intended to deceive and mislead the Court and that therefore a prima facie case of disgraceful and dishonourable conduct inconsistent with his duty as an advocate had been made out. With regard to the alternative submission on behalf of the applicant that his failure to disclose constituted gross negligence amounting to professional misconduct, the Committee reported that if they had not reached the conclusion that the evidence justified a finding of a prima facie case and that disgraceful and dishonourable conduct had been established, they would have had no hesitation in reaching the conclusion that the evidence clearly showed that the respondent had been guilty of gross negligence amounting to professional misconduct.

This report came before the Supreme Court for their consideration on 7th and 8th March, 1955. Counsel for the appellant (not being the same as at the hearing by the Committee) put in the forefront of his case the submission that there was never any obligation on the part of the appellant to disclose the proceedings before Acting-Justice Cram. He said the former proceedings were civil whereas the application for prerogative writs was on the criminal side, the parties were different, the judgment of Acting-Justice Cram was not a final judgment and the declaration on the merits had not been made by consent of the parties and was only obiter, and finally it was in any event for the opposite party to raise a plea of res judicata. He did, however, submit that if these arguments were wrong the present appellant did not act dishonourably if he thought they were right, and that in any event he could not have intended to deceive because even if he got his order nisi the previous proceedings would have been produced by the other side on the hearing of the application to make the Rule absolute.

Their Lordships pause at this stage to observe that the main contention is entirely at variance with the frank admission made by Counsel for the appellant at the present hearing that there was a clear and undoubted duty on him to make this disclosure before obtaining a Rule Nisi. His case was that it was not essential to make such disclosure in the affidavit, and that the appellant had in fact made effective disclosure before argument on the merits had begun.

The judgment of the Supreme Court was given on 22nd March, 1955. The Court set out the relevant facts and history of the proceedings at length, they referred to the authorities dealing with the duty to make full disclosure of all relevant facts in ex parte applications, and carefully considered the evidence and affidavits. They stated their conclusions as follows :—

> " Having considered all the evidence and affidavits before the Advocates Committee, and all the arguments in favour of the respondent addressed to us, we have come, with great reluctance, to the same conclusion at which the Committee arrived, namely that the respondent intended to deceive and mislead the Court. We think that the affidavits drawn by the respondent were deliberately misleading ; that the respondent knew his duty to disclose the Cram judgment, and must have known that disclosure of that judgment and of the appeal against it would inevitably result in the dismissal or indefinite postponement of his application for discretionary prerogative writs ; that the respondent did not suppress mention of the Cram judgment altogether, but misrepresented its effect and refrained from making disclosure of its full contents ; and that he postponed until he could postpone no longer giving the Judge a reference which would enable him to discover its true contents. We think that the respondent may have had some muddle-headed idea in his mind that he could ' pursue concurrent remedies ' or (as he told Hooper, J.) that having failed before one Judge he could apply to another on the lines of an application for habeas corpus. But we do not believe, and he does not himself aver, that the respondent did not know that he was under a duty to disclose to Hooper, J., the existence and the complete contents of the judgment of Cram, J. This he refrained from doing, and we think that the way in which the affidavits are drawn shows that he did not intend to disclose the full contents of this judgment until he was forced to do so, and that the intention to mislead the Court was deliberate. This amounts to professional misconduct."

They accordingly proceeded in all the circumstances of this case to admonish the present appellant.

Appeal was taken to the Court of Appeal for Eastern Africa, where in addition to the matters previously relied upon it was contended that the Supreme Court had not applied the proper standard of proof required in a proceeding of this nature. The Court rejected this contention and held that there being concurrent findings of fact by the Committee and the Supreme Court their functions were similar to those of any appellate Court in dealing with appeals where there are concurrent findings of fact by two lower Courts. Approaching the case from this angle they said :—

> " Two Tribunals looking at the picture as a whole have come to the conclusion that the advocate never intended to make full disclosure to Mr. Justice Hooper if he could help it, and we regret that we find it impossible to say that this conclusion or inference from the facts was unjustifiable or unreasonable."

The appeal was accordingly dismissed.

It was contended on the present appeal that the approach of the Court of Appeal was wrong and that this was not a case of concurrent findings of fact by two lower Courts in that the Advocates Committee was not a Court empowered to arrive at any determination or give any judgment but only to report if a prima facie case was made out, being in much the same position as Committing Magistrates in indictable cases. Alternatively it was argued that even if the principle of concurrent findings

applied there was in this case no evidence to support a finding of concealment. It was further submitted that the Court of Appeal had laid down an erroneous standard of proof for such a case as this.

Their Lordships are of opinion that, although this case does not come literally within the well known rule with regard to the functions of an appellate Court where there are concurrent findings of fact by subordinate Courts, all the reasons for the rule apply with equal or even greater force to cases where professional domestic tribunals are established by statute for investigating and finding the facts in cases of alleged misconduct by members of their own profession. The Advocates Committee was such a tribunal and it had had the great advantage of seeing and hearing the appellant giving evidence at length in a case where, the facts being undisputed, the ultimate decision turned upon questions of stupidity, ignorance or deliberate intent. They do not consider that the words " prima facie case " in Section 9 (3) (iii) of the Advocates Ordinance have the effect of assimilating the functions of the Committee to those of Committing Magistrates or of in any way relieving them of the duty of determining the facts. It is clear that the Committee in fact so acted.

Their Lordships have no doubt that the submission of " no evidence " cannot be sustained. In their opinion a careful review of the whole case affords ample evidence to support the decision of the Supreme Court and it is impossible to regard the information as to the previous proceedings, extracted piecemeal as it was by the Judge's questions, as constituting full and proper disclosure. This would suffice to dispose of the issues of fact, but as in the course of this appeal their Lordships have necessarily had occasion to give careful consideration to the whole of the evidence they feel it may be more satisfactory to all concerned to state that in so doing they have arrived at the same conclusion as the Supreme Court and would be content to adopt as their own the language of that Court, quoted above, in summarising their decision.

With regard to the onus of proof, the Court of Appeal said : " We agree that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities ". This seems to their Lordships an adequate description of the duty of a tribunal such as the Advocates Committee and there is no reason to think that either the Committee or the Supreme Court applied any lower standard of proof.

For these reasons their Lordships have humbly advised Her Majesty that this appeal should be dismissed. The appellant must pay the costs.

(39847) Wt.8069—3 90 11/56 D.L.

In the Privy Council

MAHARAJ KRISHAN BHANDARI

v.

THE ADVOCATES COMMITTEE

DELIVERED BY LORD TUCKER

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2

1956