SPECIAL BENCH.

Before Costello, Lort-Williams and Henderson JJ.

1934

July 30.

In re AN ADVOCATE.

Practitioner—Negligence—Misconduct—Client, Duty of—Indian Bar Councils Act (XXXVIII of 1926), s. 10.

Per COSTELLO J. In the absence of moral delinquency, mere negligence on the part of a legal practitioner, in the exercise of his profession, does not amount to professional misconduct.

In re *A Vakil* (1) followed.

Telling an untruth in connection with a matter which an advocate has undertaken to carry through on behalf of a client may be said to involve moral delinquency.

Seymour v. *Butterworth* (2) relied on.

It is no part of the duty of a client to frequent the office of his solicitor, or the residence of his advocate, if the advocate has no office, for the purpose of seeing that he is doing the work which he has undertaken to do and for which necessary funds have been provided.

Per LORT-WILLIAMS J. Negligence, however gross, cannot amount to misconduct, professional or otherwise.

Re *G. Mayor Cooke* (3) relied on.

Per HENDERSON J. Negligence accompanied by the suppression of truth or by deliberate misrepresentation would be misconduct.

ENQUIRY UNDER THE INDIAN BAR COUNCILS ACT.

The facts of the case appear fully from the judgment of Costello J.

H. C. Mazumdar for the Bar Council.

P. N. Banerji for the Advocate-General.

Bijaykumar Bhattacharjya, Panchanan Ghosh and *Mahendranath Mitra* for the Advocate.

Galstaun in person.

* Case No. 1 of 1934 under section 10 of the Indian Bar Councils Act.

(1) (1925) I. L. R. 49 Mad. 523.
(2) (1862) 3 F. & F. 372; 176 E. R. 166.
(3) (1889) 33 Sol. Jour. 397.

1934

In re *An Advocate.*

COSTELLO J. On the 29th of December, 1933, a complaint was made to the Court, under section 10 of the Indian Bar Councils Act, by Mr. J. C. Galstaun, concerning the conduct of an advocate, whom he had instructed to file an appeal against a decision of the Additional District Judge, Alipore, which had been given on the 10th September, 1932, on appeal, in a suit brought by Raja Janakinath Ray against Mr. Galstaun, in the court of the first Subordinate Judge, 24-*Parganâs*, at Alipore, the suit having terminated on the 13th December, 1930, in favour of the plaintiff.

The matter of the complaint was referred, by this Court, for enquiry, to the Bar Council under the provisions of section 10, sub-section (*2*) of the Indian Bar Councils Act, 1926, and the case was duly enquired into by a committee of the Bar Council, that is to say, by a Tribunal constituted under the provisions of section 11, sub-section (*2*) of the Indian Bar Councils Act. The findings of the Tribunal were forwarded to the Court through the Bar Council in accordance with the provisions of section 12, sub-section (*2*). The matter has now come before us under the provisions of sub-section (*3*) of section 12.

It is to be observed at the outset that, by sub-section (*1*) of section 10, the High Court may reprimand, suspend, or remove from practice any advocate of the High Court whom it finds guilty of professional or other misconduct. The question which we have to determine, therefore, is whether, upon the findings of the Tribunal, there was any such professional or other misconduct on the part of the advocate, against whom the complaint was made, as would require us to take action under section 10, sub-section (*1*).

It is necessary, I think, that I should refer to the facts which constituted the complaint made by Mr. Galstaun against the advocate concerned. It appears that Mr. Galstaun obtained certified copies of the judgment of the Additional Judge at Alipore and the decree made by him, on the 27th September,

1934

In re *An Advocate.*

Costello J.

1932, and that the last date for presenting an appeal from that judgment was the 30th January, 1933, or thereabouts. Mr. Galstaun handed over the certified copies of the judgment and decree and all other relevant papers, in connection with his case, to the advocate whose conduct we are now considering, and instructed that advocate to draw up grounds of appeal without delay. On the 19th October, 1932, Mr. Galstaun wrote to the advocate saying that, if he had the grounds of appeal made out, he would like to see them. Subsequently, the advocate did show the grounds of appeal to Mr. Galstaun, and, thereupon, he received from Mr. Galstaun, on the 21st October, 1932, a sum of Rs. 20 and on the 2nd November, 1932, a further sum of Rs. 220, and, at the same time, Mr. Galstaun executed a proper form of *vakâlâtnâmâ* empowering the advocate to act on his behalf. According to Mr. Galstaun's statement, and no doubt it is perfectly accurate, the advocate, thereupon, undertook to file the appeal in due time.

