SPECIAL BENCH.

Before Mukerji A. C. J., Lort-Williams and S. K. Ghose JJ.

1935

Dec. 19.
1936

Jan. 10.

In the matter of AN ADVOCATE.*

Advocate—High Court—Disciplinary jurisdiction—Misconduct of advocates, "Professional or other"—Bar Council, Enquiry by—Test of misconduct—Conviction under s. 124A of the Indian Penal Code (Act XLV of 1860), when misconduct and when ground for disciplinary action—Letters Patent, 1865, cl. 10—Indian Bar Councils Act (XXXVIII of 1926), s. 10(1).

The words "professional or other misconduct" in s. 10(*1*) of the Indian Bar Councils Act of 1926 are to be read in their plain and natural meaning. By the said words the legislature intended to confer on the Courts jurisdiction in all cases of misconduct, professional or otherwise. The word "may," used in that sub-section, leaves unfettered the judicial discretion to the Court to take action in suitable cases.

In re *Weare* (1) and *Advocate-General of Bombay* v. *Three Advocates* (2) followed.

In considering whether an advocate or any member of the legal profession should be struck off the rolls or suspended or reprimanded for proved misconduct, the test that the Court may apply in the majority of cases is (*a*) whether the misconduct renders him unworthy to remain a member of the honourable profession to which he has been admitted or (*b*) renders him unfit to be entrusted with the responsible duties (of a member of the legal profession) that he is called upon to perform.

In the matter of *an Advocate* (3) referred to.

The disciplinary jurisdiction vested in Courts should not be employed merely in aid of the criminal law of the land and merely to supplement, as it were, by way of further punishment what the advocate has received under the law for the misconduct of which he is guilty.

Ex parte *Brounsall* (4) referred to.

All criminal convictions of an advocate are not grounds for the exercise of the Court's disciplinary jurisdiction, although a criminal conviction is *prima facie* evidence of misconduct.

Advocate-General of Bombay v. *Three Advocates* (2) and *Advocate-General of Bombay* v. *Phiroz Rustomji Bharucha* (5) referred to.

*Reference by the Bar Council.

(1) [1893] 2 Q.B. 439.
(2) (1934) I. L. R. 59 Bom. 57.
(3) (1933) I. L. R. 12 Ran. 110.
(4) (1778) 2 Cowp. 829; 98 E. R. 1385.
(5) (1935) I. L. R. 59 Bom. 676; L. R. 62 I. A. 235.

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A mere conviction under s. 124A of the Indian Penal Code does not necessarily involve the removal or suspension of a legal practitioner, but the Court must ascertain and take into consideration the facts on which the conviction is based.

The *dictum* of Jai Lal J. in the case of In the matter of *Mohammad Alam* (1) approved.

DISCIPLINARY JURISDICTION.

Enquiry under the Indian Bar Councils Act of 1926.

A member of the English Bar, named Mr. Niharendu Datta Majumdar of the Middle Temple, who was enrolled as an advocate of the Calcutta High Court in 1933, was, in May, 1934, bound down under s. 107/118 of the Criminal Procedure Code to keep the peace for one year for delivering certain speeches in connection with the labour movement. Thereafter, the said advocate was thrice convicted of sedition under s. 124A of the Indian Penal Code for certain speeches.

On or about July 22, 1933, the Registrar of the Original Side, High Court, filed a petition before the said Court praying for an order calling upon the said advocate to show cause why his name should not be taken off the roll of advocates under the Indian Bar Councils Act and also of the roll of those entitled to appear and plead on the Original Side and why he should not be suspended from practising as such until such time as to this Court may seem fit and that he may be otherwise dealt with under the disciplinary jurisdiction of the Court. There was an enquiry of the matter under s. 10 of the Indian Bar Councils Act before a Tribunal of three members of the said Council appointed by the Chief Justice.

The advocate by his written statement stated, amongst others, that the convictions had no connection with his professional conduct, that they did not render him unfit to be entrusted with the duties of an

(1) (1934) I. L. R. 15 Lah. 354.

advocate, that there was no moral turpitude, that the speeches for which he was convicted were delivered by him as an officer of certain trade unions registered under the Act of 1926, that they amounted to mere personal errors of judgment. The advocate also filed a supplementary written statement before the Tribunal.

On November 29, 1935, the Tribunal made a unanimous report finding the advocate guilty of "other misconduct" under s. 10 of the Indian Bar Councils Act.

Sudhir Ray, *P. C. Ghose*, *J. C. Moitra* and *R. Chaudhuri* for the advocate. There must be moral turpitude for action under s. 10 of the Indian Bar Councils Act of 1926. In re *an Advocate* (1). The present case is neither a case of professional misconduct nor of moral turpitude. The words "professional or other misconduct" in the Indian Bar Councils Act cannot but mean misconduct in connection with the profession of an advocate and not conviction for the offences of sedition. Compare the words in the Legal Practitioners Act and in the Letters Patent. See the case of In re *Weare* (2).

The test in such cases is as laid down in the case of In the matter of *an Advocate* (3).

I refer to the case of *Advocate-General of Bombay* v. *Three Advocates* (4) and to the case of *Mohammad Alam* (5).

H. C. Mazumdar for the Bar Council. The finding of the Tribunal seems to be contradictory. It does not assign any reason why the conduct of the advocate in the present case is unworthy of an advocate. It, however, gives the advocate practically a certificate of good character, stating the case to be very near

(1) (1934) I. L. R. 62 Cal. 158.
(2) [1893] 2 Q. B. 439.
(3) (1933) I. L. R. 12 Ran. 110.
(4) (1934) I. L. R. 59 Bom. 57.
(5) (1934) I. L. R. 15 Lah. 354.

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the border line. In construing the word "other "misconduct" the rule of *ejusdem generis* should be followed.

The Advocate-General, A. K. Roy. See the case of the *Advocate-General of Bombay* v. *Phiroz Rustomzi Bharucha* (1).

Cur. adv. vult.

MUKERJI A. C. J. Mr. Niharendu Datta Majumdar, a barrister of the Middle Temple, was enrolled under the Bar Councils Act on January 11, 1933, and was admitted as an advocate of this Court, his name being entered in roll of advocates entitled to appear and plead on the Original Side of the Court on January 17, 1933. It is his case that, soon after his enrolment as aforsaid, he began to take a prominent part in labour and trade union movements and became, as he says, an "Honorary Trustee", some sort of a principal officer of a Trade Union of the Labourers of the Port and Docks of Calcutta registered under the Indian Trade Union Act of 1926. In 1934, between March 3 and December 2, he delivered a number of speeches at certain meetings of the Union held at public places. For three of the speeches, said to have been made on the 3rd, 4th and 18th March respectively, proceedings under s. 107, Code of Criminal Procedure, were taken against him and the Magistrate ordered him to be bound over to keep the peace for one year and this order was affirmed by this Court on appeal. For three other speeches, made respectively on April 29, November 11 and December 2, the Magistrate convicted him in three separate cases under s. 124A, Indian Penal Code, and sentenced him to undergo rigorous imprisonment for nine months, one year and one year, respectively. He preferred appeals to this Court in the first and the third of these cases, but not in the second case, and this Court being of opinion that

(1) (1935) I. L. R. 59 Bom. 676; L. R. 62 I. A. 235.

the sentence which he was undergoing in the second case would be sufficient for all the cases, reduced the sentence in the first case to the period already undergone and ordered the sentence in third case to run concurrently with that in the second case.

In the meantime, upon a petition presented by the Registrar on the Original Side of this Court on July 22, 1935, in which all the aforesaid cases were set out, the Court referred the matter to the Bar Council for enquiry. The Tribunal constituted for the purpose held the enquiry and its findings having been received, the case has come up before us for passing final orders.

A considerable part of the argument addressed to us on behalf of the advocate was directed to establish that the misconduct referred to in sub-s. (*1*) of s. 10 of the Indian Bar Councils Act means such misconduct as would make a lawyer unfit for the exercise of his profession. This contention apparently is based upon a comparison of the language of the said sub-section with the wording of cl. 10 of the Letters Patent, under which the Court can take action on reasonable cause; it being suggested that the legislature, by using the word "misconduct" in the Indian Bar Councils Act in the place of the more indefinite phrase "reasonable cause" in the Letters Patent, has restricted the powers of the High Court in this respect. On this supposition it has been argued that the words "professional or other misconduct" can mean misconduct in a professional capacity and also only such misconduct in a private capacity as would denote unfitness for the duties of an advocate. The argument is sought to be supported by reference to those decisions of English Courts, in which arose the question of taking disciplinary action against solicitors, and in which, while formulating the principles on which such action should be taken, the question of their unfitness to practise as solicitors was stressed upon.