Nothing more was heard by Mr. Galstaun in the matter prior to the 24th January, 1933, on which date, whilst writing to the advocate with regard to other legal matters which Mr. Galstaun had entrusted to his charge, he enquired about the appeal in the following words: "What about the appeal in Janaki-"nath Ray's case?". He seems to have underlined the words "about the appeal." To that question no reply was received, and, on the 2nd March, 1933, Mr. Galstaun wrote to the advocate a letter, at the end of which he said again: "When is Janakinath "Ray's appeal coming up"? On the 9th March, 1933, the advocate wrote a letter to Mr. Galstaun referring, by implication, to the various other legal matters, but remaining silent as to the question of Mr. Galstaun's appeal in Janakinath Ray's case. Accordingly, on the 20th April, 1933, Mr. Galstaun again wrote to the advocate and, in that letter, he put the heading '*Myself* v. *Janakinath Ray*', and said "Are you arranging to put this appeal on the board? "Please see that this is done immediately after the

1934

In re *An Advocate.*

Costello J.

"vacation". But still no reply was forthcoming. Mr. Galstaun wrote again on the 1st May, a letter in which he once more said "When is Janakinath "Ray's appeal going on". At long last, in reply to that letter, the advocate did condescend to give an answer to Mr. Galstaun's repeated enquiries. The reply was in these words: "I shall let you know about "the position of Janakinath Ray's appeal case as soon "as I shall be able to attend Court after recovery". Apparently nothing more was heard from the advocate in the course of the next ten days: so, on the 12th May, Mr. Galstaun again wrote to the advocate a letter which was headed 'Re. Janakinath Ray', and in that letter he said:—

I met Charu a few days ago in the High Court and I asked him about the appeal. Will you kindly let me know if it has been filed and what proceedings you are taking in the matter. This thing has been lying in your hands for a very long time and evidently neglected.

Now, that was a perfectly definite letter, and it contained, inferentially, a charge of neglect against the advocate. Even to that he did not reply. So Mr. Galstaun wrote a further letter on the 17th (which was also headed 'Re. Janakinath Ray') and said:

I wrote to you on the 12th, but have had no reply. I understand Charu is leaving for England to-morrow. Will you please meet me to-morrow morning at 8-30 to discuss the matter.

That letter produced a reply in the shape of a letter, dated the 17th May, 1933, in which the advocate said that he would see Mr. Galstaun on Saturday ensuing, that is to say, on the 20th May, 1933. That appointment was kept, and the advocate saw Mr. Galstaun on the 20th May. Then, for the first time, the advocate disclosed the fact that the appeal had never been filed at all, and that the moneys which the advocate had received for the necessary charges, together with the papers, were still in the hands of the advocate. Thereupon, Mr. Galstaun demanded of the advocate that he should return all the papers and the money. Apparently he only got back certain of the papers in answer to that request, but none of the money.

1934

In re
An Advocate.

Costello J.

Thereupon, Mr. Galstaun applied to this Court for an extension of time for the filing of the appeal, which had become barred so long before as the month of January. In paragraph 7 of his complaint, which is really the indictment against the advocate, he said:

> I have been very materially prejudiced and shall have to suffer considerable loss and damage by my appeal not having been filed, in time, by the said advocate, on account of his grossly negligent conduct in not filing the appeal, in time, and fraudulently suppressing the fact for about six months, in spite of the repeated inquiries by me, till a very distant date when the appeal was time-barred by limitation, even though he was furnished with costs and all necessary papers.

Then, in paragraph 8, the complainant said:—

> The aforesaid advocate is guilty of unprofessional conduct and gross misconduct and is also liable for the damages that I have sustained.

It is to be seen, therefore, that the form of complaint, which was lodged against this advocate, contained in effect four charges: (1) that he was grossly negligent, (2) that he fraudulently suppressed the facts, (3) that he had been guilty of unprofessional conduct; (I suppose this is really comprehended within the other two) and (4) that he was guilty of gross misconduct. Evidence was given before the Tribunal by the complainant and also by the advocate concerned. But prior thereto, or rather in connection with the enquiry, the advocate had put in a written statement, in which, to all intents and purposes, he admitted the facts of the case as to the chronological history of the matter. But he put forward the excuses, by way of defence, that he had omitted to attend to Mr. Galstaun's business, or to file this particular appeal, in time, by reason of the illness of his children, they having suffered from typhoid fever for about three months from the month of January, 1932, onwards, and also by reason of his own ill health in the month of December and January and again from the month of April onwards. He denied that he had any intention to defraud or to cause any loss or damage. Then at the end of paragraph 9 of his written statement he said:—

> He was and is always ready to return to Mr. Galstaun the money he had received from him on account of costs.

1934

In re *An Advocate.*

Costello J.

The Tribunal, in its findings, say that the broad facts are not in dispute, and those facts are set out in some detail. The actual findings are contained in paragraph 5 and subsequent paragraphs. In paragraph 5 the Tribunal said :—

> We have not the slightest hesitation in finding that the advocate concerned was guilty of gross negligence, in the performance of his duties as an advocate, and that he had no justification for not filing the appeal within time. We are not at all satisfied with the excuses put forward by the advocate and do not accept them.