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One such case is In re *Weare* (1) in which Lopes L. J. observed :—

> The jurisdiction of the Court extends, not only to the case where the misconduct has been connected with the profession of the solicitor, but also to cases where the conduct, though not so connected, has been such as to make it clear to the Court that that person is no longer fit to be held out as a fit and proper person to exercise the important functions with which the Court entrusts him. * * * * * If he has previously misconducted himself we should consider whether the circumstances were such as to prevent his being admitted, or whether he had condoned his offence by his subsequent good conduct, the principle on which the Court acts being to see that suitors are not exposed to improper officers of the Court.

But in the same case Lord Esher M. R. expressed himself in words which may perhaps be read as taking a much wider view of the Court's jurisdiction in this respect. He observed :—

> The Court is not bound to strike him off the rolls unless it considers that the criminal offence of which he has been convicted is of such a personally disgraceful character that he ought not to remain a member of that strictly honourable profession.

There is, however, no authority in which it has been said that in the case of misconduct in a private capacity, unless it denotes unfitness in professional capacity, action should not be taken. And I do not see why the words "professional or other misconduct" should not be read in their plain and natural meaning. I, therefore, respectfully agree with Beaumont C. J. in holding that by the words aforesaid the legislature intended to confer on the Court jurisdiction to take action in all cases of misconduct, misconduct in a professional or other capacity [*Advocate-General of Bombay* v. *Three Advocates* (2) affirmed on appeal by the Judicial Committee in *Advocate-General of Bombay* v. *Phiroz Rustomji Bharucha* (3)].

The word "may" in sub-s. (*1*) of s. 10 of the Act makes it plain that, while the jurisdiction of the Court is not restricted but extends to all cases of misconduct, a discretion is left to the Court to take action in suitable cases only. With regard

(1) [1893] 2 Q. B. 439, 449.
(2) (1934) I. L. R. 59 Bom. 57.
(3) (1935) I. L. R. 59 Bom. 676; L. R. 62 I. A. 235.

to the exercise of the Court's discretion in a case of this nature, or for the matter of that in any other case, it is not possible to lay down any hard and fast rule, and the exercise of the discretion will often have to be varied with changing conditions. No general principles can or ought to be laid down fettering the Court's discretion, except that it must be exercised judicially. But if reported decisions afford us a guide, I would adopt, with respect, the test which Page C. J., on a consideration of some of the authorities laid down *In the Matter of an Advocate* (1). He said:—

> The test that the Court has to apply in considering whether an advocate should be struck off the roll of advocates is whether the proved misconduct of the advocate is such that he must be regarded as unworthy to remain a member of the honourable profession to which he has been admitted and unfit to be entrusted with the responsible duties that an advocate is called upon to perform.

With all respect, I would prefer to take the two conditions laid down as aforesaid disjunctively and apply the test in that way so that on the fulfilment of any one of the conditions the test would be regarded as satisfied. This test would prove a sound working rule in the majority of cases and would be applicable to all branches of the profession; the first condition being a standard applicable to all, and, as regards the second condition, the circumstances to be taken into consideration differing according to the duties attaching to the particular profession. The test speaks of "striking off the roll" which is equivalent to removal. But, as regards suspension or reprimand, the test would apply equally well, the form of the action taken being dependent on the nature and gravity of the misconduct found and also on other circumstances. Amongst the principles that are well settled in this connection, one is contained in the following words of Lord Mansfield in *Ex parte Brounsall* (2):—

> This application is not in the nature of a second trial or a new punishment. But the question is whether, after the conduct of this man, it is proper that

(1) (1933) I. L. R. 12 Ran. 110, 113. (2) (1778) 2 Cowp. 829; 98 E. R. 1385.

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he should continue a member of the profession which should stand free from all suspicion. * * * * * * It is not by way of punishment but the Court on such cases, exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not.

If the above principle be correct, then another principle follows immediately from it and it is this that the disciplinary jurisdiction vested in Courts should not be employed merely in aid of the criminal law of the land and merely to supplement, as it were, by way of a further punishment, a punishment which the advocate has received under that law for the misconduct of which he is guilty.