That means that the Tribunal found that the advocate was guilty of the first of the four charges which I have enumerated. There is also, it is to be observed, an *addendum*, put forward by the Tribunal itself, which is not directly referable to any of those specific charges made by the complainant, because the Tribunal says that it was not satisfied with the explanation put forward by the advocate, and that is, in my opinion, tantamount to saying that the advocate himself had put forward excuses, which were false, in order to account for the negligence of which he admitted that he was guilty. Then in paragraph 6 the Tribunal says :—

> As regards the charge of misappropriation, we find that such charge has not been established.

The comment one would make upon that is that there is no direct charge of misappropriation in the original complaint lodged by Mr. Galstaun, and it can only be extracted from that complaint by reference to the paragraph in which Mr. Galstaun said that he asked for or demanded the return of the money but had not recovered it. It is to be emphasized for our present purpose that the Tribunal did nevertheless say that there was no misappropriation.

As regards, what I have called, the second charge—fraudulently suppressing the facts—the Tribunal said: "the charge of fraudulent suppression was made "against the advocate but has not been persisted in". Then in the final paragraph the Tribunal said :—

> Although we find that the advocate concerned was guilty of gross negligence, we are by no means satisfied that the complainant himself was

1934

In re *An Advocate.*

Costello J.

not to blame partially for his appeal having become time-barred, as all the correspondence and the activities of the complainant seem to have come into existence after the appeal had become time-barred.

I feel impelled to remark, in connection with that comment of the Tribunal, that I am entirely at a loss to understand what the members of the Tribunal had in their minds in making such a comment, because in my opinion, it is no part of the duty of a client to frequent the office of his solicitor, or the residence of his advocate (if the advocate has no office), for the purpose of keeping him up to the mark, or, if I may use the commonplace expression, *i.e.*, for the purpose of seeing that he is doing the work which he has undertaken to do and for which necessary funds have been provided. In my opinion, Mr. Galstaun had a right to expect when he had given the *vakâlâtnâmâ*, necessary instructions and papers, and had provided the advocate with funds for the purpose, that he could put the matter out of his mind and rest content that he could rely on the advocate to do what he was instructed to do. The Tribunal has not in terms dealt with the charges, which I have described as the third and fourth charges, that is to say, the charges of professional misconduct and gross misconduct. Presumably, however, they were disposing of those charges by saying that there had been no misappropriation. To sum up the whole matter, the finding of the Tribunal comes to this that there was gross negligence on the part of the advocate, but there was no misappropriation of the funds entrusted to him for the purpose of the work, he had been instructed to do. In these circumstances, it would be difficult, if not impossible, for us on the material at present before us to take any action under section 10, sub-section (*1*).

The learned advocate, who has appeared on behalf of the respondent in these proceedings, has drawn our attention to the Madras case of *In re A Vakil* (1), the headnote of which states that mere negligence unaccompanied by any moral delinquency, on the part of a legal practitioner, in the exercise of his profession

(1) (1925) I. L. R. 49 Mad. 523.

1934

In re *An Advocate.*

Costello J.

does not amount to professional misconduct. The decision in that case was based upon the decision, in England, in a matter which is reported under the title of Re. *G. Mayor Cooke (a solicitor)* (1). In the Madras case, the learned Chief Justice said that :—

> Negligence by itself is not professional misconduct; into that offence there must enter the element of moral delinquency. Of that there is no suggestion here, and we are therefore able to say that there is no case to investigate, and that no reflexion adverse to his professional honour rests upon Mr. M.

With that decision I entirely agree. But I would point out that, in the present case, it is not at all certain that it can be said with strict accuracy that there is really a finding that there was no moral delinquency, seeing that the Tribunal said that they were not at all satisfied with the excuses put forward by the advocate and did not accept them. To say that one does not accept excuses put forward may be merely an euphemistic method of saying that they were of opinion that the person concerned was not telling the truth. One would have thought that if a professional man does not tell the truth in connection with a matter which he has undertaken to carry through on behalf of a client; that is conduct which might easily be said to involve moral delinquency. It is not in the best interests of the legal profession as a whole or of any member of it (other than the person accused) that there should be any lax or loose standard of professional conduct. I hope it is the case that advocates of this Court, who are not members of the English bar, desire to set for themselves and adhere to the same rigid standards of professional conduct as those which a member of the bar ought to set for himself. What those standards should be was indicated by the Lord Chief Justice of England in the case of *Seymour* v. *Butterworth* (2) where at page 381 of the Report the learned Lord Chief Justice says :

> Mr. Seymour did not occupy the position of a private individual, nor was it as a private individual that his conduct was made the matter of inquiry. Mr. Seymour was a barrister, and, as such, was subject to the

(1) (1889) 33 Sol. Jour. 397.