The present case is not one in which the advocate concerned had engaged himself in revolutionary activities designed to destroy the Government or the system of which the Courts of justice form part or to boycott the Courts or to break any particular law which it is the duty of the Courts to administer. Nor is there any indication of his having made an organised or persistent attempt to create a breach of the peace or to incite acts tending to subvert law and order. In the speeches that he made on a subject in which he was interested, he advocated certain reforms and supported a policy, which suited his ideals; and in the course of those speeches he made utterances which were open to objection. For some of these speeches it was considered necessary to bind him over for a year to keep the peace; and in others, passages were found in which he had transgressed the limits of fair criticism and which appeared to bring him within the clutches of the law as to sedition. For the offences of sedition he was punished in the three cases in which he was tried. It is really the convictions in these last-mentioned cases which have to be regarded for the present purpose.

That to be convicted of sedition is to be found guilty of a misconduct cannot be denied. Indeed it is beyond question now that conviction of a criminal

offence is *per se* evidence of misconduct [*The Advocate-General of Bombay* v. *Three Advocates* (1) affirmed on appeal by the Judicial Committee in *Advocate-General of Bombay* v. *Phiroz Rustomji Bharucha* (2)]. But while conviction for a criminal offence is *prima facie* evidence of misconduct, all criminal convictions are not grounds for the exercise of the Court's disciplinary jurisdiction, *e. g.*, motoring offences. And here the first question is whether a conviction for the offences of sedition is such misconduct as would, in all circumstances, require action to be taken under the Court's disciplinary jurisdiction. A consideration of some of the authorities relevant upon the point will be useful.

A case to which very great importance must attach is that of *Shankar Ganesh Dabir* v. *Secretary of State for India* (3), in which a pleader made speeches at various places against a particular land-revenue system in vogue in the province, in the course of which he characterised the system as unjust and illegal and advised his audience to stop payment under that system and leave it to Government to recover the dues by attachment. His *sanad* was cancelled upon grounds, one of which was that his conduct appeared to be incompatible with his obvious duties and responsibilities as an official of the Court. The case went up to the Judicial Committee and their Lordships, in refusing leave, laid stress on the point that the pleader had not confined himself to protests, however vehement, against the tax or against its injustice, but that he had urged an organised resistance of payment and attempted to establish a system which would have impeded and might have defeated its recovery with grave danger to public peace. The case was one under s. 13 (*f*) of the Legal Practitioners Act.

(1) (1934) I. L. R. 59 Bom. 57.
(2) (1935) I. L. R. 59 Bom. 676; L. R. 62 I. A. 235.
(3) (1922) I. L. R. 49 Cal. 845; L. R. 49 I. A. 319.

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The abovementioned cases as well as a large number of other cases, where legal practitioners convicted under s. 17 of the Criminal Law Amendment Act, 1908, or under s. 3 of the Police Incitement Disaffection Act, 1922, or for similar other offences, or found guilty of civil disobedience, or of participating in *hartâls* or revolutionary campaigns for breaking or disobeying the laws of the land have been referred to and discussed in an elaborate judgment by Jai Lal J. in the case of *In the Matter of Mohammad Alam, Advocate* (1). Of these cases special reference must be made to three. One of these is the case of *Emperor* v. *Kolhatkar* (2) in which a legal practitioner of the Central Provinces was convicted under s. 124A of the Indian Penal Code and the question of his dismissal arose under s. 12 of the Legal Practitioners Act. The Court held that—

> *Prima facie* such a conviction implied a defect of character * * * and that loyalty to the Crown is a fundamental part of the structure of the legal profession throughout the British Empire.

It was found that the sedition of the pleader took the form of an implacable hatred of the British rule and everything connected with it, indicating a desire and intention not to correct but to root out the Government of India. And it was found that, even after the punishment was served out, he stubbornly adhered to his criminal tendencies and that there was an entire absence of any change of character or disposition in the direction of loyalty to the Crown. On these findings the pleader was dismissed.

Another case is *In re Jivanlal Varajray Desai* (3), in which the advocates involved had signed a pledge whereby they bound themselves to refuse civilly to obey certain laws and such other laws as a Committee to be appointed thereafter might think fit. MacLeod C. J. held that it was

(1) (1934) I. L. R. 15 Lah. 354. (2) (1910) 8 Ind. Cas. 282, 285.
(3) (1919) I. L. R. 44 Bom. 418, 437.

the duty of the legal practitioner to advise their clients to the best of their abilities as to what the law is, and not as to what the law should be in their opinion, and that this conflict should be more pronounced if any of the legal practitioners had occasion to advise his clients regarding one of the laws denounced by the league, and added :—

A very sound principle to remember is that those who live by the law should keep the law.

Beaumont C. J. in the case of *The Advocate-General of Bombay* v. *Three Advocates* (1) dissented from the aforesaid view and observed that no such embarrassment was likely to ensue and also observed :—

In our opinion, the obligation of obedience to the law is neither greater nor less in the case of lawyers than that of other citizens. If the so-called principle means that those who earn their living by the practice of the law must cease so to do if they break the law, the condition is one which should be imposed under legislative authority when the advocate is admitted and not invented afterwards by the Court.

The third case in *In the Matter of a Second Grade Pleader of Ramachandrapur* (2). In this case the legal practitioner had instigated to forsake the English Courts and resort to the Courts to be set up by the Congress and to cease paying taxes to Government. For this conduct the renewal of his *sanad* was refused, Coutts-Trotter J. remarking as follows :—

The last thing that I think we should consider ourselves concerned with in the ordinary way, is what the political opinions of anybody are, whether they are members of the legal, or any other profession. But while the Courts will always uphold the liberty of the subject in thought or speech, an applicant, who comes to ask for the issue or renewal of a *sanad*, is applying to be treated as a part of the machinery, for the maintenance of the law and order in the body politic and to take an active part in administering, for the other subjects of the Crown, the benefits that may be supposed to result from the upkeep of law and order. It is intolerable and illogical that a man should seek to be put in that position, while at the same time he is saying that law and order should be disobeyed, and taxes are not to be paid and that all public officers are to be abandoned, in order to paralyse the very life of the body politic.

It is apparent that the pleader in the case last mentioned was persisting in his tenets when the order aforesaid was made.

(1) (1934) I. L. R. 59 Bom. 57, 80. (2) [1924] A. I. R. (Mad.) 129.

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On a consideration of the cases referred to in his judgment, Jai Lal J. in the case of *In the matter of Mohammad Alam* (1) deduced certain tests and came to the following conclusion :—

> Applying the above tests to the present case it seems to me that a mere conviction under s. 124A does not necessarily involve the removal or suspension of a legal practitioner, but the Court must ascertain and take into consideration the facts on which the conviction is based.

The case before the learned Judge was one in which the advocate concerned had been convicted of sedition, and the question that was being considered was whether he should not be removed or suspended from practice under cl. 8 of the Letters Patent of the Lahore High Court and s. 41 of the Legal Practitioners Act. I have carefully considered all the decisions referred to by the learned Judge and with the conclusion quoted above I entirely agree.

I have read the speeches which the advocate delivered on the several occasions. They certainly bring the advocate within the clutches of the law as to sedition, inasmuch as in some of the passages therein base motives were attributed to Government and remarks were made which were likely to lead to disaffection and hold the Government up to contempt in the eyes of the public. At the same time, however, I am clearly of opinion that the general tenour of the speeches was inoffensive and was such as one would expect to find in speeches made in connection with questions affecting a Labour Union. I would say of all the speeches what was said in respect of one of them by my learned brother Lort-Williams J., namely—"Unfortunately, in his enthusiasm, this "accused, as so often happens, went over any line "which could be held to be legitimate."

Regarding the speeches together I find that, except on some particular questions, his views are not in any way hostile to the Government and indeed there are several passages in them in which he may

(1) (1934) I. L. R. 15 Lah. 354, 387.

be taken to have advocated obedience to law and order. The Tribunal of the Bar Council has pointed out,—

> Apart from his activities in connection with the labour movement the respondent (meaning the advocate) seems to be a young man of good character, inexperienced in his profession, honest and straight in his dealings. No question of professional misconduct arises here. * * * After a very careful and anxious consideration of the speeches and all the surrounding circumstances, we have come to the conclusion, not without some hesitation, that the respondent is guilty of "other misconduct" under s. 10 of the Bar Councils Act, though, in view of the fact that his speeches and conduct were in connection with the then existing industrial movements and disputes, the case seemed to us to be very near the border line.

In my opinion no further action is called for in the case and I would order accordingly.

LORT-WILLIAMS J. I agree.

S. K. GHOSE J. I agree.

A. K. D.