(2) (1862) 3 F. & F. 372 (381), 176 E. R. 166 (170).

1934

In re
An Advocate.

Costello J.

domestic forum of the benchers. It was beyond dispute that if the conduct of a member of an Inn of Court was such as to be unworthy of a gentleman, he was within the jurisdiction of the Benchers of his Inn. In the same way as officers of the army were subject to investigation when charges were made against them of conduct unbecoming officers and gentlemen, barristers were subject to the jurisdiction of the Benchers if their conduct was unbecoming the profession and unbecoming gentlemen.

These observations prescribe a high code of professional ethics and conduct and it is one which we should wish, and I am sure every one would wish members of all branches of the legal profession will endeavour to conform to. We are, however, not now dealing with the matter upon that basis because as I have stated the Tribunal has gone no further than to find gross negligence on the part of this particular advocate. There is no finding of misappropriation. Since these proceedings opened, however, we have had put before us by Mr. Galstaun—the complainant—what purports to be the copy of a letter, dated the 28th July, 1933, delivered to the advocate, for which he holds a receipt signed by the advocate's own hand in the peon book which was used at the time this letter was sent. Now, in this letter Mr. Galstaun says :—

> Referring to my previous correspondence, will you kindly refund me the Rs. 240, which was paid to you, as costs and stamp duty, for filing the appeal against Raja Janakinath Ray and others and which you failed to do. Unless I receive the amount in the course of three days, I shall bring the matter to the notice of the Chief Justice.

To that letter no reply was received, so we are told. The importance of it is that had this letter been put in evidence before the Tribunal, at the time of the proceedings before them on the 29th May, 1934, it might have had some influence upon their decision upon the question as to whether or not it could rightly be said that there had been no misappropriation and professional misconduct on the part of the advocate. Mr. Bhattacharjya has said all that was possible to be said on behalf of the advocate. He has told us that the advocate actually tendered to Mr. Galstaun the money received from him and that Mr. Galstaun declined to take it back. Apparently there was some evidence to that effect before the Tribunal. One cannot overlook the fact, however,

that in the written statement which this advocate put forward, there is no suggestion at all that he had ever tendered the money to Mr. Galstaun. On the contrary, he merely says, in the passage to which I have already referred, that he was and is always ready to return to Mr. Galstaun the money which he had received on account of costs. To be "ready to return" is quite a different thing from tendering a sum of money. It is not quite clear why the complainant did not put before the Tribunal the letter of the 28th July, 1933, referred to above and give evidence concerning the circumstances in which it was sent. Mr. Galstaun has stated that the reason why he did not is because the question was never raised as to whether or not the money had been returned or was likely to be returned. We are of opinion that this letter, if it was sent in the manner described by Mr. Galstaun, was of such material importance that we think the Tribunal ought to hold a further inquiry into this case. We shall accordingly refer the case back to the Tribunal, through the Bar Council, under the provisions of section 12, sub-section (*4*) of the Indian Bar Councils Act of 1926, with a direction that the Tribunal do hold a further enquiry in the light of the observations which I have made.

LORT-WILLIAMS J. I agree that this matter should be sent back to the Tribunal for further enquiry. But, in my opinion, mere negligence, however gross, cannot amount to misconduct, professional or otherwise.

As was stated by Lord Esher M. R. in the case of *Re. G. Mayor Cooke* (a solicitor) (1) :—

> The motion was made against a solicitor for such misconduct in his profession as would call upon the court either to strike him off the rolls or deal with him by way of punishment in some other manner. . . . . But when such a motion was made asking the court to exercise penal jurisdiction over a solicitor, it was not sufficient to show that his conduct was such as to support an action for negligence or want of skill. In order to support such a motion as the present it must be shewn that he had done something dishonourable to him as a man and dishonourable in his profession. A solicitor was bound to act with the utmost honour on behalf of his client.

(1) (1889) 33 Sol. Jour. 397.

1934

In re
An Advocate.

Lort-Williams J.

In view of the fact that the Tribunal seem to have given as their reason for finding the charge of misappropriation not established, that they did not believe that the complainant ever asked for the return of his monies, the letter produced by Mr. Galstaun to-day is material and important, and ought to be considered by the Tribunal.

HENDERSON J. I also agree that this case should be sent back for further enquiry. The Tribunal have found that the advocate was guilty of negligence. It is not very clear whether they have considered that he has been guilty of suppressing the truth, although that was practically admitted before us. I will merely say that I am clearly of opinion that negligence accompanied by the suppression of the truth or by deliberate mis-representation would be misconduct.

Case referred back.

S. M.